IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A94/2014

In the matter between: 24/10/2014

WAR Appellant

(1) REPORTABLE: YES / ~~NO~~

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

and

23/10/14
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant was convicted in a regional court on six counts of sexual violation of his biological daughter, M, born on 20 June 2000. On counts 1 to 3, he was found to have sexually penetrated the complainant in 2007 in Pretoria by sexually penetrating her with his finger or penis, of having the complainant take his penis into her mouth and of licking the complainant's genitals. On counts 4 to 6, he was acquitted on an equivalent set of counts alleged to have been committed in Boksburg. On counts 7 to 9, he was convicted on an

equivalent set of counts which the court below found to have been committed in Pretoria in the period September 2008 to April 2009. The appellant was sentenced to life imprisonment on counts 1, 2, 7 and 8 and to 10 years imprisonment on counts 3 and 9.

2 The appellant appeals against his convictions. No application for the requisite leave was made in relation to sentence. Counsel for the appellant said that this was an oversight and, although there seems to be substance in the submission, because of the conclusions to which we have come, I need say nothing further on this aspect.

3 In addition, after conviction but before sentence was passed, the applicant brought an application to the court below by notice of motion dated 27 February 2012 to lead further evidence under s 309B of the Criminal Procedure Act, 51 of 1977.

4 The allegations as to the place where the crimes were found to have been committed and were allegedly committed are explained, on the factual findings of the court below, as follows. Until about 2007 the appellant, his wife C, who is the complainant's mother, and their foster child, J, lived in Parktown Estates in Mayville, Pretoria.[1] The family then moved to Boksburg where they stayed for about a year. The

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[1] This residence was called Parktown in the evidence and I shall do the same.

appellant and C had matrimonial problems. The couple separated. In about 2008. The appellant, the complainant and J moved back to Pretoria and stayed with the appellant's wife's parents for about six weeks. The appellant, the complainant and J then moved in with the appellant's brother for about four weeks. After that the appellant, the complainant and J moved to a house in Wolfaardt Street in Pretoria.

5 So the appellant was convicted of sexually violating the complainant in Parktown, Pretoria and in Wolfaardt Street, Pretoria and acquitted of sexually violating the complainant in Boksburg.

6 The appellant's defence was a complete denial. The court below disbelieved the appellant and found the six charges proved. Essentially, although there was some evidence which could be described as corroboratory, the conviction was based on a favourable analysis of the testimony of the complainant, who was just over 10 years old when the appellant pleaded to the charges in the court below on 30 September 2010 and who testified in the court below through an intermediary.

7 The court below found that the complainant had not initially reported the conduct of the appellant about which she testified in court. But when the complainant visited her mother on a date not identified in the

evidence but apparently while the appellant, the complainant and J were living in Wolfaardt Street, the complainant's mother found a drawing which alarmed her. The drawing, which was exhibit 1 at the trial, apparently consisted of three pages. The author of the drawing is not readily established from the record. Only the complainant testified about it and she said variously that the drawing was done by a friend of the complainant (also called M), by another friend, J, and by the complainant herself, under the dictation of a friend. The friends in question are all of an age with the complainant and are girls. One page of the drawing depicts a male person urinating as well as two persons having sexual intercourse. On the drawing is written, clearly by a child:

> Hulle sekxs byte [buite] op die gras

8 The children who made the drawing also wrote the word *tolie* [*tollie* or *tottie*?] three times on the same page of the drawing. I am given to understand that this term is a euphemism for a penis.

9 The complainant's mother decided apparently to seek professional help arising from her discovery of the drawing. The complainant's mother herself did not testify at the trial and what we know from *viva voce* testimony about the interaction between the complainant and the

professionals consulted appears only from the evidence of the then 10 year old complainant herself. The complainant apparently talked during this process to at least three women called by the complainant Magriet, Elaine and Wilma.

