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**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

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**CASE NO.: A132/2015**

**14/4/16**

In the matter between:

**KOLOANE LUCAS MANYAPELO**

Applicant

and

**THE STATE**

Respondent

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## JUDGMENT

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### **JANSEN J**

- [1] The appellant, Kolane Lucas Manyapelo, is a 67 year old male serving a term of 20 years imprisonment at the Correctional Services of Klerksdorp, having been convicted on a charge of rape in the regional court for the Regional Division of Northwest, held at Klerksdorp on 17 October 2013.
- [2] The regional magistrate dismissed the appellant's appeal in respect of conviction and sentence but he was granted leave to appeal in respect of both his conviction and sentence by this court.
- [3] The appellant was legally represented throughout the proceedings.
- [4] There was only one charge against the appellant namely rape in terms of the Sexual Offences Act 32 of 2007, read with the provisions of sections 51 and 52 and schedule 2 of the Criminal Law Amendment Act 105 of 1977, as amended. It was alleged that during or about December 2011 near Kanana, the appellant unlawfully and intentionally committed an act of sexual penetration with his minor daughter who was born on 25 November 1997 (which was proved by way of her birth certificate).

- [5] The appellant was convicted of rape on 30 October 2013 and sentenced to 20 years' imprisonment on 31 October 2013.
- [6] The appellant was granted bail, pending his appeal to this court.
- [7] The trial commenced on 16 May 2013, and it was placed on record that the consequences of section 51(1) had been explained to the appellant.
- [8] The appellant pleaded not guilty and exercised his right not to proffer a plea explanation.
- [9] The minor gave evidence through an intermediary, after a section 170(A) application in terms of the Criminal Procedure Act 51 of 1977 had been brought.
- [10] It was also placed on record that the appellant was the complainant's biological father.
- [11] An intermediary was duly sworn in and testified that she was an educator, and that she had acted as an intermediary since 2003.
- [12] When the minor testified she was 15 and a half years old. The minor testified that she did not like her father because he had done "filthy things" to her. She testified that she did not live with him but that the alleged rape had taken place on one of the occasions when she had visited him. She testified that she was constrained to sleep in her father's bed in his bedroom, and further testified that there was nobody present when the alleged rape took place.

- [13] The minor testified that during the night she realised that the appellant was removing her panty and that he was lying on top of her whilst holding a flashlight in his hand. Thereafter he inserted his penis into her vagina. When he had finished, he instructed her not to tell her mother and added that he would buy her clothes if she did not tell her mother. She said they both fell asleep after the incident and that he took her to the local taxi rank the next morning (an arrangement which had been made prior to the incident).
- [14] The minor testified that the incident happened during the school holidays. She testified that she was then in grade 6 but failed her grade and thus had to repeat grade 6. She testified that she did not tell her mother about what had happened “*because of Satan*”. She only told the social worker at school about the incident, who telephoned her mother. This was long after the incident and she could not recall the social worker’s name.
- [15] The minor testified that she also told a cleaner at the school named E. K. and a teacher called R. van der Z. about the rape. She further testified that her father raped her once only. She never visited her father again.
- [16] During cross-examination, the minor was asked whether it is correct that her father was forced to leave the family home because he was no longer on good terms with her mother. She answered in the affirmative.
- [17] The minor also conceded that her mother refused to visit her father. She admitted that she only visited her father when her mother was not at the family home. She

further admitted that she used to visit her father twice a month during the day in the company of friends. She also confessed that she had told her father during her last visit to him that her mother did not wish her to visit him any longer as her mother would assault her when she found out that she had visited her father. She also conceded that her father and the elderly woman staying with him loved her very much. Furthermore, she testified that the elderly woman was always present when she visited her father. She denied that the elderly woman bullied her when she was there and admitted that she always gave her money to return by bus to her residential home.

[18] Further in cross-examination, when asked about God and telling the truth, she testified as follows when asked whether she could say before God that her father had never raped her: “*I do not know.*”

[19] It was put to her that there were people who did not like her father and who had told her to come and lie in court, which she denied.

[20] When questioned about the discrepancy in her evidence that she only visited her father during the day when accompanied by friends, but had testified that she had, alone, slept over at her father’s home, she stated: “*I cannot answer.*” During further cross-examination she reiterated that she always visited her father in the company of a friend. It was also put to her that the neighbours saw when she visited her father, which she denied, but she could not explain her denial. She simply remained silent and did not respond.

