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IN THE NORTH GAUTENG HIGH COURT

(HELD AT PRETORIA)

CASE No. A 40/2013

DATE: 28 JANUARY 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M[...] G[...]

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

PRELLER J:

The appellant was convicted and sentenced in the Regional Court at Louis Trichardt on the following charges: Counts 1, 2 and 3: Three charges of rape committed on 2 and 5 September 2009, for which he was sentenced to three terms of imprisonment for life;

Count 4: Using a child for producing six pornographic photographs between 2 and 5 September 2009;

Count 5: Exposing the said child to pornographic images of his wife and himself having sex during 2009;

Count 7: Possession on 2 November 2009 of six images on a computer of children engaged in sexual conduct or in a display of genitals.

On counts 4, 5 and 7, which were taken together for purposes of sentence, he was sentenced to 10 years' imprisonment.

He was acquitted on count 6, which was one of sexual grooming of a child.

The victim was almost 11 years old at the time and is the appellant's stepdaughter. He was married to her mother about three years before the incidents which were to lead to his trial. In the first three charges it is alleged that he inserted his penis into her mouth, vagina and anus respectively. The child having been under the age of 12 at the time, she cannot consent to the acts with which he was charged. In terms of the provisions of Act 32 of 2007, the acts alleged in the first and third counts also constitute rape and the minimum sentence of imprisonment for life is applicable in view of the age of the victim.

I wish to stress at the outset that nothing that I may say in this judgment is to be regarded as condoning in any way what the appellant did. Sexual molestation of a minor child is and remains a serious crime.

The appellant and his wife lived together with the victim and her brother, who was two years older, in the Air Force Base at Louis Trichardt. It appears from the evidence that the appellant and his wife had a predilection for pornography and at times filmed and stored their sexual activities on a computer that was kept in their bedroom. His wife was no shrinking violet in this regard. Captain Fourie of the Child Protection Unit testified that she had seized 149 compact discs and nine stiffies in the bedroom where the computer was kept and which had been pointed out by the complainant. The only evidence about the contents of those discs and stiffies is the statement in the key to exhibit B that the complainant was pointing out the DVD's "**allegedly used in recording the rape between the victim and the suspect**". The appellant's wife later testified that "her" CD's and DVD's had been removed by the police. It is further borne out by the fact that there was a picture of the naked upper half of her body taken by herself on her digital camera and also by the two photographs (numbered 7 and 8 in exhibit B) taken by the police of a somewhat elaborate artificial penis that was found by them in the house and could only have been used by her. According to the affidavit by the police photographer who took the pictures, they were taken at 15h30 on the day of the appellant's arrest. In the key to the album they are described as being of "**...the artificial penis which was found inside the house which was allegedly used by the suspect sometimes before raping the victim.**" The appellant did not make any statement to the police at the time of his arrest and his wife has not spoken to the victim by this time, which means that the information could not have come from either of them. In their evidence neither the complainant nor her mother made any mention of any such incident at all. It could not have been used on the complainant since she was, according to herself and to the doctor who examined her, still a virgin. It seems that the wife's cousin, Ms. L[...], who was clearly prejudiced against the appellant, assumed the worst against

him and made that groundless allegation to the police. This is one of the aspects that should have been probed in cross-examination or by the court as will be dealt with later.

It is also clear that the parents did not take the necessary care to ensure that the children did not see what was on the computer. According to the mother's evidence the children had access to the computer. She stated that "**as far as I know**" the pornographic material was protected by a password and "**The password was on and off, on and off so sometimes there was a password, sometimes there was no password.**"

On 2 November 2009 the appellant's wife was alone at home and looking at some of the pornographic material on the computer when she discovered some photographs on which she recognised the face of her daughter. She phoned her cousin, Ms L[...], who came to the house and attempted to copy the photographs of the child on a memory stick. The cousin was called as a witness, despite there being hardly anything of relevance in her evidence. The magistrate as well as the defence attorney allowed the prosecutor to elicit from her a lot of hearsay about what she had allegedly been told by the appellant's wife, but which the latter did not confirm and in some cases contradicted in her evidence. Although several important parts of her evidence were not sufficiently audible to be transcribed, it is clear enough that she stated more than once that she had seen images (none of which was identified in her evidence) of the appellant having intercourse with or raping the complainant. There is not a single photograph depicting intercourse on which the face of either the complainant or the appellant can be seen and she never attempted to explain how she could say that any of the photographs before the court depicted either of the two. I have dealt elsewhere with the doubtful identification of some photographs by the complainant and refer to what was said there. I remark on this because the magistrate allowed herself to be misled by the positive identifications ascribed to Ms G[...] of what is on some of the photographs, but which the latter quite fairly did not attempt to make in her evidence. In her judgment (record, p.174-175) the magistrate stated that the cousin had seen photographs of the appellant having sexual intercourse with the complainant and that her mother had identified the foot of the appellant on one of the photographs. These are two examples of findings made by the court that were based on nothing but pure hearsay by Ms L[...].