10 Elaine is apparently Elaine du Toit and Wilma is Wilma Joy Stander. Both these women are social workers. They made statements which were handed in as exhibits before the court below. The statements were not admitted as to the truth of their contents but it was admitted that the complainant had made the communications to Mesdames Du Toit and Stander as alleged in their statements. It seems from these statements, if it is permissible to have regard to them for this purpose, that the drawing came to light in early 2009, before 17 March 2009 when Ms du Toit allegedly discussed M for the first time with Magriet who is apparently Magriet van Schalkwyk.[2]

11 It appears from Ms du Toit's statement that the complainant told Ms du Toit or Dr Grabe, who performed a medical examination on the complainant, that the complainant had reported only "incidents" [*insidente*] at Wolfaardt Street and had made no mention of having been sexually violated at Parktown.

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2 In addition to Mesdames Van Schalkwyk, Du Toit and Stander, the complainant also consulted with two other social workers for the purpose of determining whether she ought to testify through an intermediary.

12 Although the appellant was charged in each count with having violated the complainant on more than one occasion, the complainant only told the court below of two incidents of sexual violation: the first in Parktown when the complainant was seven years old and the second in Wolfaardt Street in 2009, ie when the complainant was about nine years old. On each of these occasions, the complainant testified, her vagina was penetrated by the appellant's penis, the appellant performed cunnilingus upon the complainant and the complainant performed fellatio upon the appellant. She testified further to discovering ejaculate on her body after the sexual violations, which she washed off, and receiving ejaculate in her mouth which she was told to swallow but made her vomit. The complainant said in evidence that she was told that the ejaculate was like "sweeties".

13 From Ms du Toit's statement, it appears that on 19 October 2009, Ms du Toit took the complainant to the police to make a statement to a woman police official, Insp Pienaar, about a sexual crime [*seksuele misdaad*] committed against her. But the complainant became frightened because the policewoman was in uniform and would not talk.

14 Ms du Toit's statement alleges that the complainant however told Insp Pienaar that her male cousin, D, had touched her genitals [*aan haar privaat gevat*] but could not give the time or place when this happened and said that D only touched her [*net aan haar gevat*]. Ms du Toit then apparently returned the complainant to her mother. After the complainant had been returned to her mother, the complainant's mother allegedly telephoned Ms du Toit. The mother reported to Ms du Toit that the complainant had said that she could not tell the truth to Insp Pienaar, ie that the appellant had inserted his penis into the complainant's genitals because then the appellant would go to jail, where he would die [*sy nie vir ... Insp Pienaar ... die waarheid kan vertel dat haar pa sy privaat en* [in?] *haar privaat indruk nie, want dan gaan haar pa tronk toe, en hy sal daar dood gaan*].

15 According to Ms du Toit, the complainant's mother reported to her that the complainant said that she had told the complainant's maternal aunt, Willemien Palm, that she had lied [*gejok*] to Insp Pienaar. Ms du Toit says that she confirmed this with the aunt. D is Ms Palm's son and was 13 years old at the time.

16 On 4 November 2009, Ms Palm apparently telephoned Ms du Toit and told her that the complainant had told her, Ms Palm, that the complainant had decided to tell the police that D had hurt her [*haar*

"seer" gemaak] because D was just a child and could not go to jail and that her father was sorry for what he had done, loved her and would not do it again. Ms Palm is reported as having said that she told the complainant that she must just tell the truth and that if it was D that hurt her she must say so to the police.

17 On 5 November 2009, Ms Palm apparently telephoned Ms du Toit to say that she had confronted D (presumably with a version of what the complainant had reported), and that D began crying and said that it had happened but that he had not initiated it. Apparently D reported that the complainant touched D's penis (as well as that of another little boy) and put her own hand into her panties and moved her hand around.

18 None of this evidentiary material was discussed by the court below in its judgment.

19 Dr Grabe gave evidence. She described two healed clefts in the complainant's hymen, which was intact. Dr Grabe testified that more often than not sexually violated girls present with intact hymens and that during the violation, the hymen is often just stretched. Dr Grabe described the clefts as indicative of sexual activity but could not say whether the clefts were caused by a penis or by another object.

