

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **CA&R26/2020**

Heard on: 23 November 2020

Delivered on: 12 March 2021

In the matter between:

RUDOLPH KOERT DORREPAAL

Appellant

and

THE STATE

Respondent

Coram: **Phatshoane ADJP et Chwaro AJ**

JUDGMENT

THE COURT

Introduction

- [1] The appellant, aged 56, and his spouse, Ms MD, aged 43, were married to each other in 2008. They were arraigned before the Regional Court Magistrate, Ms A I Venter, in the Regional Court held at De Aar, Northern Cape, on seven and eight counts, respectively, relating to sexual assault and rape on a minor child, NG, Ms MD's eight year old daughter and the appellant's stepdaughter.

- [2] Following a trial which ran intermittently from 03 October 2011 to 28 July 2017 the appellant was convicted on 28 July 2017 on four of the seven counts and sentenced on the same date to life imprisonment in respect of Counts 3 and 4, three years' imprisonment on Count 2 and four years' imprisonment on Count 6. In terms of section 309 (1)(a)(ii) of the Criminal Procedure Act, 51 of 1977 (the CPA), read with sections 10, 11 and 43(2) of the Judicial Matters Amendment Act, 42 of 2013, an appellant has an automatic right of appeal to this court against both his convictions and sentence. This appeal is on that basis.
- [3] Ms MD faced Count 8 alone. Count 7 is that of defeating and/or obstructing the ends of justice in that Ms MD is said to have removed documents from the appellant's clinic file which showed that he was HIV positive. On Count 8 she was accused of having failed to report the sexual offences against the minor to a police official as envisaged in s 54(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ("the Sexual Offences Act"). She was acquitted on all counts save Count 7 for which she was convicted of an attempt at defeating or obstructing the ends of justice and Count 8 in respect of which she was found guilty as charged. She was sentenced to three and two years imprisonment, respectively. She did not appeal.
- [4] A summary of the charges preferred against the appellant, upon which he was convicted and sentenced, is substantially the following:
- 4.1 In respect of Count 2, he stood accused of indecent assault in that during the period 2006 to 15 December 2007 at or near Petrusville, Northern Cape, he unlawfully and intentionally indecently assaulted the seven year old girl, NG, by touching/fondling her genitalia and at times penetrated her genitalia with his finger;
- 4.2 On Count 3, he was accused of rape in that he contravened section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act, also read with the provisions of sections 51, 52 and 53 of the Criminal Law Amendment Act, 105 of 1997 ("the Minimum Sentence Act"), in that between 16 December 2007 and November 2010 at Petrusville, he

committed an act of sexual penetration (vaginal) on NG, now eight years old girl, with his finger;

4.3 On Count 4, the State accused him of rape, the only difference being that between the 16 December 2007 and 2010 at Petrusville, he committed the act of sexual penetration (vaginal) on NG, the eight years old girl, with his penis.

4.5 On Count 6, the State's case was that he was guilty of contravening the provisions of section 5(1) read with sections 1, 56, 57, 58, 59, 60 and 61 as well as Chapters 2, 3 and 4 of the Sexual Offences Act in that during the period 16 December 2007 until November 2010 at Petrusville, he sexually assaulted NG, by forcing her to masturbate him.

- [5] The general drift of the appellant's case is that he was not the perpetrator. He submits that NG ("the complainant") and her brother were influenced to implicate him falsely. He further contends that the trial court failed to apply the necessary caution relating to a child witness when assessing the evidence of the complainant. He also argued that the trial court did not properly evaluate the evidence of Dr Liebenberg, who examined the complainant, following the alleged sexual abuse.

The factual matrix in the case presented by the State

- [6] The complainant was 13 years old when she took the stand. She has a brother, F, who is three years younger than her. Ms MD is their mother and the appellant their stepfather. During the relevant periods, as specified in the charge sheet, she and her brother lived with their grandparents in Orania during the weekdays and would visit their parents in Petrusville over the weekends. This stopped after the complainant had reported the sexual abuse to her aunt, Ms LvS.
- [7] The complainant explained the sexual abuse as follows. She was sick and lying on her mother's bed watching TV. The appellant, Papa Koert, came to lie next to her and put his hand in her pyjama pants. He touched her private part and

cautioned her not to tell anyone of the act. At night times, when her mother was asleep because she took sleeping tablets, Koert would climb on her bed, lie behind her, tell her to open her legs and would touch her private part. At times he would rub and fondle her vagina with “something hard” from behind. Many times he tried to penetrate her anally with his penis from behind.

