SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A400/2012

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.
(4) DATE. **16 September 2014**

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SIGNATURE SIGNATURE

In the matter between:

H Appellant

v

THE STATE Respondent

JUDGMENT

SPILG, J:

NON-DISCLOSURE OF IDENTITIES

1. This is a proper case to preserve the victim's anonymity. Aside from being a minor, as she grows up her self-esteem and dignity may be unnecessarily affected if she perceives that those who she comes into contact with are aware of her identity. The manner in which the appellant, H, is treated by the authorities should he obtain parole and return to society is not adversely affected. If there is any other possible prejudice to the public's right to know it is more than outweighed by the young girl's rights to dignity and privacy.

2. The court accordingly directs that neither the appellant nor the victim or her family's name may be revealed.

THE ISSUES

3. H appeals against his convictions and the sentences imposed by the regional court in respect of all three charges being;

    a. count 1; rape in terms of the provision of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 *('the Sexual Offences Act')*;

    b. count 2; common law rape;

    c. count 3; indecent assault;

    The applicable minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 *('the CLAA')* were applied in respect of each count.

4. The complainant in each case was the appellant's step-child who will be named B. She is a minor and was born on 26 March 1995.

5. The trial court imposed life imprisonment in respect of each of the first two counts and ten years imprisonment for indecent assault, having found no substantial and compelling circumstances present in relation to any of the offences. Since a life sentence was imposed all the sentences were ordered to run concurrently in terms of section 39(2) (a) (i) of the Correctional Services Act 11 of 1998. The appellant was also declared unfit to possess a firearm. The learned Regional Court Magistrate Mr P Venter granted leave to appeal in respect of both conviction and sentence.

6. The provisions of the Sexual Offences Act came into effect on 16 December 2007. This explains why the appellant was charged (under count 2) with common law rape in respect of a series of rapes allegedly perpetrated against B prior to that date and covering an extended period from 2006, when she was only 11 years of age, until November 2007. The first charge was in respect of the subsequent series of rapes, as that offence is now more broadly defined under the Sexual Offences Act, allegedly committed on B between December 2007 and March 2008, at which stage she was 12 years old. The series of indecent assault charges related to the period from 1997 when B was 2 years old to March 2007.

7. Section 3 of the Sexual Offences Act defines rape as "*an act of sexual penetration, without the consent of (the complainant)"*. In terms of the section 1 definitions *'sexual penetration'* is defined to include under subparagraph (a) "*any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs ... of another... and any part of the body of another person.*

8. In terms of section 15(1) of that Act, as qualified by the Constitutional Court in *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development and another* 2014(1) SACR 327 (CC), consent is not a defence where a person over the age of 16 years commits an act of sexual penetration with a child, who for the purposes of this provision is defined in section 1 as a person 12 years or older but under the age of 16 years.

9. The indecent assault charges relate to other acts of sexual molestation allegedly committed during the course of a decade, commencing from when B was barely 2 years old until past her 13th birthday. These charges related to touching her buttocks and private parts when she was very young and extended to kissing her private parts as she developed to full puberty.

10. Counsel for the appellant did not seriously challenge the credibility findings against H nor did he persist with attempting to diminish the weight that could be placed on B's testimony on the grounds that she was an alleged victim and a single child witness. Moreover he did not persist with the contention that B's evidence should carry little or no weight given the way in which her aunt elicited from her the nature and extent of sexual abuse at the hands of the appellant. In my view the magistrate had correctly considered and applied section 60 of the Sexual Offences Act (weight of victim's evidence), section 208 of the CPA (single witness), *S v Sauls and another* 1981(3) SA 172 (A) at 180E-G (single witness) and *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) at 1028B-D (child witness).

11. The court *a quo* properly cautioned itself regarding the assessment of the evidence of a young child and in weighing her evidence was satisfied that it could be accepted as trustworthy and reliable. B had provided in-depth details of the molestations. Despite lengthy examination and cross-examination, her testimony remained consistent throughout. Her evidence provided a clear

account of the nature of the various acts of sexual abuse, the circumstances under which they occurred, including the place and occasions. It was also clear that there had not been a material contradiction between the contents of her statement and what the doctor claimed was related by her on the one hand and her testimony on the other regarding whether the appellant did penetrate her fully. On each occasion adults interpreted what they believed had occurred although B had never maintained that there was full penetration and she remained consistent in this regard.

