

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

DATE

SIGNATURE

Case No.: A283/15

In the matter between:

De Beer, Daniel Coenraad

Appellant

And

The State

Respondent

Coram: VALLY J et SIWENDU AJ,

Heard: 10 MAY 2016

Delivered 29 JUNE 2016

Summary: Single Witness– Child- Rape- Cautionary Rule- Proof Beyond Reasonable Doubt- Minimum Sentence- Substantial and Compelling Circumstances- How To Treat The Evidence Of Children.

ORDER

The appeal against conviction is dismissed. The sentence imposed by the court a quo is set aside and replaced as follows. The accused is sentenced to life imprisonment. The accused's name shall be reflected in the sexual offenders register.

JUDGMENT

Vally J (Siwendu AJ concurring):

Introduction

[1] The appellant was arraigned in the Regional Court, Kempton Park, on a charge of rape in contravention of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 (the CPA) and the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), as amended, as well as sections 92(2) and 94 of the CPA. On 5 May 2011, the appellant, who was legally represented, pleaded not guilty to the charge. On 16 October 2012 he was convicted as charged.

[2] The appellant is the stepfather of the complainant. The complainant was eight (8) years old at the time of the incident.

[3] Upon convicting the appellant the magistrate heard evidence in mitigation of sentence. Thereafter, on 9 October 2013 he sentenced the appellant to 15 years imprisonment, five of which were suspended on condition that the appellant was not convicted of sexual offences during the period of suspension. It was further ordered that the appellant's name be entered in the sexual offenders register.

[4] Subsequently, the appellant successfully applied for leave to appeal his conviction as well as for bail pending his appeal.

[5] The appellant's appeal was initially set down for hearing on 29 February 2016. On that day this court placed the appellant on notice to indicate why his sentence should not be increased if this court were to find that his conviction was safe and in order. The appeal was thereafter postponed to 10 May 2016 in order to give both the appellant and the State the opportunity to address this issue in further submissions. Both took advantage of the opportunity.

The State's case against the Appellant

[6] The State called six witnesses. The most important witness was the complainant herself. She provided direct testimony of what had transpired between herself and the appellant. However, before relaying her testimony it is necessary to look at the evidence of the other witnesses, because it provides the context as to how the matter came to light. It is also necessary to look at the other evidence, because the appellant claimed that much of this evidence focussed on communications between the complainant and some of these witnesses, and this evidence materially contradicted the complainant's own evidence in court.

[7] The maternal grand-aunt of the complainant informed the court that on 30 March 2010 she was visited by her sister (the maternal grandmother of the

complainant), her sister's husband (the grand-stepfather to the complainant) and the complainant. Her sister was visibly upset and informed her that the complainant had claimed that the appellant had molested her. Her sister was afraid of the mother of the complainant, who is her sister's daughter and the complainant's biological mother. She asked the complainant what had happened. The complainant told her that the appellant had removed her panties, put his fingers into her vagina and then licked them. Her sister informed her that because she (her sister) feared the mother of the complainant she did not want to take the matter further. However, she prodded her sister to do the right thing, which was to report it to the authorities. Her sister relented. Thereafter, she contacted the police and informed them of the allegation of the complainant. After reporting it to the police she took the complainant to a doctor. The doctor examined the complainant and confirmed that the complainant was penetrated and that there was swelling around her vagina. The doctor also informed them that the vagina was infected. The complainant was not able to say to them when exactly the appellant had molested her. The grand-aunt kept the complainant with her. She telephoned the mother of the complainant and informed her of the allegations as well as the outcome of the medical examination. The mother of the complainant came to her house to hear the allegations first hand. A charge was laid against the appellant and the complainant was taken to the Teddy Bear Clinic.

[8] The maternal grandmother of the complainant informed the court that on 27 March 2010 the complainant had for the first time informed her that the

appellant had on more than one occasion inserted his fingers into her (the complainant's) vagina and licked his fingers thereafter. This occurred after the complainant had refused to return to her mother's home. When she asked the complainant why she was refusing to return to her mother the complainant revealed the information about the sexual assault. She asked the complainant why she had not reported the incidents to her mother. The complainant replied that her mother had a habit of sleeping a lot and that the appellant used to put sleeping tablets in her mother's coffee. The complainant also told her that the appellant seemed to favour her over the younger sibling. She confirmed her sister's evidence regarding the events of 30 March 2010. She had no difficulty in admitting that her own relationship with her daughter, the complainant's mother, was severely strained, but denied that any animosity between her and her daughter motivated her to falsely implicate her daughter's husband, the appellant, in the sexual molestation of the complainant. She admitted that she did nothing between 27 March 2010, when she first heard from the complainant about the sexual assault, and 30 March 2010. It was only on 30 March 2010 that she decided to visit her sister for assistance. One factual issue that was focussed on during her cross-examination was whether she and her husband had ever shared a bed with the complainant, and if so, whether the complainant had slept between her and her husband. She conceded that this had occurred. She also admitted that her relationship with her daughter and the appellant was conflictual.