- [8] On one occasion, when watching TV with her parents on their bed, her mother fell asleep. The complainant was lying next to Koert. He took her hand and ask her to caress his penis. He ejaculated in her hand. She does not know whether there was a stage where Koert had attempted penile penetration through her vagina. She intimated that in the course of the molestation that went on for years she would cry and ask her abuser to stop but to no avail. She reported to her brother F that the appellant molested her. He immediately wanted to inform Ms MD of the abuse. The complainant barred him from doing so because their parents would always fight and she was scared there would be another fall-out.
- [9] The complainant says she once played a game called “*plaas plaas*” with her hyperactive little cousin, H. He stumbled and missed touching her arm but touched her private part “*hy het net aan [sy geslagsdeel] geraak*”. She told Ms MD of this incident. Her mother asked her to draw pictures of H touching her private part and to pen letters which portrayed H as the aggressor and the appellant as caring person. Ms MD warned the complainant to keep her husband as long as possible out of jail and told her what to write down. One of the undated letters written following the appellant’s arrest reads:

“H...het aan my koekie gevat. Dit was nie lekker nie. Papa Koert het dit nie gedoen nie. Hy is 'n goeie mens. H.. het dit baie gedoen en ek het gehuil. Hy het sy vinger in my gedruk en ek wil nie weer hieroor praat nie en ek wil nie weer dokter toe gaan nie. Ek wil hê dat [ek en] my papa kan vriende wees. Ek wil hê dat my papa Koert terugkom”.

- [10] The complainant says she also reported to Ms MD that Koert inappropriately touched her. Ms MD became funny and cried but she was also happy because she thought it was only H who touched her inappropriately.
- [11] F was 10 years old when he testified. He confirmed that the complainant told him that the appellant touched her private part (*"het sy vertel oom Koert karring by haar verkeerde plekkie"*). He further confirmed that he was eager to tell Ms MD but the complainant prevented him from doing so because she would yell at them. He further testified that after the appellant was arrested, their mother took them along to visit him at the police holding cells, where he told F and the complainant to implicate their eight years old cousin, H, as nothing would happen to H.
- [12] F says Ms MD promised to give them Christmas gifts in recompense if they implicate H. She also requested him to leave the room when she asked his sister to draw pictures and write the letters already referred to. F intimated that the first statement that he made to the police, in which he implicated H, was untruthful. He attested to the statement in the manner that he did because Ms MD indoctrinated them to say that H was the culprit. It dawned on him to tell the truth because he could no longer endure telling lies. He never observed H or the appellant inappropriately touching the complainant.
- [13] Ms LvS is Ms MD's sister. On Thursday 18 November 2010 at approximately 14h00 she was helping the complainant to prepare for her school examination and would ask her questions which she struggled to answer. She was not herself, was unhappy and tense. Ordinarily, the complainant would make jokes and engage in a discussion but on the day in question her concentration was elsewhere. She enquired from the complainant what bothered her. She replied that she did not want to move to Pofadder with her parents. In the course of persuading her to relocate the complainant informed her: "he [the appellant] was going to do it again". The complainant revealed that the appellant touched her "number one place (*nommer 1 plekkie/verkeerde plekkie*) during weekends and should she relocate with her parents, he would do it every day. The complainant was very emotional.

