



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Coram: Meer J et Andrews AJ

[REPORTABLE]

Case no. A356/2017

In the matter between:

L B

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 08 JUNE 2017

Andrews AJ,

[1] The Appellant was arraigned in the Parow Regional Court on one count of contravening the provisions of Section 5(1) (sexual assault), as well as one count of contravening the provisions of Section 3 (rape), of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. On 2 December 2015

the Appellant was convicted on both charges and on 16 March 2016 was sentenced to life imprisonment; the two counts having been taken together for the purposes of sentencing. The Appellant, who has an automatic right of appeal as a result of the life sentence imposed by the court *a quo* appeals against both his conviction and sentence.

[2] The Appellant was alleged to have performed sexual acts with his 17 year old daughter spanning over the period August 2013 to about May 2014. The Appellant, who was legally represented, pleaded not guilty to the charges proffered against him and offered a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. Two witnesses testified for the state, namely the complainant, LJ (identity not disclosed as complainant was under the age of 18 years at the time of the commission of the offences), and Ms S J, her grandmother. The J88 was handed into evidence by agreement. The Appellant and Mr I Koeberg testified for the defence. The salient features of the *viva voce* evidence lead in this matter are set out below.

[3] **LJ** testified that she was essentially raised by her paternal aunt and uncle. She narrated that her relationship with her father was good. LJ articulated that she had made a pledge to the Appellant to remain pure until she reached the age of 21 years. The Appellant who had read the complainant's diary made the discovery that LJ had a boyfriend and was engaging in sexual activity. LJ testified that the Appellant, who was infuriated, confronted her to establish the veracity of what he had uncovered. The confession by the complainant confirming same upset the Appellant. He informed LJ that he would decide what he would do about it. After a lapse of about a few weeks the Appellant informed LJ that he wanted to check

whether she really had sex. This request shocked LJ and rendered her unsure about what to do. The Appellant proceeded to instruct her to pull down her pants so that he could check whether she was still a virgin, which command she obeyed as the Appellant threatened to beat her if she defied him.

[4] On the next occasion, the Appellant threatened to inform LJ's aunt and uncle if she did not have sex with him. The complainant described that the Appellant instructed her to lie on the bed where he proceeded to fondle her breast and vagina. Notwithstanding LJ's protestations the Appellant forced himself onto her and proceeded to engage in sexual acts and have sexual intercourse with the complainant who was crying at that stage. Thereafter, these encounters were perpetuated by the Appellant on a regular basis until the complainant eventually reported the ordeal to her grandmother.

[5] **Ms S J**, the grandmother of the complainant, testified that she took LJ home one Sunday during 2014, after she had spent the weekend with her. As Ms Jonkers was about to leave, LJ asked her not to go. Ms S J narrated that she observed her teary eyed granddaughter which prompted her to ask what was troubling her. LJ informed her that it concerned the Appellant. Ms S J enquired whether the Appellant was touching her, which LJ confirmed. Ms S J thereafter proceeded to report the matter to LJ's aunt and uncle which culminated in a family meeting and the ultimate institution of criminal charges.

[6] **LB**, the Appellant, testified that he and the complainant shared a father daughter relationship which later progressed into a consensual sexual relationship between them. He narrated that this relationship subsisted from about August 2013 to April 2014. The Appellant described this relationship to be an intimate love

relationship as a couple and was kept secret from the rest of the family. According to the Appellant, they stopped having sexual intercourse and ceased being in a relationship after the complainant informed him that she had a boyfriend.

[7] **Mr I K** testified that LJ lived with him and his wife, the Appellant's sister, since she was about 9 years old. They had a good relationship with each other. He articulated that he was surprised to encounter Ms S J at his home one Monday afternoon. Mr K narrated that Ms Jonker's expressed her suspicion that the Appellant was molesting LJ. Mr K articulated that he and his wife confronted the complainant who at first denied the averments. Ms K stated that he at no stage suspected that anything untoward was happening between the complainant and the Appellant.

[8] Dr Molefe examined the complainant on 8 July 2014 and compiled a J88. As the complainant was sexually active the findings thereon could not corroborate the state's case.

[9] The Appellant's grounds of appeal on conviction can be succinctly distilled as follows:

- (a) Appellant contended that the court *a quo* erred by finding that the state had discharged the *onus* and proven its case beyond reasonable doubt; and
- (b) That the court *a quo* erred in finding that the intercourse was not consensual.

[10] To this end, the Respondent contended that a proper case for interfering with the decision of the court *a quo* had not been made out.

[11] It is an established legal principle that the trial court's evaluation of the evidence and acceptance thereof is presumed, in the absence of material misdirections, to be correct and as such, an appeal court will not lightly interfere with the factual findings of the trial court, in particular where these are based on credibility findings. It needs to be born in mind that the trial court has a significant advantage in assessing and evaluating the evidence of witnesses, having had the opportunity to see such witnesses in person and being able to observe their demeanour. It is also under such circumstances assumed that the trial court's findings of fact are correct. The court of appeal does not have the power to interfere with such findings unless there are demonstrable and material misdirections by the trial court which renders such findings to be clearly wrong. See ***S v Hadebe and Others***,¹ ***S v Monjane and Others***², ***S v Francis***,³ ***S v Bailey***,⁴ and ***R v Dhlumayo and Another***⁵ in this regard.

[12] In a well-reasoned judgment, the court *a quo* examined the totality of the evidence. The Magistrate was cognisant of the trite legal principals pertaining to the evidence of a single witness. The Magistrate, after considering the minor discrepancy in relation to whom LJ made the first report, found the contradiction not to be material. Furthermore, the Magistrate found that the complainant gave a logical and chronological exposition of events. Additionally, the Magistrate found that there was sufficient corroboration in the testimony of Ms S J. Moreover, the Magistrate found that corroboration was to be found in the accused's version. In this regard, sexual encounters were not denied by the Appellant. Where and when these sexual

¹ 1998 (1) SACR 422 (SCA)

² 2008 (1) SACR 543 (SCA).

³ 1991 (1) SACR 198 (A) at 204C–E.

⁴ 2007 (2) SACR 1 (C).

⁵ 1948 (2) SA 677 (A).

encounters occurred was also not disputed. It was also not disputed that the sexual encounters were kept hidden from the family.

[13] In relation to the evidence of the Appellant, the Magistrate found that there were major contradictions between the evidence of the Appellant and that of Mr K. She found that Mr K tried to protect the Appellant. The Magistrate found the version of the Appellant to be improbable, and rejected it to be false beyond reasonable doubt.

[14] On a conspectus of the evidence, I am unable to fault either the reasoning or the findings of the Court *a quo*. Despite the minor discrepancy as to who the first report witness actually is, I am satisfied that LJ's evidence was satisfactory in every material respect as was articulate in **S v Olawale**⁶. In this regard, I am in agreement with the Magistrate that there was sufficient corroboration for LJ's version through the evidence of Ms S J. In **S v Mahlangu and Another**⁷ the Court held, in relation to a single witness, that corroboration can also be found '*in the improbability of the appellant's version*'⁸. I am satisfied that the Magistrate's finding in this regard cannot be faulted. It is furthermore common cause that the complainant was sexually active prior to the Appellant having sexual intercourse with her and therefore medical evidence would not have assisted the state's case in this regards.⁹

⁶ [2010] 1 ALL SA 451 (SCA) at page 452: '*...the Court pointed out that the evidence of a single witness has to be clear and satisfactory in very material respect. The evidence has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is truthful beyond reasonable doubt.*'

⁷ 2011 (2) SACR 164 SCA.

⁸ At 171 para 22d.