12. Throughout her evidence B fervently believed that she had succeeded in preventing the appellant from penetrating fully both by trying to keep her legs crossed or tightly together, despite his attempts at separating them, and by crying out in pain during these attempts. The magistrate accepted that there had not been full penetration.

13. In relation to the rape convictions, the appellant contends that the magistrate erred in finding on the evidence given by B that she had in fact testified to there being any penetration to support a conviction whether under the common law or under the Sexual Offences Act. The appellant submitted that on the proven facts he had only rubbed his private parts against B's body.

14. No arguments were advanced before us in respect of the indecent assault conviction.

15. In respect of sentencing it was urged that life imprisonment was shockingly inappropriate because it is reserved only for the "*worst category of rape"*; the argument being that the offences were accompanied with *"little violence".* It should be noted that at the time the appellant was asked to plead, the regional court's sentencing jurisdiction had been increased, enabling it to impose life

imprisonment. See section 4 of the Criminal Procedure Amendment Act 38 of 2007.

16. It is advisable to first set out the facts of the case relevant to both the issue of whether there was penetration and in respect of the evidence affecting sentence as a whole.

THE EVIDENCE

17. B was born to L and her previous husband. They separated and later divorced. According to the appellant he formed a relationship with B's mother when B was six months old. However B's aunt who testified believed that B was about eighteen months old at the time. B's mother subsequently married the appellant and they have a son. B's mother and the appellant separated after she became aware of the alleged sexual molestation of B. They were divorced at the time of the trial.

18. The first time B informed an adult of her claim that she had been sexually molested by the appellant, including being raped by him, was in April 2008. It was in response to her aunt's questions. B had just turned 13.

19. At the time of the trial B was 14 years old and an intermediary was appointed under section 170A of the CPA. No issue has been taken with regard to either the regularity of the process or its effect on the proceedings. B made use of anatomically correct dolls representing a male and a female to demonstrate what she alleged occurred. The appellant seeks to rely on B's demonstrations to support his contention that there was no evidence of penetration.

20. The first witness was the mother' sister, who B called *"ouma"*. She related how B revealed that she had been sexually molested by her step-father. She claimed

that the disclosure was made in early April 2008 at her daughter's wedding on their farm in Limpopo. B had arrived with her mother, step-brother and the appellant to attend the wedding. Since it was still school holidays it was arranged that B would remain at the farm for a few days after the wedding. However the mother and the appellant returned home before the wedding reception because the mother had been slapped by him during an altercation. B stayed on as previously arranged. On Monday 7 April while B was helping to pack the wedding gifts the aunt asked if the appellant had ever touched her. Her question was prompted by the appellant's behavior towards B's mother at the reception and also her own suspicions.

21. B replied that he had. The aunt asked if the appellant had ever grabbed her and touched her in places that he was not allowed to. B initially revealed that he had touched her in inappropriate places including her breasts. The aunt then said that many other children are also molested and asked why neither she nor B's mother had been told about these incidents before. B replied that the appellant threatened that she would be taken away and would never see her mother again. The appellant had also said that if she revealed what occurred to her mother he would say that it was her fault as she had led him to do these things.

22. The aunt believed that B had been willing to relate these events because of the way the appellant had hit her mother on the previous day. According to B, the appellant had previously told her that he had been fondling her since she was two years old. In further amplification, the aunt testified that on previous occasions when enquiring about what was troubling B, she would reply that nothing was wrong. However it was only on the occasion in April 2008 that the aunt expressly asked if the appellant had assaulted her. Prior to that she never asked about the appellant's behavior towards B, but focused rather on B's general behavior as to why she was moody or acting in what the aunt described as a bombastic fashion.

