IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A198/2015

23/8/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

23/8/16 — DATE

SIGNATURE

In the matter between:

S P M — **APPELLANT**

And

THE STATE — **RESPONDENT**

JUDGMENT

Fabricius J,

1.

This appeal was previously before two colleagues of this Court on 15 September 2015. The order that was subsequently made was that the appeal be referred to a Full Court. When this order was made, my colleagues had obviously lost sight of the provisions of section 14 (3) of the ***Superior Courts Act 10 of 2013***, which reads as follows: "Except where it is in terms of any law required or permitted to be otherwise constituted, a Court of a Division must be constituted before two Judges for the hearing of any Civil or Criminal Appeal: provided that the Judge President, or, in the absence of both the Judge President and the Deputy Judge President, the senior available Judge, may in the event of the Judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third Judge be added to hear that appeal". In the light of these provisions I asked Counsel for the Appellant and for the State for their comment. Respondent's Counsel was of the view that the matter could proceed before us and there was no

jurisdictional issue in the context of that section. Counsel for Appellant contended otherwise, but did not provide us with a practical solution to the ostensible problem. In my view this section and its provisions have nothing to do with the jurisdiction of a Court, but simply provide for a practical approach to save time and effort should two Judges on appeal not be in agreement. In the present case, because of the order of the two Judges, three Judges had to read the record *de novo*, and this could have been avoided if a third Judge had simply been added to hear the appeal. There is therefore no merit in any suggestion that this Full Court is not properly constituted or cannot properly hear the appeal.

2.

The role-players in this sad case are the following:

2.1

The Appellant. He was born on 1 November 1961. He was previously married and had four children from that marriage.

2.2

His wife C, was born on 20 May 1962, and they were married in 2002.

2.3

The stepson of the Appellant was 24 years old at the time of the proceedings before the Regional Court. He suffers from a speech defect and attended a special school. It cannot be said that he received even a proper basic education. He is a victim of life and of the circumstances of this case, inasmuch as he spent most of his time begging in the streets under false pretences that he was doing so on behalf of some or other charity, whilst it was also alleged by the Appellant (and this is a mere allegation without any proof whatsoever) that he also had regular intercourse with his sister who is the main victim in this case.

2.4

The complainant in this case, and also the Appellant's stepdaughter is N. She was born on 31 July 1997. The hearing before the Regional Court took place during August 2014. She fell pregnant with the child of the Appellant in 2012 and gave

birth to a daughter on 13 September 2012. It appears that she completed grade 9 in school and then left because of her pregnancy.

2.5

Her aunt E, was 53 years old at the time of the criminal trial. She had completed her matric. She had known the Appellant for about 11 years.

In this judgment I will refer to the witnesses with reference to their first name, so as to protect, as far as I am able, the identity of the witnesses, and more particularly, the identity of the victim.

3.

The charges:

Charge 1 was that during 2007, the Appellant unlawfully and intentionally committed an act of sexual penetration with the complainant N, then 10 years old, by inserting his penis into her vagina without her consent. Reference was made in this count, as well as in the others, to the provisions of section 51 (1) read with ***Part 1 of Schedule 2 of Act 105 of 1997***, and in particular to the fact that imprisonment for

life upon conviction could be imposed. Count 2 was in similar vein, except that it referred to 2010 when the complainant was 13 years old. Count 3 similarly referred to 2011 in the same context when the victim was 14 years old. Count 4 referred to 2012 when the victim was 15 years old, in similar vein. Count 5 was a charge of assault with the intent to do grievous bodily harm and referred to an incident in 2013 when the Appellant allegedly assaulted the complainant with open hands and/or fists and/or by pushing her against a wall and furniture with the intent to cause her grievous bodily harm.

4.

The plea:

The Appellant pleaded not guilty to Count 1. To Count 2, referring to the charge relating to 2011, he pleaded not guilty, but at the same time said that it was "possible". To Count 3 he pleaded not guilty, as also to Counts 4 and 5. He was represented by a legal practitioner from the Legal Aid Board. In the plea-explanation it was said on his behalf by his legal representative that as far as Count 1 was

concerned, the Appellant never had the opportunity to have had intercourse with the complainant and in fact also did not do so during 2007. The complainant was simply lying in that context. The same was said in respect of Count 2, and as far as Count 3 was concerned, he admitted that he had had intercourse with the complainant when she was 14 years old. This was with her consent. It was also said that there had been one incident during 2011. In the context of Count 4, he admitted that he had had intercourse in 2012 with the complainant who was then 15 years old and it was similarly with her consent. It was then said that there had in fact been two occasions during 2012 on which he had intercourse with the complainant with consent. As far as Count 5 was concerned, he admitted an incident where the complainant swore at him as a result of which he simply pushed her away. She did not suffer any injuries as a result thereof. The Appellant confirmed these explanations given by his lawyer.

