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IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

CASE NO: A710/2012

DATE: 7/5/2013

IN THE MATTER BETWEEN

A[...] M[...]

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PRINSLOO, J

- [1] On 18 July 2005 the appellant, then about 50 years old, was convicted in the Vanderbijlpark regional court of raping the complainant, a 13 year old girl, on a number of occasions during the period May to June 2004.

- [2] On the same date, the learned regional magistrate, correctly, referred the appellant for sentence by the High Court in terms of the provisions of section 52 of the Criminal Law Amendment Act, Act 105 of 1997, as that particular subsection then provided.

- [3] On 22 February 2006, the matter came before SALDULKER, J who found that the proceedings before the learned regional magistrate were in accordance with justice and she confirmed the conviction.

- [4] On 27 February 2006 the learned judge sentenced the appellant to eighteen years imprisonment, after finding that there were substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment.

- [5] On 28 May 2009, the learned judge granted leave to appeal to this court against both the conviction and sentence.

- [6] In the appeal before us, Mr Nel appeared for the appellant, and Ms Vorster appeared for the state.

[7] It is convenient to quote the contents of the charge-sheet:

"That the accused is guilty of the offence of rape read with section 51 of Act 105 of 1997.

In that upon or about during May to June 2004 and at or near 3246 Silicon Street, Lenasia South in the regional division of Gauteng, the said accused, wrongfully and intentionally had intercourse with V[...] M[...] a 13 year old female person, without her consent."

[8] In the trial court the appellant was legally represented and he pleaded not guilty, denying all allegations of having had sexual intercourse with the complainant, who was his stepdaughter. At the commencement of the proceedings, the learned regional magistrate also explained the implications of section 51(1) of Act 105 of 1997 to the appellant, namely that, if convicted, he could be sentenced to imprisonment for life, which was the prescribed minimum sentence.

[9] In terms of the relevant statutory provisions, it was ruled that the trial would be conducted in camera and the young complainant was also allowed to give her evidence through an intermediary as well as by the use of closed circuit television. The intermediary, Ms Getrude Maselelo, was adjudged to be properly qualified and a competent person to be the intermediary. The 13 year old complainant was also found to be appreciative of the implications of taking the oath.

[10] The complainant testified that the incidents, or rapes, started during May 2004 and the last occasion was on 25 June 2004. It happened on several occasions, basically every day unless the accused worked nightshifts.

[11] The following background facts are also useful to record: when the complainant was about 3 years old, her mother formed a relationship with the appellant. Out of this union, two younger siblings, a boy and a girl, were also born. The five of them lived in the house mentioned in the charge-sheet which belonged to the appellant. For a number of years, the appellant and the mother shared a bedroom, so that the two siblings had a bedroom and the complainant had her own bedroom.

The weight of the evidence was to the effect that from about May 2004 the appellant moved into the room of the siblings with the latter going to sleep with their mother and the complainant stayed in her own room. The room now used by the appellant was adjacent to that used by the complainant.

The complainant and the mother testified that during the relevant period, May to June 2004, the appellant and the mother were not on good terms, and, according to the mother, the appellant would not speak to her, and would not explain why he adopted such an unsociable attitude. The appellant, on the other hand, testified that there was no ill feeling between him and the mother, and they slept together throughout, with the exception of two nights when he was on nightshift and had

the control radio with him which meant that he could be called up for duty and nightshift at any time. This version was not put to either the complainant or the mother in cross-examination.

[12] It was during this period when the appellant was said to sleep in the other room, that he, on the first occasion in May 2004, came to the complainant's room while she was sleeping, took off her pajamas and panty and inserted his penis into her vagina, obviously without her consent. He made certain up and down movements. She said that her private part was sore as a result.