- [21] It was further put to the minor that the neighbours would testify that they saw her visiting her father during the day and further that she never visited her father during December 2011, which she denied.
- [22] The minor testified that she indeed visited her father during December 2011 and that the elderly woman was present. She changed her version during further questioning and admitted that her father had bought her clothes in November 2011 because he knew that he would not see her in December 2011, because he left for circumcision ceremonies and only returned on 1 January 2012.
- [23] The minor, as a result, admitted that her father could not have raped her in December 2011. In re-examination, she was unable to confirm whether or not she had conceded that her father had not raped her or was not at home during December 2011. There was simply a long pause and no response. She, however, persisted in stating that her father had done “filthy things” to her.
- [24] The court then asked the minor a question about the cleaning woman (F.) at the school whom she had told about the rape, and she said she was called into the principal’s office and that a social worker was present. The minor’s evidence was very confusing and she had no idea about time or years as she believed that the year prior to her trial was 2011. She told the court that she had known F. for five years which was clearly inaccurate as she testified that she told F. about the rape in 2011.
- [25] The next state witness was the teacher R. van der Z.. She testified that the school which the complainant attended was a special educational needs school. She testified that she was the Head of Educational Guidance and heard all disciplinary

hearings. According to her testimony it was reported to her that the minor was experiencing problems at school. On the 17<sup>th</sup> of May 2012 Ms Van der Z. phoned the minor's mother to arrange a meeting to discuss the problems. The meeting was held in the deputy-principal's office who was present as was the mother and the cleaner who had to act as an interpreter because the minor was more fluent in Setswana. (I pause to mention that the intermediary spoke Sotho to the minor, stating that Sesotho and Setswana are related. They might be but they are different languages in many respects. It places a question mark behind the minor's ability to have understood any of the statements put to her by the intermediary and *vice versa*). Furthermore, the intermediary, Numvula Dorothy Jass, placed on record that she would be speaking in English. This, in itself, poses a problem. With a child witness, the intermediary must clearly speak to a child in her home native language.

[26] At the meeting, the people present asked the minor why she made inappropriate sexual noises in class which disturbed the other school children. She also made sexual suggestions to boys. Upon questioning, Ms Z. said this was the first time that she behaved in this way at the school as she only commenced attending the school in 2012. However, she said this was not the first time that the minor misbehaved. She had done so previously and had built up 250 demerit points. She testified that the minor was very shy during the meeting and did not wish to respond to questions. F. translated and the minor stated that she had had intercourse with her father.

[27] The mother started crying because she clearly knew nothing about the incident. Ms Z. phoned Child Line and the police arrived. Ms Z. denied that there was a social worker at the school and stated that Child Line sent a social worker to the school at her behest. Although the social worker consulted with the minor, she did not cease

her behaviour and was expelled from the hostel and matters exponentially became worse.

[28] During cross-examination, Ms Z. said that the minor's behaviour commenced during about February 2012. She mentioned that the minor told F. for the first time about the alleged rape during the meeting in May 2012.

[29] On a question of the court, Ms Z. told the court that the school which the minor attended was for problem children, either because they had learning difficulties or because they misbehaved in other ways such as abusing alcohol.

[30] The next state witness was the minor's mother. Clearly the mother also had problems in following the interpreter. She often stated that she did not understand the questions, to such an extent that the court had to ask her whether she understood them. She answered in the affirmative. However, it appears from the evidence that she followed the interpreter with difficulty because Setswana was her home language.

[31] The mother confirmed that the minor was a slow learner and that the school addressed a letter to attend a meeting at the school, which she did, accompanied by her elder daughter. She confirmed that F. told her during the meeting that the minor had been raped by her father and that she was further told that the child was misbehaving in general. She was told that the "funny things" that her child was doing related to sexual intercourse and that she wanted have sexual intercourse with boys attending the school. This was explained to her by F.. When the mother later confronted her daughter, she was shy and refused to speak to her.