⁹ See **Monageng v The State** [2008] ZASCA 129 at para 25 where Maya JA stated as follows: '*It was argued that the complainant's version was not supported by the medical evidence and that absence of physical injuries was a further indication that there had been no rape. I find no merit in this contention. It needs first to be pointed out that physical injuries are not always a consequence of rape. This is because physical force is not necessarily used in rape... Despite its neutrality, the doctor's evidence did not exclude the possibility of rape in view of the time lapse and the fact that the complainant had since washed...*'

[15] The Appellant's version, that the sexual encounters were consensual, is in my view not plausible. There are inherent and fundamental problems with this scenario as the Appellant is the complainant's father, who at the time of the commission of these offences was 39 years old. The Appellant wishes the court to believe that he and his daughter were in a relationship. The Appellant's version is interlaced with a myriad of improbabilities. In this regard, it appears to be improbable that he was the one who taught the complainant to kiss when it is common cause that the complainant had a boyfriend and was sexually active. Furthermore, the manner in which and timing of this so-called relationship appear to be questionable as it coincidentally dovetails with when the Appellant made the discovery in LJ's diary.

[16] On the complainant's version, the Appellant used the information he discovered as leverage to illicit sex from her. LJ was no doubt fearful or embarrassed that her aunt and uncle would find out about her escapades as they were strict and would not have allowed her to engage in that type of behaviour.

[17] From the evidence presented, it is pellucid that the Appellant knew that he was doing something wrong and consequently instilled fear into the complainant in order to keep what he was doing a secret. It is unfathomable that the sexual encounters were consensual. The Appellant tried to romanticise this sordid relationship. The complainant however explicitly stated that her resistance was met with intimidation, threats and violence. The mere fact that she later submitted to him is not indicative of consent.

[18] In *S v B*¹⁰ it was held that *'[e]xplicit opposition to intercourse need not be established. In addition, mere acquiescence could not be equated with consent in cases where a complainant did not resist in an observable manner due to fear or intimidation'*.

[19] The complainant's consternation is unequivocally encapsulated when she articulated the following: *'...Watter pa doen dit aan sy dogter?...*' In the circumstances, I am satisfied that the Magistrate correctly found that the sexual encounters were not consensual. Moreover, I am persuaded that the Magistrate correctly rejected the Appellant's version as not being reasonably possibly true. I am satisfied that the state has proven its case against the Appellant beyond reasonable doubt. This being so, the appeal on conviction stands to be dismissed.

[20] The Appellant's grounds of appeal on sentence can be crystallised as follows:

- (a) That the sentence of life imprisonment was disproportionate and had the effect of destroying rather than rehabilitating and improving the Appellant for his future reintegration into society;
- (b) That the court *a quo* over emphasised the seriousness of the offence as the expense of the Appellant;
- (c) That the court *a quo* erred in finding that no substantial and compelling circumstances existed justifying a deviation from life imprisonment.

[21] The Respondent submitted that the aggravating circumstances and interest of the community in this matter far outweigh the mitigating factors of the Appellant. It

¹⁰ 1996 (2) SACR 543 (C).

was further contended by the Respondent that the court *a quo* correctly found that there were no substantial and compelling circumstances present to deviate from the prescribed minimum sentence. The Respondent submitted that there was no misdirection on the part of the sentencing court and that all of the aspects referred to by the Appellant as his grounds of appeal were considered when the sentence was imposed.

[22] It is trite that sentencing is within the discretion of the trial court and that a court of appeal will not lightly interfere with the sentence imposed. The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by irregularity or misdirection or where there is a striking disparity between the sentence passed and that which this court would have imposed.¹¹ This court on appeal cannot simply *juxtapose* its views and opinions on sentence and then conclude that the sentence of the court *a quo* is inappropriate if it differs from what this court would have done. It is only when the trial court has exercised its discretion in an improper manner or misdirected itself that interference will be warranted.¹²

[23] The court *a quo* considered the traditional factors of the triad, such as the Appellant's personal circumstance, the nature and seriousness of the offences, the interest of the community; the impact the offences has had and continues to have on the victim as well as the legal principles applicable to the minimum sentencing regime.

¹¹ *Grobler v S* 2015 (2) SACR 210 (SCA) at para 5.

¹² *S v Rabie* 1975 (4) SA 855 (A). See also *S v Pieters* 1987 (3) SA 717 (A).