[13] The appellant took the complainant to school every morning in his motor vehicle. They were alone in the car and on a number of occasions the appellant warned the complainant not to tell her mother about these incidents. In this regard, it should also be added that the appellant was the sole breadwinner of the family, the mother being unemployed at all relevant times. According to the complainant, the appellant, on occasion, told her that if she were to reveal his conduct and he were to go to jail, the rest of the family would be destitute.

[14] The complainant testified that although she found these experiences painful, she persevered and did not scream. She felt tired because she never slept properly and she lost interest in playing with her friends. She also failed her mid-year exams during that year, when she was in grade 8.

[15] There was some dispute between the complainant and the mother on the one side and the appellant on the other side, about the question of visibility. The complainant and the mother testified that, although the light was off in the room of the complainant when she slept, the outside light of the house of the neighbours was always switched on during the night and the glow shone through the window of the room used by the complainant (although covered by a curtain) leaving sufficient light and visibility for the complainant to clearly identify her stepfather during these nocturnal visits. In any event, there was never any suggestion as to who else, but the stepfather, would have raped the complainant at night, if indeed those attacks took place. The testimony of the appellant, on this subject, was that the outside light of the neighbour only shone against the side wall and could not illuminate the room used by the complainant.

[16] There was also an incident when the complainant screamed one night while being raped by her stepfather who then left the room before the mother could rush in to enquire about the reason for the screaming. The complainant did not answer the question but she kept on crying. The mother also observed the appellant standing in the passage by the door of his room swearing at the complainant and complaining about the fact that she was making a noise.

[17] By 25 June 2004, the complainant had had enough, and this was the last time she was attacked. On 26 June, when her stepfather was not at home, she told her

mother what was going on. The mother consulted with an aunt and the matter was reported to the police. On 30 June, the appellant was arrested.

[18] On 30 June, the complainant was also examined by Dr Soomati D Natha, whose J88 form was also handed in as an exhibit.

[19] In her evidence, the mother, L[...] M[...], confirmed that she used to get on well with the appellant, and so did the complainant. She confirmed that things took a turn for the worse when the appellant stopped talking to her, for reasons unknown to her, and he would not discuss the issue either. She confirmed that over the relevant period, May to June, he slept in the other room. The younger siblings slept with her and the complainant stayed in her own room.

The mother corroborated the evidence of the complainant that there was sufficient light in the latter's room at night for identification purposes. This light was caused by the outside lights of the neighbours.

[20] The mother confirmed the incident in the passage when the complainant was crying, and when the appellant swore at the complainant.

The mother confirmed the complainant's evidence that the latter always appeared to be tired, lost interest in her friends and failed her mid-year examinations. This was uncharacteristic of the complainant, because she used to be a happy child

playing with her friends, two of whom were named in the evidence, and always passing her examinations. The mother confirmed that the report was made to her on 26 June, that she consulted with an aunt who actually laid the charge with the police, that the arrest took place on 30 June and that she had the complainant examined by Dr Natha on 30 June. At a point after all this happened, the mother and her children also left the home of the appellant and moved in with her sister in Vlakfontein.

- [21] Dr Natha gave comprehensive and lengthy evidence about the condition of the complainant. She was also cross-examined quite intensively. She related the version of the events as told to her by the complainant. This version, broadly, corresponded with the evidence of the complainant during the trial.

The complainant said that she had been a virgin before the attacks started taking place. She said that condoms were used during the attacks. I add that during the trial, the complainant also explained the clothing worn by the appellant when he visited her at night. He wore shorts and a T-shirt. This evidence of the appellant's favorite sleeping attire was also confirmed by the mother.

- [22] Returning to the evidence of Dr Natha, she said that on gynaecological examination she noted tears on the posterior fourchette. There was no bleeding anymore but there was increased friability. This means that the tissue looked like it was torn and healed and torn and healed. The edge of the hymen was irregular.