5.

The evidence of the complainant N:

She gave evidence on 4 August 2014. Her date of birth was 31 July 1997. The importance of the oath was explained to her, various questions were put to her in that context, as well as the importance of the matter for the Appellant, and the possible sentence upon conviction, all of which she understood clearly. She then confirmed that she would speak the whole truth and nothing but the truth. I am satisfied from her answers as a whole, in the given context, that she fully understood the difference between right and wrong, as well as truth and lies, and that she accepted that the difference was of importance. She described how their family, if I can call it that, moved to Nigel when she was about two years old. She remembered that the Appellant touched her indecently when she was about three. This incident did not form part of any charge sheet and whether or not it in fact occurred was not further dealt with in the proceedings below. The complainant then testified that during about 2007. The Appellant approached her when she was sleeping in her own room, pressed her shoulders against the bed, pulled down her clothes and

raped her by inserting his penis into her vagina. The mother had been at home at the time and had been asleep. Although the assault had hurt her she had said nothing to anyone, nor had she received any treatment. She was afraid of his threats, inasmuch as the Appellant told her that he and her mother would chase her away, and there would be no one to look after her. The Appellant at the time worked for a certain garden services company in Nigel.

Nothing further occurred in this context until 2011 when she was 14 years old and in grade 7. The Appellant then started to "manipulate" her by threatening her that she would not be fed and looked after if she did not sleep with him. At the time, her brother and her mother, she and the Appellant all stayed together in a small confined lodging. They received social benefits and the Appellant said that if she was chased away she would have no lodging and no support. She was also told to beg in the streets on the pretence that she was collecting money for a children's home. The same was told to her brother. The Appellant also continuously swore at them, insulted and degraded them. Her duty was to beg every Saturday and to ensure that she obtained at least R200 per day. With this as brief background, she

testified that she was raped practically every weekend during 2010. This occurred always after the lotto draw on a Saturday evening. Her mother had been asleep at the time as well as her brother. They slept in the same room. The accused then told her to go to the bathroom where he took off her clothes, told her to bend forward and then raped her. This also occurred regularly on Wednesdays. She kept silent. She believed in his threats and feared that no one would look after them if he was evicted from the house. Her mother could not work because of a physical disability, and she was too young. They received financial benefits, as I have said, by way of a disability pension. It also occurred regularly that before getting her to go to the bathroom, he indecently assaulted her in her bed.

6.

During 2012, she felt bilious from time to time, skipped her menstruation and as a result visited a clinic who informed her that she was pregnant. This was during February 2012. She did not have intercourse with anyone else. She showed the

result of the pregnancy test to the Appellant who laughed, told her that her version was a lot of nonsense and said that the test was unreliable. With the assistance of a friend at school she did a further test which was also positive. The Appellant then told her that he was sterile and could not be the father. It then occurred that on one Monday morning her mother looked at her strangely and told her that she knew that she was pregnant. She said to her that the Appellant had told her and had also told her that a young boy at the school had been responsible and was the father. She was too afraid to tell her mother the truth and then left the topic in the air. The Appellant had also advised her to have an abortion and generally speaking she was in a state of fear. She then left her school as well. Although she was pregnant, the accused still raped her regularly on Wednesdays and Saturdays.

7.

In 2012 she finally had the courage to refuse to have intercourse. She could not look her mother in the eyes anymore, felt that the whole scenario was wrong and

decided to take a stand. The accused then started to assault her. She was six months pregnant at the time. She was pulled and pushed around, thrown against a couch and hit in the face. Her daughter was born on 13 September 2012. During that time the Appellant also regularly shouted and swore at her and her mother over every possible area of critique, for instance, if the baby's nappies were not properly packed away, or not hygienically. She could not tolerate the circumstances any further and decided to phone her aunt E. She told her everything what had occurred since she was very young. The aunt wanted to report this to the police, but she begged her not to as she was still afraid that they would all be evicted and would have no one to look after them. After a few days of argument they laid a complaint with the police, despite the fact that the Appellant had begged her not to do so. Her mother was easily manipulated and the Appellant had told her that her mother would not believe her in any event. Also, DNA tests were done on the Appellant and these were positive. The Appellant was the father of her child. He still denied it and, in the context of Count 5 of the charge sheet, she described how he assaulted her. A photo of her face was taken which was swollen and blue and this she showed to her

aunt. The Appellant also regularly assaulted her brother. Ultimately her brother left the home and mainly spent his time begging in the streets.