- [14] Ms LvS discussed the revelation by the complainant with her other sister, PD, and her parents. They all visited a local pastoral counsellor, Mr Omar Fourie, who advised that they call the police or communicate with Ms MD and request her to handle the matter as it involved her children. Ms LvS did not have a good relationship with Ms MD, therefore, on the next day her mother and sister PD visited Ms MD to inform her of the abuse. F and the complainant returned home. Ms LvS says that a few days later she reported the abuse at Hopetown Police Station.
- [15] Ms LvS says it came out during the investigation of the incidents in issue that her son H, who was eight years old and three years younger than the complainant, was implicated of having improperly touched the complainant. She was dumbfounded but dismissed the allegation as absurd.
- [16] Dr J A Liebenberg examined the complainant on 29 November 2010 at 16h45 in the presence of Ms MD and completed the J88 medical report, which was handed in evidence by consent. The doctor observed that the complainant's hymenal diameter was 7,1 mm which in his opinion was indicative of sexual molestation. The hymenal diameter beyond 4mm is synonymous with molestation or vaginal-hymenal injury. 90% of the children in the age group of the complainant would have a hymenal diameter of 4mm. 10% will have hymenal diameter between 4 mm and 5 mm. However, a diameter of 7.1 mm is associated with molestation unless the child had been subjected to serious abdominal injuries which her parents would know about because she would have required medical attention. The doctor intimated that a hymenal diameter of 7.1 mm is rarely found. His last encounter with this was in a case where the victim had been raped. He rejected any suggestion that a penetration by a finger of an eight years old boy could have caused the hymenal diameter of 7.1 mm. The doctor was of the view that the object that would have caused this type of an injury would have had a diameter of approximately 20 mm. The doctor could not determine what object was used to penetrate the complainant.
- [17] The doctor further found that the complainant's perineum was red and that there were old hymenal injuries or tears at a 6 o'clock and 11 o'clock position. At that stage, there were no signs that the molestation took place 24 hours preceding

the examination. He concluded that there had been vaginal penetration past the hymen, which occurred more than once and on several occasions.

- [18] The doctor recommended that a child psychologist be engaged because Ms MD made the examination very difficult. He found it hard to communicate with the complainant so as to establish her medical history because her mother responded to questions on her behalf and took over the examination. He described Ms MD as someone antagonistic towards him and uncooperative. He testified:

"Aanklaer: So wat as u nou vir ons 'n voorbeeld... (tussenkoms)====Byvoordeeld het iemand vir jou hier seer gemaak. Nee, niemand het jou nog seer gemaak nie nê. Daardie klas van ding, met ander woorde dit maak dit baie moeilik vir my. Daar is een vraag wat ek baie sterk kan onthou wat dit moeilik gemaak het en dan het die ma deurlopend wanneer ek vrae vra het sy die vrae geantwoord en sy was aggressief gewees in haar manier hoe sy antwoord."

- [19] Ms Dornè Sue-Ann Wentley is a social worker who compiled the victim impact report on 05 January 2011 regarding the complainant.¹ She recorded that the complainant suffered from anxiety as she was uncertain how her case would affect her family. She testified that Ms MD was opposed to the assessment of her children, in particular, she refused that a forensic social worker, Cpt Ursula Hildegard Spies, interview the complainant and threatened that she had an attorney. Ms Wentley made contact with Magistrate Muller, a commissioner of child welfare, Petrusville, who ordered that the complainant and her brother be removed from the care of their mother on 03 December 2010 because she influenced them not to be assessed. The complainant did not disclose to Ms Wentley who her assailant was.

- [20] Cpt Spies, a forensic social worker in the employ of the SAPS, had three sessions with the complainant and F on 06 and 17 December 2010 and 07 January 2011. She compiled a report which was handed in evidence without any objection.² She confirmed that prior to the three sessions Ms MD protested that

¹ Exhibit C

² Exhibit D

her child be assessed in the absence of a legal representative and in fact brought one with to a session. She explained to the attorney concerned to bring an application in court for an order that he be allowed to be present during the sessions albeit through some type of a two-way mirror/video conferencing facility. The attorney concerned promised to revert but never did.

- [21] Cpt Spies says during the first session the complainant stated that H was the only aggressor who touched her private part. On 17 December 2010, the second session, when the social worker probed to clarify the information obtained from the first session, the complainant was anxious to know whether her mother would be enlightened of the session and was therefore unwilling to talk. However, she told Cpt Spies that it was both H and the appellant who violated her. The complainant went on to substantially relate the version she already placed before court, in respect of the sexually offensive acts that the appellant perpetrated against her, to Cpt Spies. The Captain intimated that one of the sensoric information obtained by the complainant from the abuser was her knowledge of his voice albeit the offensive acts were committed in darkness. Cpt Spies says the complainant did not give any further information regarding H on that specific day.
- [22] In the last session of 07 January 2011 the complainant was once more concerned with what would happen to her mother if she were to tell the truth. She told the captain that it was only the appellant that improperly touched her: *"Once at the back sometimes in front...I don't know what he used; it was painful. Now and then I felt that he had not put his pants on. It happened many times. I said it was H I was afraid my mom would do something...My mom loves Koert. Mom said we will sit in the streets if we lose Koert. She said her house, car and everything will be taken away if [Koert] is locked-up..."* (translated).
- [23] In Cpt Spies' professional opinion what Ms MD said to the complainant was manipulative and had a negative influence on her. The complainant was scared of her mother if she shared information. The impact of the influence would result in the child being initially untruthful when he/she relates the events but at times he/she would tell the truth. She further assessed the complainant's brother who,

during the first two sessions, also implicated H. On a follow up session he recanted. He informed Cpt Spies that his earlier version, in which he accused H, was on account of his mother's influence.

The appellant's version:

- [24] Following an unsuccessful attempt for his discharge in terms of s 174 of the CPA the appellant took the stand. He had been living with HIV for several years before the incidents in issue. He came to know the complainant and her brother about 2005 and 2006 when he started dating their mother. His relationship with the children was cordial from the onset but they saw him as a bystander because they had their biological father. They became receptive to him as part of their family in a period of about six months to a year because he availed himself as their father.
- [25] He was arrested on the morning of 28 November 2010 in connection with the offences in issue. Ms MD and the children visited him in prison because the children were restless and could not sleep as he was not at home during that evening. He denied ever committing any of the offences with which he was charged. In respect of Count 6, sexual assault in that he requested the complainant to assist him to masturbate, he intimated that the evidence adduced by the State did not make any sense to him. Over the years Ms MD's family accused him of similar offences with no end in sight. He says that there were always subversive plans within that family to find a reason to take the children away from his wife. Ms MD was stressed as a result of the harassment her family put her through. It did not dawn upon him and his wife to take the complainant for medical examination to dispel the allegations that he molested her. They considered the claims to be frivolous. He denied that he and his wife tried to conceal the complainant's abuse. He also refuted having influenced the complainant and her brother in any manner whatsoever.
- [26] Ms MD testified in her own defence. She says her family disapproved of her relationship with the appellant. The allegations that he molested the complainant surfaced in 2006 when he really had no contact with the children. In light of these

allegations, when they were resident in Kenhardt, she sought advice from a priest and a social worker. She did not take the complainant for medical examination because she was advised that it was unnecessary and it never occurred to her to do so. In any event, the complainant did not give her any impression that she needed that form of examination. In all instances where the family made an allegation against the appellant she would discuss this with the complainant and would thereafter invite the appellant into their discussion. Insofar as the present allegations are concerned she remained committed to the appellant because the complainant told her in one of their openhearted discussions that it was H that violated her.

- [27] Ms MD confirmed that her relationship with Ms LvS was not cordial. On the weekend in which the complainant disclosed to Ms LvS that the appellant violated her the complainant was sad. The complainant informed her that she was afraid of Ms LvS; she did not want to return to Orania where they resided during weekdays and that H hurt her. The complainant accused the appellant of the offences because Ms LvS exerted influence upon her to do so. She says W/O Samole Coetzee also told the complainant that it could only have been an adult that was the perpetrator. Ms MD also blamed the complainant's grandparents and the Department of Social Development Officials, in particular, Ms Wentley, of exerting pressure upon her children to implicate the appellant falsely. She says insofar as the complainant testified that she made her say or do certain things, such as drawing pictures and writing letters, which sought to exonerate the appellant, she lied but could not say why the complainant would do so.
- [28] Ms MD confirmed that she and her children visited the appellant in prison following his arrest. The appellant persuaded the complainant to visit a doctor. She agreed. Ms MD denied having been obstructive during the complainant's consultation with the doctor. She intimated that the complainant did not inform her of her abuse at the hands of the appellant and she did not hold the metaphoric candle when the offences were allegedly committed.

Ad conviction:

[29] It is trite that the State bears the onus to prove its case beyond a reasonable doubt. The court can convict on the evidence of a single witness provided it is satisfactory in every material respects³. In *Y v S*⁴ the court pronounced:

'Proof beyond reasonable doubt can only be met where reliable evidence sets out coherently the event(s) on which a charge is founded. The version that emerges at the end of the State case must be sufficiently coherent to avoid conflict with the constitutional rights guaranteed to every person charged with a criminal offence. And while the compound effect of imperfections in a child's recollection and communication faculties, together with the possible trauma of sexual violence must be taken into account in the evaluation of the evidence in sexual assault cases, these factors do not justify discarding the set standard of proof for conviction. An accused's constitutional rights both in relation to fair trial procedures as well as to a just result cannot be discarded.'