[9] The complainant's step-grandfather testified that he was present on 27 March 2010 with his wife (the maternal grandmother) when the complainant indicated that she was unhappy about returning to the home of her mother as her stepfather had sexually assaulted her. His evidence was unequivocal in two respects: a) the complainant was adamant in her refusal to return home to her mother; and b) the complainant was unambiguously clear that the appellant had sexually molested her. The sexual molestation involved the appellant putting his fingers on more than one occasion into the vagina of the complainant and thereafter licking them. Both he and his wife did nothing about it until they visited his wife's sister on 30 March 2010. His role in what happened with the complainant thereafter was minimal as his wife and her sister had taken charge of the matter. He admitted that the relationship between himself and his wife on one side and the appellant and the appellant's wife (his stepdaughter) on the other was strained well before the complainant had alerted them to the sexual assault. He denied that he had ever sexually molested the complainant or the complainant's mother. He was aware that such an allegation had been made against him by the appellant and the complainant's mother after it was put to them that the complainant had accused the appellant of sexually assaulting her. He was adamant that there was no substance to this allegation against him. He denied that he or his wife influenced the complainant to falsely accuse the appellant of sexually assaulting her.

[10] A forensic social worker testified. She got involved after 30 March 2010 when the matter had already been reported to the police. She interviewed the

complainant on three occasions, viz on 28 April, 13 May and 1 June 2010. She wrote a report which she handed to the court before testifying. Her testimony was based on the contents of the report. Before the interviews with the complainant had taken place she had been informed that the complainant had reported that she had been sexually molested by the appellant. However, she used various recognised clinical methods to acquire the information from the complainant herself. These involved winning the trust of the complainant, ensuring that the complainant was at ease during the interviews, ensuring that the complainant was not traumatised further by having to discuss the allegations, and finally making sure that the complainant was able to give a clear explanation of what she alleged was done to her by the appellant. The substance of her testimony was that the complainant had repeated to her the allegation that the appellant had sexually molested her (the complainant) by inserting his fingers into her vagina on more than one occasion. After interviewing the complainant three times she was satisfied that the complainant was telling the truth. Finally, she recommended that the complainant be allowed to testify through an intermediary.

[11] The State led the evidence of the complainant herself. The complainant testified through an intermediary. From the inception of her testimony she maintained that the appellant had harmed her. She stated that the appellant had removed her panties while he was alone with her in a bedroom, placed his fingers in her vagina and licked them thereafter. He had done this on more than one occasion. She was asked why she did not inform her mother of these incidents and she replied that her mother was always asleep when it happened,

that she was afraid of the appellant who had told her that if she spoke of the incidents to anyone he would hurt her. She further said that he would make coffee for her mother and would place sleeping tablets in the coffee before giving it to her mother to drink. This would make sure that her mother would not wake while he molested her. The reason she knew they were sleeping pills is because he told her so. She denied that anyone influenced or instructed her to claim that it was the appellant who had molested her. She agreed that she told her grandmother and step-grandfather of the incident on 27 March 2010 when she refused to return to the home of her mother and the appellant. During her cross-examination she was asked a few times if her grandmother and step-grandfather had influenced her to allege that it was the appellant who had molested her and she consistently answered, "No". During her cross-examination she was asked how she knew that it was sleeping pills that the appellant put into the coffee of her mother, to which she replied: "*Ek het op die boksie geles dit is slaappille*". This is different from what she said during evidence in chief. During her evidence in chief she said she knew they were sleeping pills because the appellant had told her that they were sleeping pill. Further, during her cross-examination she stated that the brother of the appellant, too, had on occasion molested her, but as this issue was not pursued with any rigour during her testimony she did not provide any detail of it.

[12] Finally, a doctor who examined the complainant on 2 April 2010 testified about the facts he established from the examination as well as the conclusions he drew from those facts. His evidence was that upon examining the

complainant he found that she had been sexually molested. He found that notwithstanding the fact that she had been penetrated her hymen had not been severed. After carefully examining the nature of her injuries he came to the conclusion that the sexual assault(s) took place during the four weeks prior to her visit to him on 2 April 2010. His evidence was completely uncontroversial.

The evidence of the appellant

[13] The appellant did not testify in response to the evidence of the State. He only testified in mitigation of sentence. Accordingly, it would only be necessary to deal with his evidence if the conviction was upheld. However his wife, who is also the mother of the complainant, testified on his behalf. She testified that when she was thirteen years old her stepfather had rubbed her breasts. She had told him to stop, which he did. He never repeated this misconduct. She said that her child, the complainant, had never told her of being molested by the appellant and that the appellant and the complainant had a good relationship. In fact, she said, they had great affection for each other. She related a conflictual incident between herself and the appellant on the one side and her mother and her stepfather on the other side, which damaged their joint relationships. It was her testimony that her and her husband's relationship with her mother and stepfather was so fractious and conflictual that she believed that they would not hesitate to bring harm to them. In particular, her mother was very upset at the fact that she and her husband decided to move away from her as this caused her mother to lose regular direct contact with the children – the complainant and the complainant's younger sister. Her mother blamed the appellant for causing

her to lose this direct and regular contact with the children and as a result told her that he would pay for separating her from her grandchildren. Later on there was another incident that served to aggravate the ill feeling her mother and stepfather had for her and the appellant. It concerned a time when her mother and stepfather came to live with them for a short time as her stepfather did not have money. During this stay the two children shared a room with her mother and stepfather. In fact, the complainant slept on the same bed with her mother and stepfather. After a while they received a letter from the landlord informing them that by accommodating her mother and stepfather in their home they were in breach of the lease agreement they had concluded with him. It was then that the appellant felt that he could no longer contend with them living in his house and asked them to leave. This caused them grief. They felt that they were being chased away by the appellant in their time of need. They claimed that the appellant had orchestrated the situation by getting the landlord to complain of their presence. Before leaving they warned him that they would avenge his ill treatment of them. This latter incident took place only a few months before the complainant made the allegation that the appellant had sexually molested her. She denied that the appellant had made coffee for her regularly, or that she slept most of the time while he was at home. With regard to the sexual assault she said that the complainant told her that the appellant had put his fingers into her vagina and that the appellant's brother, Willie, had penetrated her with his whole hand. Finally, she claimed that the complainant was influenced by her mother and stepfather to falsely accuse the appellant of sexually molesting her.

Analysis

[14] It is common cause that the appellant and his brother were charged for molesting the complainant. This resulted from the fact that the complainant had claimed at one stage that the brother of the appellant, too, had molested her. However, the State withdrew its case against the brother. The appellant sought to make much of this. He claimed that the fact that the State chose initially to charge both him and his brother while later withdrawing the charge against his brother indicates that the evidence of the complainant cannot be relied upon. It shows, he contented, that the complainant had made contradictory claims about who actually had molested her. I am not persuaded by the contention. It is correct that the complainant had at one stage alleged that both he and his brother had molested her and that at the trial she stated that it was only him that did so. But this does not mean that she was not candid, nor that she was confused about him being the actual perpetrator of the assault on her. At all times she consistently maintained a few elements of her testimony, as well as her statements to various persons from 27 March 2010. These were:

[14.1] it was the appellant that had placed his fingers in her vagina and had licked them thereafter;

[14.2] the appellant did so while her mother was asleep;

[14.3] she was afraid that the appellant would harm her if she told anyone of what the appellant had done to her;

[14.4] she was never influenced by her grandmother or step-grandfather to identify the appellant as the person who did this to her;

[14.5] that the appellant had molested her on more than one occasion;

[14.6] that only the appellant and his brother had molested her.

[15] In order to meet the case against him the appellant elected to produce the evidence of his wife only. He chose not to testify himself, even though the State had put up substantial evidence of his conduct, which required an answer from him. This was: that he assaulted the complainant; that the assaults took place in the bedroom while his wife and the complainant's younger sister were asleep in the bedroom next door; that he put sleeping tablets into the coffee of his wife prior to assaulting the complainant; and that he threatened to bring harm to the complainant should she tell on him. Instead, he chose to meet the case by claiming, through the evidence of his wife, that the grandmother and step-grandfather of the complainant had influenced the complainant to falsely claim that he was the perpetrator of the assault on the complainant.

[16] The appellant's wife made the claim that the complainant was influenced by her grandmother and step-grandfather. He had no basis for making such a claim, and if he had he certainly did not present it to the court. He merely appropriated her claim. The basis for his wife making the claim was that they sought revenge for her and the appellant's conduct in:

[16.1] firstly, moving away from them; and,

[16.2] secondly, in requiring them to leave their (the appellant's and her) home when the landlord threatened to evict all of them.

[17] This claim - that the complainant was influenced by the mother and stepfather of the appellant's wife to falsely accuse the appellant because they sought revenge for the ill treatment meted out to them by the appellant – is untenable. Her mother and stepfather must have harboured such ill feeling towards them that they would, without conscience, use the complainant in the most pernicious way to get back at them. To do so they would have to be extremely malicious. There was no evidence presented that would allow for such a radical conclusion to be drawn. Further, they would have to be so cunning that they could get away with such a conspiracy. To get the complainant to falsely accuse the appellant of a very serious crime, and to maintain this, would be no mean feat given that the complainant was questioned on so many occasions by so many different persons at so many different times.