8.

Cross-examination of the complainant:

It is noticeable from the typed record of the proceedings that her cross-examination comprised some 12 pages only. One of the more obvious reasons for that would be that the Appellant had admitted having had intercourse with the complainant on two occasions from 2011, if regard is had to what was put to her by Appellant's Counsel. In any event, she denied that and said it was 2010 when she was in grade 7. It was also put to her that in the context of Count 1 the Appellant would testify that he worked nightshift and therefore could not have raped her during the evenings as she had testified to. After brief examination about Count 1, she was asked why she had not told her mother about these assaults. Complainant said repeatedly, during the short cross-examination that she was afraid, that she was

threatened and told that she would be chased out of the house and left alone without maintenance or care, in the streets. She also told nobody at school. There was an interval between 2007 and 2010, for reasons which were not explained by anyone, nor dealt with, but she said it then happened all over again. In 2010 she was in grade 5. It was put to her that in 2011, while her mother was asleep, she called the Appellant to the bathroom. She then took a ballpoint pen and inserted it into her vagina. It is clear from the record that the complainant regarded this notion as being totally absurd. She also added that she had been previously raped and there was therefore no point, if that was the suggestion, that she would perform this "sick" act (as she put it), to facilitate an easier act of intercourse with the Appellant. In any event, she said that in 2010 the accused called her to the bathroom. She denied that on all of these occasions the Appellant was seated on the toilet and that she then sat on top of him. Further, she said she always had to bend forward and intercourse then took place in that manner. It was also put to her that on a particular Sunday morning, when her mother had gone to church, she asked the Appellant for R15 to buy airtime for her cell phone. When he was hesitant to give her this money,

she, by way of insinuation promised him sexual pleasure. It was also put to her in the same context that she asked the Appellant for money to buy cigarettes and had similarly then offered sexual favours. It is clear that the complainant found these notions absurd and denied them repeatedly. She also added that she had obtained cigarette money from her brother. According to her, the Appellant knew that all these acts of intercourse were against her will. On most occasions she had to bend forward on other occasions she was lying on her back. He often shouted at her that he would kill her and nothing would happen to him as a result, because of the brain operation that he had undergone which would result in blameless conduct on his part. She believed that. She also testified in some detail about the occasions when she was forced to beg in the streets together with her brother. In fact more time was spent on this topic than the various acts of intercourse she had described. She was emphatic that she was assaulted on more than three occasions and in fact on a regular basis. She denied that she had discussed the pregnancy with the Appellant and who would inform her mother. She was simply told on a Monday morning that her mother knew about it and this was so, because the Appellant had told her after

he had been drinking. She was also told by Appellant that he had told her mother that a boy from the school was the father.

Appellant's Counsel put to her that Appellant's version was that she had consented to the acts of intercourse and had merely attempted to hide them from her mother. She replied that she kept all of these occurrences to herself, because she was afraid that her mother would not believe her in any event. She again repeated that she was often assaulted by the Appellant with his hands and indeed with his fists. Her brother could confirm that and her mother as well, who kept quiet because she also feared the Appellant. She denied that she had sworn at the Appellant when on the particular occasion, giving rise to Count 5, he had knocked her away and had injured her.

She confirmed that she had sent photos of her facial injuries to her aunt.

I will again refer to her evidence and the tone and the detail of her cross-examination when I deal with the judgment of the learned Regional Magistrate hereunder. I do appreciate that Appellant's defence as expounded through cross-examination of the complainant was in the nature of things rather limited in that he

had admitted intercourse on two occasions. Nevertheless, many questions that ought to have been asked, both by the prosecutor, Defence Counsel and even the Court, were not asked. In this context, I have particularly in mind the knowledge or the lack thereof, of her mother, of these repeated acts of forced intercourse over the years. My main impression from the record as a whole in this context is that there was most likely a conspiracy of silence and, that a young girl kept quiet due to insecurity, lack of care, obviously lack of any love and warmth in their home and most importantly, because of the presence of fear that she would be left to her own devices in the streets.

