

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: CC55/2016

In the matter between:

THE STATE

vs

M. D.

Accused no 1

N. M.

Accused no 2

JUDGMENT

MBENENGE J:

Introduction

[1] This case is about a ten year old girl, L. M., who allegedly suffered at the hands of her biological parents who are both facing sexual offence related charges.

[2] On count 1 it is alleged that during the period January 2014 and 3 November 2015, on diverse occasions, at Mdantsane, M. D. (accused No. 1) unlawfully and intentionally committed an act of sexual penetration with L. M. (the complainant, otherwise also

referred to hereinafter as L.) by inserting his genital organ into the genital organ of the complainant without the complainant's consent.¹

[3] On count 2 it is alleged that during the period and at the place mentioned in count 1 N. M. (accused No. 2) unlawfully and intentionally aided and/or abetted accused 1 to sexually violate the complainant by holding the complainant down and closing her mouth to enable accused 1 to penetrate the complainant vaginally with his penis without the consent of the complainant.²

[4] On count 3 the allegation is that during the period and at the place referred to in count 1 both accused unlawfully and intentionally caused the complainant to witness or be in their presence whilst engaging in a sexual act.³

[5] The State duly applied that, in the event of a conviction on count 1, section 5(1) of the Criminal Law Amendment Act 105 of 1997 relating to a minimum sentence of life imprisonment, be of application, in that the complainant was raped more than once and whilst being a person under the age of 16 years old.

[6] Both accused pleaded not guilty. The pleas they tendered on all counts were confirmed as being in accordance with the instructions held by their legal representatives.

State case

[7] At all times relevant hereto L. stayed in a single roomed corrugated iron shack together with her parents (the accused herein) and her younger brother (H.).

¹ Rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

² Aiding or abetting another person to commit a sexual offence in contravention of section 55 (c) of Act 32 of 2007

³ Causing a child to witness a sexual offence or sexual act in contravention of section 21 (2) (a) of Act 32 of 2007

[8] She testified, with the aid of an intermediary, to how accused 1 raped her. She estimated the bouts during which she was raped at around 50. Accused 1 would climb on top of her whilst she lay on her back on the bed, and insert his penis into her vagina and perform thrusting movements. This would be done with accused 1 having taken off his clothes and hers as well. This experience caused pain to her vagina. Before that she never occasioned such pain. Her mother, accused 2, used to be present on some occasions when she was being raped, but on the day when the unbecoming conduct of accused 1 was detected she had been away at a drinking place.

[9] She narrated an incident during which she was raped and on which her mother inserted a cloth in her mouth. There were times when the accused had sex inside the shack, in her presence. She believed that when her parents had sex they were aware of her presence in that she had been watching TV. She had never seen other persons have sexual intercourse before. When being raped by accused 1, accused 2 would do nothing and simply keep mum. She must have been in grade 1 on the occasion accused 2 inserted a cloth in her mouth whilst she (the complainant) was being raped. That was when her father started raping her.

[10] Towards the conclusion of her evidence in chief, L. handed into Court a letter which she penned for her mother, pleading for reconciliation and urging that they let bygones be bygones.⁴

⁴ The letter reads:

“Good morning mom I am alright and how are you? I know what has taken place but it has gone by and what has taken place has taken place. Now we must reconcile and love each other or if we do not do such a thing forgiveness is the most important part and I have also forgiven you. I have forgiven you and to make it come to an end we have got reconcile and forgive each other. I think of you I am longing for you and all of us please come and see me on 24th October sleep well I love you mom and I will remain loving you.”

[11] Under cross-examination L. said since the incarceration of her parents she has been staying with her grandmother. Before the rape she used to relate well with her father. The relations soured after he started raping her. Her relationship with her mother has been cordial, especially compared to that with her father, hence she expressed herself the way she did in her letter. Her father and mother did not have a healthy relationship. His father would assault her mother for no apparent reason. She sympathized with her mother. She is still fond of and misses her mother. That does not go for her father.

[12] She doesn't know why her mother had put a cloth in her mouth whilst she was being raped. She was scared of asking her. She described her mother as having been a stern disciplinarian.