23. The initial accusations of sexual molestation did not surprise the aunt since, as B was growing up, the appellant would continually refuse to allow B to stay over on the farm, offering lame excuses. B's revelations also explained her change of attitude as she had become more bombastic and was moody even though there remained an otherwise close bond between the aunt and B.

24. During cross examination the aunt explained that B's mother was only informed on the following day of B's accusations against the appellant. The aunt considered that the mother was not emotionally prepared for this after being humiliated at the wedding by the appellant. The aunt was also concerned about unsettling B's mother while B was not with her and further believed that it was preferable for B's emotional state, which included being scared of the repercussions of her revelations, to be calmed by direct contact with her mother. However force of circumstance made it necessary to speak to her sister over the telephone on the Tuesday.

25. The aunt also revealed that when B was still very young, she would not want to return home with her family at the end of their stay on the farm and would throw a tantrum. On these occasions the aunt would tell B to compose herself otherwise her parents might not allow her to visit again. The aunt accepted that on some occasions B's reluctance to go home stemmed from the perception that her step-brother was being preferred.

26. After B disclosed that the appellant had fondled her, the aunt tried to establish indirectly whether the appellant had sexual intercourse with her. She asked whether he had done other things to her to which she replied that he had. The aunt asked if he had ever penetrated her. B replied that she did not understand. The aunt then enquired if the appellant had ever removed B's panties and whether his private parts had ever entered her body. B remained silent for a moment and then said yes.

27. The aunt followed up by enquiring what the appellant had done. B then broke down and cried. She said that the appellant had sex; that he had placed his private part inside her but did not penetrate her. She however described how she would cry out because his action of entering her was painful. The appellant would stop for a moment when she cried out. He would then resume until she cried out when it again became sore. The appellant would however desist if it was very painful for her. The aunt then expressly asked if he had inserted his private part and B said that he had. The aunt then told her that this was what penetration meant.

28. The aunt understood from B's subsequent replies that the first occasion appellant had sexual intercourse with B was when she was in standard 3. This therefore occurred when she had turned twelve or shortly before. At that time their family was living at the home of the appellant's mother. B claimed that on weekends when her mother was at work the appellant would take her to his bedroom, lock the door and have sex with her. If the appellant's mother enquired about what he was doing in the bedroom, when B cried out, he would answer that she was being reprimanded and that he had spanked her.

29. The aunt indicated that B appeared nervous and had not wanted to reveal these details. The aunt explained that she had elicited the details, a little at a time, after assuring B that even if she had been touched it would not be right. The aunt told her that these things occurred to many children, and she must talk about them because they were wrong. In this manner B progressively revealed what she claimed the appellant had done to her.

30. B told her aunt that she did not know how many times the appellant had *"raped"* her. She however said that it occurred mostly on the weekend. It is evident that on these occasions the appellant would withdraw his penis and then satisfy

himself by masturbating on her. B told the aunt that after having sex he would clean up with his underpants or her panties, hide the garment in the cupboard and later put it in the wash.

31. The aunt also explained to B that the appellant would carry on unless her mother was told and that they could then take it further. B's mother was informed and it was agreed that B would not return to the appellant' house but remain with the aunt. A short time later, and after confronting the appellant with B's disclosure, the mother left the house and also came to stay on her sister's farm.

32. The next state witness was Dr Riester. She had mainly worked in child abuse clinics for close to decade. Dr Riester had been on duty at the Kidz Clinic on 1 July 2008 when B was brought in for examination. She was 13 years old at the time and in full puberty. She claimed not to have experienced consensual sex. On examination her hymen demonstrated clear evidence of past sexual abuse which initially took the form of fondling, digital penetration or of penetration by the tip of the penis. This was evident from an old tear to part of the hymen that had now healed. According to the doctor, B readily allowed her genitalia to be touched during the examination. This was to be expected in sexual abuse cases and corroborated her clinical findings.

