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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A130/2017

In the Appeal between:

M. R. M.

Appellant

and

THE STATE

Respondent

CORAM: JORDAAN, ADJP *et* LEKALE, J

HEARD ON: 11 SEPTEMBER 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 14 SEPTEMBER 2017

Summary: Criminal law- Incestuous rape and sexual assault- Father taking sexual advantage of his 14 year old girl by fondling her breasts and raping her- Rape committed no matter how careful father was not to penetrate his daughter deep and how caring and loving he was in the process - Relationship between culprit and victim aggravating factor - Crimes impacting negatively on victim's mother who collapses and faints when husband admits evil deeds and apologises - Father grooming daughter to become secret second wife for sex purposes – Decided cases on sentence providing guidelines and not constituting rules of thumb - Appeal dismissed.

- [1] On 24 August 2016 the appellant, who was legally represented, was convicted of raping his 14 year old daughter more than once and of assaulting her sexually by the Regional Court at Bloemfontein. He was, thereafter, sentenced to life imprisonment for rape in accordance with section 51(1) of Criminal Law Amendment Act 105/1997 (the Minimum Sentences Act) and 5 years imprisonment for sexual assault on 26 August 2016. He feels aggrieved by both the convictions and sentences imposed. He now exercises his automatic right of appeal against the same in the present proceedings.
- [2] On returning the guilty verdicts the trial court, *inter alia*, found that the complainant was an excellent witness and, further, accepted the evidence of her mother and one M. M. (M.) whom the court below described as a strong, neutral and reliable witness. The trial court, further, rejected the appellant's version as not reasonably possibly true and found that he was neither a credible nor reliable witness. The court below, furthermore, accepted as excellent the

undisputed evidence of the medical expert he called as a court's witness in terms of section 186 of the Criminal Procedure Act (the CPA) with regard to how the hymen accommodates a penis in a polo neck-like manner by stretching and retracting. The trial court, furthermore, found that there were multiple incidents of rape and breast fondling with due regard to, *inter alia*, the opinion of M.. The court *a quo*, further, found no cause, in the form of substantial and compelling circumstances, to depart from life imprisonment as applicable prescribed minimum sentence in the instant matter.

- [3] On the papers and in argument before us Mr Tshabalala, for the appellant, submits to *inter alia*, the effect that the appellant's version is reasonably possibly true. He, further, submits that the utterances of the complainant's grandmother to the effect that the appellant's alleged conduct is what she came to Bloemfontein for, the fact that the complainant incriminated the appellant when she was confronted with her involvement with boys as well as the fact that the appellant is the one who suggested that the complainant and her friend be subjected to virginity testing all support the reasonable possibility that the complainant was incriminating the appellant falsely. On sentence Mr Tshabalala submits to, *inter alia*, the effect that life imprisonment is disturbingly inappropriate and falls to be set aside regard being had to, *inter alia*, the appellant's personal circumstances, inclusive of the fact that he has been in custody since the date of his arrest, as well as the fact that the rape in the instant matter does not fall into the category of serious rapes in the light of case law.

- [4] On its part the State supports both the convictions and the sentences with Mr Simpson submitting to, *inter alia*, the effect that the trial court evaluated the evidence correctly regard being had to case law and correctly rejected the appellant's version as not reasonably possibly true. As to the sentences imposed he submits that they are not shockingly inappropriate.
- [5] The factual findings of the trial court, its acceptance of and conclusions on oral evidence are presumed to be correct unless and until they are shown, on adequate grounds, to be wrong. (See **S v Francis** 1991 (1) SACR 198 (A)).
- [6] In approaching the evidence of single witness with caution, the court seeks to satisfy itself that despite its shortcomings, defects or contradictions the truth has been told. (See **S v Carolus** 2008(2) SACR 270 (SCA) at *par* [15]).
- [7] An admission is confirmation of a fact unfavourable to the declarant or maker. Evidence of an admission made extra-judicially by any person in relation to the commission of an offence is admissible if it does not constitute a confession and if it was made freely and voluntarily in the sense that it was not induced by any promise or threat proceeding from a person in authority. (See **Section 219A of Criminal Procedure Act 51/1977** and **R v Barlin** 1926 AD 459 at 462).
- [8] When confronted with two or more conflicting versions that cannot be reconciled the court adopts a holistic approach to the totality of

evidence before it and has regard to probabilities. (See **S v Guess** 1976 (4) SA 715 (A) at 718).