9.

Evidence of the aunt E:

The aunt had known the Appellant for 11 years. She confirmed that when the complainant's baby was about six months old she was contacted by the complainant who initially told her about the baby, but at the same time did not want to disclose who the father was. She asked her to tell the truth in this regard and after a few

days of to-and-fro in that context, she was ultimately informed of the fact that the Appellant was the father. She then went to fetch complainant who stayed with her for a few days during the first week of July 2013. During that time she was phoned at least four times a day by the Appellant, and the complainant repeatedly told her that she was afraid. She even went so far as to say to the complainant that she ought to remember that her own child could possibly be the next victim. On 31 July 2013, which was the complainant's birthday, she spoke to her the whole night over the phone. She was told by the complainant that the Appellant had promised her, as an alleged birthday present, to have sex with her that particular day. Nothing much occurred thereafter until September of that year, and during that period the complainant told her about the various incidents of indecent assault and rape. The complainant had also told her that when she was very young she did not know that it was wrong to be touched in an indecent manner, because she had slept in the same room as her parents and had apparently observed them. The complainant also told her about the pregnancy tests and the allegation that a boy at school was the alleged father.

According to her point of view, both the complainant and her brother lived in terrible fear. She confirmed receiving a photo over the Blackberry cell phone which clearly indicates that the complainant had a blue eye after an assault. She received a number of those photos. She also confirmed that the complainant had told her that she was forced to beg in the streets. According to her, the complainant was a "terrible wreck" (in translation from the Afrikaans). She also mentioned that she noticed when the complainant stayed with her for a few days she had nightmares.

10.

Cross-examination of the aunt:

During cross-examination nothing of note emerged, except a new fact, namely that the complainant had told her that the Appellant had asked her to imitate the sounds during intercourse that her mother had apparently made during sexual acts. She was cross-examined about the photos of the assault that she had received, and confirmed that the marks on the complainant's face were clearly visible.

11.

The complainant's brother:

He was 24 years old at the time of the hearing and confirmed that he had a speech defect. The prosecutor at the time observed that in his opinion the brother had a low IQ and that he had apparently only obtained grade 10 education at a special school. He knew the difference between right and wrong and truth and lies, and was accordingly warned in that particular context by the learned Magistrate. He testified that the Appellant had often shouted at his sister and had assaulted her with his hands and his fists. He had also knocked her about. He testified that he had observed the marks of such assaults on her face. According to him he was a slave of the Appellant and had been mentally and physically abused by him as well. He had been forced out onto the streets to beg.

During cross-examination he confirmed that he had seen how the Appellant had knocked the complainant about and this had happened in his presence.

He was not asked about any knowledge that he may or may not have had about the sexual activities that form the basis of the charge sheet or of any other nature. It was never put to him that he had some sort of a sexual relationship with his sister.

12.

The complainant's mother:

She was 53 years old at the time of the hearing in August 2014. As far as her education was concerned, she had obtained a grade 6 level only. She confirmed that the Appellant had assaulted the complainant regularly. She did not know the reason for such conduct. This assault included hitting her with his open hands and his fists. She was not asked about any knowledge or the lack thereof of any sexual activities between the Appellant and the complainant, which on the one hand may seem particularly strange, but on the other hand may be explained by the fact that her educational level was up to grade 6 only. There may be other reasons on which I do not want to speculate about, but the record clearly shows that the prosecutor

did not examine her at all about the various incidents testified to by her daughter. Cross-examination of her compiled less than one page of the record.

The Magistrate deemed it proper, and rightly so, to ask her about details of the family. She mentioned that she received a social benefit and was afraid of losing it. She could not work, because she was sick inasmuch as she became dizzy from time-to-time. She confirmed that her son was not very intelligent. She did not know what had happened to her daughter's father. Her daughter was eight years old when she married the Appellant. She then corrected herself and said that if her memory served her correctly, the complainant was seven. When it was put to her that the complainant had said that she was indecently touched by the Appellant when she was three or four years old, she said that she could not properly remember.

13.