33. Dr Riester confirmed that there was no evidence of *"regular episodes of full penetration"*. She also accepted that the scarring and other forensic evidence was inconsistent with the appellant having been raped, in the sense of there being full penetration on a regular basis over the two year period that B had mentioned to her aunt. In regard to the contents of her statement, the doctor confirmed that during the examination B never claimed that there was full penetration; B had told her that the appellant would stop when she cried with pain although he had not fully inserted his penis. The doctor said in her testimony that:" *She told me that he only put the tip of the penis near her"* (*pp15- 16 of the*

record). The doctor confirmed that B had initially claimed that he had raped her twice a week but when the medical evidence did not indicate full penetration B was asked again and the reply was that when she cried, he stopped and would not insert his penis fully even when he resumed.

34. B then testified. This was through an intermediary as provided for in terms of section 170A of the CPA. She testified from a separate room via a closed circuit television monitor. Save for the presence of B's mother and aunt, this part of the proceedings was held *in camera.*

35. B claimed that the appellant disclosed to her that he had been touching her since she was two years of age. Her own recollection was that he had molested her since grade 1 when she would have been seven years old. She effectively repeated the account she had provided to her aunt (as related by the latter in her testimony to the court) of sexual molestation at the hands of the appellant. She also related how the appellant would play with her and wrestle on the bed. He would then touch her breasts, buttocks and private parts. This occurred at least twice a week. Although she did not want him to do it she could do nothing as he would punish her by making her do extra chores around the house. The appellant would try and manipulate her in this way and if he did satisfy himself with her, B would be rewarded by not having to do the chores or was promised a gift. He also tried to manipulate B's immaturity and vulnerability as a step-child by his lowering her self-esteem or creating a feeling of being needed; on some occasions threatening that he would tell her mother that she is a slut and a whore who led him on at which point he would then say that he would make sure that she would not see her mother again, while on other occasions he would call her his girlfriend and attempt to convince her that there was nothing wrong since he was not her real father.

36. The effect of his playing on her emotions and attempting to distort her value system is demonstrated by the following passages during her testimony. When

asked to confirm that she no longer wished to stay with the appellant she said that: "*Om die waarheid te se ek het nie eintlik 'n probleem gehad om by hom te bly nie. My stiefpa was nog altyd my stiefpa gewees. Die enigste pa wat ek ….* (" *To be truthful I do not actually have a problem to live with him. My step-father has always remained my step-father. The only father I …"*).

It is apparent from what was said next by defence counsel and the court that B could not finish the sentence because of the emotional effect the words she was expressing were having on her.

37. B claimed that the appellant had stopped sexually molesting her for a while. This occurred when an older cousin alleged that the appellant had also sexually molested her. The sexual molestation however resumed when they moved into a block of flats in about 2005 when she was in grade 4. She then effectively repeated what her aunt had related to the court concerning what had been told to her. B described how he would take her panties off and undress her, kiss her in inappropriate regions of her body and attempt to penetrate her. This was painful and he would stop when she cried out. He would be naked. On one occasion he even attempted to have her on top of him but it was too painful and he stopped. She explained that he would lie on her and rub his penis against her and then attempt to penetrate her. She would resist by crossing her legs and he would attempt to separate them. When she pleaded that he should not do it, it was then that he said that there was nothing wrong as he was not her real father.

38. On the critical issue of whether there had been penetration she said that he had not fully inserted his penis into her vagina. There were occasions when he would not attempt penetration but would simulate sex on top of her and masturbate. During cross examination she repeated that the appellant would on occasion insert his penis and attempt to have full penetration but she would cry and he would immediately withdraw. She confirmed that on these occasions it was not simply rubbing his penis on her body but that he would actually insert it , although

she could not say how deeply; she did not look. B however mentioned the region which hurt when he penetrated.

39. When questioned about the words used in her statement that the appellant had inserted his penis in her vagina she said that she had used other terms to describe them as she did not like using these words with people. Later under cross examination she also explained that the appellant had told her that she was no longer a virgin and she had conveyed to the doctor how the appellant had related what was taking place between them.

40. Nonetheless she remained steadfast that there was penetration but not fully " *omdat ek dit nie toegelaat het nie"* .Literally it means;" *because I had not allowed it* "; in context it meant " *"I had prevented it from occurring"*.