- [9] The two cardinal rules of logic applicable when reasoning by inference in our criminal justice system are firstly, that the inference sought to be drawn must be consistent with all the proven facts and secondly, that the inference so sought to be drawn must be the only reasonable inference capable of drawing from such proven facts. (See **R v Blom** 1939 AD 188).

- [10] The question as to whether or not cause, in the form of substantial and compelling circumstances warranting a departure from prescribed minimum sentences, exists depends on the answer to the question whether the cumulative impact of mitigating factors on aggravating circumstances, inclusive of the interests of the community, renders the applicable prescribed minimum sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 (SCA)).

- [11] The period an accused person spent in custody awaiting finalization of the trial does not *per se* and without further ado constitute legal cause to depart from prescribed minimum sentences. It is a factor to be taken into consideration when determining the appropriateness of the sentence to be imposed. (See **Radebe and Another v S** 2013(2) SACR 165 (SCA)).

- [12] A sentencing court has a discretion to consider sentence untrammelled by sentences imposed by other courts in similar cases insofar as such other sentences are guidelines and not binding precedents. In fact “... **decided cases on sentence provide**

guidelines, not straitjackets.” (See **S v D** 1995(1) SACR 259 (A) and **Patrick Clive Bailey v The State** [2012] ZASCA 154 at *par* [17]).

[13] The factual basis for the convictions, as accepted and found by the trial court, is apparent from the evidence of the three witnesses who testified for the State as well as the medical expert who testified in terms of section 186 of CPA at the instance of the court below.

13.1 **M. M. M.** testified under oath to *inter alia*, the effect that she is 15 years of age and the complainant in the matter. The appellant is her father and as at 22 January 2015 she and her two siblings were staying alone with him in the absence of their mother, who was working in Johannesburg. On that particular day she did not go to school while her siblings went. She was playing outside in the morning when the appellant called her into the house. She got into the house with the appellant who proceeded to brush her breasts with his hands moving in a circle-eight movement around and over her breasts. The appellant pointed out that he wanted to feel if she had slept with boys. The appellant took her to the bedroom and threw her onto the bed. The appellant undressed her and himself. He slept on top of her inserting his penis inside her vagina, whereafter, he made up and down movements on top of her. She felt pain in her stomach in the process and cried. The appellant wiped off her tears and, thereafter, removed his penis out of her vagina. He, thereafter, inserted his finger into her vagina and when he removed the finger she saw some white substance on the

finger. The appellant took a shower and before he could leave for work he told her not to tell anyone about the incident because he would kill them. The appellant, further, promised to bring Danone yogurt and Ultra Mel home when he returned from work. She did not cough a word about the incident to anyone as a result of the appellant's threats. Later in June the same year, on a date she could not remember, the appellant came home very late at night as she was sleeping with her two siblings and wanted her to go to his bedroom to sleep but she refused. When she woke up in the morning she realised that she was naked although she had her panty girdle on when she went to bed. She, thereafter, developed the practice of taking a pin with her to bed every night so that she could pinch the appellant whenever he interfered with her. At the dinner table on 30 August 2015 her mother, who was home for the weekend, questioned her, in the presence of the appellant and her maternal grandmother who was visiting from Lesotho, about the boyfriend she was earlier seen with. Her friend, one N., who was with her together with their boyfriends when she was caught, was also summoned together with her mother. She and N. disputed the claims. N.'s aunt, one M., was called and suggested that they be taken for virginity testing. She got scared that it was going to be discovered that she was no longer a virgin and spilled the beans against the appellant disclosing what he did to her. Her mother fainted and M. took the appellant to the outside and returned to inform them that the appellant had admitted the incidents

and asked for forgiveness. The appellant thereafter ran away going to Lesotho.

