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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**Case no. CC42/2018
Dates heard: 13-14/8/18
Date delivered: 15/8/18
Not reportable**

In the matter between:

THE STATE

and

R S

JUDGMENT

Plasket J

[1] The accused was charged with the offence of rape, it being alleged by the State that on divers occasions between 2016 and 2017 he had committed acts of sexual penetration with the complainant, his eight year old daughter. He pleaded not guilty.

[2] The complainant's mother testified that she and the accused had been involved in a relationship for some years. They had four children, the oldest of whom was the complainant. It was clear from her evidence that the relationship between

them was a stormy one, and she claims – and the accused admitted – that he assaulted her from time to time.

[3] She testified too that on some occasions the accused chased her from their home. She would go to stay with a neighbour, Ms L J. Sometimes she would leave her home alone. On other occasions, she would be accompanied by all four of her children. At yet other times, she would only be accompanied by the three younger children, while the complainant remained at home with the accused. This evidence was confirmed by L J and by the complainant.

[4] The complainant's mother's evidence was not always a model of clarity. What emerges from it, however, is that for some time, she suspected that the accused may have been abusing the complainant. It would appear, that members of the community also harboured this suspicion. One of them, a neighbour by the name of I, reported her suspicion to a social worker who interviewed both the complainant and her mother. It was at this interview that the complainant told her mother that she had been raped by the accused.

[5] The matter was reported to the police and the complainant was taken to hospital where she was examined. The doctor who examined her testified that he had found a fairly recent, but healing, tear to the urethral orifice and that the hymen was torn. The latter injury was in all probability an older injury than the former given that there were no signs of bleeding, swelling or bruising. These injuries, he testified, were consistent with penetration. He discounted the possibility of them being self-inflicted.

[6] The complainant gave a straightforward account of events. She stated that, on evenings when her father had instructed her mother and siblings to leave the house, he had had sexual intercourse with her. This had occurred on a few occasions. In cross-examination, she agreed with her mother's evidence that it had happened on three occasions. To remove any doubt, she demonstrated what had happened to her with the aid of anatomically correct dolls and explained that her father had caused her pain in her vaginal area with his penis.

[7] The accused denied having raped his daughter. He testified that his relationship with the complainant's mother had deteriorated from about 2016 onwards. He does not know why his daughter would accuse him falsely of having raped her. Although he speculated that perhaps the complainant's mother was behind the false complaint, it was clear from his evidence that he had no sound basis for this assertion, other than their deteriorating relationship.

[8] The accused testified that on some occasions when he and the complainant's mother had argued, she would leave the home. He denied having ever chased her from the home. On every occasion, she had left of her own free will. Sometimes she went on her own, while at other times she took all of the children with her. She never left the complainant with him in the house at night.

[9] I turn now to an assessment of the evidence.

[10] In her evidence, the complainant's mother deviated from the version I have set out above. Having said unequivocally that the first time the complainant told her of the abuse she suffered was when the social worker intervened, she then testified that the complainant had told her of this some months before. I am of the view that that version can be discounted for three reasons: first, it is at odds with what is stated in the summary of substantial facts, secondly with her earlier evidence and thirdly with the complainant's evidence that she informed her mother after she had informed the social worker (who she referred in her evidence as the 'tannie'). It would appear that, even if suspicions had been aroused, nothing was done about them until I drew in the social worker who investigated the allegations, and set the law in motion.

[11] Despite my criticism of the complainant's mother as a witness, her evidence corroborates the evidence of the complainant in certain respects – particularly that, on some occasions, the accused chased the complainant's mother from the home, along with the complainant's siblings, leaving her alone at home with her father. That evidence is also corroborated by the evidence of L J, who confirmed that sometimes the complainant did not accompany her mother when she stayed overnight in her shack.

[12] The doctor who examined the complainant was an objective witness with no connection to the case. His clinical examination found a relatively new as well as an older injury in her private parts. Both were consistent with the complainant having been penetrated, but at different times. This corroborates her evidence that she was subjected to sexual penetration on more than one occasion.

[13] The complainant's evidence was consistent. She struck me as being a very good witness, despite, understandably for one so young, losing concentration now and then. For the most part, her version was logical and clear, and when an inconsistency crept in once or twice, it was corrected when clarity was sought. I am aware that the complainant is a single witness and, on that account, and because of her tender years, her evidence must be approached with caution.

[14] Given the quality of her evidence, I am of the view that she was a satisfactory witness in every material respect. Furthermore, her evidence is, as I have shown, corroborated in important respects by the evidence of her mother, the doctor and L J.

[15] The accused gave evidence in which he stuck to his denial that he had never raped his daughter as alleged. Although he suggested a conspiracy on the part of the complainant's mother to implicate him falsely, this is implausible for the reasons I shall give. In fairness to the accused, he testified that in truth he had no idea why he was being accused falsely and could only speculate that his partner's animosity towards him was the underlying reason.

[16] Despite the complainant's mother's undoubted animosity towards the accused, the conspiracy theory advanced by him does not bear scrutiny. In the first place, the complainant's mother is an entirely uneducated and unsophisticated person. In my view, the hatching and execution of such a scheme would be beyond her. If she somehow managed to put it in place, it would in all likelihood be exposed. The notion of the complainant, a nine year old witness who is currently in grade 2 at school, being able to stick to script through cross-examination by an experienced criminal lawyer is also fanciful and unlikely.

[17] While the accused cannot be said by any means to have been a poor witness, his denial, it seems to me, is unable to explain the complainant's injuries which were, as I have said, consistent with her having been sexually penetrated more than once. If the complainant and her mother had indeed conspired to falsely accuse the accused, they did so in the knowledge that someone else had raped her more than once, and content to allow that person to escape justice. That strikes me as being so unlikely that it can be discounted.

[18] The accused, on the evidence before me, was the only person who had the opportunity to sexually abuse the complainant. I accept the evidence that on three occasions, he and she were alone in their home after he had chased the complainant's mother and her siblings from the home. The evidence to that effect is clear, convincing and mutually supporting. Nothing could necessarily be inferred from the fact that they were alone together in the home but for the fact that, consistent with her version, the complainant suffered from injuries that in all probability were caused by sexual penetration.

[19] When all of the evidence is viewed holistically, I am of the view that the overwhelming probabilities favour the version put up by the State, with the result that I find that the State has proved its case beyond reasonable doubt and the accused's denial cannot be and is not reasonably possibly true.

[20] I accordingly find the accused guilty as charged.

C Plasket

Judge of the High Court

APPEARANCES

For the State:

Ms H Obermeyer

Director of Public Prosecutions, Grahamstown

For the accused:

Mr D Geldenhuys
Grahamstown Justice Centre