B further said under cross examination that after she cried in pain when the appellant attempted to penetrate further, he would then withdraw, on occasion attempt to penetrate again, and as he was about to ejaculate would withdraw his penis and ejaculate on her. She differentiated this from a completed act of full sexual intercourse.

41. B testified that this would take place in the main bedroom and generally occur on Friday evenings when her mother was in the bath and her step-brother was already asleep. It also occurred on either a Saturday night or Sunday morning. On the occasions when her mother heard her cry out, B would explain that her stepfather had reprimanded her or had hit her.

42. Aside from these acts, on week nights the appellant would feel her private parts when entering her room to say goodnight. He would do the same to her niece who slept in the same bedroom.

43. During cross examination she used the phrase; " *dan sal hy op my kom"* ("*then he would come on me*"). When asked to explain how she came to use this term she said that the appellant had taught it to her. She said that he had taught her everything. Counsel enquired how the appellant had taught her. She said that it was by watching DVDs of couples having sex; the appellant would show the DVDs on Saturday mornings after her mother had gone to work and while her step-brother was playing outside.

44. B said that she had told her cousin about the sexual molestations, but not to an adult until her aunt asked her.

When asked to explain why she told her aunt what had occurred when she would not tell her own mother for fear of being taken away from her, B replied that she knew that her aunt would be able to deal with her step-father whereas her mother was too scared to do anything. B also confirmed that when she was in grade 4 the appellant started preventing her from spending school holidays with her aunt.

45. The appellant testified in his own defence. He denied ever indecently assaulted B or sexually molesting her in any way. He pertinently denied having sexual intercourse with her or penetrating her. He claimed that B had a motive for lying and explained that she was angry because he had asked her mother to leave the house. The appellant claimed that if he had not told B's mother to leave the house the complaint of sexual molestation would not have been laid. He however was forced to concede that before his wife had left him, or been told to leave, B had already made the allegations of sexual molestation to her aunt.

46. Aside from admitting that on some Saturdays he would be off work while B's mother was at work and that his niece claimed to have been molested by him, the appellant denied every allegation made against him.

47. The appellant sought to explain the injuries to B's vagina which indicated that there had been some attempt to penetrate her. He mentioned that there had been some toys left in the bath and she had sat on one of them. He blamed his former lawyer for this explanation not being previously raised. It had not been put to either the doctor or to B.

THE CONVICTION

48. The forensic evidence is clear. B's hymen was thick with two clefts. The tears were old and the injuries to her vagina were consistent with sexual abuse in the form of fondling, digital penetration and penetration of the tip of the penis. The learned magistrate correctly found that this constituted strong objective evidence which corroborated B's evidence of the extent of sexual molestation.

49. In order to prove common law rape under count 2 the state had to demonstrate beyond a reasonable doubt that the appellant had unlawful intercourse with B without her consent. The appellant's defence was that he never had intercourse with her and that even according to B's evidence he had gone no further than to rub his private parts on her body. Moreover it was argued that there was no rape since there was no full penetration.

50. In regard to the evidence, the admitted forensic report is clear. There had been tears consistent with some penetration albeit not fully. The only question was how it occurred. The learned magistrate correctly rejected the belated explanation that B had sat on one of her step-brother's toys while in the bath.

The evidence of B and its detail, as correctly found by the trial court leaves no doubt that the internal injuries occurred because the appellant had penetrated her with his penis, albeit not fully. The extent of the sexual degradation and the descriptive clarity of her evidence were not made up. The learned magistrate

took care in appreciating all the concerns of accepting the evidence of a child victim in a sexual offence case, leaving aside a court's entitlement to weigh such evidence in accordance with the relevant provisions mentioned earlier of the Sexual Offences Act and the CPA .

51. That leaves the question of what constitutes common law rape. This was well settled in our law. It was defined as the unlawful and intentional act of sexual intercourse with a female without her consent . See generally *Principles of Criminal Law* (3rd ed.) Jonathan Burchell at p706 and the extension of the common law in *Masiya v Director of Public Prosecutions, Pretoria and another* 2007(5) SA 30 (CC) at paras 39 to 44.