[13] If the rape had occurred at night her father would, after raping her, retire to bed. If it had occurred during day time, she would go to play after having been raped. She did not tell her friends, scared that they might inform their parents of what had befallen her. She also did not tell her teachers at school, fearing that her mother would get to know of that and beat her up. Once upon a time she almost informed her grandmother about the rape, but got a fright upon noticing her mother staring at her. As far as the complainant was concerned her brother did not witness the rape; he would either be playing outside or asleep already. During the period in question accused 1 was unemployed. He worked during weekends, doing odd jobs. Her parents consumed liquor a lot. At times they would be drunk when engaging in sexual intercourse.

[14] She was taken to hospital at some point after she had been raped, and was examined by a doctor. The relevant medico-legal report was handed in as an exhibit in these proceedings.

[15] L. was also cross examined by accused 2's legal representative. The incident when her mother inserted a cloth in her mouth whilst she was being raped by her father had occurred at night. Her father had sex with her whilst lying on her parents' bed. She had hitherto been lying on her bed. Her father assaulted her mother even on this

occasion, demanding to have sex with her (accused 2). He threatened to kill her mother if she did not allow that to happen. It was suggested to her that on the morning following the rape incident her mother had approached her saying she had done whatever she did the previous night scared that her father would assault her. She denied this as a lie.

[16] Apropos the charge accusing her parents of causing her to witnesses them having sex she said her parents had been aware that she was awake because she had been watching TV. She however did not rule out the possibility of her parents thinking she was asleep when in fact she had been awake.

[17] On another occasion her father had arrived back home and kissed her. When she remonstrated with him about this, he closed the door, inserted a cloth in her mouth, lifted up her dress, took off his clothes and caused her to lie on the bed and had sex with her. They then heard the sound of someone playing music and walking towards the shack. The accused removed the cloth from her mouth and moved away from her. The person that had been approaching the shack turned out to have been her maternal uncle, who was in the company of her mother. Her uncle asked what had been taking place there. She then told her uncle that the accused had threatened to kill her if she divulged what had happened. Her mother slapped accused 1, asking why he had sex with her child, but accused 1 did not respond. Her uncle eventually reported the matter to the police.

[18] S. M., the complainant's maternal uncle, also testified. Accused 2 is his cousin. On 3 November 2015 at about half past one he was at a tavern at Mdantsane. Both accused were also at the tavern. He observed that accused 2 bore some scars on her face. When he asked her about the scars accused 2 said the scars had been caused by accused 1 who had assaulted her. He confronted accused 1 about this. Accused 1 thereupon left the tavern. At a later stage accused 2 and S. also left the tavern. When along the way accused 2's friends saw S. they became excited, asking where he had been. He told them he had been away in Johannesburg. At some point, accused 2 went to the toilet. When she was taking long to emerge from the toilet, S. went to look for her.

Accused 2 said she was tired, and asked S. to accompany her to her shack. He did. Along the way S. was playing music from his cellular phone.

[19] S. said when he got to the shack he saw accused 1 and the complainant on the bed. He asked why the complainant had not been to school. She responded that she was tired. The complainant jumped out of bed and got out of the shack. S. followed her. At that point he overheard a smacking sound. It turned out that accused 2 was slapping accused 1, asking why he had been sleeping with his child. He lifted the complainant's dress and observed that she was not wearing her panty. He asked her pointing to her private part what accused 1 had done to her in that part of her body. She responded that her father had threatened to kill her if she reported what he had done to her.

[20] S. became angry. The complainant then eventually reported that her father "*inserted something in her thing*". At that point the complainant was facing downwards, and teary. S. pulled off the blankets. He thereupon observed that accused 1's trousers had been pulled down to knee level. Accused 1's body including his private parts had been exposed from knee upwards. When he confronted accused 1 about what the complainant had told her, accused 1 denied having done anything to her. S. assaulted accused 1, and thereafter summoned the police. Some 4 or 5 days prior to this, S. had heard from accused 2 that accused 1 had been sleeping with his child, but he never took her seriously on that because she had been drunk.