Four sets of photographs were handed in at the trial:

Exhibit B is a set of 12 taken by the police on the day when the appellant was arrested and is of little relevance, except perhaps as far as the two photographs referred to above of the artificial penis are concerned.

To illustrate the sloppy way in which the evidence and exhibits were handled, I can refer to the evidence around the attachment of the exhibits in the house of the appellant:

- The photo album was submitted under cover of an affidavit which was intended to be in terms of

sec 212 of the Criminal Procedure Act, but fell far short of the requirements of the section. The defence nevertheless consented to it being handed in, but no admission of its correctness was recorded.

- The deponent to the affidavit states that he attended the scene on 2009-11-02 at 15:30 where, after making his own observations, he took photographs of the scene and prepared "**a photographs and photo album**". In the key to the photographs he states that all of them were taken by him on the said date at about 15:30 "**at the scene**", which could only have meant the house of the appellant. Nevertheless the photo's numbered 10, 11 and 12 were clearly taken at some other place, which was probably the police station. That is apparent if the window in the background of no. 10 is compared to the one appearing on no's 2 and 4, and the floor on no's 5 and 6 to the two different floors on no's 11 and 12. Captain Fourie also testified that the computer had been handed over by sgt. Botha to w/o Mynhardt at the police station, and sealed in her presence. The photo of the sealed computer (no. 12) was therefore clearly not taken "at the scene". There was no attempt to clear up these discrepancies.
- When the captain testified that sgt. Botha had identified the computer to her, the court enquired from the prosecutor whether Botha would be called as a witness and allowed the hearsay after being informed that he would be called. He did not testify and no admission of the identity; of the computer was sought from the defence.
- Without sgt. Botha's evidence the chain of evidence showing that the computer had not been tampered with between the time of its removal from the house and its sealing, was not completed. This evidence would have been essential in view of the (admittedly unconvincing) attempt by the appellant to deny that he was the one who had stored the offending material on the computer.
- Photo number 9 is of a Samsung 760 digital camera and is described as "**the camera that was used during the crime**". That is in conflict with the evidence of Col. Freitag, the commander of the cyber crime unit in Kwazulu-Natal, who testified that the photographs in question had been taken with an LG model KS 360 cellphone. In this regard capt. Fourie testified that the camera belongs to Ms G[...] and that there was only one photograph on it, being a nude photograph of her upper body which had been taken by herself.

Exhibit C consists of 6 photographs which, according to the hearsay version of Ms L[...], were printed from the computer by the appellant's wife. On two of them the face of the complainant can be seen;

Exhibit D contains 20 photographs. Col. Freitag recovered them from the recycle bin of the computer, which means that they had been deleted from the computer but could still be recovered. They were in the recycle bin in a file marked Dcl;

Exhibit E is a set of 24 photographs. According to col. Freitag's evidence the)/ had also been copied from an LG KS360 cellular phone to the computer. The photo's are smaller than those in exhibit D and are in black and white.

Col. Freitag testified that she had made a copy of the hard drive of the computer with a "fast block". That is a device with which she can copy the information that is on the hard drive, but not change any of it. Then she used a forensic tool, known as an NK, to make a copy of the computer's hard drive. She emphasised that there was no possibility of her changing anything of what she copied. She explained that every digital camera, be it part of a cellular phone or an ordinary camera, gives every photo a unique number. That number cannot be changed or duplicated. Even if an image is deleted, the camera will not give its number to the next photo, but will carry on with the set of numbers to the next image. That means, according to her, that a digital camera cannot give a photo more than one number, nor can it give the same number to more than one photo.

On the hard drive she found several hundred pornographic pictures from which she selected those that could possibly involve minors. I have referred above to what seems to me to be the difference between the latter two sets of photos. There is an inscription at the top of each picture which the witness explained in her evidence in chief. The prosecutor led her to say that the number at the top of each photograph in this set starts with "Makhadu 26-11-2009" while it actually is "Makhadu 26-11-09/7". She said that it was the case number under which she saved the document. It appears from the record that the CAS number given to the case by the police was Makhado 26/11/09.

In the second line of the heading the above number is repeated and is followed by the word "Recycler" which, according to her, indicates that the photo was recovered from the recycle bin. That is followed by about 30 digits, which were not explained. Then follows "1003\Dc1", which she said refers to the folder in which it had originally been saved and which was subsequently deleted but recovered by her.