20 The court below found the complainant to be an impressive witness. In view of my conclusions, I do not wish to dwell on this finding. The court however found the appellant and his mother, who testified to observing the complainant during childish sexually orientated play with J, to be unreliable witnesses.

21 The court below was particularly impressed with the relatively graphic descriptions the complaint gave of fellatio and cunnilingus and of the presence of ejaculate after the sexual activity. The court reasoned that this evidence must have been the product of actual experience. The court below discounted the previous inconsistent statements of the complainant on the basis of her testimony that the appellant had told her that if she reported the violations to the complainant's mother, the appellant would die in jail and that the complainant loved and had a good relationship with her father and therefore wanted to protect him from the consequences of his actions. It also weighed with the court below that the complainant was unlikely to want to do the appellant an injustice.

22 It concerns me that in the initial reports to the social worker or the medical doctor, the complainant apparently made no mention of the violations at Parktown. My concern is increased by the failure of the State to call the complainant's mother. The complainant's evidence

was that while her mother was watching television in another room, she was sent off to lie in bed with the appellant, while her foster-brother slept on a mattress in the same room.

23 While some mothers might see nothing wrong with a seven year old girl sharing a bed alone with her father, other mothers are more cautious. It would have been useful if the trial court had been told whether or not the complainant's mother corroborated the complainant's evidence. One does not know from evidence other than that of the complainant whether the appellant had had the opportunity at Parktown to conduct himself as described by the complainant. The appellant himself did not testify about this and was not asked in cross-examination whether the complainant was ever in bed alone with the appellant.

24 I turn now to the application to lead further evidence upon which I touched in paragraph 3 above. Sections 309B(5) and (6) read as follows:

> (5) (a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

(b) An application for further evidence must be supported by an affidavit stating that-

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must-

(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

25 The evidence sought to be adduced appears from affidavits by Ms Palm and the complainant herself. Mrs Palm's affidavit, sworn on 18 February 2012, states that on 16 February 2012 the complainant's mother made a report to her as a result of which Ms Palm sought an interview with the complainant, then a few months short of her twelfth birthday. During that interview, Ms Palm says, the complainant told

her that the appellant had never sexually interfered with her in any of the respects charged against him.

26 The complainant herself swore to an affidavit on 18 February 2012. In her affidavit, the complainant said that she told Ms Palm that she had had sexual intercourse with the Palm twins, one of whom is D, and that she had never been sexually interfered with by the appellant. The complainant said that:[3]

> ... I once went to the doctor (a woman) and the doctor told me that I must say in court that my father put his penis into my private part.

27 On 1 March 2012, counsel for the appellant moved the court below for leave to lead the further evidence presaged in the application in terms of s 309B. After argument, the court below observed that *although the new evidence must be heard* [*alhoewel die nuwe getuienis aangehoor moet word*], the application was premature and could only be entertained after sentence had been passed.

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3 My translation. "... ek was eenkeer dokter toe en die dokter ('n vrou) het vir my gesê dat ek in die hof moet sê dat my pa sy privaat deel in myne gesit het."

28 The record which has been placed before us is incomplete. Some parts of the record had to be reconstructed and some parts are missing. One can infer that an application for leave to appeal was brought and that the regional magistrate did not pronounce on the application to lead further evidence. On 21 October 2013, the court convened to reconstruct the record. The regional magistrate recorded, from memory,[4] that leave to appeal had been granted and that the reason why leave had been granted was that the defence wanted to place the application to lead further evidence before the High Court.

29 Included in the record on appeal is a document which appears to be a further statement made by the complainant and signed on 22 March 2012. What part this statement played in the proceedings before the court below, if any, does not appear from the record. The handwriting in the statement is, in my impression, immature. In the statement, the author says that she lied to Ms Palm because Ms Palm "talked me into being frightened!!" [*het my bang gepraat!!*]. In the statement the author purports to reinstate the version that it "was him!!!!" [*dat dit hy was!!!!*] The statement was on the face of it made before the complainant's mother and yet another social worker, Nadia van der Merwe.