[21] Under cross examination S. disputed the suggestion that accused 1 had not been at the tavern, adding that he even stored pictures in his cellular phone pointing to accused 1's presence at the tavern on the day in question. After he had assaulted accused 1, the latter drew a knife which he took from underneath the mattress. He was referred to a statement he made to the police and wherein nothing is stated about accused 1 having been found with his pants down. He said he had told the police about it and sought to attribute the oversight to the fact that he had been angry.

Defense case

[22] Accused 1 testified in pursuit of his defense. He confirmed that he and accused 2 had been in a romantic relationship and that L., the complainant, is their offspring. They already occupied the shack when the complainant was born. They have been staying with the complainant in their shack since her birth. He was employed at Spindrift Company, boilermakers at NU12, Mdantsane.

[23] He denied having raped or attempted to rape the complainant. He admitted that there were occasions when he picked up a quarrel with accused 2. He would come back home and find her drunk. She used to swear at her, and he would assault her. On one occasion he assaulted accused 2 in the presence of the children. On other occasions they fought the children would either be away playing or asleep. He also denied having had sex with accused 2 within view of the children. He used to first check whether the children were asleep before having sex with accused 2.

[24] On 3 November 2015 he proceeded to his place of work at Fort Jackson, Mdantsane. Upon arrival there some parts needed for boiler making had not arrived. The task they were to perform on that day was deferred to the following day. He returned home just after 14:00 where he found the complainant and accused 2. Accused 2 was sober. Whilst they were chatting, one of accused 1's friends arrived and requested him (accused 1) to accompany him to NU5. He agreed, and on their arrival at NU5 the friend bought him a liter of Paarl Perle which they both consumed. When he eventually got back home he found the complainant present. Accused 2 was not there. He asked the complainant where her mother was. She told him she was at Sandile's home. He took off his shoes and lay in a relaxing position. The complainant was at that stage watching TV, sitting on her bed. Q. and S. arrived, finding out about accused's 2 whereabouts. The complainant told them she had gone to a nearby shack. They asked where his father was. The complainant pointed at him. He had covered himself with a duvet and wore something on his upper body, whilst lying on his bed. S. asked why he had closed the door as if he had been raping the child. He responded that he found the children watching TV and that he had not committed any rape. S. assaulted him. He retaliated by

hitting him with fists. A fight ensued. He was overpowered and fell. He thereafter lost consciousness. He came around when in police custody. When fighting with S. and Q. he did not see accused 2.

[25] During cross examination on behalf of accused 2, accused 1 was asked how, given accused 2's handicap, it was possible for them to fight each other. He said this would happen when both of them had been drunk. He even pointed to scars on his face claiming that these had been caused through having been hit with empty bottles by accused 2. He said the fights used to take place even within view of their children, when both accused had been drunk.

[26] It was put to accused 1 that on the occasion when a cloth had been inserted in the complainant's mouth he had said he cannot plant a cabbage and leave it to others to harvest, which he also denied. He further denied ever threatening to hit accused 2 or to kill the complainant.

[27] Accused 1 was also cross-examined by the prosecutor. He said they used to have sex with accused 2 whilst the children were asleep in the shack. On the occasions when the TV had been switched on it was possible that the complainant had seen them whilst having sex. He said they did have sex whilst in drunken state, but on those occasions the children had not been in the shack. He further said they did have sex when sober in the presence of the children. When this aspect was pressed on further, he changed his version and said they did not have sexual intercourse whilst the children were present. Asked whether they would have sex when the children were asleep, his answer was in the affirmative. He said they would take precautions such as switching off the lights and TV, and ensuring that the children were asleep before having sex. He nevertheless admitted that on occasions when they were drunk and had sex it was possible that the children had been watching them. In this regard he testified as follows:

“First of all, we would be drunk and not notice that the children had arrived because normally the children would be taken to go when we are drunk, but sometimes we could not notice because of being drunk.”

Asked why it was not put to the complainant that precautionary measures used to be taken, he said he had not informed his lawyer about that.