On the first five photos in this exhibit there is a date which turned out to have been written in the odd way that Americans do these things, namely "090902". As a good South African the prosecutor, thinking that the last two digits indicate the year and not the day, asked her what "09092002" refers to. (On the remaining 15 photos in the exhibit this part reads "090905"). Her answer was that these are the dates on which the photos had been taken, provided that the date setting on the camera had been correct. The final part of the code is a set of six digits and the letters ".jpg". That, she said, is the unique number assigned by the camera to each photo. Her forensic tool also informed her that the photos had been taken with a model KS360 LG cellular phone.

She was then taken through the individual photo's and by the time that she came to the third one in this series she, also being a good South African, said without any prompting from the prosecutor that the photo had been taken on 09/09/2002. Thereafter she consistently referred to these dates as being in 2002

and 2005 respectively, which could clearly not be correct. In September 2002 the victim was not yet four years old and it would have been four years before the appellant and her mother were married. The two dates indicated by the codes 09\09\02 and 09\09\05 were obviously the American way of referring to respectively the 2nd and 5th September 2009, but nobody seemed to notice.

The first five images in exhibit D bear the date 090902. The numbers identified by col. Freitag as the unique number on those five range between 180220 and 180431. If her evidence is correct that the camera numbers each picture taken by it in sequence, it would mean that on 2 September 2009 at least 211 photo's were taken. The remaining 15 pictures in exhibit D (from D 6 up to D 20) are dated 090905 and the unique numbers on them range between 144451 and 145431. That would mean that on that day at least 980 pictures were taken, which seems hardly likely. If the numbers are really unique and are given to images taken by the camera in sequence, it is unexplained why the numbers given on 2 September would be higher than 180000 and why three days later the numbering would go back and start at 144451.

There is another feature of concern about the accuracy of the colonel's evidence. In her evidence about the cellular phone that she received together with the computer, she referred to a "micro SD card" without explaining what it was. I can only assume that it is the memory card of the phone. In any event, she managed to retrieve some deleted photos from this device as well and printed them out as Exhibit E. If I understand her evidence correctly, the difference between exhibits D and E is that the contents of the former were recovered from the recycle bin of the computer where they had been stored in a folder named Dcl and the latter from the cellular phone. She included the word "Recycler" in the codes to the photos in exhibit D to indicate that they had been recovered from the recycle bin of the computer. Nevertheless both sets of photographs have as part of their codes the word "Recycler" and the characters "Dcl". No attempt was made to clear this up.

The court *a quo* often misunderstood the evidence of col. Freitag. In its judgment on p.177/8 the court understood the inscription "Makhadu 26/11/09" on the images in exhibit D as a date, and on p. 178 held that the photo's had been downloaded from the cellular phone to the computer on 26 November 2009. On that date, however, the appellant has been in custody for more than three weeks already and anything on the computer on that date must have been done by somebody else. I have already pointed out that "Makhado 26/11/09" was the MAS number allocated to the case by the police. Of more importance is the statement on p. 177 I. 7-9 that col. Freitag found **"...various images of sexual intercourse and photo's of pornographic nature with children."** At p. 191 the court even recorded in paragraph 5.1 that it was common cause that she had printed photo's of child pornography. The witness, however, was careful throughout her evidence to say nothing more than that she had extracted what **could be** images of children from the computer, and she never said that anything that she had found was indeed child pornography. This kind of failure to pay attention to details and easy jumping to conclusions is what led to serious misdirections, as will appear later.

Everything of any relevance in exhibit E is also contained in exhibit D, with the difference that the former are smaller and not in monochrome. Exhibit E can therefore be safely ignored. The court and counsel, having seen the complainant giving her evidence, would have been able to recognise her face on Exhibits D18 (which is the same photo as C5) and D19. They are the only images showing both her face and genital area. Exhibit D11 (the same as C2) is taken from above and shows what could be the face of a young girl with what could be part of a penis in her mouth. Because of the angle from which it was taken, it is difficult to say with certainty that the face is that of the complainant, but her evidence that the appellant had put his penis into her mouth and that the exhibit in question shows that incident, was not specifically disputed in cross-examination and the appellant agreed that the face in the picture is hers. Her evidence that it is a picture of herself should accordingly stand.

In the witness box Ms L[...] was taken through exhibits B and C only. She identified the face of the complainant on exhibits C2 and C5 but for an undisclosed reason did not attempt to identify anything on C1.

On C3 is depicted a pair of buttocks with a penis between them. She boldly declared "**This is C[...]s bud** (read "butt") **and there is anal penetration.**" Asked how she knows that it is of the complainant, she stated "**Because I recognise it from the other pictures.**" C3 is badly out of focus but the one thing that is clear about it, is that it does not show anal penetration. Her statement that she could recognise it from other pictures is nonsensical because apart from the bad focus, there is no other picture on which she could remotely have identified that part of the complainant's anatomy. In respect of C4 she said that it is the complainant's vagina and that Ms G[...] had told her that it looked like that "**....after he was finished...**" with the complainant. Ms G[...] never examined her daughter and could not identify any picture that did not show the complainant's face. This witness seems to have simply sucked this evidence from her thumb.

