

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

6/02/2015

CASE NO: A432/2014

DELETE	WHICHEVER	IS	NOT
APPLICABLE			
(1)	REPORTABLE:	YES/NO	
(2)	OF INTEREST TO OTHER	JUDGES:	YES/NO
(3)	REVISED		
DATE:	5/2/2015		
SIGNATURE:	[Signature] Jansen		

In the matter between:

THEMBA PATRICK DLADLA

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSEN J

- [1] On 16 April 2014 the appellant was found guilty of rape in terms of section 3 of the Criminal Law Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 38 of 2007 and was

sentenced to life imprisonment in terms by the acting regional magistrate Ms B Oswell in Springs.

- [2] When the matter came on trial on 3 February 2014, the appellant pleaded not guilty to the charge of rape. It was alleged that he raped the daughter of his wife (“the complainant”) on the 14th of October 2011. The appellant had been married to the complainant’s mother for a period of six years when he allegedly raped the complainant who was 13 years old at the time. The complainant was staying with her grandmother during the period of the alleged rape.
- [3] The medical report relating to the complainant was handed in by consent, as exhibit “**A**”. The birth certificate of the complainant was also handed in by consent as exhibit “**B**”.
- [4] The first witness for the state was the complainant’s stepmother who testified that the complainant was her stepdaughter and that she neither knew nor met the appellant.
- [5] According to the stepmother, when the complainant visited her during December 2012 and seemed troubled and harassed. She testified that the complainant would shut herself in her room, always crying, was rude and was also very angry. She testified that she became very concerned that

something was wrong with the complainant as she noticed that the complainant was displaying signs of a child who had been harassed as she had previously, researched this topic.

[6] The stepmother testified that she questioned the complainant and stated that she was aware of the fact that the complainant would always set out her problems in a letter if something was bothering her. She told her that if it was difficult to talk to her then she should write her a letter telling her what her problems were. The complainant then wrote a letter and gave it to her. The letter was handed in as exhibit “C”. Upon receipt of the letter and reading it, the complainant’s biological father informed the complainant’s biological mother and they went to the police station.

[7] During cross-examination the stepmother was asked if she knew the complainant’s biological mother. She answered in the affirmative. She was then asked if she knew whether the mother was staying with a man and whether she had a boyfriend. The stepmother stated that she could not answer that as the incident took place in 2011 when she did not even know of the complainant’s existence. It was only in September 2012 when she found out that her husband had a child. She did testify that the complainant’s father was aware, at all relevant times, that the complainant was his biological child. The stepmother said that after finding out about the existence of the complainant, the complainant

visited her and her biological father during the holidays. The stepmother testified that the complainant did not have a boyfriend nor did she have friends.

[8] The stepmother, when asked if she perceived the complainant's behaviour to be normal teenage behaviour, she confirmed that she perceived the complainant's behaviour to deviate from normal teenage behaviour.

[9] At the next court appearance the stepmother brought the complainant to court. At that stage the complainant was fifteen years old and testified through an intermediary in terms of section 170A of the Criminal Procedure 51 of 1977.

[10] The complainant testified that she was in Grade 10. She testified that on 14 October 2011 at about four o'clock an incident occurred at her home after returning from school. Upon arriving home, she knocked first and that after her stepfather had opened the door for her, she went to the bedroom and closed the door. She further testified that she started undressing (as she had to take off her school uniform to change into casual clothes), whereupon her stepfather entered the bedroom whilst she was half naked. She further testified that he then pushed her onto the bed and proceeded to take off his pants and underpants and then took his

penis and inserted it in her vagina. She testified that she felt pain. She stated that after he had “slept with me” he got dressed and left her crying.

[11] The complainant testified that when her stepfather’s daughter arrived home she found her crying and asked her what was wrong but she lied as to the reason why she was crying

[12] When asked who the first person was whom she told about the rape the complainant stated that it was her class teacher and then her mother. Neither the teacher nor her mother did anything. Her teacher at least arranged counselling for the complainant.