The child had healed tears at 3 o'clock and 6 o'clock positions. There was a synechia at about the 6 o'clock position. This was like a cut "that was not together ... it was two separate edges". It is like a healed cut that is not bleeding but open. There was no bleeding or discharge because of the length of time that had expired since the last incident some five days earlier. For the same reason the doctor took no specimens for analysis. According to her, the results of the examination did not exclude recent vaginal penetration. The hymen was not intact. On a 13 year old this sort of an injury is highly probably one that could have been caused by a blunt object, for example a finger or a penis.

During cross-examination, the doctor also said that if the complainant had still been menstruating when the last attack took place (which appeared likely from the history provided by the complainant) the injury occasioned on that date would have been lessened by the additional moistness in the vagina.

[23] The doctor also testified that because the injuries are mostly noted in the lower half of the clock, from 3 o'clock to 9 o'clock, they suggest a high probability of forceful penetration. These injuries would include the synechia at 6 o'clock and the friability to which I have referred.

[24] The appellant was the only witness in his own defence. He denied everything. He denied, as I have said, that he was on bad terms with his wife and that he had slept in the other room over that extended period, barring for the two nights when

he was on standby with the control radio. He said that he was on good terms with the wife and the complainant. He could think of no reason whatsoever why the complainant and the wife would fabricate false evidence against him. He did say that all the rooms in the house had keys so that they could be locked if necessary. It must be pointed out that this evidence was supported by the mother whilst the complainant said that the keys had been removed at some earlier stage by the appellant. The appellant also denied the incident when he was in the passage when the complainant first screamed and later cried.

[25] In a well-reasoned judgment, the learned regional magistrate found that the evidence of the appellant could not be reasonably possibly true. There was no reason, according to him, for the complainant and the mother to fabricate false evidence. The learned regional magistrate paid due regard to the cautionary rules when it came to considering the evidence of a single witness. She found corroboration for that evidence in the medical evidence presented by Dr Natha and the fact that there was no other conceivable person, suggested by anybody, that could have had sexual intercourse with the complainant under the prevailing circumstances. Further corroboration was found in the change in the behavior of the complainant who became lethargic, was always tired, would not play with her friends and failed her examinations.

[26] I find no material misdirection on the part of the learned regional magistrate when she made the factual findings which led to the conviction. Under these

circumstances, a court of appeal will not interfere with the factual findings – see *R v Dhlumayo & Another* 1948 2 SA 677 (A). The learned judge correctly confirmed the conviction.

[27] In the result, I am of the view that the appeal against the conviction must fail.

[28] As to the sentence imposed, the learned judge thoroughly considered the relevant aspects of this particular case. In coming to the conclusion that there were substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one of life imprisonment, the learned judge took the following into account: the appellant came from a stable background. He had been employed for twelve years with the Johannesburg Water Board, earning a salary of some R9 000,00 a month and had been a useful member of society, maintaining his family, including the complainant. He had already been in custody for some eighteen months by the time sentence was imposed. The appellant had a number of previous convictions but all of them occurred more than ten years before the sentence was imposed. There was no evidence that the complainant had suffered long term permanent psychological harm as a result of the rape.

The learned judge also identified aggravating factors such as the fact that the appellant was the stepfather of the victim and, therefore, in the position of trust where he was supposed to protect rather than abuse the complainant. The learned

judge also paid due consideration to comparable cases and comparable prison sentences that had been imposed.

[29] Sentencing is, in any event, in the province of the trial court, and will only be interfered with by a court of appeal if vitiated by misdirection or irregularity or if the sentence can be described as being shockingly inappropriate. In my view, this is not the case in the present instance. Consequently the appeal against the sentence should also fail.

[30] The order that I make is that the appeal against the conviction and sentence is dismissed.

A710-2012

I agree

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

A P LEDWABA
JUDGE OF THE NORTH GAUTENG HIGH COURT

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 20 MARCH 2013
FOR THE APPELLANT: V Z NEL
INSTRUCTED BY: LEGAL AID SOUTH AFRICA
FOR THE RESPONDENT: Ms VORSTER
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS