REPUBLIC OF SOUTH AFRICA

HIGH COURT, NORTH GAUTENG PROVINCIAL DIVISION (PRETORIA)

(1) REPORTABLE: Electronic reporting.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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Appeal Case No. A534/2013

In the matter between:

AG Appellant

versus

The State Respondent

JUDGMENT

MEYER, J

[1] This is an appeal against the appellant's convictions by the regional court, Secunda on a charge of indecent assault and on two charges of rape of his minor stepdaughter (the complainant). He was sentenced to five years' imprisonment pursuant to his conviction of indecent assault and to fifteen years' imprisonment

pursuant to each conviction of rape. In terms of the order of the trial court, the sentences, which total a period of thirty-five years' imprisonment, are to run concurrently and the appellant is accordingly to serve an effective period of fifteen years' imprisonment.

[2] The complainant was born on 26 August 1997. She has a brother who is two years older than her. Their natural parents divorced more than a decade ago. Since 2001 (when the complainant was three years old), she has been residing in Brackenfell, Cape Town with her father and his life partner, who was referred to in the evidence as the complainant's stepmother. The complainant's brother also resided with them until he went to high school. Since then he has been residing with his mother and the appellant. The complainant's mother and the appellant married each other during 2001. They resided in Randfontein until 2007 and in Secunda since then. The complainant and her brother (until he started to reside with their mother and stepfather) used to visit their mother and stepfather, the appellant, in Randfontein and later on in Secunda during the June and December holidays.

[3] The trial court accepted the complainant's evidence that the appellant inserted his finger into her vagina on occasions since she was about eight years old until she was about ten years old at times when she visited her mother and him in Randfontein (count 1), that he had sexual intercourse with her since she was about ten years old until she was about twelve years old on occasions when she visited them in Secunda (count 2) and that he once had sexual intercourse with her when they were on holiday at a resort in Tugela (count 3). The trial court disbelieved the appellant that he did not

indecently assault or rape the complainant. I need not elaborate any further on the graphic detail of the evidence of the complainant or that of the appellant.

[4] The trial commenced on 22 May 2012 when the complainant was only fourteen years of age. The state prosecutor brought an application in terms of s 170(A) of the Criminal Procedure Act 51 of 1977 (the Act) for the appointment of an intermediary in order to enable the complainant to give her evidence through that intermediary. Section 170(A)(1) of the Act provides as follows:

'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary'.

[5] The state's application was founded thereon that given the age of the complainant, the relationship of daughter and stepfather, the nature of the charges against the appellant and the nature of the evidence the complainant was to give against him, she would be exposed to undue mental stress or suffering if she were to testify at his criminal trial. The appellant's opposition to this application was essentially based on the contention that the complainant's age of fourteen did not warrant the appointment of an intermediary. The trial court agreed with the state and held that the complainant would be exposed to undue mental stress if she was to give her evidence other than through an intermediary.

[6] The appellant argues that the trial court's decision to invoke the provisions of s 170(A) of the Act without having required that appropriate and sufficient evidence be

adduced in order to have exercised his discretion whether s 170(A) should be invoked or not, constitutes an improper exercise of his discretion and a gross irregularity that warrants the setting aside of the convictions.

[7] The appellant relies on *S v Mathebula* 1996 (2) SACR 231 (T), at 234b, wherein Stafford J referred with approval to the following comment by the authors of one of the leading commentaries on the Act:

'In Kriegler Hiemstra: *Suid-Afrikaanse Strafproses* (5de uitg) op 433 huldig die geleerde skrywer die volgende standpunt met verwysing na die aanstelling van 'n tussenganger:

> 'Jeugdigheid as sodanig is nie voldoende nie. Die hof sal hom deur 'n verskeidenheid faktore laat lei, byvoorbeeld die intelligensie, ouderdom, geslag en persoonlikheid van die getuie, die aard van die getuienis en dies meer. Dit sal, ooreenkomstig gevestigde beginsels, nodig wees om die partye te ken voordat die besluit geneem word.'

[8] The appellant also relies on *S v Stefaans* 1999 (1) SACR 182 (C) at 187i – 188i in which judgment Mitchell AJ set out a number of guidelines 'as to how and in what circumstances the section should be invoked' but also recording '… that such guidelines can only be given in broad terms, as each case must be dealt with on its own merits.' In support of his argument the appellant relies on the seventh guideline stated by Mitchell AJ, which is:

'If the application is opposed, the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a proper discretion as to whether the section should be invoked or not.; Such evidence may, in the case of a younger witness in a matter clearly involving mental or physical trauma, consists of nothing more than evidence of the nature of the charge and the age of the witness. In

other matters, evidence of a suitably qualified expert, whether that be a social worker, psychologist or psychiatrist, may be necessary.'[1]

[9] The appellant's argument is rather refuted by the *Stefaans* judgment. The complainant is 'a younger witness in a matter clearly involving mental or physical trauma' where the evidence in accordance with the guideline laid down in *Stefaans* may 'consist of nothing more than evidence of the nature of the charge and the age of the witness.'

[10] Southwood J, in *Kerkhoff v Minister of Justice and Constitutional development and others* 2011 (2) SACR 109 (GNP), para [7], said that-

'[i]t is clear that the [s 170(A)(1)] enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed. It is not concerned with whether the child is competent to give evidence or whether the child's evidence is admissible, credible or reliable. These are issues which will arise in the trial and will be decided by the court in the light of all the evidence. It is significant that s 170A makes provision for a simple procedure for the appointment of an intermediary and essential jurisdictional fact, ie when it appears to the court that the relevant witness would be exposed to undue mental stress and suffering; and that no provision is made for the accused to oppose the appointment of an intermediary. While an accused must have a right to be heard on the issue, it seems to me that, in the case of a witness of 10 or 11, it is very unlikely that a court would conclude that it is not in the interests of the witness to appoint an intermediary. As pointed out by the Constitutional Court, the appointment of an intermediary will ensure that the trial is fair.'

[1] The appellant also refers to the judgments of Mogoeng JP in *S v Booi and Another* 2005 (1) SACR 599 (B) and of Plasket J in *S v Dayimani* 2006 (2) SACR 594 (ECD).

[11] The same holds true for a fourteen year old complainant in a case involving sexual offences. Ngcobo J, in *DPP Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC), paras [108] – [109], said the following:

'[108] A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intense and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological wellbeing of the child complainant as the original abusive act was. Indeed, High Courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants 'to further trauma possibly as severe as the trauma caused by the crime'. It is precisely this secondary trauma that s 170A(1) seeks to prevent.

[109] Having regard to this, it must be accepted that a child complainant in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering. The object of s 170(A)(1) read with s 170(A)(3) is precisely to prevent this risk of exposure. It does this by making provision for the child to testify through the intermediary away from the accused and in a child-friendly room.'

[12] The young fourteen year old complainant in this matter faced a high risk of exposure to undue mental stress or suffering if she testified without the assistance of an intermediary and in the presence of her stepfather. I am in all the circumstances satisfied that the learned regional magistrate properly exercised his discretion in invoking the provisions of s 170(A).

[13] The appellant argues that the trial court, without hearing any address from his legal representative and without considering relevant aspects which a court is obliged to take into account in determining the admissibility of evidence under s 227(2) of the Act,[2] '… refused cross-examination of the complainant in respect of her previous sexual encounter with a person other than the Appellant'. Such evidence, the appellant argues, was introduced by the state and his legal representative was accordingly entitled to cross-examine witnesses, including the complainant, '…in respect of the complainant's previous sexual encounters'. Such evidence, the appellant further argues, was relevant and should have been allowed in the light of the J88 that was introduced by the state regarding Dr DM Andrews' clinical examination of the complainant on 8 March 2011 (the charges relate to incidents between 2007 – 2010) and his conclusion recorded therein that his findings are '… consistent with vaginal penetration more than 6 to 12 days ago.' This conclusion, the appellant argues, '… indicates that there was recent vaginal penetration of the complainant' and the trial court should '… either have called Dr Andrews to clarify his report or should have given the appellant the benefit of the doubt that the complainant had sexual encounters a few

[2] Section 227(2) of the Act provides that '[n]o evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross-examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless – (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or (b) such evidence has been introduced by the prosecution.' A court is in terms of s 227(4) enjoined to grant an application contemplated in s 227(2) 'only if it is satisfied that such evidence or questioning is relevant to the proceedings pending before the court' and relevance is to be determined with reference to the factors listed in s 227(5). A court is in terms of s 227(6) prohibited from granting such application 'if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant- (a) is more likely to have consented to the offence being tried; or (b) is less worthy of belief.'

days before the J88 was compiled'. There is no merit in these contentions of the appellant.

[14] Dr Andrews' medical examination revealed that the complainant had a torn hymen and his conclusion as recorded in the J88 is clear and required no clarification.[3] His conclusion does not indicate recent vaginal penetration, but that there was no penetration within six to twelve days of his medical examination of the complainant.

[15] It is necessary to refer in some detail to the rest of the evidence that is relevant to the appellant's contentions. The sequence in which the state called its witnesses was this: first the complainant, followed by her stepmother, father, brother and mother.

[16] The complainant testified in chief that during the December 2010 school holiday she confided in her brother by telling him that the appellant rapes and molests her. In this regard she testified as follows:

'And how did you eventually tell someone what was happening to you? --- My broer het verlede Desember by my pa kom kuier en my pa hulle was by die werk gewees en ons het eendag, toe sit ons in die kombuis en toe sê hy vir my as ek my grootste geheim vir hom vertel, sal hy syne vir my vertel en toe het ek vir hom vertel.

What did you tell him? --- Ek het vir hom vertel dat oom [AG] my verkrag en molester.

And what did your brother say? --- Hy het my geglo.

And what did he say he was going to do about it? --- Ek het vir hom gevra om vir niemand te vertel nie en hy het gesê hy sal nie.'

[3] See: *S v MM* 2012 (2) SACR (SCA), paras [15] and [24].

[17] The appellant's legal representative, Ms Coetzee, was aware of the fact that the complainant's brother stated in his witness statement that the complainant had said to him that the appellant molests her and that she had sex with someone else who was not the appellant. The following transpired during Ms Coetzee's cross-examination of the complainant:

'… Het jy enigsens enigiets anders aan [J] meegedeel rakende verhoudings met ander vriende? --- Nee. Nooit nie? --- Nee, ek het nie met hom gepraat oor wat by my skool aangaan nie.

Kêrels? --- Nee.

Ander mense met wie jy sou seksueel verkeer het? --- Nee.

Prosecutor: Your Worship, the State objects, it is boarding on character evidence.

Mev Coetzee: Edelagbare, ek neem aan dat die (tussenbei) …

Hof: Ja, (onhoorbaar) …

Mev Coetzee: Edelagbare, ek is bewus daarvan dat ek daar op die grens, die grens daarvan betree, maar ek is ook bewus van wat is die inhoud van die verklaring van die broer en as ek dit nie nou aan haar stel nie, dan gaan ek maar later haar weer moet laat terugroep. So sy moet vir my, daar gaan moet getuienis gelei word deur die broer.

Hof: U kan aan haar stel wat in die broer se verklaring vervat is sodat sy daarop kan antwoord.

Mev Coetzee: Dankie Edelagbare. [J], jou broer het gesê: my suster het my ook al aan my vertel dat sy seks gehad het met iemand, maar nie oom [AG] nie. --- Ek het dit nooit vir hom vertel nie. Ek het vir hom vertel dat ek verkrag was deur oom [AG] en dit is al.

. . .

… ons was laas gewees by die getuienis van jou, by die verklaring van jou broer waarin ek die stelling maak dat u broer sê dat jy ook seks met iemand anders gehad het, met 'n ander man. --- Okay. Ek het nie gehad nie en ek het dit nooit vir hom gesê nie.

So jy vertel, jy sê jou broer vertel 'n leuen? --- Ja.'

[18] The submission that the trial court, without hearing any address from the appellant's legal representative, refused cross-examination of the complainant relating to any previous sexual experience is patently factually incorrect. The complainant under cross-examination denied that she had any sexual experience with anyone other than the appellant.

[19] Mrs Coetzee also cross-examined the complainant's stepmother on whether the complainant had any other relationships and on the statement which the complainant allegedly made to her brother relating to her having had sexual intercourse with a person other than the appellant, thus:

'Mevrou, het [E] enige verhoudings gehad met ander seuns?

Prosecutor: Your Worship, I am just going to object to the question, it is character evidence again. --- Nee, sy was op daardie stadium 10 en 12 jaar. Ek bedoel sy het maatjies, die bure oorkant ons is goeie maatjies met haar. Daar het nog net een seuntjie by ons huis kom kuier. Sy het nie kêrels en sulke goed nie.

Mev Coetzee: Dra u enige kennis daarvan dat [J] sou kennis dra dat daar, dat sy sou beweer dat sy seks gehad het met 'n ander man. --- Dit is 'n totale, ek sal sê dit is onsin. …'

[20] The undisputed evidence in chief of the complainant's father was that his son had told him during a telephone conversation on 14 February 2011 that the complainant had confided in him that the appellant had raped her. In this regard he testified that his son had told him-

'… dat hy en [E] het in die Desember in Standerd 10 toe hulle by ons was met die vakansie, voordat hulle weg is, het hulle met mekaar 'n gesprek gehad of hulle geheime het wat die een nie van weet nie of wat beide nie van weet nie en [E] het toe vir hom gesê dat sy het 'n geheim wat hy vir niemand van moet vertel nie en dit is dat [AG] het haar verkrag. Dit was die gesprek op die 14de Februarie.'

Mrs Coetzee did not cross-examine the complainant's father on this aspect of his evidence-in-chief.

[21] The evidence in chief of the complainant's brother regarding the statement which she had made to him during December 2010, was the following:

'[E] het blykbaar gedurende Desember 2010 aan u iets vertel kan jy net vir ons 'n bietjie meer inligting gee en net vir ons sê hoe het dit gebeur dat sy vir jou vertel het? --- Sy het vir my gevra of ek enige geheime het wat ek haar wil vertel. Ek het gesê nee en sy het vir my gesê dat oom [AG] het haar gemolesteer en dat sy het seks gehad met iemand maar dat dit nie oom [AG] was nie.'

[22] The following transpired when he was cross-examined on the same issue by Ms Coetzee on behalf of the appellant:

'Me. Coetzee: Dankie edelagbare. Vertel vir my jy het weggespring met getuienis rakende 'n geheim wat jou suster aan jou vertel en toe het sy, jy gesê jy het nie 'n geheim nie en toe het sy vir jou kommentaar daarop gelewer. Gee vir my net 'n herhaling van dit wat jy gesê het waarmee jy weggespring het? --- Sy het gevra het ek enige geheime wat ek haar wil vertel waarin ek gesê het nee toe sê ek vir haar presies dieselfde toe sê sy dat oom [AG] het haar gemolesteer en sy het seks gehad maar dit was nie met hom nie.

Prosecutor: I am going to object to that your worship. That is dwell on it. It is inadmissible. It is character evidence.

Hof: Relevantheid Me. Coetzee?

Me. Coetzee: Edelagbare inderdaad … (tussenbeide)

Hof: Getuienis van vorige seksuele omgang is slegs relevant as die kliënt se verweer een van toestemming is wat dit nie is nie so dit is nie relevant nie en derhalwe ontoelaatbaar.

Me. Coetzee: Goed edelagbare daar is op hierdie stadium 'n regsmediese verslag ingedien met 'n skeur aangedui in die hymen en uiteraard is dit nou toelaatbaar aangegee en aanvaar ook deur die hof sonder die getuienis van die mediese dokter maar waarop daar 'n indikasie is en suspisie is dat dit deur die beskuldigde toegedien is terwyl dit wel deur miskien 'n seksuele ander interaksie was.

Hof: Die antwoord wat die getuie gegee het is reeds op rekord en die hof sal dit toelaat.

Me. Coetzee: Dankie edelagbare.

Hof: Enige verdere kruisondervraging daaroor egter gaan die hof nie toelaat nie.

Me. Coetzee: Dankie.

[23] The state did not introduce evidence as to any previous sexual experience or conduct of the complainant as contemplated in s 227(2)(b) of the Act nor did the appellant make an application under s 227(2)(c) to adduce such evidence or to cross-examine the complainant or any other witness regarding sexual experiences or conduct of the complainant. The state introduced evidence of previous consistent statements which the complainant had made to her brother and to her stepmother.[4] A previous consistent statement is not permitted to be used as an assertion of the truth of its

[4] Sections 58 and 59 of the Criminal Law (sexual Offences and Related Matters) Amendment Act 32 of 2007 provide as follows:

'58. Evidence of previous consistent statements
Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

59. Evidence of delay in reporting
In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

content. It merely proves '… consistency on her part in regard to her complaint a factor that serve to rebut any suspicion that she may have fabricated her allegations'.[5]

[24] The issue that arose concerns the terms of the previous statement which the complainant alleged she had made to her brother during December 2010: she testified that she had told him that the appellant molests and rapes her and he testified that she had told him that the appellant molested her and that she had sex with someone other than the appellant. If the complainant's brother's evidence was accepted, then, of course, the complainant's evidence of having been raped by her stepfather would have been inconsistent with her previous statement to her brother. A previous inconsistent statement which is proved may be used only to impair credibility and not to prove the truth of what is asserted in the statement.[6] It appears from the relevant passages of the record of the proceedings in the court a quo which I have quoted above that the issue regarding the content of the previous statement which the complainant had made to her brother during December 2010 was fully ventilated in the evidence. The trial court permitted the witnesses to testify and to be cross-examined on the issue. It correctly in my view rejected the evidence of the complainant's brother on this issue.

[25] The appellant argues that the trial court erred in not finding that the previous consistent statements which the complainant had made to her stepmother have no probative value. I disagree with this contention. The complainant loved her mother and she feared that her father would not allow her to visit her mother if what the appellant

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[5] Per Leach JA in *Kruger v The State* (612/13) [2013] ZASCA 198 (2 Deember 2013), para [9]. Also see: DT Zeffertt and AP Paizes *The South African Law of Evidence* (2nd Ed) at 452; Du Toit et al *Commentary on the Criminal Procedure Act* 23-21.

[6] *R v Hoskisson 1906* TS 502 at 504; *R v Deale and Others* 1929 TPD 259; *R v Beukman* 1950 (4) SA 261 (O); *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) ([2002] 4 All SA 74) at 584 (SACR) at 82h-83i. Cf *S v Mathonsi* 2012 (1) SACR 335 (KZP).

had been doing to her came out. She, however, confided in her brother during December 2010 to whom she made her first report when she told him her 'secret'. She asked him not to tell anyone. For reasons that require no elaboration the complainant's brother told their father on 14 February 2011 about the report which the complainant had made to him during December 2010. The complainant thereafter made the reports to her stepmother once her stepmother confronted her with what her brother had told their father: that the appellant had molested and raped her. The complainant initially vehemently denied the allegations, but of her own accord – 'not as a result of leading or suggestive questions, nor of intimidation'[7] - confided in her stepmother in the days that followed: on 21 February 2011 only about the incidents in Randfontein and on 24 February 2011 also about the incidents in Secunda and on holiday. It is also noteworthy that the complainant has not seen her mother since the latter part of February 2011 when the complainant's father and stepmother became aware of the allegations of sexual abuse. No inference can be drawn from the length of the delay between the commission of the offences and the reporting thereof by the complainant to her stepmother on 21 and 23 February 2011 or for that matter to her brother during December 2010. Also, the initial prompting of the complainant by her stepmother in confronting her with what her brother had told their father does not in the circumstances of this case render the complainant's subsequent statements to her stepmother without probative value. The evidence does not support a finding that the complainant's

[7] *R v C* 1955 (4) SA 40 (N) at 40G.

stepmother '… employed any means of a leading or suggestive or intimidating nature to obtain the story from her.'[8]

[26] The complainant testified that the appellant had raped her on occasion while her mother was asleep in the same bed. The complainant also testified that the appellant had raped her when they were on holiday and camping in a tent in circumstances when the appellant and her mother shared a mattress and the complainant slept on a separate mattress next to the appellant's side and her brother on one next to their mother's side. This, the appellant argues, is highly improbable. I disagree. The appellant's argument ignores the complainant's unchallenged evidence that her mother is a deep sleeper and is not easily awakened.

[27] Overall I am unable to find that the trial court's assessment of the evidence upon which it convicted the appellant can be faulted. The trial court applied the relevant cautionary rules in evaluating the evidence of the complainant. It found that in giving their evidence the complainant's mother and her brother were trying to protect the appellant. It rejected the appellant's exculpatory version. I should add that the appellant's evidence that it was the complainant who displayed sexual deviation over years in that she, since the age of three (in Randfontein and later on in Secunda) occasionally took his hand and placed it on her 'private parts', had not been foreshadowed in the cross-examination of the complainant and is a clear fabrication. I agree with the trial court's conclusion that the state has on the totality of the evidence proved the guilt of the appellant on each count beyond a reasonable doubt.

[8] *Gittleson v R* 1938 SR 161 at 166.

[28] The appeal is dismissed.

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

18 August 2014

Date of hearing:	11 August 2014
Date of judgment:	18 August 2014
Appellant's counsel:	Mr Coleman
Appellant's attorneys:	Redelinghuys Attorneys, Randfontein C/o Louis Benn Attorneys, Pretoria
Respondent's counsel:	Adv Burke