[24] Prior to the enactment of the prescribed minimum sentences, sentencing primarily and exclusively fell within the discretion of the Courts. The courts having due regard to the triad (the crime, the interests of society and the circumstances of an accused person) were free to impose whatever sentences they deemed just and fair as per the common law. This position has however changed, to the extent, that whenever an accused, is charged with one of the listed offences in the Schedules, the starting point now is Section 51 of the Criminal Law Amendment Act 105 of 1997.

[25] If regard is had to the purpose for which the Criminal Law Amendment Act was enacted, it should serve as an indicator of how serious offences are viewed and regulated in South Africa today. Consequently, sentences imposed by the courts must surely dispel any notion of uncertainty in this regard.

[26] Section 51(3) of the Act, confers a limited discretion upon the courts to depart from the prescribed minimum sentences, as it creates two preconditions namely:

- (a) It must determine if substantial and compelling circumstances are present that justifies a departure from the prescribed sentence.
- (b) The substantial and compelling circumstance(s) is to be placed on record.

[27] In the absence of these two preconditions, courts are obliged, to impose the prescribed minimum sentences, and may nevertheless, despite such circumstances, still impose the prescribed sentence.¹³ When imposing the prescribed sentences, courts are bound to focus more on the retributive and deterrent purposes of

¹³ *S v Mthembu* 2012 (1) SACR 517 (SCA) at para 11.

sentence, than the rehabilitation and reformation of the offender.¹⁴ The result may be that despite the favourable circumstances of the accused, a court may, after having regard to the interests of society, and the nature of the offence, still decide to impose a heavier sentence than the prescribed one.

[28] The court *a quo* was apprised of the personal circumstances of the Appellant, which included *inter alia* that he was 38 years old at the time of the commission of the offences, divorced, and the father of three children. The Appellant's highest level of education is standard 8. At the time of sentence the Appellant was in custody awaiting trial for a period of approximately two years. Prior to his incarceration, the Appellant was employed as a construction worker. Additionally, the Appellant has previous convictions for theft and assault.

[29] The Constitution of the Republic of South Africa and many major international instruments to which South Africa is a signatory State regard the rights of women and children very highly. Society considers rape to be a very serious problem, especially as it is a prevalent offence and one in respect of which an apposite measure of retribution is called for. This is so because it constitutes '*a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim*'.¹⁵

¹⁴ See *S v Swart* 2004 (2) SACR 370 (SCA) at paras 12 and 14 and *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others* 2009 (2) SACR 361 (SCA) at para 22.

¹⁵ In *S v Chapman* 1997 (3) SA 341 (SCA) at paragraph 344J, it was stated, correctly in my view, that rape is a serious offence, '*constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.*'

[30] The above sentiments were echoed in **Director of Public Prosecutions, Western Cape v Pins**¹⁶ where it was stated that:

*'No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa had done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ...'*¹⁷

[31] The law reports are replete with a plethora of case law pertaining to the manner in which the courts have approached incestuous rape. In the matter of **Director of Public Prosecutions, North Gauteng v Thabethe**,¹⁸ the Supreme Court of Appeal's reasons for interfering with the trial judge's sentence was *'the emergence of a trend of rapes involving young children which is becoming endemic'*. In **S v PB**,¹⁹ Bosielo JA, writing for a full bench, noted that *'rape of young girls by their fathers ... has become prevalent'*. This was one of the *'seriously aggravating circumstances'* that was taken into account in confirming the absence of substantial and compelling circumstances.²⁰

¹⁶ 2012 (2) SACR 183 (SCA) at 186F-H.

¹⁷ See also *S v Nkunkuma & Others* [2013] ZASCA 122.

¹⁸ 2011 (2) SACR 567 (SCA) at para 17 and 22.

¹⁹ 2013 (2) SACR 533 (SCA) at para 13.

²⁰ *Ibid* at para 24. See also Du Toit *et al*, *Commentary on the Criminal Procedure Act*, Volume 2 (Juta) [Service 54. 2015], 28-10B-12B.