[18] As regards his wife's claim that she was sexually molested by the stepfather when she was a child it is important to note that both her mother and her stepfather strenuously denied that the stepfather had molested her or that she had reported it to her mother at the time. This claim against the stepfather, it has to be remembered, only surfaced after the complainant had informed on the

appellant. She also failed to give any details of the sexual assault on her by her stepfather.

[19] What is particularly disconcerting about this claim is that, if she was aware of the history of her stepfather molesting her as a young child, she had no basis to release the complainant into their care. Yet she had done so. She had also allowed the complainant to share a bed with her mother and stepfather. The appellant's counsel conceded that her conduct was inexplicable. In my view, her conduct as a mother is not consistent with that of someone who herself has been a victim of a sexual assault by a parent when she was a young child. It also bears mentioning that she did not then, nor even at this stage, pursue the allegation against her stepfather. Nothing stopped, or stops, her from so doing and the law could, or still can, take its course.

[20] I am not able to find that the appellant's account of why he was blamed for sexually assaulting the complainant to be reasonably possibly true.

[21] In any event the appellant's claim that, because his wife was sexually assaulted by her stepfather, it was, or could only be, her stepfather that had sexually assaulted the complainant, is untenable. Even if many years ago his wife was sexually assaulted by her stepfather that is no basis to reach the conclusion that the stepfather perpetrated a sexual assault on the complainant at some time prior to the medical examination conducted upon the complainant by the doctor on 2 April 2010. The conclusion the appellant asks the court to

draw in this regard is at odds with the basic tenets of logic. Absent any concrete evidence against the stepfather there is no basis to conclude that he was the perpetrator, or even the possible perpetrator, of the sexual assault on the complainant. This claim was no doubt made to introduce an element of doubt regarding the appellant's guilt. It was made to defeat the State's case, but unfortunately on its own it is insufficient. On its own it does not raise any doubt that dispels or undermines the evidence presented by the State, especially the evidence presented by the complainant.

[22] The appellant attacked the finding of the court *a quo* that the complainant's evidence was reliable. He contended that the complainant had contradicted the evidence of the social worker in material respects thus showing that she was not consistent. It will be remembered that the social worker testified as to the information she received from the complainant a month or so after the incident was reported. The social worker used certain techniques to get the complainant to reveal her ordeal. Nevertheless, the differences in the versions of the social worker and the complainant, according to the appellant, are:

[22.1] the social worker said that the complainant told her that she had informed her mother of the sexual assault but her mother did not believe her. In her evidence the complainant said that she did not tell her mother because she was afraid that the appellant would inflict harm upon her.

[22.2] the social worker said that the complainant had told her that the brother of the appellant had also assaulted her in the same way as the appellant had done. In her evidence the complainant failed to provide the same detail. She merely said that the appellant's brother had also molested her.

[23] The appellant contended that these differences in what the complainant is supposed to have said to the social worker and what she said in court demonstrate that the complainant was dishonest in her testimony. As a result, he argued, her evidence must be regarded as being unreliable. I do not agree. Firstly, the differences in the evidence were not so material that they resulted in contradictions of fundamental facts. On the fundamental facts the evidence was essentially the same. More importantly, there was nothing improbable about the complainant's version. Furthermore, it must be borne in mind that the evidence of the social worker was hearsay. The evidence of the complainant in court was direct. The complainant was cross-examined and not once did she contradict herself in any material way. Her evidence was focussed and, as I say above, consistent. It is also of importance that the evidence of the social worker was never put to her, nor was there an application to recall the social worker. It is important not to overlook a fundamental principle of cross-examination, which is that it is the duty of a cross-examiner to put to a witness that there are material contradictions between her evidence and the evidence of other witnesses, and that on the reliance of these contradictions it will be contended that she is not

being candid with the court.¹ In this case it was not done. I am mindful of the fact that the complainant was an eight-year old girl, which made it necessary to ensure that the cross-examination was not unduly aggressive or hostile, as this carries with it the potential of causing serious psychological harm to the child. However, there is no reason why the discrepancies cannot be put to a young child without causing the child distress or psychological harm. The cross-examination can be polite and conducted through the careful choice of words. The child, after all, often testifies, as has occurred in this case, through a professionally trained intermediary² whose task it is to protect the child from distressing and hostile cross-examination that can be painful even for adults. There is also s 63 of the *Child Justice Act 75 of 2009* (CJA), which provides that a child justice court, which includes any court provided for in terms of the CPA, must ensure that the best interests of the child are upheld. While the section focusses on a child-accused there is no reason why it should not apply to a child-witness.³

[24] While the intermediary is there to protect the child, she is also there to assist the court in ensuring that the process of establishing truth is not compromised simply because the witness is a child. The cross-examiner is not absolved of the duty to courteously, but thoroughly, put her client's version in full to the witness. This may include informing the witness that it would be

¹ See in this regard the well-known *dicta* of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at [61] – [65] regarding the duties of a cross-examiner.