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4 Page 2 of the record on appeal.

30 In the light of the application to lead further evidence, I appointed Adv A Skelton to represent the interests of the minor complainant. The court is grateful to Adv Skelton for accepting the brief from the court and gives great weight to her submissions.

31 Adv Skelton reported to the court that she consulted with the complainant in the presence of an associate and formed the impression that the complainant was of below average maturity for her age.. During that consultation, the complainant stated that the real truth was that her father had not raped her, that, in effect, words had been put in her mouth by the professionals who worked with her and that the recantation of 22 March 2012 had been untruthfully made under the influence of her mother and the social worker.

32 Adv Skelton has agreed to represent the complainant during the further conduct of the proceedings in the court below. I shall include a direction to that effect in the order which I propose.

33 In ruling that the application to receive further evidence should be heard by this court on appeal, the regional magistrate erred. In my view, the decision whether or not to receive further evidence under s 309B(5)(c)(i) is that of the court which has tried the applicant. Section 309B(5)(c)(ii) requires the court granting an application for

further evidence to evaluate that evidence, with reference, amongst other things, the cogency and sufficiency of the evidence and the demeanour and credibility of the witnesses who gave it. An appeal court hears such evidence only rarely and does not enjoy the well known advantages of a trial court in relation to the evaluation of the evidence in the context of the trial as a whole.

34 I do not think, however, that we should merely send the matter back to the court below with a direction to consider the application to lead further evidence. I intend in this regard to propose the order which I think the regional magistrate ought to have been made. This court, sitting on appeal from a case in a lower court, has the power under s 19(d) of the Superior Courts Act, 10 of 2013, to set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.

35 I think that interests of the complainant require that to the extent possible, having regard to the interests of justice, this case be disposed of with as little delay as may be possible. I do not think that the proceedings should be lengthened by a further consideration of the application to lead further evidence before the court below. This court is in as good a position as the court below to adjudicate this

application - in contradistinction to the evaluation of the evidence alluded to in the affidavits I have mentioned.

36 Requirements (ii) and (iii) laid down in s 309B(5)(c) have been met. The question before us is whether the evidence foreshadowed in the affidavits put up in support of the application to lead further evidence would presumably be accepted as true.

37 The *locus classicus* in relation to the applications to lead further evidence on appeal is *S v De Jager*1965 2 SA 612 A 613 where the legal position (before the enactment of s 309B) was summarised:

> (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
> (b) There should be a prima facie likelihood of the truth of the evidence.
> (c) The evidence should be materially relevant to the outcome of the trial.
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> Non-fulfilment of any one of these requirements would ordinarily be fatal to the application, but every case must be decided on its particular merits, and there may be rare instances where, for some special reason, the Court will be more disposed to grant the relief.

38 In *S v Steyn* 1981 4 SA 385 C, in an analysis which the Appellate Division in *S v Myende* 1985 1 SA 805 A 811D found to be "fairly exhaustive" and the Supreme Court of Appeal in *S v Ndweni and Others* 1999 4 SA 877 SCA 882F to be "exhaustive", the court analysed in the light of the cases, the degree of cogency of the evidence sought to be presented required in such cases. The learned judge distilled (at 393) a common thread that the evidence must be of such a nature that it could possibly be believed by the trial court.

39 In *Myende, supra*, the Appellate Division was confronted with a case where it could not be said that the evidence adduced by the applicant to lead further evidence could, in the light of the countervailing material put up by the State, raised a real or genuine dispute on the papers. Nevertheless, the Appellate Division decided not to apply the test laid down at all. The court held at 811E, observing that the applicant had been sentenced to death and been defended by *pro deo* counsel who had prepared the application under adverse circumstances, that the application should be granted

> ... without wishing to set a precedent, and in spite of the application, as it stands, failing the test.

40 In *Ndweni*, the court found that the test propounded in *Steyn*, 882F had much to be said for it but found it unnecessary to come to a final conclusion. Here too, the court exercised its discretion in favour of the applicant to depart from the test. In *Ndweni*, it appeared some four years after the trial that evidence was available that it was not the applicants but others who had committed the crimes charged against the applicants, but that such evidence, although available to the prosecution, had been suppressed.