C6 shows an erect penis placed between two buttocks. On the photo a foot (presumably of the owner of the penis) is also visible, but it is not in direct light and not properly in focus. The witness once again declared that it shows anal penetration (which cannot be seen on the photograph) and that Ms G[...] had "**...said she can identify him by his foot....it is definitely his foot.**" Not only is it patently clear that the photo is not clear enough for the foot to be identified as belonging to a particular person, but Ms G[...] did not go any further in her evidence than saying that it could possibly be the appellant's foot.

There is no feature by which any of these photos can be identified as being of the complainant. According to the complainant's mother Ms L[...] had never been in her house before and the latter did not testify that she had ever seen the complainant naked so that she could recognise any part of her body in a photograph.

Ms L[...]s evidence can therefore safely be ignored.

A feature common to all the photographs in the exhibits is the absence of pubic hair. Col. Freitag said that she had extracted the photographs that **could be** of child pornography from the computer. She was not asked what made her think that the selected material depict children and I suspect that she simply selected pictures on which no pubic hair was visible. I could not find anything on any of those photographs to indicate that they were of prepubescent children and not of adult females with shaved pubic areas. To illustrate this I can refer to the evidence of Ms G[...] when she was referred to exhibit C1. She said that the vagina shown on this photograph could not be hers. The reason that she advanced was not that it could be recognised as that of a child, but that it was "**clean shaved and I never shaved myself clean.**"

It should be kept in mind that Col. Freitag had selected the exhibits from close to a thousand other pornographic pictures and that we do not know for example whether there were other similar pictures of females with an appearance similar to that of the victim.

The complainant's mother was quite fair in her evidence when asked if she could identify persons on the photographs. The closest that she came to make a positive identification where the face of the complainant was not visible was in respect of exhibit C6, where she said that the buttocks visible on the photo may be those of the complainant, because she could see red dots on them and the victim had scabies at the time and that "**...her whole body was fully covered in the scabies...**". Looking at the exhibit I can see a pinkish area around the buttocks (which is probably due to the colour quality of the photograph, which shows the body in shades of pink and turquoise), but there is no indication of any red spots on any part of the body on that or any other photograph in the exhibits.

I find it necessary to comment on two aspects of this case. Firstly, in an application to review the proceedings in the court *a quo* and which was not proceeded with, the appellant complained about Mr Sikhutshi, the Legal Aid lawyer provided to him. He stated that he had on several occasions requested an Afrikaans speaking lawyer because he found it difficult to communicate properly with Mr Sikhutshi. The trial proceeded without an interpreter and Afrikaans-speaking witnesses were questioned in English by Mr Sikhutshi. Apart from him, everybody involved in the case was Afrikaans speaking and the endless translations and explanations of questions and answers by the bench to him and to witnesses illustrated that language was a serious problem. What he (and the appellant) tried to say in English was often meaningless and one wonders how much he understood when the Afrikaans evidence was not explained to him. Although he did his best for his client, Mr. Sikhutshi was clearly out of his depth and was often bullied by the bench. A case in which the accused faced three sentences of life imprisonment obviously cried out for the appointment of a more senior legal representative. Some examples are referred to in this judgment.

More disturbing was the approach of the presiding magistrate. Unfortunately she seemed to be unaware that a criminal trial is a quest for the truth and lost sight of the essential requirement of impartiality.

More about this later.

Keeping in mind my remarks above about the seriousness of the crime in question I now move on to consider the evidence of the complainant.

The first thing that struck me about the evidence of the complainant's mother was that she never mentioned finding any indication of distress or trauma about the incidents on the part of the victim when she asked her about what the appellant had done to her. She testified in chief that she had asked her child whether the appellant had touched her inappropriately, which she confirmed. The following is then recorded at p. 58:

"When she told you that, was she citing or was she normal or was she shocked? — I think she was shocked.

Why do you say so? — For me finding out or knowing this."

It appears further from her evidence in cross-examination (at p.73) that the complainant felt bad about being found out more than anything else and was ashamed of what had happened and would not talk about it or tell her mother about it. She further testified (p. 75) that there was never any change in her child's behaviour or emotional state and that she had done very well at school all the time and failed only one term.

That term was ".....**the second term last year.**" (record p. 81), which was in 2010, and about nine months after the dates alleged in the charge sheet. The complainant herself testified that she had never failed any grade, but only one test, which seems more probable in view of her mother's evidence that her scores were always better than 60%.