² Section 170A of the *Criminal Procedure Act 51 of 1977* (CPA) specifically provides for this eventuality.

³ *S v Ndwandwe* [2012] ZAKZPHC 47 at [15]

argued that the witness was not candid or correct in her account of the events which are the focus of the proceedings. A competent intermediary would ensure that this is not done in a manner that is distressing or psychologically harmful to the child. Furthermore, the presiding magistrate (or judge) is there to protect the best interests of the child and will no doubt oversee the cross-examination so that no harm is brought upon the child witness. This can be done without compromising the right of the accused to canvass, as well as challenge, all evidence presented against her. In our case, the appellant elected not to canvass the evidence of the complainant, which he claimed was contradictory.

[25] The final complaint of the appellant was that the court *a quo* failed to adequately take note that the evidence against him was really presented by a single witness and was therefore subject to the cautionary rule. According to the appellant, had the court *a quo* done so, it would have concluded that the State had failed to prove its case beyond reasonable doubt.

[26] The Roman Dutch law, which as we all know forms the basis of our common law, did not allow for the conviction of an accused solely on the uncorroborated evidence of a single witness.⁴ This was changed by legislative intervention. Statute allowed for the court to convict an accused on the evidence of a single competent and credible witness. The legislative advance, nevertheless, did not remove the duty of the courts to look carefully at the uncorroborated evidence of a single witness before they were satisfied that the

⁴ DT Zeffertt, AP Paizes and A St Q Skeen, *The South African Law of Evidence*, (2003), at 793

State had proved its case beyond reasonable doubt. Anything less would render the conviction unsafe. Over the years, in the exercise of this duty courts naturally became aware of the need to take care before reaching the conclusion that a conviction in these circumstances was safe. This approach towards such evidence was captured in the following *dictum*:

“... the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for the conviction by s 284 of Act 31 of 1917, but in my opinion that section should be relied on where the evidence of the single witness is clear and satisfactory in every material respect.”⁵

[27] For decades this has been the general approach of our courts to the evidence of a single witness in cases involving sexual offences such as rape. Unfortunately, this has been interpreted to mean that the courts have adopted a cautionary rule that has to be applied to the evidence of a single witness who in almost all cases happens to be the victim of the sexual offence. This interpretation has often not served the interests of justice. It has often resulted in the adoption of the notion that many, if not most, women who are single witnesses in cases involving sexual assaults inflicted upon them are prone to lie. It is a notion that had no scientific basis and is simply illogical.

[28] The thrust of the law, however, has never altered. It is, and always has been the law that the proof required for a safe conviction has to be beyond reasonable doubt. On this basis, if the evidence was weak, shaky or not convincing then it would be safer to acquit, for the alternative, an incorrect conviction, is most certainly not in the interests of justice. Quite simply the protection is inherent to the requirement that the proof of guilt must be found to

⁵ *R v Mokoena* 1932 OPD 79 at 80

be beyond reasonable doubt. There is therefore neither basis nor need for the courts to apply the cautionary rule when dealing with a case of sexual assault. The application of the rule in cases of sexual assault was nothing short of a sexist practice. I agree with Modiba AJ (as she then was) who pointed out that the application of this rule reeked with double standards :

“The defence requested the court to treat Ms Mogomotsi's evidence with caution, because she is a single witness. I found this request very interesting because the accused is also a single witness in respect of his version. The request is not only based on double standards, it is reminiscent of the discriminatory assumptions of the past age that a complainant in a rape case is likely to be untruthful.”⁶

[29] The practice of applying the cautionary rule in sexual offences cases should not be part of a legal order that strives to treat all persons with equal respect. In any event, the practice is no longer allowed in our law. In *S v J Olivier* JA struck it a death blow when he said:

“The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, Judges have attempted to justify the cautionary rule by relying on 'collective wisdom and experience' ... This was also the justification, before the reform of the law, in the UK. This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? whose experience? what proof is there of the assumptions underlying the rule?

The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men or that they are intrinsically unreliable witnesses.”⁷

And:

“In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and

⁶ *S v Charles Tabane* (Case No.: SS 36/2013) (Unreported) at p 10

⁷ *S v J* 1998 (2) SA 984 (SCA) at 1007F-1008A. All citations and footnotes have been omitted

no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”⁸

[30] There has also been legislative intervention dealing with this unacceptable practice as it hindered the interest of justice. Section 60 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007* (Sexual Offences and Related Matters Act) provides:

“Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

[31] In the case of children however the law is still somewhat ambiguous. It is still customary to apply the cautionary rule in these cases, though it is done not on account of the nature of the offence but rather on account of the nature of the witness. A child-witness, it is said, is susceptible to suggestion and to the folly of imagination and his/her⁹ evidence needs be treated with caution. Schreiner JA set the tone for this when he observed:

“The dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices. (*Rex v Ncanana*, 1948 (4) SA 399 (AD)) and in the case of complaints in charges of sexual assault (*Rex v W.*, 1949 (3) SA 772 (AD)). The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court.”¹⁰

⁸ Id. at 1009E-F. The application of the rule has also been dispensed with in Namibia – see *S v K* 2000 (4) BCLR 405 (NmS) at 419E

⁹ It is a notorious fact that many young boys, too, have over the years been subjected to sexual molestation.