41 *S v Hanuman* [1998] 1 All SA 254 SCA is an example of an application to lead further evidence that was decided against the applicant. The applicant was convicted of raping and indecently assaulting his stepdaughter, aged 12 when the events commenced. In an affidavit made after the applicant's appeal against his conviction and sentence had been dismissed by the high court, the erstwhile complainant said that she had lied in every material respect in her previous statement to the police. The SCA found that the complainant had exhibited clear emotional and physical signs of having been abused and had testified at her trial in depth and in detail to various instances of sexual assault perpetrated upon her by the applicant over a period of more than two years. The alleged motive for the recantation was found by the SCA to be improbable. The SCA held, at 258h, that what must be looked for is some credible evidence

aliunde that the evidence originally given was false. In all these circumstances the dismissal of the application to lead further evidence was confirmed on appeal.

42 The complainant has presented different versions on the crucial issue of the conduct of the appellant in interviews, her testimony in court and her affidavit which was used in support of the application to lead further evidence. It thus cannot be said that the evidence in the affidavit is presumably true. In *R v Van Heerden en 'n Ander* 1956 1 SA 366 A Centlivres CJ said:

> [T]he further evidence is the evidence of selfconfessed perjurers, who, according to themselves, deliberately gave false evidence on which the appellants were convicted. In the usual type of case the further evidence which is tendered is not the evidence of self-confessed perjurers and there is no reason why the Court should not regard that evidence as being *prima facie* true.
> I can see no reason why the Court should accept at their face value affidavits made by persons who allege therein that they gave perjured evidence at the trial.

43 As this is a case involving a child, her best interests must be considered. Indeed, under s 28(2) of the Constitution, in every matter concerning children, their best interests are paramount. Counsel for the State submitted that it was not in the complainant's interests to

have the matter reopened. Counsel made two points in this regard: firstly, that the relevant allegations in the affidavits made in support of the application to lead further evidence should be rejected on the papers in the light of the later recantation and the probabilities, including the probability that the complainant has been influenced in her recantations in favour of the appellant; secondly, that the trauma of a further court appearance would be too severe to allow of such a course.

44 As to the first point: in my view the versions of the complainant that the appellant did not violate her are consistent with statements she made before the trial in the court below. The medical evidence is of but slight assistance in assessing the cogency of the complainant's evidence in court. The insults to the hymen could have equally been caused by another child or even have been self-inflicted. Although the intimate knowledge of sexual matters points towards the conclusion that the complainant experienced these things herself, it is, standing alone, not the only reasonable inference.

45 It may well be true, as counsel submits, that the complainant has been influenced to recant in favour of the appellant. But the difficulty, at this stage, is in deciding which, if any, of her versions, including her versions given before the trial even started, is true. One may not lose

sight that the guilt of the appellant must be proved beyond a reasonable doubt. I have pointed to the failure by the prosecution to adduce evidence which might have been corroborative of the complainant's version in the witness box. The complainant is a child and a single witness. As such, her evidence is subject to the cautionary rule.[5] The complainant did not present with any emotional signs of sexual abuse and the medical evidence in relation to physical signs of abuse is equivocal. In all these circumstances, I do not think that one can reject the evidence foreshadowed in the application as false. I think it is useful to look at this aspect of the case as one would view an application for final relief on motion in a civil case. Applying the procedural test in *Plascon-Evans*, I would not have rejected the foreshadowed evidence on the papers.

46 As to the second point: Adv Skelton told us that the complainant actually wants to return to the witness box and give further testimony. In addition, one must weigh up the stress of further testimony against a situation in which the complainant is denied the right to give further evidence and then has to live with a possible feeling on her part that she had wrongly condemned the appellant to prison for life. Such a

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5 *S v Matshivha* 2014 1 SACR 29 SCA para 22 . Although there is no rule requiring corroboration for the evidence of a child, at t the same time the danger of believing a child where his or her evidence stands alone must not be underrated. *Woji v Santam Insurance Co Ltd* 1981 1 SA 1020 A 1-28

perception would of course be unjustified because the complainant bears no guilt or even responsibility for what has happened. But the feeling on the complainant's part might, this notwithstanding, well be present and cause her considerable anguish in time to come.