In her evidence the complainant stated that she participated in these activities with the appellant because he had told her that there would be trouble if she did not do as he told her. It is not clear on her evidence that she acted out of fear or that the threat was repeated on any subsequent occasion. It is in any event not her version that there was any form of compulsion on every occasion. Apart from the alleged threat there is no indication in her evidence of how she felt about the incidents - no expression of fear, disgust, embarrassment or any other negative emotion. That also appears from the two photographs in the exhibits on which her facial expression can be seen and which show no sign of fear, anguish, embarrassment, disgust or any other negative emotion. Based on the above evidence there is a strong suspicion that the victim was not an unwilling participant in the events. I am fully aware that she was at the time only ten years old and that the absence or otherwise of her consent is irrelevant as an element of the commission of the offence. It must, however, be an important factor in considering an appropriate sentence.

As could be expected of a child of her tender years, her evidence was not above criticism. The first

mystery was her evidence that she could only remember that these incidents had taken place on 31 August and 18 September 2008, which was a year earlier than the dates on which the photographs mentioned in the charge sheet were taken according to col. Freitag. Those are the dates that she mentioned in the statement that she made to the police on 2 November 2009. Since that was two months after the dates on the photographs, she (and her mother) should have been able to reconstruct the dates when her mother was away on her course and the incidents occurred. No attempt was made to establish where the two dates mentioned by her come from.

As far as count 5 (exposing a child to pornography) is concerned, she was briefly taken through her evidence without going into more than the essential details. The images in question were not produced in court and were not mentioned by col. Freitag in her evidence. The complaint's evidence that the appellant showed her a DVD of naked men and women and also images of himself and her mother having intercourse was undisputed in cross-examination and the appellant tried to explain it away with a story that the complainant had walked into the room while he was busy copying pornographic material to the computer. Her evidence that she was shown these images is more convincing, since she would not otherwise have known of the existence of that material. Their existence was confirmed by Ms G[...] and not disputed by the appellant in his evidence. In view of the appellant's plea of not guilty the failure to cross-examine on this point is difficult to understand and it is not clear whether it was a mere oversight, due to a lack of experience on the part of his attorney or because of a conscious decision not to dispute the allegations in count 5. The evidence clearly justified the conviction on this count.

The prosecutor took the complainant through the six photographs in exhibit C one by one. The background against which her evidence should be considered is that she testified on 24 May 2011, which was 20 months after the date on which, according to col. Freitag, they had been taken. In reply to a question by the court she stated that the appellant had never shown them to her and that she had not seen any of them after they had been taken.

On exhibit C5 her face is clearly visible and recognisable and the face on C 2 could arguably be hers. Her identification of these two exhibits was not attacked in cross-examination. The other four pictures are however a different kettle of fish. Not only are the pictures not clearly in focus, but there is no distinguishing feature whatsoever about the parts displayed in them by which anybody could recognise them as belonging to a specific person. None of them show any pubic hair, with which aspect I have dealt above. She nevertheless in respect of each one of them baldly stated that the body parts appearing on them were hers and, where applicable, that of the appellant. No attempt was made by either the prosecutor or the court to test the correctness of her identification or to find out on what she based her identification. Realising this problem, the court asked her (record p.105) how she recognised the photographs and her answer was simply "**Want hy het dit geneem.**". That probably means that she assumed that they were the images made by the appellant and that she could not recognise any feature on any of them. She confirmed that he had not shown her the photographs after taking them and her answer

was accepted without further testing.

Exhibit C4 for example shows a hairless female genital area which she baldly identified as hers. On it two fingers are visible on the one side of the opening and one on the other. When asked (record p.104) whether she knew whose fingers they are, she answered without hesitation that the one is hers and the others "syne" (referring to the appellant). Looking at the fingers on the photograph, however, the first discernable feature about them is that they are of practically exactly the same size and clearly not those of a grown man and a ten-year-old child. There is no indication in the record that the appellant is an abnormally small man and on a wedding picture of the appellant and Ms G[...] in exhibit E it can be seen that his hands are at least the same size, if not bigger, than those of the complainant's mother. The appellant pointed out in his evidence that on at least one of the fingers in the picture a cuticle is clearly visible (as is the case with the fingers of both of the hands that are visible on exhibit D10) and that his fingers have no visible cuticles. He was not asked to show his fingers to the court, which means that his statement was accepted. When Ms G[...] was asked (record p. 63) whether she could recognise those same fingers, her answer was "Not really".

In view of the complainant's evidence that she had not seen any of the pictures taken by the appellant before, her identification of these pictures must be pure guesswork and wholly unreliable.

Exhibit D consists of photographs of a nature similar to those in exhibit C. D19 shows the complainant in a pose similar to the one in C5 and her face is clearly recognisable. Nevertheless the complainant was not referred to exhibit D at all and apart from the general evidence of col. Freitag no other witness dealt with any of the images in it.

The complainant was quite clear and in fact adamant that the appellant had only placed his penis against her anus and vagina and never penetrated her. She never testified about the artificial penis that, according to exhibit B, had been used on her by the appellant "sometimes before raping" her. She also testified that she had been examined by a doctor who found that she was still a virgin.