¹⁰ *R v Manda* 1951 (3) SA 158 (A) at 163E-F

[32] This approach is still a prescribed guide for the assessment of the evidence of the child despite the development of the common law by Olivier JA in *S v J* and the legislative intervention in s 60 of the Sexual Offences and Related Matters Act.

[33] But, once again, it cannot be forgotten that the issue for the court is still whether the State has proven beyond reasonable doubt that the sexual offence for which the accused stands indicted was committed. Insofar as analysing the evidence of the child is concerned the crucial question as in every case is: is the evidence of the child trustworthy? In answering this question the trial court should consider whether the child is able to narrate his/her experience with reasonable clarity, whether he/she is able to provide sufficient details of the offence, whether s/he understands the importance of being truthful and whether s/he understands what s/he is saying.¹¹ With the assistance of the intermediary all of these issues can be attended to by counsel for the State and for the accused during the presentation of the child's testimony. If this is done and the evidence is found to be untrustworthy, then proof beyond reasonable doubt would be absent and an acquittal should follow.

[34] It is on the basis of this approach that I now turn to the case against the appellant.

¹¹ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-C

[35] In my view the magistrate did not fail to examine the evidence of the complainant carefully before finding that the State had proven its case beyond reasonable doubt. The evidence of the complainant was sound, consistent, not contradicted and reasonably detailed for it to be accepted. The complainant fully comprehended what she was saying. At the same time, the failure of the appellant to testify meant that there was no real alternative to her evidence. He had every right not to testify, but his failure to do so is not without consequences. He has to meet the case of the State against him, and if by remaining silent he fails to meet that case then the court may find that the State has put up sufficient evidence to warrant a verdict of conviction. All that is required is that the evidence shows beyond reasonable doubt that he is guilty of the offence for which he was indicted.¹² Having failed to testify, the appellant attempted to create doubt as to the veracity of the complainant's evidence by presenting the evidence of his wife. His wife claimed that the evidence of the complainant was motivated by malice on the part of her mother and stepfather. However, his wife's evidence was wholly inadequate. She could not say anything regarding the incidents the complainant testified about. She said nothing about the medical findings of the doctor concerning the harm done to the complainant. She did not point to any animosity between the complainant and the appellant or between herself and the complainant. She could give no details of how her mother and stepfather influenced the complainant and why they were able to exercise such influence over her. In short, her evidence was so weak that it did not dispel the evidence of the State or show that there was a

¹² *S v Boesak* 2001 (1) SA 912 (CC) at [23] – [26]

reasonable possibility of the appellant being falsely accused of sexually assaulting the complainant.

[36] In conclusion on the issue of the safety of the conviction by the court *a quo*, I find that the evidence of the appellant's culpability for sexually assaulting the complainant was overwhelming. His failure to testify left that evidence unchallenged. Hence, I find that on a careful analysis of the totality of the evidence that was presented at the court *a quo* the State had proved beyond reasonable doubt that he sexually assaulted the complainant, by penetrating her with his fingers. In terms of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with sections 256, 257 and 281 the CPA such an act constitutes rape. He is therefore guilty of the charge on which he was indicted.

Sentence imposed by the magistrate

[37] The learned magistrate heard evidence in mitigation of the sentence to be imposed. The appellant testified. The learned magistrate also received a pre-sentence report drawn by a clinical psychologist. The clinical psychologist testified as to the contents of the report. After considering the evidence of the appellant as well as the report the magistrate decided to impose a sentence of fifteen years imprisonment, five of which were suspended on condition that the appellant was not convicted of sexual offences during the period of suspension.

[38] The justification for this sentence is to be found in three short paragraphs in the judgment. They read:

“I am of the opinion that despite the fact that this [indistinct] is very serious, I also do not agree with the state that a life sentence, **although a life sentence is the appropriate sentence in the circumstances**, but I am of the opinion that are certain other factors that wants the court to deviate from the prescribed minimum sentence and of the opinion that a life sentence at this particular state will not be appropriate sentence as well as the totally suspended sentence, will not be a appropriate sentence.

The sentence that the court has to imposed, is the sentence that will make you to realised what you have done is not acceptable. And so even the people that want to do this particular issue must know that the court will not take this thing lightly and that this is not acceptable and the court will not accepts to such particular things.