[13] The complainant was then shown the letter which she wrote to her stepmother and which was then read out in the court. In the letter she stated that she had to tell her something but she was scared to do so face to face. She then confessed that she had been raped by her stepfather and that her mother did not do anything about the rape. She further implored her stepmother to show her love as her own mother did not love her and that her family did not care for her and kept on saying that she is angry. She also requested her stepmother not to tell anyone about the rape and once again asked for her love. The complainant also wrote that she would rather kill herself than have to have a life without parents.

- [14] The complainant further testified that her father took her to a doctor but it was a long time after the incident. Her mother was still in a relationship with the appellant at the time when she saw the doctor.
- [15] The complainant said she first told her mother about the incident in 2012 and her teacher in 2013 and then wrote the letter to her stepmother as she wanted her to help. Her mother and teacher had done nothing save for the teacher organising counselling for her. She also testified that her mother had told her not to tell anybody.
- [16] The complainant was asked about her mother and stepfather's relationship when the complainant lived with them. She testified that her mother and stepfather quarrelled at times, and that sometimes the quarrels were verbal and at times physical. She denied that her mother had another boyfriend when the question was put to her. It was also put to her that the only reason why the appellant was being implicated is because in June 2012 he and her mother were fighting and he packed his belongings and left the house and that the appellant alleged that her mother told him that she would "show him" and thus had persuaded her to lay a false charge of rape. The complainant denied this.
- [17] The complainant testified that after the rape on 15 October 2011, she went to stay with her grandmother. She alleged that it took her a long

time to tell anybody about the rape because she did not want her mother and stepfather to part ways and also did not tell her grandmother because she did not want her to fall ill.

[18] Allegedly the appellant left the complainant's mother after she told her teacher about the incident. However, this evidence does not tally with her evidence that she told her teacher only in 2013.

[19] Upon cross-examination as to why she told nobody at first she testified that she did not want her mother and stepfather to part ways because he took good financial care of them. She also testified that she knew her stepfather would go to prison and she did not wish this to happen.

[20] The complainant's mother was made available to the prosecution, but was not called to testify.

[21] The next state witness called was the complainant's class teacher. She stated that she had taught the complainant from 2011 and was still teaching her in 2014. She stated that she noticed that the complainant's behaviour had changed and that other teachers had also observed that the complainant was not doing her school work. She then questioned the complaint if she had a problem but was told that there was nothing wrong. The teacher further testified that the complainant's behaviour started to become more bizarre. One such example of bizarre behaviour

was that it seemed as though she did not want to stay in the class and constantly asked to be excused from the class to go to the toilet.

[22] The teacher testified that on a day whilst she was teaching the class the complainant was writing a letter instead of doing her school work and when she requested to see the letter the complainant refused to hand it to her. The teacher stated that not long after that particular day, the complainant must have realised that she was concerned about her and wanted to help her. She further testified that the complainant began to trust her and even asked for her phone number which she gave to the complainant.

[23] The teacher testified that weeks after having given the complainant her telephone number she received a sms from the complainant very late one evening. The sms was to the following effect: "*Madam will you come to my burial. I am going to kill myself*". She testified that she immediately went to the complainant's grandmother house but unfortunately the grandmother did not know where she was but furnished her with the telephone number of the mother. She then testified she spoke to the mother, who told her that she did not know what the whereabouts of the complainant were but stated that she thought her daughter was safe and was quite confident that her daughter would not harm herself.

Having no further recourse, the teacher returned home. The mother clearly had no interest in the wellbeing of her daughter.

[24] The teacher testified that the very next day when she arrived at school she called all the girls who were close to the complainant and asked them whether they had seen the complainant as she was not at school. She testified that the complainant stayed away from school for three days. Upon her return to school the teacher said she asked her why she wanted to commit suicide. The complainant then told her what had happened the day she was raped by her stepfather.