Our common law held that the slightest penetration was sufficient to complete the act of sexual intercourse. Burchell (3rd edition) puts it as follows at 706; "*it is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured"* . See cases such as *S v K* 1972 (2) SA 898 (A) at 900C where rape occurred even though the woman's hymen was not ruptured. The author sites an extract at ftn 48 from EH East in 1803 (1 *Pleas of the Crown* 437) :

> "*The quick sense of honour, the pride of virtue in the female heart … is already violated past redemption and the injurious consequences to society are in every respect complete".*

Today we would speak of an infringement to one of the most significant constitutional rights which complement the right to life; namely the right to dignity which encompasses the entitlement not to be violated or to suffer degradation.

52. In my view the learned magistrate was correct to convict the appellant of common law rape in that the State had proven beyond a reasonable doubt that there was sexual intercourse constituted by the partial penetration of B on a

number of occasions prior to 16 December 2007 and when B was between 11 and 12 years of age. It is equally clear that under the definition of rape in terms of the Sexual Offences Act as set out, the appellant had repeatedly raped B since that Act came into force until the end of March 2008 during which period B was still 12 years old.

53. There was also overwhelming evidence of indecent assaults regularly perpetrated by the appellant on B which included touching her on her buttocks, breasts and private parts at a much younger age and as she developed during puberty by licking or kissing her private parts and also at this subsequent stage when she was 11 and 12 years of age by simulating sexual intercourse on top of her and other acts focused on but falling short of penetrating here vagina. Although the learned magistrate did not indicate when the acts of indecent assault commenced, it is apparent from reading the judgment as a whole that he considered that it commenced at least by the time B was in grade 1 when she would have been 8 years old.

54. The appeal against each of the convictions fails.

SENTENCE

55. I am satisfied that the learned regional court magistrate properly considered whether there were substantial and compelling circumstances to deviate from the minimum sentences provided for in respect of each offence under the relevant provisions of section 51 of the CLAA as read with the Schedule 2 and also carefully considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the offender including his moral blameworthiness and the interests of society by which I include the interests of the victim and her family.

56. The only real challenges to the magistrate's decision on sentence were the contention that the nature of the offence did not deserve the severest of sentences, which it was argued was reserved for the worst type of sexual offence where violence was involved, and that the sentence induces a sense of shock.

    Counsel however accepted that under Part 1 of Schedule 2 of the CLAA the minimum sentence for rape as contemplated in section 3 of the Sexual Offences Act where the victim is under the age of 16 years is life imprisonment (see subpara (b)(i)) in respect of rape). It was therefore necessary for the court to find the existence of substantial and compelling circumstances before it was entitled to impose a lesser sentence.

57. In considering whether substantial and compelling circumstances were present, the learned magistrate had the advantage of a probation officer's pre-sentence report which contained an assessment of the appellant and set out his personal circumstances.

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58. The appellant was a first offender and is the sole bread winner. He was 48 years of age at the time of sentencing, was in a relationship and had a young child then aged just over a year. He also has another child from an earlier marriage who was then 22 years old. He was brought up in a stable family environment and had been in secure employment for 15 years until he was dismissed after the present convictions were handed down. The appellant had suffered two heart attacks and was on medication.

59. The court *a quo* took into account the impact a custodial sentence would have on the rights of the appellant's children who were being maintained by him (*M v The State and the Centre for Child Law Institute* 2008 (3) SACR 332 (CC)and found that the girlfriend with whom he has the baby child has not sought financial assistance even before he was incarcerated (which was only on conviction as he

had been released on warning until then) and that he could not claim to be a primary care-giver.

60. The court however accepted that the accused was in poor health and had lost his employment as a result of the conviction. It also accepted that there was not full penetration but correctly found that this did not demonstrate compassion, rather that the appellant was still in the process of sexually grooming B while she was not yet fully developed to allow full penetration.

The court also took into account the lack of remorse and the failure of the appellant to come to terms with his crimes.

61. The nature of the crime and its effect on the victim and society at large has been set out in many important cases. In *Carmichael v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 45 the Constitutional Court said that *"Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self determination of South African women".*

62. Earlier I referred to rape as infringing the right to dignity, which compliments the right to life as the most significant of our constitutional values (see generally the individual judgments of the constitutional court justices in *S v Makwanyane* 1995(3) SA 391 (CC)). The right to dignity encompasses the entitlement to self-respect, not to be violated or to suffer degradation.

63. After B had revealed the sexual abuse to which she had been subjected, she was assessed by the Kidz Clinic after a referral by the South African Police Service at Boksburg. The clinic assesses and treats abused children. B was then 13 years old and in grade 7.

The finding was that B's cognitive and communication skills were age appropriate and she could tell the difference between right and wrong. While the social worker who conducted the assessment found that B had developed attachments with significant adults and was willing to talk freely, she feared certain men such as the appellant, was emotionally unstable and was "*not very confident* ".

64. The social worker also conducted a follow up assessment in March 2012 where B claimed that she felt manipulated by the appellant and remained scared of him if he were to come out of prison. She felt that he had ruined her life. . She did not wish to see him again and was upset and hurt by him. As appears later, she experienced a deep sense of betrayal.

65. B revealed that her behavior had changed, that she continued to be traumatised and has regularly experienced flashbacks to the rapes. Since the rapes she suffers from nightmares and is aggressive. The social worker confirmed that these symptoms were typical of abused children.

66. B's letter written in March 2013 after the appellant was convicted provides a significant insight into a child betrayed. The prosecution produced it into evidence during the sentencing phase. In the letter B expressed her resentment and anger as well as an entitlement to exact what she perceived to be just punishment for having been deprived of a normal upbringing- an upbringing which he took away from her and which is lost forever. It is also evident that as she has developed and has lived outside the environment he created she has gained a deeper insight into how he manipulated her and the extent to which he abused the custodial relationship of a surrogate father:

> "*Ek … was verskriklik kwaad gewees vir hom omdat hy aan my 'goed' gedoen het. Ek was hartseer omdat hy my enigste pa was wat ek nooit gehad het nie. ….. Ek voel hy verdien wat hy kry. Hy kan dan elke dag voel en dink aan wat hy aan my gedoen het. Hy voel dalk nou ek het sy*

lewe geruineer maar wat hy aan my gedoen het was 10 keer erger so hy verdien als wat sy kant toe kom"

[Loosely translated: "I... was extremely angry against him because he did 'things' to me. I was heart-sore because he was my only father who I had never had. I feel he deserves what he gets. In that way every day he can then feel and think of what he did to me. He no doubt feels that I have ruined his life but what he did to me was ten times worse so he deserves everything that comes his way."

67. In the bluntest of terms H abused a child over whom he had control and whom he should have nurtured and protected while she was growing up. Instead he sought to groom her for sex from early childhood and into puberty. He engendered in her a sense of fear and self-loathing by playing on her vulnerability by suggesting that she may be taken from her mother and by holding her responsible for what she was forced to endure.

68. To suggest that there was little violence because the appellant would stop when she cried out is to ignore what underpins the triad of factors that are to be taken into account when considering sentencing. The effect on the victim's dignity and self-worth in cases of sexual abuse are as brutal as the severest lashing, if not more so; the scars they leave may be indelible and endure for the victim's entire lifetime.

69. The appellant however contended that *S v Vilakazi* 2009 (1) SACR 552 (SCA) was in point and relied on the following passage at [55];

"In this case there was no extraneous violence and no physical injury was caused other than physical injury inherent in the offence. There was also no threat of extraneous violence of any kind."

70. In my respectful view this would take the passage out of context. These observations were case specific and were qualified by a number of considerations mentioned in that judgment and encapsulated at [54];

> *"'I should not be understood to mean that the absence of any one or more of the various aggravating features specified in the Act necessarily justifies a departure from the prescribed sentence for that would suggest that the maximum sentence is reserved for only extreme cases. That was not so prior to the Act and it is not the case now. There comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more. Whether and if so to what extent, the absence of other aggravating circumstances might diminish the offender's culpability will naturally depend upon the particular circumstances.'*

71. In the recent case of *S v Kwanape* 2014 (1) SACR 405 (SCA) which was only , reported after we heard argument and in response to reliance placed by the appellant on a number of cases, Petse AJA referring to the last mentioned passage in V*ilakazi* said at para [16]

> "*But, as this court made plain in S v Fraser 'it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. Ultimately each case must be decided in the light of its peculiar facts*.

The court then continued (at [17])

> *"Rape is undeniably a despicable crime. In N v T it was described as 'a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In S v Chapman this court said it is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. Its gravity in this*

case is aggravated by the fact that the victim was a 12-year-old child. In S v Jansen rape of a child was said to be 'an appalling and perverse abuse of male power'."

72. In the present case there was also the emotional manipulation of a vulnerable child. B felt unable to communicate to her mother what was taking place because the appellant led her to believe that she was to blame and that she had to bear the guilt and endure the continued invasion of her body because of something inherently bad within her which made him do these things to her, or because she was ashamed as if it was her tainted soul that led her to be singled out and violated in such an enduring manner. And what of the immeasurable loss of all the milestones a young girl in a free country is entitled to enjoy when passing through puberty and the effect of the degradation of her body and psyche in the medium to long term. By whatever measure, B endured physical and psychological trauma and the reports make it plain that the prognosis is not good, based on similar cases.

73. This is not the case of a single rape, but multiple rapes committed within what should be the sanctuary of the home by a person on whom she was entirely dependent and who was expected to provide guidance, nurturing and be a role model. It is difficult to comprehend how B can be expected to enjoy the ordinary milestones of a girl becoming aware of her body, finding love and being in a settled relationship.

74. In my view the imposition of the life sentences does not induce a sense of shock nor is it disproportionate particularly having regard to the values to which we subscribe and the application of section 51 of the CLAA.

As stated earlier there was no real challenge to the minimum sentence imposed in respect of the indecent assault conviction under Part 3 of the Second Schedule as read with section 51 of the CLAA. These assaults commenced when B was very young and were part and parcel of her sexual grooming by the appellant, progressing to more invasive intrusions as she developed.

75. Accordingly there are no grounds for upsetting the sentences imposed by the court *a quo*.

GENERAL

76. In *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnan JA said:

> "*Despite our particularly strong commitment to the promotion of the rights of victims of sexual crimes, particularly rape, we still do not have a clear strategy for dealing inclusively with it, either at a primary preventative or secondary protective level. The result is that, as alarmed as we may be by the reported incidence of rape, the true extent of the scourge appears far more widespread.* (at [22])

The court continued;

> "*Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming."* (at [23])

77. This case was one of three appeals heard during the course of the week that involved the rape of an under-aged girl by someone who either was her custodian or whom she knew and trusted. The abuse of a custodial relationship

or position of trust in all three cases is disturbing. More generally speaking there appears to be no multi-disciplined response that attempts to devise and implement appropriate programs at schools and within the communities that would combine the wisdom and experience of those such as sociologists, community and religious leaders, educators NGOs and the local police. Ponnan JA in the above cited passage from Matyityi referred to the absence of an inclusive strategy at primary and secondary levels. The incidence of rape and other cases of sexual abuse suggests that it is vital to implement an orchestrated initiative that will have the broadest reach to create respect, awareness and provide accessible avenues of reporting.

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78. Finally it is appropriate that this judgment also speaks to the victim. B was continually subjected to sexual molestation from the time she first would have been able to recall events. The appellant sexually groomed her and attempted to manipulate her psychologically. As B poignantly noted in her letter, the appellant was the only father figure she knew. B's inner strength and moral compass should be acknowledged and is inspirational.

ORDER

79. The appeal on both the convictions and the sentences imposed are dismissed.

VALLY, J:

I agree.

SPILG, J **VALLY, J**

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DATE OF JUDMENT: 16 September 2014

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