Everything [indistinct] that is your personal circumstances, the seriousness of the offence and the interest of the community, I am of the opinion that the following sentence is appropriate sentence under the circumstance.” (The quotation is verbatim, but the bold is mine)

[39] While there is an acknowledgement by the magistrate that he is required to give effect to the provisions of ss 51(1) and (3) of the CLAA, there is no logical reason provided as to why he did not do so. Sub-sections 51(1) and (3) of the CLAA, read with Schedule 2 of the same Act, make it plain that the court can depart from the minimum sentence of life imprisonment only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a sentence lesser than life imprisonment. In that case the court must enter those circumstances on the record before it imposes a lesser sentence. The magistrate merely noted that he was required to apply the provisions of ss 51(1) and (3) of the CLAA but then ignores them altogether. There are no reasons furnished as to why they are ignored.

[40] It is important to note that while ss 51(1) and (3) call for the imposition of minimum sentences they do not remove altogether the power of the court to

determine what the appropriate sentence in a specific case should be. That decision is left to the court. The court is allowed to depart from the prescribed minimum sentence should it find that there are substantial and compelling circumstances present which indicate that the imposition of a minimum sentence would not be in the interests of justice. That is the prevailing legal position post the enactment of ss 51(1) and (3) of the CLAA. It is best summarised in *S v Malgas* where the following was said:

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary:

- A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the

need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
- H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."¹³

[41] It was pointed out in *S v Vilakazi*¹⁴ that the approach in *Malgas* is necessary to ensure that there is some congruency in sentencing and that the sentence imposed is proportionate to the gravity of the crime.

[42] It bears remembering that the important message contained in *Malgas* is that while sentencing courts have a residual discretion when imposing a sentence in a particular case they nevertheless have to provide sound reasons for departing from the minimum sentence prescribed in s 51(1) of the CLAA. They do not have a free-hand to do as they please without any regard whatsoever to the legislature decision on what the policy of sentencing should

¹³ 2001 (2) SA 1222 (SCA) at [25]

¹⁴ 2009 (1) SACR 552 (SCA) at [14] – [15]

be, so that there can at least be some consistency in sentencing. Sentencing courts have been reminded of this many times by the Supreme Court of Appeal. An unambiguous reminder is to be found in the *S v Matyityi* where the court said:

“It follows that, to borrow from *Malgas*, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As *Malgas* makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”¹⁵

[43] It follows that the trial court committed a material misdirection by imposing a sentence that falls far short of what is called for in terms of s 51(1) of the CLAA. Viewed in the light of the sentence prescribed by this sub-section of the CLAA, the sentence imposed by the trial court is unduly lenient.

[44] The State did not cross-appeal against the sentence imposed. This court was concerned that such misdirection could result in a failure of justice. Thus, when the matter was first called, this court decided to postpone the matter in order to afford the appellant and the State the opportunity to make submissions on whether this court was empowered to interfere with the sentence imposed by

¹⁵ 2011 (1) SACR 40 (SCA) at [23]

the trial court and, if so, why it should not interfere with the sentence imposed by setting it aside and replacing with one that gives effect to the provisions of ss 51(1) and (3) of the CLAA. Both the appellant and the State took full advantage of the opportunity and both presented lengthy submissions in this regard. Effectively, the State took the view that this court is empowered to interfere with the sentence imposed and that it should do so in the interests of justice. It asked that this court set aside the sentence imposed and replace it with a sentence of life imprisonment as prescribed by s 51(1) of the CLAA. The appellant took the contrary view. He maintained that this court had no power to interfere with the sentence imposed as the State had failed to cross-appeal against it.

[45] There can be no doubt that this court sitting in appeal is vested with the power to *mero motu* increase the sentence imposed by the magistrate. It has always had this power. It is a power that is essential to the performance of its duty to do justice. However, since the enactment of the Constitution this power can only be exercised after the appellant has been given due notice about the possibility of the sentence being increased.¹⁶ In my view, the appellant in this case was given the due notice. He had an opportunity to make full submissions on the matter and he took full advantage of the opportunity. In fact, it was directed that the State make its submissions first and he was given appropriate time to respond thereto, as well as to make submissions independent of what the State's submissions were. In these circumstances, there can be no doubt

¹⁶ *S v Bogaards* 2013 (1) SACR 1 (CC) at [58] – [72]

that this court may increase the sentence imposed by the magistrate should it find that it is in the interests of justice to do so.

Should the sentence be increased?

[46] The magistrate we know failed to adhere to the prescripts of the ss 51(1) and (3) of the CLAA. We know that the sentence he imposed falls far short of what those precepts request of him. In so doing, he committed a material misdirection.