- [32] Upon further questioning, she admitted that the minor later herself, after the meeting at the school, told her about the rape by her father.
- [33] The mother testified that she and her husband lived apart and that the minor would visit her father on her own. She confirmed that she would sleep over, for example, on a Friday and return on the Saturday.
- [34] The mother said that she did not wish her daughter to visit her father because “*she did not appear very well*” to the mother. Upon questioning, she said the child did not appear very well because she would refuse to speak about what happened at her father’s place, because her father had told her to say nothing. She did not explain that she knew the father had allegedly told the minor to say nothing. What the minor did tell her was that she slept in her father’s bed although there were two rooms, so she phoned the appellant and told him that she did not want the minor to visit him. The appellant told her that it was the minor’s right to visit him.
- [35] The mother admitted that the minor visited the father but it was without her permission, when she was at work, because she did not wish the minor to visit her father. She also visited him over weekends and slept over without a friend. The mother testified that the elderly woman was not always at the father’s home. Again, it is unclear as to how she knew this or could testify about the absence or presence of the elderly woman.
- [36] The mother further testified that even before the minor went to the remedial school in 2012, she referred the child to a psychologist at the Crisis Centre, V., because of

her strange behaviour. V., according to the mother, called in the father for questioning. Apparently, her father would show her pornography “*on the TV*”. She changed her version thereafter and stated that this happened after the meeting at the school. The mother was completely confused. She then reverted to stating that she took the child to a psychologist before the meeting at the school to find an appropriate school to which to send her. She added that she took her to the Crisis Centre because the child would sometimes report that when they slept together, the father did funny things to her. She said that she was surprised, when informed at the meeting, that her daughter had been raped because at that stage she did not know that her child had been raped. She did not tell the school about the videos but reiterated that the child had later told her that the father did “funny things” to her.

[37] The mother testified that the child used to be a well-behaved scholar but then her strange behaviour started. She was emotionally unable to cope at school. It was put to the mother that the appellant would testify that she had problems at all the schools because she was a slow learner, but the mother said her emotional state made it impossible for her to fit into any school.

[38] It was put to her that she falsely wished to blame the appellant for all the minor’s problems, which she denied. It was also put to her that whilst she was still living with the appellant, the police brought the minor home because she went missing on various occasions, which she admitted. It was further put to the mother that the appellant would testify that he looked after the child, which the mother denied. It was also put to her that she made up stories to get the appellant into trouble, which she denied.

- [39] It was put to her that the appellant would testify that the child never slept over at his place, save when in her, the mother's, company. The mother denied that she slept over at the father's house with the minor. (The appellant later testified that she slept over to discuss their marital problems.) She testified that she did not want her child to sleep over and share a bed with the appellant. She then confessed that on some occasions she would allow the child to go to the appellant because he would buy her things. This, in itself, was a strange admission given the fact that she maintained that she did not wish the minor to visit the appellant.
- [40] On a question of the court, she testified that she and the appellant had been living apart since 2010.
- [41] F. was called next. She confirmed what the previous witnesses had said but added that the minor had a boyfriend and had confessed to her that she had sexual intercourse with him in the toilet at the school. Thereafter, she told F. that she had also had sexual intercourse with her father. She testified that the minor did not know how many times the appellant had sexual intercourse with her and that the minor did not tell her mother because she was scared. She stated that the mother was crying at the meeting and that the minor was very shy and quiet during the course of the meeting. She said the minor was always involved with boys and very naughty.
- [42] F. was confronted with the allegation that the mother was clearly pretending to cry because she had already taken her to the Crisis Centre, but F. said even she was affected by the statement that the appellant had raped his own child. She denied that the minor had told her that she had been raped by the appellant before the meeting.

[43] The state then closed its case.

[44] The appellant testified next. He testified that the minor used to visit him with two of her friends, and never alone, and only slept over when accompanied by her mother. He denied raping the minor or her sleeping over on weekends and blamed these lies on the mother because she hated him so much. He gave a version that his wife had told somebody at the “Metropolitan” that he was deceased as she wanted money. The minor, so her father testified, was expelled from school because of a lack of funds.

[45] The appellant testified that the mother treated him like a baby and that they had often been called in by the various schools which the minor had attended because of her misconduct. She also went missing three times and the father said that he went to look for her. He denied showing the child pornography. He testified that he saw the minor last in April 2013 and she and her friend confessed to him that she had failed at school because she “played” too much. He mentioned that he has six daughters and had never been accused of any inappropriate behaviour towards the other five daughters.

[46] The appellant testified that he loved the minor.

[47] During cross-examination, the appellant was questioned about his visit to the Metropolitan and why this fact had not been put to his wife. He stated that he was confused and did not tell his attorney. He testified that he had paid the child’s school fees and bought her clothes annually during December and January. Later on he admitted, however, that it was the mother who paid the school fees.