In this regard I find it necessary to comment on the strange attitude of the court *a quo*. In a rape case medical evidence, often in the shape of a form J88, is almost without exception of crucial importance. More in particular in the present case it would have been important for the trier of fact to check on the correctness of the complainant's allegation that she had never been penetrated. Expert medical evidence would also have obviated the need for the court to speculate and make a layman's finding on the question whether what the court noticed on some of the photographs constituted penetration. That doubtful finding made the difference between two sentences of imprisonment for life and a sentence for what could not have been more than an indecent act with a minor in terms of the Act. One would therefore have expected the court to not only welcome the form J88, but also to call the doctor as a witness in terms of sec. 186 of the Criminal Procedure Act if the prosecutor did not do so.

What happened in this case though, is that defence counsel attempted to cross-examine Ms G[...] on the contents of the J88 that had been provided to him by the prosecutor. There could have been no doubt that it came from the police docket and related to the doctor's examination of the complainant. The court interrupted him, informing him that he could not be allowed to cross-examine the witness on the document unless the State was going to hand it in as an exhibit. The prosecutor then informed the court that it was accompanied by a statement in terms of sec. 212(4) and that it may as well be handed in by the defence. That persuaded the court to look at the form, noticing that according to the J88 the person examined was named C[...] B[...], and ruled that no cross-examination of the witness on the report would not allowed.

Eventually, and after the case of the appellant had been closed, the court allowed his counsel to reopen his case and hand in the document with the consent of the prosecutor. According to the doctor's report the complainant's hymen was intact and there was no sign of penetration. As was the case when the defence made the first attempt, it was obvious that the form was in respect of the complainant. It turned out that the doctor who examined the complainant confused her name with the address where she lived, being B[...] street.

The result of this is that one does not know what would have emerged from the cross-examination of the complainant's mother about the contents of the form and one is left with the uncomfortable feeling that it was a deliberate attempt by the court to exclude evidence that may have been to the advantage of the accused.

In a similar vein it is necessary to refer to another incident during the cross-examination of the complainant. She confirmed that she had been consulted by a social worker who had compiled what sounded like a victim impact report on the basis of their consultation. In a case of this nature a court would normally regard such a report as essential information and the prosecutor would in any event have been duty bound to make it available to the defence if she did not intend to use it in the State case. When Mr Sikhutshi on behalf of the appellant (unnecessarily) sought the court's leave to use the report, the prosecutor surprisingly objected on the basis that it was not evidence before the court. Without even inviting the attorney to address the court on the question the court simply ruled that if the social worker was not going to testify, that line of cross-examination could not be allowed. Equally surprisingly, Mr Sikhutshi accepted this ruling without demur. There is of course no basis on which defence counsel can be prevented from asking a witness whether he or she had told another witness or for that matter any other person something, and if it is denied, to present the evidence of that other person in order to prove the dishonesty of the witness. What is particularly disturbing in this instance is the almost inescapable inference that the prosecutor was hiding information that would have assisted the defence and that the magistrate was a knowing party to it. It is, for example, not inconceivable that it may have appeared from the report that the complainant or her mother had been the instigator of the events in question, which would have been an important factor for a just decision in the case. It is simply incomprehensible

why the court *a quo* deliberately closed its eyes to this important information.

These are two respects in which the trial of the appellant was blatantly unfair and which are very nearly serious enough to justify his acquittal on that ground alone. The magistrate and the prosecutor would both be well advised to think again about their duty to be fair to an accused person.

Not much needs to be said about the evidence of the appellant. In his evidence in chief (p.133) he was asked whether he had put his penis in the complainant's mouth, as depicted on exhibit C1. His surprising answer was that he could not remember any such thing. Any normal person would obviously be able to remember whether he had done such a thing, unless there were so many other similar incidents that he was unable to recollect whether that had also been done. There was an unconvincing attempt to suggest that some other unidentified person had had access to the computer and may have been responsible for the offending material on it. What remains unexplained in his evidence, however, is how some unidentified person (who must have been a male) would have had sufficient access to his cellular phone to take the pictures and why he or she would thereafter have taken the trouble to copy them to the appellant's computer. Many of the relevant parts of his evidence were never put to any of the state witnesses and many crucially important parts of the evidence of state witnesses were not attacked in cross-examination. The magistrate quite rightly rejected his evidence as false beyond reasonable doubt.

That leaves one to consider what was proved on the State case. Count 5 is the easiest to dispose of: the complainant's evidence that the appellant had showed her images of her mother and stepfather (and also of other men and women) having sex, was in effect undisputed. This charge was clearly proved.

Counts 4 and 7 can be considered together. Both charges are limited to six images. In count 4 it is alleged that he used the complainant for the purposes of producing 6 images of child pornography and in count 7 that he had in his possession six images of children engaged in sexual activity or in a display of genitals. The prosecutor never made any attempt to identify the images in question but it is clear that the charge sheet had the six images in exhibit C in mind. It should not be expected of a court to fish out of the 50 photographs submitted in exhibits C, D and E the six on which the State intended to rely to prove these two counts. As stated above, exhibit C6 clearly shows the face and genital area of the complainant. I have already found that exhibit C2 coupled with the complainant's undisputed and uncontradicted evidence that it is of herself with the appellant's penis in her mouth constitutes the necessary proof. Due to the similarity of exhibit D19 to C5 it is clear enough that the former is also of the complainant. Whether the court should assist the State or not by finding that D19 is intended to be included in the pornography contemplated in counts 4 and 7 is really of no consequence, since the commission of the offence will have been proved whether the appellant produced and possessed one, two or six offending photographs. I have already found that the bald statements of the complainant identifying the remainder of the images in exhibit C as being of herself are insufficient and unreliable but the conviction on counts 4 and 7 should stand.

That brings me to the three charges of rape in counts 1, 2 and 3. In terms of the Sexual Offences Act any form of sexual penetration is sufficient to constitute rape. In these three charges the State relies on oral, vaginal and anal penetration respectively. Apart from the complainant's direct evidence, the allegation of oral penetration in count 1 is corroborated by exhibit C2. Her evidence that it is her face that appears on the exhibit was agreed to by the appellant and her statement that it is his penis that appears on it was not effectively challenged or contradicted by the appellant. In addition the evidence of col. Freitag establishes that the photograph was taken on his cellular phone and copied on to the computer. The commission of the act was proved beyond reasonable doubt and because of the age of the complainant her consent is irrelevant. The conviction on this count was clearly correct.

On counts 2 and 3 there is the repeated statement by the complainant that she was never penetrated anally or vaginally and that the appellant only put his penis against her anus and vagina. Some corroboration for this evidence can be found in the doctor's report and affidavit which were belatedly allowed in as evidence.

There is some merit in the view of the court *a quo* that the complainant is only 13 years old and does not know what the law requires in order to constitute rape. That can however not be the final word on the topic. If the court was not satisfied with her evidence that she had not been penetrated, she should have been asked her understanding of what penetration is and the meaning of the term in law should have been explained to her. In the end the court disregarded her express evidence that there had never been any penetration on the strength of its own interpretation of what can be seen on exhibits C1, D12 and D20 in respect of count 2 and on exhibits C6, D14 and D 17 in respect of count 3. There was no attempt by any witness to identify anything in exhibit D, apart from the evidence of col. Freitag that the images had been copied from the appellant's cellular phone. It is impossible to say that they had not been copied to his camera from some other source or that he had taken them of other females. Exhibits C1 and C6 are accordingly the only two that need to be further considered.

Exhibit C1 is not fully in focus and although a female sexual opening can be recognised in it, it is not beyond doubt that the other object is a penis - it may as well be an artificial penis or some other similar object. It is furthermore by no means clear that the photograph actually shows penetration. Because of the curved shape of the labia there is no clear definition of where exactly the opening of the vulva begins. It is risky for a court to find that in circumstances such as the present penetration has been proved beyond reasonable doubt. The finding that penetration was proved is recorded at p. 201. At p. 197 the court found that the appellant as a layman could not express an opinion on the question whether the penis shown in exhibit D17 is circumcised or not and that the defence should have adduced expert medical opinion on this aspect.

Nevertheless the court did not hesitate to make what is probably a more difficult finding to make without the benefit of expert medical evidence and without even inviting argument by counsel on the question.

The same objections apply in respect of the finding by the court that anal penetration is visible on exhibit C6, with the added problem that the anus of the victim is not even visible on the photo.

Even if the finding of penetration could be sustained, there remains the problem that the complainant's bald statements that the genitals shown in exhibit C (apart from C2 and C5) are those of the appellant and herself are unreliable. I have dealt with that aspect earlier and there is no need to repeat it here.

The result is that the guilt of the appellant was not proved beyond reasonable doubt on counts 2 and 3 and those two convictions should be set aside. In view of the rest of her evidence (that was not really disputed) that the appellant had placed his penis against her vagina and anus, a contravention of sec. 5(1) of the Sexual Offences and Related Matters Amendment Act, no.32 of 2007 has been clearly proved and he should have been convicted of that offence.

In mitigation of sentence Mr Sikhutshi informed the court that the appellant had been in custody awaiting trial for 18 months. He was 35 years old and a first offender. At the age of 8 he was adopted into a family where he was maltreated and also abused by an older stepsister. He was furthermore sodomised on several occasions at the boarding school that he attended. His work history was not placed on record but he had been a soldier at the air force base for two years before the incidents in question. I must assume that it appeared from the victim impact report that was withheld by the prosecutor and suppressed by the court that, apart from other possibilities, the offences had no negative impact on the complainant. In his address Mr Sikhutshi referred to "the pre-sentence report", but it is not clear whether one had been prepared and if so, whether it was before the court.