[30] The above salutary principle must be applied, in cases of child witnesses in sexual assault cases, in conformity with what the Constitutional Court enunciated in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*⁵ as follows:

"If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through.

Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them."

³ *Olawale v S* [2010] 1 All SA 451 (SCA) at paras 14-15; *S v Stevens* [2005] 1 All SA 1 (SCA) at 5d-h and *S v Gentle* 2005 (1) SACR 420 (SCA) at para 17.

⁴ (537/18) [2020] ZASCA 42 (21 April 2020) at para 71.

⁵ 2009 (4) SA 222 (CC) at paras 105-6

- [31] In assessing the evidence of a child witness, a trial court is expected to determine whether such evidence is trustworthy on the basis of the child's mental capacity to observe an event; the child's capacity to remember the event about which he or she has to testify; the child's capacity to communicate about the event and the child's possession of sufficient intelligence to appreciate the obligation to speak the truth. In *Woji v Santam Insurance Co Ltd*⁶ the court explained this approach in the following manner:

"The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth? Then also 'the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility' (per SCHREINER JA in *R v Manda* (supra)). At the same time the danger of believing a child where evidence stands alone must not be underrated."

- [32] Mr Potgieter, for the appellant, contended that the trial court ought to have been cautious in evaluating the evidence of a minor child. He argued that the court did not attach sufficient weight that the complainant and her brother F were influenced to implicate the complainant falsely and that Ms LvS was biased towards the appellant and his wife. He argued that the complainant had, on

⁶ 1981 (1) SA 1020 (A) at 1028A-E

previous occasions, implicated H; she struggled with certain recollections and could not explain how the acts were committed. Mr Potgieter further contended that the court erred in finding that F corroborated the complainant in his account. The trial court also misdirected itself, so it was argued, in its evaluation of the evidence of Dr Liebenberg.

- [33] It is common cause that the complainant was sexually violated. The key issue in dispute both in the trial court and in this court is whether the complainant was sexually molested by the appellant. A single incident in respect of which H accidentally touched the complainant's private part when playing became central to the appellant's defence.
- [34] It is important to first consider the purported influence which the appellant contends various family members and officials exerted upon the complainant and F to implicate him falsely. Ms LvS is at the forefront of the group said to have done so. However, it was never put to her that she did so. Instead the defence put it to Ms Wentley that from the statement which F made to the police there was pressure from Ms LvS and the Investigating Officer, W/O Salome Coetzee. Ms Wentley bore no knowledge of this. It is illogical that Ms LvS would try to protect the interest of her son H in the circumstances where the complainant had pointed to the appellant as the assailant to various officials. W/O Salome Coetzee, in the course of the investigation, collated the pictures and letters that were drawn and written by the complainant during the period of the alleged molestation. Ms MD could not say why she was of the view that the Warrant Officer influenced the complainant because she also disclosed the pictures and/or drawings that depicted the appellant as innocent.
- [35] Cpt Spies conceded that it was possible that any family member may have influenced the children to exonerate H and attribute the wrongdoing to the appellant. However, she went on to state that the complainant never mentioned that she was unhappy with her extended family. Cpt Spies intimated that her assessment is of the nature that establishes what bothers a child. In her opinion if there was pressure from the extended family on the complainant she would have revealed this. She did not.

- [36] The evidence is overwhelming that the appellant and his spouse persuaded the children to implicate H falsely and, in the complainant's own words: *"to keep the appellant as long as possible out of jail"*. F was eight years old when the appellant was subjected to the full might of the law. F could not, by any stretch of imagination, have invented evidence to the effect that they were told by the appellant that if they implicated H nothing would befall him. He also corroborated the complainant's version on how their mother influenced them. Under cross-examination the complainant remained resolute that H only touched her private part accidentally once when playing. She also intimated that she was certain that she did not out of her own free will tell her mother that H improperly touched her. She was forced by her mother.
- [37] Concerning the identity of the abuser the evidence by Dr Libenberg that the hymenal diameter of 7.1 mm could never have been caused by a finger or fingers of an eight year old boy should dispel any notion that H was responsible for the deeds. An object that would have caused the vaginal injuries would have had a diameter of approximately 20 mm. It is significant to point out that the defence also attempted to put the blame on a catheter to discredit the complainant's version. It was put to Dr Libenberg that the vaginal injuries could have been caused by a catheter that the complainant carried at the time set out in the charges. As it turned out, she had this catheter on for few weeks when she was six months old not at the time of the offences.
- [38] Ms MD was hard pressed to concede that the medical evidence and the complainant's evidence was the death knell to the defence's course. *"Ek kan nie verby die mediese bewys kom nie"*... *"Ek kan nie verby my kind se getuienis kom nie.."* Crucially, the offences are alleged to have been perpetrated over a number of the years. Rumours concerning the abuse commenced when H was four and continued until he was eight years old. Apart from the corroborative medical evidence it is inconceivable that the four, five, six, seven or even eight year old H would have caused the vaginal injuries of the magnitude described by the doctor as the appellant and his wife sought to suggest.

[39] In our view the identity of the assailant ought to be resolved without any difficulty. The appellant was no stranger to the complainant. She knew him for years and more importantly, she was accustomed to his voice. It is to be recalled that Cpt Spies testified that one of the sensoric information obtained by the complainant from the abuser was her knowledge of his voice albeit the offensive acts were committed in darkness. The complainant intimated that she was a light sleeper. During those dreadful moments when the appellant entered her bedroom to molest her she would switch the light on but he would instruct her to switch it off. This should put paid any proposition that her identification of the attacker is vague.

[40] Mr Potgieter further took issue that cross-examination of the appellant and his spouse came close to harassment. He argued that the record is bristling with sarcastic and degrading remarks with no intervention by either the legal representative or the trial court. In *S v Omar*⁷ the court made the following important observation:

'After a reading of the record I am compelled to observe that the conduct of the prosecutor in cross-examining the appellant was unseemly and unfair. He was hectoring, rude and unreasonable. His questions were interspersed with derogatory comments on the credibility of the appellant's answers and on his demeanour. I am satisfied that any witness subjected to abuse of this nature would be unfairly handicapped thereby and precluded from doing full justice to himself.

The magistrate in his reasons in reply to this criticism observes that the appellant was represented by counsel who could have objected had he considered the manner of cross-examination to be unfair. This is correct, so far as it goes. I am constrained to remark, however, that the fact that an accused is represented by counsel does not absolve the presiding officer from ensuring that he receives a fair trial or from requiring those who appear before him to comport themselves properly in his court. The magistrate should never have permitted the prosecutor to behave in this fashion.'

[41] It is important to remember that a cross-examiner should put his/her case or defence on each and every aspect which he/she wishes to place in issue,

⁷ *S v Omar* 1982 (2) SA 357 (N) 358H-359A.

explicitly and unambiguously, to a witness.⁸ This the State did comprehensively and within the bounds of acceptability. The cross-examination was not unduly lengthy but was repetitive. Some of the remarks made by the prosecutor were uncalled for. However, we are unpersuaded that the questions asked led to a failure of justice. After all, it is permissible for a cross-examiner to press hard but fairly if a witness, like in this case, is evasive and untruthful.

[42] The trial court was alive that the complainant was a single witness whose evidence had to be approached with caution. She made an admirable impression on the trial magistrate who was of the view that she was trustworthy, reliable and gave her evidence in a straight forward manner. The magistrate considered that the complainant gave evidence on events which took place over a long period of time after a long time lapse.

[43] The court rejected the appellant's version as false insofar as it was in conflict with the State's version. In our view the State acquitted itself of the onus to prove the appellant's guilt beyond any reasonable doubt. The magistrate's conclusion that the appellant is guilty on the two counts of rape, sexual assault, and indecent assault is unassailable and ought not to be disturbed.

Ad sentence:

[44] To recapitulate, the appellant was sentenced to three years imprisonment in respect of the conviction on Count 2, indecent assault, life imprisonment in respect of the convictions on Counts 3 and 4, rape, and four years imprisonment in respect of the conviction on Count 6, sexual assault.

[45] It is trite that the sentencing discretion pre-eminently resides with the trial court. An appellate court may only interfere with the sentence where it is convinced that such sentencing discretion has been exercised improperly. A mere misdirection is not by itself sufficient. It must be of such a nature that it shows directly or

⁸ *S v Boesak* 2000 (1) SACR 633 (SCA) at 647c para 49.

inferentially, that the court did not exercise its discretion at all or that it exercised it improperly or unreasonably.⁹

[46] In *S v Malgas*¹⁰ it was held that the court should not deviate from imposing the prescribed minimum sentences for flimsy reasons. The court conducting an enquiry into whether substantial and compelling circumstances are present or not must still consider the long established triad of factors in respect of the nature of the offence in question, the personal circumstances of the accused person, and lastly the interests of society.

[47] Mr Potgieter submitted that the trial court erred in finding that the cumulative effect of the appellant's personal and mitigating circumstances were not sufficient to justify a departure from the imposition of the prescribed minimum sentences as set out in Part 1 of Schedule 2 of the Minimum Sentence Act. He argued that the court did not attach sufficient weight to the appellant's medical condition and over-emphasised the interests of the community and the seriousness of the offences. He further submitted that the trial court imposed the sentence out of anger and thus erred in concluding that there were no substantial and compelling circumstances present which would ameliorate the effect of the prescribed sentence of life imprisonment.

[48] Counsel for the State, Mr Hollander, submitted that given the prevalence and seriousness of the offences upon which the appellant was convicted and the lack of remorse displayed by him, the trial court correctly imposed the prescribed sentence of life imprisonment in respect of Counts 3 and 4 as there were no substantial and compelling circumstances present.

[49] The appellant's personal and mitigating circumstances are recorded as follows. He is unemployed. He attained matric and was previously employed as a computer programmer. His health was affected by his HIV positive status. He was a recipient of the State's social grant.

⁹ *S v Pillay* 1977 (4) SA 531 (A) at 534H-535G

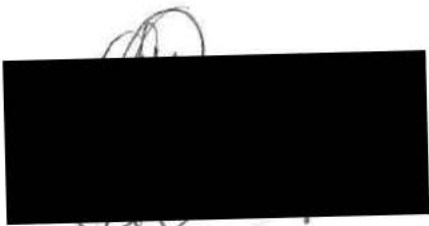
¹⁰ 2001(1) SACR 469 (SCA)

- [50] The complainant was described by the appellant as a kind-hearted person who deeply cared for others. She shed tears as she relived the incidents in court. Her abuse went on to the point where she intimated she could not think any longer. She did not know how to react or what to do each time the appellant entered her room to violate her. She kept the secret of the abuse for years to herself because she was scared that the revelation would disintegrate her family. In her victim's impact report Ms Wentley recorded that the complainant had been psychologically and emotionally traumatised by the incidents. She has been made to feel worthless, cheap, shameless, and empty. Ms Wentley added that the impact of the offence left the complainant confused, vulnerable and exposed.
- [51] The complainant was robbed of her innocence in the sanctity of her own private space where she was supposed to have been safe. She regarded the appellant as her father who was supposed to have been protective of her. The emotional scars emanating from the agony is likely to remain with her for her lifetime. Her plaintive requests to her stepfather to stop were ignored. He carried on undeterred. It was placed on record that the complainant was not infected with HIV. Even so, the fact that the appellant knowingly sexually violated the complainant while he was HIV positive is one of the most aggravating features of this case. While his ill-health is a factor to be considered in determining the appropriate sentence the punishment must fit the crime.
- [52] In our view, the personal and mitigating circumstances of the appellant do not constitute substantial and compelling circumstances as envisaged in the Minimum Sentence Act and certainly recedes to the background. Taking into account their cumulative effect, the nature of the sexual offences upon which he was convicted, their prevalence in society, the aggravating factors present, the interests of society and the need to exact punishment that would be retributive and serve as a deterrent, satisfy us that the trial court properly applied its mind. Consequently, its conclusion should not be upset.

We make the following order:

Order

1. The appeal against both the conviction and sentence is dismissed.
2. The conviction and the sentence of the appellant by the trial court is hereby confirmed.


V M PHATSHOANE
FOR THE COURT
O K CHWARO
FOR THE COURT

APPEARANCES:

Counsel for the appellant:

ADV J POTGIETER
Instructed by:
Peyper Lessing Attorneys
Bloemfontein

Counsel for the respondent:

ADV Q HOLLANDER
Instructed by:
Director of Public Prosecutions
Kimberley