[48] The appellant then admitted that he was not even aware of the fact that the minor was in a school in Potchefstroom. It was put to the father that the daughter visited him only to be raped by him. He denied raping her. He reverted to his version that the mother had a vendetta against him. He also claimed that the mother “hurt” him, which was new evidence. He admitted that he was already residing with the elderly woman in 2010.

[49] The appellant admitted that he fell in love with the woman with whom he was staying because he was allegedly in an abusive relationship, and hence proposed to her. She accepted his proposal after two weeks. They started living together permanently during 2011. However, he alleged that the minor and the mother visited him in 2010 and slept over when his new “wife” only visited him and was not yet staying with him.

[50] The appellant’s evidence became extremely confusing – on the one hand, stating that when the minor slept over at his place, she had to sleep in his bed, on the other hand stating that he had a new girlfriend sleeping with him. He then testified that the minor would visit occasionally but did not like his girlfriend and would then leave.

[51] It was also put to the appellant that it was very strange that he was allegedly in an abusive relationship, yet the police was never called.

[52] The next defence witness was the appellant’s girlfriend. She testified that the appellant never raped the minor, never slept over, and never came to her father alone. She testified that she was always present over week-ends. Under cross-

examination, she testified that she was a “neighbour” of the mother and the minor and did not know of any problems between the appellant and his wife. She stated that her relationship with the appellant only started in 2011. She then changed her version and said she lived at the back of the appellant and his wife’s house and that the wife saw the appellant visiting her. This was in 2010.

[53] It was put to her that in testifying that she was always with the appellant over weekends, she was seeking to protect him. She denied this. She also stated that the minor always visited her father with a friend.

[54] The last witness for the defence was a neighbour of the appellant’s, who testified that the minor visited on Saturday or Sunday afternoons with a friend or friends and would not sleep over. She was forced to concede during cross-examination that she only knew what happened during the day but not at night.

[55] The argument on behalf of the minor was short and to the point: the appellant and his girlfriend did their best to deny the rape or that the child ever slept over. On behalf of the appellant, the inconsistencies in the state’s witnesses’ evidence were pointed out. As set out in the synopsis of the evidence above, there were important contradictions. It was argued by the prosecutor that the appellant was the one who fabricated evidence and who said that the mother assaulted him, that he was in an abusive relationship, and that she wanted to get back at him. Yet he could not explain why the police had never been called in before.

### **Analysis of the evidence**

[56] It is clear that the minor was a problem child, seemed to be sexually active and already creating problems before she went to her new school in Potchefstroom. Her evidence was confusing. She made no mention of seeing “funny” videos at the appellant’s house. The mother seemed to suspect something because the minor told her that the appellant slept with her in his bed. She did not wish her child to visit him. However, the suggestion that she somehow wanted to incriminate the father seems baseless.

[57] None of the witnesses were model witnesses. The minor’s mother contradicted the minor’s evidence during cross-examination stating that she would sleep over at the father and that he insisted on her sharing a bed with him. The father’s girlfriend testified to the contrary.

[58] A large lacuna in the State’s evidence was the fact that the evidence that the mother had taken the minor to the Crisis Centre before her misbehaviour at her new school in Potchefstroom had commenced, was never followed up by the State. This evidence would have been of great assistance as the psychologist, V., even called in the father, as was testified by the mother. No witnesses were called to testify regarding the need for the mother to visit the Crisis Centre and the minor’s mother was not cross-examined on this aspect. Clearly the minor was already misbehaving at that stage.

[59] There were many aspects of the minor’s evidence which were unsatisfactory. In particular, it is important that she admitted that her father could not have raped her in December 2011 as alleged by her. She also admitted that he and the old woman

loved her very much. Her evidence was also, under cross-examination, that she only visited her father in the company of friends. However, it should be added that dates were clearly not the minor's strong suit.

[60] The delay between the rape and the complainant reporting it may not be taken into account because various factors may give rise to the delay such a shame or intimidation as provided for by section 59 of the Criminal Law Sexual Offences and Related Matters Amendment Act of 2007.

[61] The minor was a single witness, and hence the cautionary rule applies. In *Rex versus Mokoena* 1956 (3) SA 81 (A) at 85H it was stated that the evidence must not only be credible but also reliable but it is clear that there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (*S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh the evidence, consider the merits and demerits thereof and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he or she is satisfied that the truth has been told. (*S v Sauls & others* 1981 (3) SA 172 (A) at 180 E-F). The second cautionary rule which finds application is the fact that the minor was a child.