The court remarked in passing sentence that each individual comes before the court from a different background and manner of coping with trauma and that it is extremely difficult for "**.....even a highly trained individual such as a judge or magistrate to comprehend full/ the range of emotions and suffering a particular victim of sexual violence may have experienced.**" That is exactly the reason why it is so regrettable that the magistrate disallowed the report to which Mr Sikhutshi tried to refer.

Finding that there are no substantial and compelling justifying the imposition of a lesser sentence, the court imposed three sentences of life imprisonment on the first three counts and, taking the other counts together for the purposes of sentence, a sentence of ten years' imprisonment. The court dealt at some length with the prevalence and seriousness of rape as a crime and the consequences for its victims and also with the breach of the position of trust in which the appellant was *vis-a-vis* his stepdaughter. These factors are more fully considered in some of the judgments to which the court was referred in argument. I am acutely aware of all those factors and wish to make it clear that nothing that I say in this judgment is intended to detract from the gravity of the problem. The unfortunate background of the appellant as a child did not carry much weight with the court and were dismissed with the statement that it was

his responsibility to get himself some help. If this factor had been properly addressed in a considered pre-sentencing report, it would probably have carried more weight with the court and would probably have lead to a different result. Although his attorney did not mention it in his address on sentence, it appears from the record that the appellant's wife has since started living with the man with whom the appellant suspected her of having an affair. That means that he has lost his wife with whom (according to her evidence) he had a very good marriage, and also his family. It is also set out in his application for condonation of his failure to launch his application for leave to appeal that he could only do so after receiving his pension money from the defence force, which means that his employment was terminated.

An important factor that the court seems to have overlooked is the gradation of seriousness of different kinds of rape as considered in **S v. Abrahms, 2002(1) SACR116 SCA** and several subsequent cases, as well as the principle of proportionality that has received more attention in a number of recent judgments. The range of the degrees of seriousness in kinds of rapes has been widened by the recent introduction of the Sexual Offences Act. In terms of the Act any form of penetration is now classified as rape and is subject to the prescribed minimum sentences for rape. That includes *fellatio* and probably *cunnilingus* as well, if the tongue of the perpetrator should enter between the outer lips of the vulva of the victim. In terms of the Act, what would previously have been no more than the performance of an indecent act with a minor is now elevated to the status of rape and subject to a much heavier sentence. It was obviously the intention of the Legislator that an indecent act with a minor should now be visited with a heavier sentence if it involves any form of penetration. One wonders though if it can really be the intention that in the case of *cunnilingus* a literal slip of the tongue could make the difference between a sentence of something like five years' imprisonment and one of imprisonment for life.

Considering the different degrees of seriousness of the offence, I have recently read a judgment of a case in which an adult male had grabbed a twelve-year-old girl who had been playing with her friends, dragged her into some bushes and violently raped her, causing her serious injuries. Most observers will agree that, absent any unusual features, that would be a crime deserving the heaviest sentence that a court can impose. Comparing the circumstances of the present rape to that one, the principle of proportionality makes it clear that the present case does not justify the imposition of imprisonment for life - one simply feels that the circumstances of the present crime do not call for the heaviest sentence that a court can impose.

The personal circumstances of the appellant, the fact that he is a first offender who spent 18 months in custody awaiting trial, the nature of his offence and the limited effect that it had on the complainant and the serious consequences that his offence already had for himself, cumulatively constitute substantial and compelling circumstances that justify the imposition of a lesser sentence.

All the different offences committed by the appellant in my view constitute a single course of conduct,

probably committed with the intention of eventually having full sexual intercourse with the complainant with her consent. For that reason it seems appropriate that all the counts of which he has been convicted should be taken together for the purpose of sentence. I do not think that the appellant is a hardened criminal and believe that he has more than learnt the necessary lesson from the time that he has already spent in prison, but there should be a suspended sentence hanging over his head to prevent a possible repetition.

I propose the following order:

1. The convictions of rape on counts 2 and 3 are set aside and convictions of contravening sec. 5(1) of Act 32 of 2007 are substituted for them.

2. The sentences imposed by the court *a quo* are set aside and the following is substituted for them:

A. Counts 1, 2, 3, 4, 5 and 7 are taken together for the purpose of sentence and the accused is sentenced to ten years' imprisonment, five of which are suspended for five years on condition that the accused is not convicted of an offence involving a sexual act with a minor and which is committed within the period of suspension.

B. This sentence shall be deemed to have been imposed on 3 June 2011.

F.G. PRELLER

JUDGE OF THE HIGH COURT

I agree.

P.P. M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT

It is so ordered