[47] The appellant had committed a heinous crime. He raped a minor child on more than one occasion. Rape in general, we know, is a very serious offence. Our courts have repeatedly said this and so has our legislature by enacting s 51 of the CLAA. Courts have a duty to ensure that the offence is dealt with in a manner that respects the rights of rape victims. Mahomed CJ has reminded courts of this duty:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights.... The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. We communicate that message in this case by an order that the appeal of the appellant against his convictions and sentences is dismissed.”¹⁷

[48] The appellant acted in a manner that is unacceptable to our constitutional order. We are committed to the protection, safety and interests of

¹⁷ *State v Chapman* 1997 (2) SACR 3 at 5b-e

all children. Our commitment has been enshrined in the Constitution. Subsections 28(1)(b) and 28(1)(d) bequeaths upon every child the right “*to family or parental care*”, and the right “*to be protected from maltreatment, neglect abuse or degradation.*” Both rights of the complainant have been violated by the conduct of the appellant. The appellant has also violated her right to dignity. He did all this by abusing the position of trust he occupied in relation to the complainant and in relation to the family as a whole. He took advantage of the power he wielded over the complainant. He made sure that she was fully aware that should she raise any alarm about his conduct she would suffer severe consequences, thus ensuring that she was powerless to do anything about it.

[49] After informing on what the appellant had done to her, the complainant and her sister have been removed from the family home and have been placed in care. They have been separated from their mother. They have essentially been deprived of their family life. Hence, the conduct of the appellant has had significant negative consequences for both the complainant and the complainant’s younger sister.

[50] A social worker had interviewed the complainant prior to the sentencing of the appellant and had compiled a report on the impact of “*the sexual abuse on*” the complainant. Her report, which was placed before court and not challenged, contains the following:

“(the complainant) reports that she feels heartbroken and bad about herself because her mother chose to take her step-father’s side. She reports that she is happy that she was removed otherwise the abuse would have carried on. (The complainant) reported to the undersigned that if she had to see her stepfather

again she would tell him that what he did was very ugly and ask him why he did it. She would ask him his “brain told him to do what he did”.

The child care worker reports that (the complainant) has been suffering from encopresis. This was discovered after the general assistant found the soiled underwear hidden in her cupboard. According to the literature found in Forensic Assessment Consultation Training (FACT 2013): “encopresis occurs when a child becomes inconsistent regarding defecation after having learnt complete toilet habits. It represents a strong form of aggression that manifests itself in this way. It is also aimed at the parents.” It further states that cases of encopresis are isolated and are usually linked to serious emotional disorders. It can also occur in the case of the child who has been sexually molested.

(the complainant) has been struggling with schoolwork as she battles to remember and concentrate in class or when doing homework

...

It is clear that the sexual abuse on the child had a major, emotional impact on her life. The child is struggling to cope with what happened to her and will need long term therapy in order to lessen the impact on her.”

[51] A clinical psychologist employed in the South African Police Services compiled a pre-sentencing report. She had consulted with the appellant prior to compiling it. The report was presented to the court. She found that the appellant showed no remorse for his deeds. She testified as to its contents. She was cross-examined by counsel for the appellant. Her findings were never challenged. Instead, her cross-examination focussed on whether the appellant had committed the unlawful acts.

[52] The appellant testified in mitigation of sentence. He said he was thirty-seven years old at the time he was sentenced; that he does not have any children of his own; that he is married to the mother of the complainant; that he is employed; that his younger brother lives with him and his wife; that his younger brother, too, is employed and contributes towards the upkeep of the household. That was the sum total of the facts he placed before court. During

his cross-examination he was invited by the state prosecutor to put up any evidence regarding his psychological state of mind or his character or anything that would assist him and he declined the invitation.

[53] None of the facts he placed before court can be regarded as constituting substantial and compelling circumstances that warrant a departure from the minimum sentence prescribed by the legislature. He has not placed anything before the court to show that the sentence called for in s 51 of the CLAA is disproportionate to the crime for which he has been convicted or that it fails to give sufficient weight to his personal circumstances. In fact, his counsel stated there are no substantial or compelling circumstances that the appellant could place before court. The appellant consistently adopted this attitude, even after he was given an opportunity to make fresh submissions on this issue. Nothing prevented him from asking this court to remit the matter to the court *a quo* or for this court, to receive new evidence demonstrating that there are substantial and compelling circumstances warranting a departure from the sentence prescribed by s 51(1) of the CLAA.

[54] Accordingly, I can find no substantial or compelling reasons to depart from the sentence prescribed in s 51(1) of the CLAA.

Order

[55] The following order is made:

1. The appeal against conviction is dismissed.

2. The sentence imposed by the court *a quo* is set aside and replaced as follows.

- 1 The accused is sentenced to life imprisonment.
- 2 The accused's name shall be reflected in the sexual offenders register.

VALLY J

SIWENDU AJ

Date of Hearing: 10 MAY 2016

Date of Judgement: 29 JUNE 2016

For the appellant: Adv JJ Greef

Instructed by: Kemp De Beer and Goosen Attorneys

For the respondent: Adv P Nel

Instructed by: Director of Public Prosecutions