[62] In this matter, various questions arise. What happened to the child before the alleged "rape"? Why was she sent to a psychologist by the mother? Why was she emotionally not coping at school? Why did she on the one hand maintain that her father raped her in December and then changed her version that he could not have done so because he had left for initiation ceremonies? Why did she, on the one hand,



testify that she slept over at the father but on the other hand admit that she only visited him in company of friends?

[63] Why did she go missing on occasions? On her own version, she had “sexual experience” with a boyfriend and would thus know what the sexual act entailed.

[64] The prosecutor failed to address all these issues as did the counsel for the appellant. Given all the lacunae in the State’s case and applying the cautionary rule, it cannot be stated that the State did not prove its case beyond a reasonable doubt.

[65] The analysis on which the court must embark, as was spelt out in the matter of *Buzwe Maxwell Musoti and the State (2013) ZASCA 160 (25 November 2013) at par [21]* is carefully to evaluate the evidence of the complainant and that of the appellant, weighing both against the intrinsic probabilities of each version.

[66] It was never placed on record in which language the interpreter interpreted. It was clear that the mother had difficulty in following him. The mother indicated that she wished to testify in Sotho. The appellant stated that he wished to testify in Setswana.

[67] When regard is had to the minor’s evidence, she contradicted herself on whether she slept over at her father and whether she only visited him during the day in the company of friends. She was clearly sexually active, and had problems at schools before her mother was called to the principal’s office at the Potchefstroom school. She was unable, when asked, to confirm before God, that she was telling the truth in alleging that her father had raped her. It appears as though her problems commenced long before the alleged instance of rape, as a result of which her mother took her to

the Crisis Centre to the psychologist V., who also called in the father. V.'s evidence was of cardinal importance, yet V. was not called by any of the parties.

[68] Furthermore, it should be borne in mind that the mother admitted that the reason why the minor was placed in a school in Potchefstroom was because she is a slow learner.

[69] The father blamed the mother in stating that she had told the child to fabricate stories. He was also far from being a model witness. However, his version that the mother wished to implicate him was never properly canvassed during cross-examination.

[70] Further, no medical report was obtained, but it would probably not have assisted the court much in that the minor alleged that she had sexual intercourse with a boy at school. The minor never testified to this effect. However, F. testified that the minor was always involved with boys and very naughty.

[71] The appellant's girlfriend, E. K., also corroborated the appellant's testimony.

[72] The manner in which the trial was conducted is to be deplored. Cardinal witnesses such as the minor's friends and V., the psychologist, were never called.

[73] In the result, it cannot be stated that the appellant's version cannot reasonably possibly be true and should be rejected. The State did not prove its case beyond a reasonable doubt.

[74] During the sentencing procedure, it transpired that the appellant was 67 years old and was born on 4 March 1946 and has no criminal record. He raised five daughters, one of which passed away. He supports two grandchildren because of his daughter's death. He also has a duty of support towards the minor. He is a primary caregiver in full-time employment and works long hours as a driver, even at his age. The appellant was also paying R800-00 a month for the maintenance of the minor. He had four remaining daughter and had never been convicted of any misbehaviour towards any of his daughters. The complaint by the minor was the first complaint of any alleged deviant sexual behaviour.

[75] The appellant had been in custody since his application for leave to appeal was refused on 31 October 2013 by the magistrate. Leave to appeal was granted on 11 August 2014 by this court and the appellant's bail application was successful on 14 November 2014. Thus the appellant was in custody at the Klerksdorp Correctional Services for a year.

[76] No witness impact report nor a pre-sentencing report was obtained. On a conspectus of the evidence it appears as though the minor was, in general, a miscreant who ran away from home, already had problems at school (the nature of which unclear) before she attended her new school and who, in general, led a licentious lifestyle.

[77] In the premises, the appeal is upheld.

[78] The following order is proposed: —

*Order*

1. The appeal is upheld.
2. The conviction and sentence are set aside.

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**MM JANSEN J**

Judge of the High Court

I agree and it is so ordered.

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**KGANYAGO AJ**

Acting Judge of the High Court

*For the Appellant* **Advocate Pistorius** (082577 4532)

*Instructed by* **Schoeman Steyn Attorneys, Welkom**

*For the Respondent:* **Advocate L Williams** (084 294 8548)

*Instructed by* **The Office of the Director of Public Prosecutions, Gauteng Division, Pretoria**