47 Adv Skelton submitted that in assessing the best interests of a child, her own wishes must be taken into account and that as she grows older, the autonomy she enjoys in relation to decisions affecting her ought to increase. I agree with these submissions. The complainant is now 14 years old and although she presented to counsel as being somewhat immature for her age, I think that the complainant's own wishes should be given weight in the present context.

48 Counsel also told us that the complainant had asked if she might once again give evidence through an intermediary. This last aspect is for the trial court to weigh and we are confident that it will be carefully considered.

49 What takes this case out of the ordinary is that the complainant herself gave conflicting versions of what had happened to her even before the trial began. There is no reason why this court should prefer one version over another in considering the application. The version presented by the complainant in her affidavit put up with the

application to lead further evidence might be true. The appellant, comparably to the applicant in *Myende*, is facing life in jail. I would regard it, as the Appellate Division manifestly did in *Myende*, as an affront to justice if the appellant were denied an opportunity to investigate in court the evidence foreshadowed in the application.

50 I would therefore allow the application. Counsel for the appellant and the State have come to terms on bail for the appellant pending the determination of proceedings in the court below and I shall embody their consensus in the order I shall proceed to frame.

51 I propose the following order:

1 The convictions of the appellant imposed in the regional court, Pretoria of contraventions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and the sentences imposed pursuant to those convictions are hereby set aside.

2 The application by the appellant to lead further evidence succeeds. The matter is remitted to the trial court:

2.1 to hear evidence by the complainant, who is to be recalled for this purpose;

2.2 to hear such evidence as either party may wish to adduce relative to the issues arising from the affidavits delivered in support of the notice of application dated 27 February 2012 for leave to lead further evidence, the statement in the appeal record dated 22 March 2012 purporting to be that of the complainant and the communications of the complainant to her counsel appointed by the court, Adv Skelton, as disclosed to the court by Adv Skelton during argument before this court on 10 October 2014;

2.3 to hear such further evidence as the trial court may consider in the interests of justice to receive;

2.4 to consider such evidence in the light of all the evidence given in the trial, make such findings as the trial court may consider appropriate, whether on the cogency and sufficiency of the further evidence, demeanour credibility or any other matter and give a decision *de novo* on all the evidence.

3 The President of the regional court is requested to afford this case such promotion on the roll of that court as circumstances may allow.

4 Adv A Skelton is appointed to represent the interests of the complainant during the resumed proceedings before the trial court and in any matter arising from such proceedings.

5 The trial court is requested to consider whether the complainant should give her further evidence through an intermediary.

6 In reporting on this case, the media are directed not to disclose any information which may lead to the identification of the complainant.

7 The appellant's bail in the sum of R2 000 is hereby reinstated on the following conditions:

7.1 The appellant will have no contact with the complainant or her mother before finalization of this trial;

7.2 The appellant will report to the police station at Wierdabrug every Monday, Wednesday and Friday between 07h00 and 19h00;

7.3 The appellant will not leave the district of Pretoria unless he needs to do so and if such a need arises, he will not do so without prior notification to the investigating officer;

7.4 The appellant will reside until the trial is completed at 11 Broadway West Street, Valhalla and will not change his residential address during the trial unless he gives prior notification to that effect to the investigating officer.

8 The appellant must upon payment of bail as set by this court forthwith be released from custody.

NB Tuchten
Judge of the High Court
23 October 2014

I agree. It is so ordered.

MW Msimeki
Judge of the High Court
23 October 2014

RaathsA94.14

For the appellant:
Adv L Augustyn

For the complainant:
Adv A Skelton

For the State:
Adv J Cronje
Instructed by Director of Public Prosecutions
North Gauteng