



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

Case No: A124/2011

In the matter between:-

W. D. H.

Appellant

and

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* MBHELE, J

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 18 APRIL 2016

DELIVERED ON: 12 May 2016

- [1] The appellant was convicted in the regional court on 4 counts of rape. The complainant in respect of each count was a young child. They were the appellant's own elder daughter (count 1), a friend and classmate of the elder daughter (count 2), a daughter of the neighbours of the appellant (count 3) and the appellant's younger

daughter (count 4). Counts 1 and 4 were taken together for purposes of sentence as were counts 2 and 3. In respect of each group of counts, the appellant was sentenced to life imprisonment. The appellant appealed against the convictions and sentences. Counsel were agreed that the appellant has a right of appeal in terms of section 309(1) of the Criminal Procedure Act, 51 of 1977.

- [2] The elder daughter was born on [.....] 1997. During February 2009 she testified that on several occasions during 2005 and 2006, when her mother was away from home to shop, the appellant had raped her at home. She was then 8 to 9 years of age. She said that on each occasion the appellant took off her underpants. Sometimes he undressed completely and sometimes only took off his underwear and pants. On these occasions he lay on top of her, penetrated her vagina with his penis and made movements. The appellant told her not to tell anyone about this and, because she was afraid that her parents would fight, she did not tell her mother.
- [3] The classmate was born on [.....] 1996. During February 2009 she testified that the appellant had raped her on the elder daughter's birthday on [.....] 2006. On that day the classmate and her parents and other people attended a party at the house of the appellant and his wife. The girl was then 9 years and approximately 10 months of age. She said that during the evening the appellant called her into a room. He locked the door and told her to pull down her underpants. She refused, whereafter the appellant did so himself. He pulled off his trousers and climbed on top of her. His penis touched her vagina. She told him to get off her but he refused. She hit him and only then he desisted.

- [4] The neighbour's daughter was born on [.....] 1997. She also testified during February 2009. Her parents and the appellant and his wife were neighbours and friends. She therefore often visited the appellant and his family. During 2006, when she was approximately 9 years of age, she slept over at the appellant's house. She slept in the same bed with the appellant, his wife and their two daughters. She testified that during the night the appellant pulled her from the bed onto a mattress on the floor. He turned her onto her back and pulled down her clothes. The appellant was naked. He inserted his fingers into her vagina. He then penetrated her with his penis and made up and down movements. The girl called out to the appellant's wife. The latter woke up and asked what was going on. The girl responded by saying that nothing was wrong, as she was afraid of the appellant. The appellant quickly got up. Both dressed and went back to bed. It appears from the evidence that this little girl reported the incident first to her elder sister and then to her teacher and that this led to reports by the appellant's elder daughter and her classmate.
- [5] The appellant's younger daughter was born on [.....] 1999. During 2006 she was but 6 to 7 years of age. She did not testify. According to the evidence of three social workers she was severely traumatised and unable to testify.
- [6] In his evidence, the appellant denied any wrongdoing. His wife supported him. She denied any knowledge of the incident concerning the neighbour's daughter. She said that she did not believe the children and that her husband would do no such thing.

- [7] The regional court evaluated the evidence thoroughly and carefully. It came to the conclusion that the evidence of the children was true and rejected the evidence of the appellant and his wife as false beyond a reasonable doubt. It is trite that this court is bound by these findings, unless they were affected by a material misdirection or we are convinced that they were wrong. No misdirection was relied upon in this regard and we are not convinced that the findings were wrong. Upon these findings the appellant was correctly convicted on count 1, 2 and 3. It is trite that the slightest penetration suffices for a conviction of rape. And the appellant cannot have the benefit of speculative possibilities not raised by him.
- [8] In the absence of evidence by the younger daughter, the conviction on count 4 was based on the evidence of the elder daughter and on what the younger daughter told Ms Buys, a forensic social worker employed by the South African Police Services. The younger daughter told Ms Buys the following:

“And she didn’t want to talk anything? --- Sy het wel beperkte inligting gegee.

Such as? --- Sy het gesê dat sy seksueel misbruik is deur twee persone. Sy het erken dat een ‘n familielid is wat in Hartswater woon. Sy het gesê dat die ander misbruik in ‘n groen huis in Bloemfontein plaasgevind het. Sy het gesê dat beide haar ma en haar suster was teenwoordig in die huis terwyl die misbruik plaasgevind het en sy het gesê haar suster Cindy weet wat gebeur met haar, maar verder wou sy geen inligting verskaf nie. Ekskuus, behalwe dat sy nie omgekoop of misbruik was om stil te bly nie of gedreig.”

[9] Counsel for the appellant argued that the younger daughter's statement to Ms Buys should not have been admitted in terms of section 3(1)(c) of Act 45 of 1988. In my view the argument is sound. The appellant was not given any warning that the statement would be admitted in terms of this provision and it was only admitted during the judgment of the trial court. The statement was very vague and must be seen in the light of the evidence that the younger daughter was too traumatised to relate what had happened to her. But despite initial concerns, I am not convinced that the trial court erred in convicting the appellant of raping the younger daughter. It is clear that something very traumatic happened to her and the elder daughter gave sufficient particularity as to what it was. She said that on more than one occasion the appellant did the same to the younger daughter than he did to her. She said that she watched him undress the younger daughter and himself. In context her evidence that the appellant then did the same to the younger daughter, means that he lay on top of her and made movements with at least some penetration. She said that her sister cried, but that the appellant told her to be quiet.

[10] It follows that appeal against the convictions must be dismissed. I now turn to the sentences. In terms of Act 105 of 1997 a sentence of life imprisonment was prescribed for each of the crimes in question, unless substantial and compelling circumstances justified a lighter sentence. The regional court found no such substantial and compelling circumstances. I agree. The appellant was regarded as a first offender. But this is heavily outweighed by the other relevant factors. He was gainfully employed but lost his job as

a result of this case. He is married but as a result of these crimes his two daughters were removed from the care of the appellant and his wife and placed in a child care centre. The appellant committed very serious crimes. Whilst he was supposed to nurture them, he raped his own children, as well as the children of family friends. As the regional court pointed out, the offences eroded the fundamental values of human dignity, equality and freedom. Although there are signs of improvement, all the girls were severely traumatised and mentally scarred. Most importantly, the appellant takes no responsibility for his crimes.

[11] The appeal is dismissed and the convictions and sentences are confirmed.

C. H. G. VAN DER MERWE, J

I concur.

N. M. MBHELE, J

On behalf of the appellant: Mr S.S. Kambi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S. Giorgi
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

/eb