[25] The teacher testified that she then went to the principal and reported what the complainant had told her. The principal then suggested that they call the complainant to the office and the complainant then once again told the principal about the rape.

[26] The teacher was, during cross-examination, asked why she stated that the behaviour of the complainant had changed. The teacher replied that in Grade 8 she seemed to be happy notwithstanding the incident but her behaviour started to change in Grade 9. She was also asked if the mother sounded like a concerned parent when she had phoned her. The teacher did not want to comment whether she thought the complainant's mother was a bad or good mother but stated that it would be perplexing for any

parent who heard that their daughter wanted to commit suicide and did not know where their child was and hence found it strange that the complainant's mother did not seem to be perplexed at all. She added that she was also disconcerted by the fact that the mother had never bothered to contact her or come and see her after the phone call informing her about her daughter's message.

[27] The state closed its case.

[28] The appellant then gave evidence. The appellant stated that he raised the complainant and never had sex with her and was married to her mother. He testified that he and his wife had commenced quarrelling in February 2012. The stepfather suggested his biological child and the complainant leave the home during February 2012. The children duly left. On the 8th of June 2012 his wife came to the house with the police. The appellant testified that he left wishing to divorce his wife but that on the 10th of June she obtained a protection order against him. During October 2012 his wife alleged that he had gone to her boyfriend's place and fired shots.

[29] The appellant strangely enough testified that there was a good relationship between his daughter and the mother and the mother and the complainant.

[30] However, the evidence indicated that the mother did not love the complainant and wanted the freedom to cavort around with boyfriends. The appellant further testified that during November 2012 the complainant asked for money for clothes and money to go to a salon to have her hair done. He paid for this and had no idea where the mother was.

[31] The J88 indicated that the nurse who examined the child long after the event stated that there were old injuries, and in her opinion the complainant never had intercourse with consent. She had clearly been penetrated on a previous occasion.

[32] It cannot be stated that the magistrate misdirected himself in respect of the testimony regarding the rape or in respect of sentencing. As was held in the well-known case of *S v Pieters* 1987 (3) (SA) 717 (A) at page 727F–H: —

“The basic governing principle was restated by Botha JA in S v Pieters.¹ It boils down to the following: The discretion to impose sentence belongs to the trial court. Owing to this fact the appeal

¹ 1987 3 SA 717 (A) at 727F–H. For a more recent, but essentially unchanged, version, see *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) at a para 21. See also, eg. *S v L* 1998 (1) SACR 463 (SCA) at 468ff; *S v Blank* 1995 (1) SACR 62 (A) at 65*h–i*.

court may not and shall not interfere with the imposed sentence unless it is convinced² that the sentence discretion has been exercised improperly or unreasonably.³ If the trial court committed a misdirection of the nature and extent indicated in S v Pillay,⁴ it means the presiding officer did not exercise the discretion properly.⁵ The relevant portion in S v Pillay reads as follows: —

“[n]ow the word misdirection in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence ... [A] mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a

2 *Op cit* 728B–C. This means that the appellant has the burden of proof to convince the appeal court of the merits of the appeal.

3 Although various tests, aids and yardsticks have been formulated and applied by various courts in the practical application of the basic principle, too much must not be made of the differences between these tests – 727H–728A.

4 1977 (4) SA 531 (A) at 534H–535G.

5 A paraphrasing of “[i]ndien dit sou blyk dat daar ‘n mistasting begaan is, van die aard en omvang wat aangedui is in S v Pillay, dan sou dit beteken dat die Verhoorregter nie sy diskresie behoorlik uitgeoefen het nie”.

misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

- [33] The minimum sentence for the rape of a child under the age of 16 is lifelong imprisonment.
- [34] Sentencing is the domain of the trial court. Hence, a court of appeal will be very reluctant to upset the factual findings and evaluation of the court *a quo* court and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned.
- [35] In the instant case the complainant's evidence was consistent with the letter that she wrote to her stepmother and with what she told her teacher. Even though the complainant was a single witness, her subsequent conduct, unhappiness and anger as perceived by her stepmother and her teachers, together with the letter that she wrote to her stepmother are all consistent with her version. Her mother's indifference explains her behaviour and her version is credible in all respects.
- [36] Regarding the evidence of a single witness it was held in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E–G that: —

*“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. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean ‘that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded ...’*

It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[emphasis added]

- [37] This dictum was repeated by Holmes JA in *S v Artman and Another* 1968 (3) SA 339 (A) at 341A–C: —

“She was, however, a single witness in the implication of the appellant. That fact, however, does not require the existence of implicative corroboration: indeed, in that event she would not be a

single witness. What was required was that their testimony should be clear and satisfactory in all material respect, see R v Mokoena 1956 (3) SA 81 (A) at pages 85-6. The court unanimously found that her evidence passed the test. I would add that, while there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt, and the courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense." [emphasis added]

- [38] In the Supreme Court of Appeal in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i–140a at paragraph [15] Heher AJA, with reference to *S v Van Aswegen* 2001 (2) SACR 97 (SCA), enunciated the position as follows: —

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance

weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

[39] It was contended that the complainant's delay in reporting the rape indicated that her evidence was unreliable.

[40] However, section 59 of the Criminal Law Act 32 of 2007 makes it clear that no such inference can be drawn against a complainant for a delay in reporting a sexual crime.

[41] The appellant's defence that it was because there was bad blood between him and the complainant's natural mother is simply far-fetched and is inherently improbable. The complainant was in any event raped before the bad blood between him and his wife commenced during February 2012. It is also difficult to understand how one can get a minor child convincingly to give false evidence in a court of law against her stepfather if she has no motive whatsoever to lie about her stepfather.

[42] The Appellate Division in *S v D* 1995 (1) SACR 259 (A) at page 260f-i emphasised the vulnerability of small children, particularly when they are abused by people whom they trust and who, more often than not, will get

away with their misdeeds because of the few avenues that they have to gain assistance.

[43] In *S v Chapman* 1997 (2) SACR 3 (SCA) at page 5b the following is stated: —

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.”

[44] In *S v Chapman supra* at page 5b–e court further stated: —

“... woman in this country have the legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[45] See also *S v Chapman supra* at page 5e where the following is stated: —

“The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all

women, and we shall show no mercy to those who seek to invade those rights.”

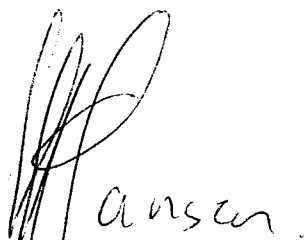
[46] In *S v Mojaki* 2006 (2) SACR 590 (T) at page 591 the following is stated: —

“Rape is a very serious offence, so serious that I doubt whether those who are not women will ever be able to fully understand its effect on the victim. It violates the dignity of the person being raped. More so when it is perpetrated on young, defenceless and innocent ones. Children are entitled to be children.”

[47] Given the severity of the emotional trauma that the rape caused the complainant, the magistrate did not misdirect himself in imposing the minimum prescribed sentence. No evidence was led of substantial and compelling circumstances which would justify a deviation from the minimum sentence.

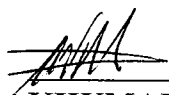
[48] In the result, I propose the following order: —

[49.1] The appeal against the conviction and sentence is dismissed.



JANSEN J
JUDGE OF THE HIGH COURT

I agree and it is so ordered



KHUMALO J
JUDGE OF THE HIGH COURT

For the Appellant Advocate VZ Van Zyl (084 618 5924)
Instructed by Legal Aid South Africa

For the Respondent Advocate PN Ngcobo (076 544 0267)
Instructed by The State Attorney Pretoria (012-309 1563)