- 13.2 **M. M.** testified to *inter alia*, the effect that she was visiting her sister in Bloemfontein when she was called to the appellant's residence. The issue on the table was the alleged involvement of her niece N. and the complainant with boys and she suggested that the girls be taken for virginity testing. The complainant, thereupon, related what the appellant used to do to her in her mother's absence including how he raped her, touched her breasts and how she would sometimes go to bed dressed in her panty girdle only to wake up in the mornings naked with a jelly-like, sour and whitish substance on her body. The complainant, thereafter, cried and so did the people in the room save for the appellant who wanted to beat the complainant up. She intervened pointing out that he rather beat her and not the complainant. She asked to have a word with the appellant alone outside and they proceeded accordingly. The appellant first refuted the complainant's accusations but when she pointed out that they are going to call the police, he conceded saying that they should rather call his relatives and his wife's relatives so that the issue could be discussed in private. The appellant, further, stated that the complainant was telling the truth but the issue should be kept within the family. When they got back into the house the appellant told the people inside that he had raped the complainant by inserting his penis inside her vagina but it was not a deep penetration. The appellant, further,

confirmed that he also touched the complainant's breasts when the latter was taking a bath. The complainant's mother, thereupon, collapsed and fainted. She went out crying to fetch a social worker but when she returned the appellant was gone.

- 13.3 **M. R.** testified to *inter alia*, the effect that she is the complainant's mother. On the fateful day she noticed the complainant with a boy and the former ran away when she saw her. At dinner time that evening she told the appellant and her mother about the incident. As she had also spotted the complainant's friend, N., with a boy she called for her. N. came with her mother but the issue could not be resolved and M.'s counsel was solicited. M. suggested virginity testing, whereupon, the complainant got scared and disclosed what the appellant used to do to her. The appellant wanted to give the complainant a hiding but. M. intervened saying that the complainant could not lie about such a thing. M. and the appellant went outside to talk in private and when they came back the appellant starred at her and exclaimed that she must please forgive him because he, in fact, did what was attributed to him. M. asked him what he did and the appellant said that he did insert his penis inside the complainant's vagina but it was not a deep penetration. The appellant, thereafter, said that both their relatives be called to discuss the matter as a family so as to keep it within the family. She told the appellant that she was done with him and that she would not be able to forgive him. She, thereafter, passed out and

when she regained consciousness the appellant was not home.

- 13.4 **Johanna Maria Kotze** testified as the court's witness after the defence had closed its case to, *inter alia*, the effect that she is a medical practitioner with vast experience in rape cases having seen some 2700 such cases inclusive of child sexual abuse cases. She holds an MBChB Degree which she acquired in 1977 among others. She also trains nurses in clinical forensic medicine. She appears on at least a monthly basis in the court below to testify in rape cases. In medical terms rape is penetration. The female genitalia consist of external genitalia and internal genitalia. The external genitalia, on its part, consist of the labia and the vestibule while the internal genitalia consist of the hymen, the vagina and the uterus with its tubes. Penetration by definition takes place when there is penetration between labia and not through the hymen. The hymen in adolescents behaves like a polo neck in that it is elastic and stretches to accommodate the penis or any object inserted and contracts back into shape thereafter. It is, therefore, totally wrong to conclude that there was no penetration if there is no broken hymen. It is possible that the genital area may not feel any pain but internally, in the area of the pelvis or abdomen, there might be pain. It is, however, a very difficult question to answer because there is no research done to date on pain specifically. There is, thus, no black and white answer on pain.

- [14] The appellant testified as the sole witness in his defence and disputed all the allegations levelled against him. He, further, testified that he was the one who suggested virginity testing.
- [15] There is nothing before us to demonstrate or suggest that the trial court's factual findings are wrong regard being had to the trial court's analysis of the evidence as guided by unchallenged expert opinion on the behaviour of the hymen in adolescents and pain. It can, further, not be said that the court below erred in his acceptance of the oral evidence tendered by the State and his conclusions thereon.
- [16] On available evidence it is clear that the trial court had cause to reject the appellant's version as not reasonably possibly true regard being had to *inter alia*, the fact that some important aspects thereof were never put to relevant witnesses who testified for the State such as the allegation that he, and not M., proposed virginity testing.
- [17] The trial court, further, applied cautionary rule when dealing with the evidence of the complainant and correctly found that the truth had been told. In this regard it is clear that the complainant was corroborated, in her evidence, by the appellant's extra-curial statement as accepted by the court below.
- [18] In my view the only fault apparent in the impugned judgment is the finding that the appellant raped the complainant more than once. There existed no evidence whatsoever of penetration after January 2015 insofar as the complainant's evidence was to the effect that

she would go to bed in her panty girdle only to wake up naked in the morning. Even if she would find a jelly-like, sour and whitish substance on her body as testified by M., that, in my judgment, does not constitute proof of penetration. The inference that the appellant raped the complainant more than once is, in my view, not the only reasonable inference that can be drawn from the proven facts.