[28] Accused 2 also testified in her defense. She is disabled in that she cannot open her hands and turn around her wrists; her knee caps sometimes pop out, hence she cannot bend and walk properly. She has been disabled since birth. Accused 1 was responsible for maintaining the family as his salary was more than the amount she received as disability grant.

[29] The relationship she had with accused 1 had initially been sound. He had a tendency to assault her when drunk or under the influence of dagga. He would at times assault her with a stick until the stick broke. Neighbours or family members would be summoned and would come to her rescue. The assault bouts happened more during weekends. There were occasions when accused 1 said he felt like assaulting her surmising that he had committed a wrong.

[30] Accused 2 does partake of liquor. She narrated her version of the events of 30 June 2015. She and accused 1 had arrived back home and found the children already asleep. They retired for the night. Accused 1 woke her up in the midst of the night expressing a desire to have sex with her. They engaged in a bout of sex. Thereafter, accused 1 said she cannot grow a cabbage and leave it to be harvested by another man. Accused 2 then asked *“are you telling me that you want to sleep with or have sexual intercourse with your child?”* Accused 1 responded in the affirmative. She refused to wake up the complainant. He assaulted her—he throttled her, covering her with a pillow, persistent that she should wake up the complainant so that he could do to her what pleased him, adding that if what he intended doing got to be known outside of their household, he would kill her. She could not fight back because she was drunk and he overpowered her. She eventually yielded to the will of accused 1. She woke the complainant saying her father was calling her. The complainant obliged and approached her father, who undressed and raped her. Whilst raping the complainant accused 1

instructed accused 2 to insert a cloth in the complainant's mouth to prevent her from screaming and being noisy. She said she believed, from experience, that accused 1 would carry his threat towards her. During December 2012 he had assaulted her. On that occasion she reported the assault to the police. However, two days after accused 1 had been arrested and detained, he was released from custody. She was apprehensive that, even if in this instance, if he were to be arrested he might be released and hurt her.

[31] The rape of the complainant by accused 1 made her feel hopeless. She harboured bitterness and could not think of anyone to whom she could confide concerning her painful experience. In the morning accused 1 went to work. She called the complainant and assured her that God would work out a plan. She was lame (her knee swollen) and unable to take her to the clinic, until her swollen knee had subsided. She also told the complainant that the swelling she bore resulted from an assault by accused 1 when she had refused to co-operate with him the previous night, whilst he was bent on having sex with her (the complainant).

[32] Once upon a time when she had consumed liquor she, in the presence of accused 1's mother and her mother, scolded the complainant saying "*this thing that sleeps with her father.*" She did this because she wanted to unload the burden inside herself. She also wanted to evoke curiosity on the part of those who had been listening, hoping that they might find out more about what had happened. Accused 2 was asked whether she knew of instances when they would have sex being aware that their child was watching them; she answered this in the negative, adding that every time they had sex they would do so verily believing that the children were asleep. They would take precautions; switch off the lights and TV, and ensure that the children were asleep.

[33] During cross examination conducted on behalf of accused 1, accused 2 said accused 1 started abusing her in 2005. When she fell pregnant she hoped that the abuse would eventually come to an end, but that never came to pass. Accused 1 used to be stern and cruel when chastising children, hence she took it upon herself to discipline the

children. All family members were aware of the abuse. She nevertheless decided to stay in the relationship because her aspiration was to have both parents bring up their children. She had been raised by a single parent and would have her children not experience the same. She yielded to accused 1's pressure to assist him rape his child because

"I did not know what to do, I could not get up, I was locked inside, I was sore and my only way I know is that he was just going to kill me....I was shocked to see that it was their father who was to do this to the children. I thought it would be an outsider that would do this."

Accused 1 assaulted her and when she endeavored screaming he would choke and cover her with a pillow. The shack door had been locked with a chain and a padlock.

[34] Under cross-examination by the prosecutor accused 2 said she saw accused 1 rape the complainant for the first time on 30 June 2015. There were times she also assaulted accused 1. She did so in defense; she would slap him. On the following day, 31 June, they (the two accused) were discussing what accused 1 had done the previous night. Accused 1 said he did not know what got inside him. He apologised, saying he would never do that again. He even bought her medication for her knee-cap. She gave the complainant pain tablets, and did not take her to the clinic.

[35] The issue of why she did not escape when she was allegedly compelled by the accused to aid him in raping the complainant was persisted in during cross examination. She said the door had been shut with a chain and a padlock, and the keys were either in accused's possession or hidden away by him. The shack did have a window, but the window had burglar nets. She said she had informed her lawyer about this, but could not account for why all this had not been put to the complainant when she was testifying. She said she inserted the cloth in the complainant's mouth on accused 1's instructions. She was asked why this had not been put to the complainant when she testified. She said she had forgotten to inform her attorney about it. She said accused 1 had threatened to kill her, not right away, but in the event of her informing other persons outside of her household of the rape. She conceded that the rape on the complainant was more serious

than the experience she had previously reported to the police. Even though the police had informed her to report other more serious cases to them in future she never reported the rape.

[36] On the day she had referred to the complainant as “*the thing that sleeps with her father*” she had sent the complainant on an errand, and the complainant had not obliged. She became angry towards her. It was suggested that she did not tell her mother, the neighbours who previously intervened or anybody else about the rape; she said she had been ashamed.

[37] Doctor Mbande was called at the instance of accused 1. He examined the complainant on 3 November 2015. He completed and signed the relevant J88 medico-legal report. According to the report “*there is no clear evidence of forced sexual penetration.*” There was redness on the orifice and labia majora. The redness could have been caused by sexual penetration which could not be ruled out as having taken place. The child appeared to be psychologically deprived or emotionally depressed.

[38] Against this background it remains for this court to pronounce on the guilt or otherwise of the accused.

[39] It is common cause that the complainant and her younger brother lived with their parents, the accused, in a single-roomed shack located in Mdantsane. At the time of the alleged offence the complainant had been 9 years old, having been born on 7 August 2006. Accused 2, the complainant’s mother, is a disability grant recipient. It was not disputed that she cannot open her hands or turn around her wrists; her knee caps pop up and she cannot walk properly. At all times relevant hereto, the accused were lovers, but their relationship was strife stricken. They quarreled a lot, even within view of their offspring, and consumed liquor regularly.

Rape

[40] In seeking to secure a conviction the State relied heavily on the testimony of the complainant, which, it was argued, found support from the testimony of S., the complainant's uncle, and, in part, the testimony of accused 2.

[41] Even though the complainant would have the court believe that she was raped by her father approximately 50 times, her testimony focused on two occasions on which the rape occurred. The one occasion testified to by the complainant of which accused 2 made common cause was that of 30 June 2015 during which, accused 1 was said to have raped the complainant aided by accused 2. The complainant also testified about another rape incident perpetrated by accused 1 during which her mother had been away at a drinking place. S. also testified about this incident, which took place on 3 November 2015.

[42] In my view, the complainant provided coherent and reliable evidence. She stood the test of cross-examination. There is indeed no basis for even surmising that she had been influenced to incriminate accused 1. Nothing need be made of the suggestion made under cross-examination and persisted in at argument stage that she hates her father and favors her mother. As will be pointed out herein below, in so far as that may be relevant, she incriminated her mother, despite having expressed preference for her.

[43] On the authority of *S v Sauls*⁵ even if it were to be contended that L. is a single witness the testimony of the complainant passes muster. In that case it was held:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness ...The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. It had been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. The question then is not whether there were flaws ...The question is what weight, if any, must be given to the many criticism that were voiced ...in argument”

⁵ 1981(3) SA 172(A) at 180 E-H; see also *AS v S* [2011] JOL 27154 (SCA)

[44] There was an attempt to criticize the complainant for not having reported the rape. This criticism is devoid of merit. To begin with, on the first occasion she was raped in the presence of her mother, the very person she could have reported to. The other rape incident was reported to S., at the earliest available opportunity.