[32] In **MF v S**,²¹ the appellant was convicted of the rape of his daughter who was under the age of 16 at the time and thus was sentenced to life imprisonment. The Full Bench dismissed the appeal against the life sentences, quoting the trial court at para 12:

'These two offences carry a minimum sentence of life imprisonment unless I find substantial and compelling circumstances to exist. I am of the view that I am unable to find any such circumstances. The accused has shown no remorse and continues to deny his guilt. He has suffered a life of poverty and he suffered at the hands of his father and is still angry at his father, but one can make no connection between this anger and the systematic rape of his daughter. These rapes were sheer sexual exploitation of the grossest kind.

The gravity of these offences, the length of time over which they endured, the breach of trust and the damage to his daughter far outweigh any mitigating features in his personal circumstances. These rapes are in my view of the kind for which life imprisonment is appropriate.'

[33] In **MD v S**,²² the Appellant was convicted of multiple counts of rape of his 16 year old daughter. He was sentenced to life imprisonment as per the Criminal Law Amendment Act. The primary question was whether he had been sufficiently warned in his charge sheet. The Court found that he had been and dismissed the appeal against the conviction and sentence. The Court made the following remarks concerning the crime of incestuous rape:

'[14] A sentence must be tailored to the seriousness of the crime committed and one expressing the natural indignation of ordinary citizens would compensate for the seriousness of the crime committed. An appropriate punishment is one which serves to protect not only appellant's female members of the family but other similarly vulnerable members of society...

²¹ [2017] JOL 38542 (ECG).

²² [2016] JOL 36667 (SCA).

[15] Rape committed by close male relatives against victims related to them is prevalent. See, for an example, cases such as *S v Sikhipha* [2006] ZASCA 73; 2006 (2) SACR 439 (SCA) [also reported at [2006] JOL 17530 (SCA) Ed] ; *S v Abrahams* 2002 (1) SACR 116 (SCA); and *S v PB* 2013 (2) SACR 533 (SCA). Courts are under a duty to punish such that this new tendency is contained. It is despicable behaviour that fathers totally turn their backs on what is their natural duty to ensure the safety of their daughters, and themselves pose a danger towards their own vulnerable children. Dealing with a similar incident in *S v Abrahams*, Cameron JA stated the following:

"Of all grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense."

"Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes."

On the effect of incestuous rape the Judge made the following important observation:

*"Third and lastly, the fact that family rape generally also involves incest (I exclude foster and stepparents, and rapists further removed in family lineage from their victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture."*²³

[34] Evident is the fact that the Appellant showed no remorse for what he did. If regard is to be had to the totality of the evidence I am of the view that the Appellant intentionally abused his position of power and authority over the complainant, who was a vulnerable child by manipulating her. Instead of protecting

²³ See also in this regard *Kwinda v The State* 2014 JDR 2013 (SCA) and *S v MDT* 2014 (2) SACR 630 (SCA).

LJ, the Appellant violated the sanctity of his own daughter which actions carry with it far reaching consequences and irreparable harm. LJ will for the rest of her life have to face the stigmatization, psychological, and emotional wounds associated with what her father had done to her. LJ will have to learn to overcome her fears and trust again. Just because there were no visible physical injuries does not make the offence less serious and as such, does not of necessity translate into a lesser punishment. LJ will carry these invisible scars for the rest of her natural life.

[35] I am satisfied that the Magistrate had due regard to all the relevant factors and adequately dealt with all the grounds of appeal in her sentence judgment. I am furthermore satisfied that the court *a quo* correctly considered the guidelines set out in **Malgas** (*supra*) and other authorities concerning the departure of prescribed minimum sentences and correctly found that there were no substantial and compelling circumstances to deviate from the minimum sentence. I find that the Magistrate did not misdirect herself. I therefore find that the sentence of life imprisonment imposed does not induce a sense of shock, having regard to the factual circumstances of this matter; and is in keeping with what has been held **S v C²⁴** that *'[r]ape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim – he murders herself respect and destroys her feeling of physical and mental integrity and security.... Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes.'* Child rape is a scourge that shames the nation and should in no way be tolerated. In the circumstances, there is no need to interfere with the sentence.

²⁴ 1996 (2) SACR 181 at 186E-F.

Order

[36] In the result, I would dismiss the appeal. The conviction and sentence are confirmed.

ANDREWS, AJ

I agree and it is so ordered.

MEER, J