- [19] As to sentence what renders life imprisonment applicable as the prescribed minimum sentence in the instant matter is the complainant's age at the time of the crime. The question is whether or not there existed cause for the trial court to deviate from life imprisonment as the applicable prescribed minimum sentence. In my view the fact that the appellant is the complainant's father and her natural guardian in whose care she was at the relevant time is aggravating. It is correct, as found by the trial court, that the appellant showed some love and care when he wiped off the complainant's tears with a face cloth after raping her. But it was all after the fact of the rape which he, in fact, denied in court. The trial court was, further, correct in his view that the appellant was grooming the complainant with the apparent view of making her his second wife for sex purposes.
- [20] The trial court rejected the appellant's version and accepted the State's version to, *inter alia*, the effect that the appellant admitted having penetrated the complainant carnally and asked for forgiveness from his wife as the complainant's mother shortly after the truth came to light. The question is, in my view, whether or not such conduct is indicative of genuine contrition on the appellant's

part. As the Supreme Court of Appeal pointed out in S v Matyityi 2011 (1) SACR 40 (SCA) at *par* [13]:

“It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined....”

- [21] The appellant was clearly not remorseful and did not take the trial court into his confidence. It is, therefore, not possible to determine if he in fact, has **“true appreciation of the consequences of [his] actions”** so as to render rehabilitation possible. (See S v Matyityi (*supra*) *par* [13])

- [22] Mr Tshabalala effectively contends that the rape in the instant matter is not the worst kind of rape and that life imprisonment as a sentence is, as such, out of kilter with sentences imposed by the Supreme Court of Appeal in similar cases regard being had to S v Mahomotsa 2002 (2) SACR 435 (SCA) and S v Abrahams 2002(1) SACR 116 (SCA) among others.

- [23] It is true that the complainant *in casu* did not suffer any physical injuries and the rape was, in fact, not accompanied by any physical violence from the part of the appellant. It is, further, clear from her Victim Impact Statement that counselling has had a positive effect on her insofar as she is now performing well at school after failing

her grates immediately after the incidents. I am, however, mindful of the caveat in **S v Mahomotsa** (*supra*) at *par* [19] that one should guard against the notion that the fact that still more serious cases than the present are imaginable, life imprisonment, as the ultimate sentence, should be reserved for such cases. It is possible that the circumstances of particular cases may be such that, even if they differ in their respective degrees of seriousness, they call for the ultimate sentence imposable.

- [24] The instant matter is, in my judgment, distinguishable from the facts in **S v Mahomotsa** (*supra*) in that the appellant is the complainant's father and was trusted by the complainant who expected him to protect her as his daughter. The appellant in the present matter is 33 years of age while the age of the appellant, who was 54 years old in **S v Abrahams** (*supra*), was, together with the fact that he was a first offender, found to constitute sufficient cause to deviate from life imprisonment as the prescribed minimum sentence. The appellant *in casu* was sneaky in his dealings *vis-à-vis* the complainant. He even provided her with niceties such as Ultra-Mel and yogurt. He would give her cash when she went to school pointing out that he was helping her but she did not want to reciprocate by assisting him. He was in a way blackmailing her to give him sexual favours. The appellant's conduct was really dangerous in that he was bent on grooming the complainant into becoming his secret second wife for sex purposes. He was determined to keep his acts secret between the complainant and himself to the extent that when the complainant pinched him with a pin at night he would effectively retreat to his bedroom quietly like

a naughty school boy caught in his silly tracks. He was calculating, cunning and conniving in his actions. He wanted the complainant for himself and kept her home not allowing her to visit even her uncle whom she used to visit before. He simply took advantage of his daughter. Aggravating circumstances outweigh by far the appellant's personal circumstances in the instant matter. The crimes affected the complainant negatively in her school performance and her mother who fainted when the appellant admitted his evil deeds. The situation would, most probably, be different had the appellant shown remorse for there would be hope that he would rehabilitate with proper corrective measures.

ORDER

[25] In consequence the appeal is dismissed.

[26] The convictions and sentences are confirmed.

LJ LEKALE, J

I concur

AF JORDAAN, ADJP

On behalf of appellant: Mr LM Tshabalala

Instructed by: Bloemfontein Justice Centre

Bloemfontein

On behalf of respondent: Adv A Simpson
Instructed by: Director of Public Prosecutions
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