[45] In any event, the following remarks of Cameron JA in *S v Abrahams*⁶ are apposite:

“...rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. The present case illustrates them with acute force. The rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused) he can exercise a proprietary entitlement. Though not the case here, a family victim may moreover for reasons of loyalty or necessity feel she must conceal the crime. A woman or young girl may further internalise the guilt or blame associated with the crime, with lingeringly injurious effects. This is particularly so when the victim is the rapist’s own daughter, and the more so when the daughter is of tender years.”

[46] The complainant’s version that she was raped did find corroboration. On the first occasion she was, as already mentioned, raped in the presence of accused 2. The testimony of accused 2 on this aspect bears relevance. On the second occasion, S., whose testimony this court has no reason to disbelieve, caught accused 1 with his pants down. The testimony of the complainant, especially in so far as it is consistent with that of S., is also worthy of belief.

[47] It is so that S. in his testimony left out certain events concerning the incident of November 2015 in the police statement he deposed to. However, in my view, he satisfactorily explained how that came about. I would not reject S.’s entire testimony purely by reason thereof that he came short in certain respects. He did explain that at the time he deposed to the statement he was still angry. It has been observed that a person

⁶ 2002(1) SACR 116 (SCA) para [23]

making a statement to a policeman in a highly emotional state may not be fully attentive to every word in the statement when it is being read back to him.⁷

[48] Accused 1 raised a bare denial defense to having raped the complainant. In this way he had an easy row to hoe. In contrast thereto, the complainant had a traumatic experience to recount. She stuck to her version and never crumbled even under cross-examination. Generally, accused 1 floundered under cross examination. For his part, he could come up with no explanation as to why the complainant, her daughter, would falsely implicate him. The utterance which he denied having made namely, that he cannot plant a cabbage and leave it to others to reap, fits well in the scheme of things and is consistent with the version of the State. Accused 2 was not shown to have lied in that regard.

[49] The medical report is neutral, but sexual intercourse was not ruled out as having taken place.

[50] I therefore come to conclusion that the State has proven beyond reasonable doubt that on 30 June 2015 and 03 November 2015 accused 1 had sexual intercourse with the complainant without her consent. I am satisfied that I can safely reject accused 1's bare denial on this aspect of the case as not reasonably possibly true.

Aiding another person to commit sexual offence

[51] Let me now proceed to consider whether it has been established with the requisite degree of proof that accused 2 aided and/or abetted accused 1 when he raped the complainant on 30 June 2015.

[52] According to the complainant, on this fateful day (30 June 2015), her mother inserted a cloth in her mouth whilst accused 1 raped her. Accused 2 made common cause of having inserted the cloth in complainant's mouth on this occasion, but claimed to have

⁷ *Cele v S* (dissenting judgment by Pillay J delivered on 12 January 2016 under case no AR191/13 KZN, Pietermaritzburg)

done this under compulsion and out of necessity, in circumstances where her life or bodily integrity had been threatened by accused1.

[53] The defense of necessity relied on by accused 2 is said to arise when, confronted with the choice between suffering some evil and breaking the letter of the law in order to avoid it, the accused chooses the latter alternative. The term ‘*necessity*’ is used here to cover this dilemma situation when it is brought about by the force of surrounding circumstances or by human agency (compulsion, duress and coercion) since the law is the same in both instances.⁸

[54] It is trite law that for an act to be justified on the ground of necessity, the following requirements should be established:

- (a) a legal interest of the accused must have been endangered;
- (b) there must be a threat to the interest which had commenced or was imminent;
- (c) the threat must not have been caused by the accused’s fault;
- (d) it must have been necessary for the accused to avert the danger; and
- (e) the means used for averting the danger must have been reasonable⁹ in the circumstances.¹⁰

[56] It needs to be stressed that whilst the above are requirements for necessity as a justification, the onus of proof of the commission of the offence continues to rest upon the State. Whether an acquittal is justified (or guilt of the accused has been proven beyond a reasonable doubt) will depend on the particular circumstances of each case and

⁸ *S v Goliath* 1972 (3) SA 1 (A) at 24D

⁹ The test for necessity is clearly an objective one.

¹⁰ Jonathan Burchell, *Principles of Criminal Law* (3rd Ed), p 259; the requirements were quoted with approval in *S v Pretorius* 1975 (2) SA 85 (SWA) at 98 C-D.

the whole factual matrix will have to be carefully examined and adjudicated upon with the greatest care.¹¹

[57] In a consideration of the factual matrix it should be borne in mind that it is incumbent on a party (including an accused) to put to each opposing witness so much of his or her own case or defense as concerns that witness and to inform such witness that other witnesses will contradict him or her so as to give such witness fair warning and an opportunity to explain the contradiction.¹²

[58] The complainant testified that she did not know why her mother inserted a cloth in her mouth when, on the relevant occasion, she was being raped by accused 1. She was scared of asking her mother why she had done this. Whilst admitting that her mother feared her father, she denied that her mother had spoken to her on the following morning claiming to have inserted the cloth in her mouth because she was being assaulted and threatened by accused 1. Her response was “[i]n fact I do not know because she never talked to me she tells lies”(sic). No suggestion was made when the complainant was being cross examined on behalf of accused 2 that accused 2 had inserted the cloth in the complainant’s mouth on the instruction of accused 1. This only emerged during accused 2’s testimony in chief. Even though this constituted a material aspect of her defense, when accused 2 was being cross examined by the State she said she forgot to inform her lawyers of this. Similarly, her version that she could not escape because the door had been shut with a chain and a padlock, with the keys having been either in accused 1’s possession or having been hidden away by him emerged for the first time when she testified. This aspect, too, could and should have been put to the complainant when she was being cross examined. This was not done.

[59] I find that accused 2’s evidence that she could not escape from the shack because keys were inaccessible and windows had been shut securely with a bugler net was a

¹¹ *S v Goliath* case (*supra*) at 97

¹² *Du Toit et al, Commentary on the Criminal Procedure Act, 22 -22A*

recent fabrication. The insertion of the cloth by accused 2 in the mouth of the complainant on the instructions of accused 1 is similarly a recent fabrication that was, in my view, meant to bolster accused 2's otherwise fragile defense of necessity.

[60] Accused 2's behavior on days subsequent to the rape in question is one of indifference. It is hard to believe that if accused 2 had been coerced on the previous night she would not at the earliest available opportunity, especially in the absence of accused 1 (the source of the threat), not have reported the rape to the neighbors, at the very least. On her own showing, neighbours had come to her rescue on previous occasions.

[61] Even on her own showing, accused 2 could not have seriously and genuinely believed that her life was in imminent danger. As already pointed out, her neighbours had rescued her when being assaulted. She could, even in this instance, have raised an alarm at some opportune point during the ordeal. Moreover, she is on record as having assaulted accused 1 to the point of causing him scars on his face despite being handicapped.

[62] Accused 2's labeling the complaint as "*the thing that sleeps with his father*" adds a further dimension which does not lend support to her version that she acted out of necessity. It shows her indifference to the rape on the complainant and is more consistent with the stance of the complainant.

[63] In my view, for the reasons already mentioned, accused 2 aided accused 1 when raping the complainant on 30 June 2015. She inserted a cloth in the complainant's mouth in order to prevent the latter from being noisy and attracting the attention of neighbours. This conduct was unlawful and intentional.

Causing a child to witness a sexual offence or act

[64] This leaves me to consider whether on the facts of this case both accused can be found to have caused the complainant to witness or to be present whilst they engaged in a sexual act within the meaning and contemplation of section 21(2)(a) of Act 32 of 2007.

[65] Section 21(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 reads:

“(2) A person (‘A’) who unlawfully and intentionally, whether for sexual gratification of A or of a third person (‘C’) or not, compels or causes a child compliant (‘B’), without the consent of B, to be in the presence of or watch-

(a) A while he or she engages in a sexual act with C or another person (‘D’);

(b)....,

is guilty of the offence of compelling or causing a child to witness a sexual act.”

[66] According to its preamble, Act 32 of 2007 is a sequel to “*the prevalence of the commission of sexual offences in our society*” which is “*primarily a social phenomenon...reflective of deep seated, systemic dysfunctionality in our society.*” Act 32 of 2007 is part of the legal mechanisms that are meant to address this social phenomenon.

[67] Indeed, children are great imitators and are quick to learn what they see. In other words, they learn what they see lived. It is therefore necessary to guide them if and when they witness scenes that their immature minds may not process well. In *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Others*¹³ Khampepe J said:

“[1] Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development.”

10 CCT12/13 [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013)

[68] It is against this background that the question at hand should be considered. In this matter it is not in dispute that the accused engaged in sexual acts in the presence of their children. The complainant's testimony in this regard is as follows:

"What else did she do? Another thing that my mother would do is she would have sexual intercourse with my father in my presence.
Did you see them have that or do that? Yes.
Now how do you know that they are having sexual intercourse what would that be doing?
My father would insert his penis into my mother and my mother would do that thrusting movement.
And where are they when they do that? Inside the shack.
Where inside the shack?.....on the bed
Did they do this in front of you, did they do it once or do they do it more than once?
They done it many times....
From what you could from what happens the time that they have sex before and after and during, do you think that they know that you are aware when they are having sex?
Yes
And how do you know that, thinking or to what happened then why do you say that they know you are awake?Because I was watching TV." Sic

[69] I hasten to say, it is not the mere presence of a child when the perpetrators are engaged in a sexual act that is offensive in terms of the section under consideration. Otherwise, the multitudes of persons who live in abject poverty, occupying single roomed shacks, together with their children, would always run the risk of contravening the section.

[70] In my view, the offence is committed by the perpetrators intentionally and unlawfully causing¹⁴ a child to witness the sexual activity engaged in. Upon a proper construction of the section the persons concerned must have consciously and deliberately created circumstances that conduce to a child witnessing sexual activity being engaged in. Furthermore, in my view, the perpetrators must be conscious of the fact that the child is watching them engage in sex. What happens, for instance, where the alleged perpetrators are engaged in sex with the door slightly ajar and not aware of the fact that

¹⁴ The accused are charged on the basis that they caused (as against compelling) the complainant to watch them whilst having sex

the child has all along been peeping through and watching them? Can it be said that merely by causing the door to be slightly ajar in circumstances where they did not even expect the presence of the child they have committed the offence? I think not. In the instant matter, therefore, the question whether or not the accused were aware that the child had been watching them is of significance. Under cross examination the complainant conceded that it was possible that on the day(s) she was watching TV from her bed's position her parents might have thought she was asleep, whereas she was not. Those are the facts upon which a pronouncement should be made in this matter.

[71] There was of course evidence of the accused having been drunk on many occasions and engaging in sexual activity in the presence of the complainant. The offence is created by the perpetrators causing a child to watch them having sexual intercourse, not by the mere possibility that the child might be watching or might have been watching. The question whether a child was caused to watch other persons engaging in a sexual act is a matter for evidence, not falling to be left to conjecture. The complainant's testimony related purely to instances when she would be lying on her bed "*watching TV when that happened*".

[72] On the facts of this matter, there can also be no reason for finding the accused guilty on the basis of *dolus eventualis*. Nor, in my view, would there have been a basis for convicting the accused in terms of section 1 (1) of the Criminal Law Amendment Act 1 of 1988, according which a person who voluntarily consumes alcohol to such an extent that it leads to criminal non-responsibility and who, whilst in this condition, commits an act punishable by law of which he would have been convicted but his self-induced lack of criminal non-responsibility, is guilty of an offence.

[73] I am accordingly of the view that the guilt of the accused on count 3 has not been proven beyond reasonable doubt.

Conclusion

[74] Accused 1 is found guilty, on count 1, on the basis that he raped the complainant on 30 June 2015 and 3 November 2015.

Accused 2 is found guilty of aiding accused 1 to rape the complainant, on count 2.

Both accused are found not guilty and discharged on count 3.

The matter is postponed for sentence proceedings to 23 January 2017. The accused shall remain in custody.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Dates heard

25, 26 & 27 October; 02 & 14 November 2016

Date Delivered

09 December 2016