It is clear that neither the prosecutor, nor the Appellant's Counsel nor the Court, deemed it either fit or proper or necessary to ask her about her knowledge of any

sexual activities between the complainant and the Appellant. Again, I do not want to speculate in this context, but one good reason could be her standard of education, or rather the lack thereof, and another good reason could be the fact that she was actually ill in the context of her fainting-fits that she had briefly referred to. There may of course be other reasons, but these do not appear from the record of the proceedings.

14.

That was the State's case.

15.

Appellant's evidence:

Appellant denied that he had had intercourse with the complainant in 2007, because he worked on nightshift with a security company. He did however admit intercourse on three occasions from when she was 15 years old. She sat on top of him in the bathroom on the first occasion.

On the second occasion, it was on a Sunday morning in his bed whilst her mother was at church. He then added that in the context of the first occasion she had penetrated herself with a ballpoint pen. She even told him that it did not hurt at all.

On the second occasion she again sat on top of him because he was too heavy. She in fact hurt him due to her vigorous movements.

On the third occasion, also on a Sunday morning, she had asked him for R15 for airtime for her cell phone. He was hesitant to provide this and she then offered him "something pleasant". They then had intercourse again.

He could not remember any other occasions.

When she became pregnant she told him she had had sex with a boy at school in a toilet. She had a pregnancy test done, first at a clinic and then again through a pharmacy kit.

According to a DNA test he was the father, although a gynaecologist had previously advised him that he was sterile.

In essence he denied that he had ever forced complainant to have intercourse against her will.

He admitted assaulting her once only because the baby's nappies were not hygienic. He knocked her against a wall which caused the blue discolouration in her face.

He then added, out of the blue as it were, that complainant often had intercourse with her brother. I must add here that this version had not previously been raised or put to anyone.

Complainant also showed him erotic photos on her cell phone.

He told no one of this whole affair, simply to protect her.

16.

Appellant's cross-examination:

Appellant was initially asked to describe the three incidents that he had referred to in his evidence-in-chief during which intercourse was held with the complainant with her consent. He initially referred to the first incident having occurred in 2012 in Heidelberg. She was then 15 years old. The second incident occurred when she

was 15 in 2013 and the third incident in 2014. He then corrected himself and said that the first incident happened during 2012, the second during 2013 or 2014. He then said that he was confused and in fact the last incident happened in 2013, as well as the second incident, and the first one in fact in 2012. That was his version as to these incidents.

The first incident, according to him, therefore happened in 2012 while the complainant's mother was sleeping. He went to the complainant and told her that her mother was asleep, and she then went to the bathroom on her own accord. He again said in this context that he was confused when asked as to detail. He said (in translation from the Afrikaans): "I cannot remember my brain is standing still I don't know". He was then given a chance by the Magistrate to compose himself and he told the Court that he could not concentrate. The case then stood down until the next day, 6 August 2014. On that day he told the Court that he was ready to proceed, and the previous day's incident was not taken further by his Counsel. He then added that on the first occasion the complainant in fact took his arm and pulled him towards the bathroom. He then repeated the incident that I have described,

namely that she inserted a ballpoint pen into her vagina. He asked her whether it did not hurt, because he was under the impression that she was still a virgin. At that time she had stood towards him with her back. He saw blood on the pen and was quite amazed. She then told him that she had still been a virgin. She then told him to sit on the toilet, took off her underclothes and sat on top of him with her back towards him. At some stage they had a conversation about all these topics and at a different stage he said she made movements with her hand to indicate what he should do because her mother was next door. She then sat on top of him with her back towards him. She made movements for about five minutes in that position. He was not asked by the prosecutor as to how this was physically possible, taken into account his weight (93kg) and her tender build. The next day she told him, out of the blue, that she had seen him and her mother do this once when she inadvertently walked into their room. This had never been put to the complainant nor to anyone else.

The second incident, according to the Appellant was then also in 2012, but at the same time he said that he could not remember the exact year. It happened on a

Sunday morning whilst her mother had gone to church. On this occasion she asked him for R15 and he accepted that it was either for cigarettes or for air-time. She did however not tell him what she wanted the money for. This was also a new fact never before put to anyone. There were tears in her eyes and she begged him for this amount. He had a soft heart he said and therefore gave her the money. She then started removing her clothes. He resisted the temptation and told her that he loved her mother. He also told her that it was not right what she intended to do. She then removed all her clothes and lay next to him on the bed and told him to remove his own clothes. He then did so. She then told him not to lie on top of her, because he was too heavy and she then climbed on top of him. Her front was towards him and she made the usual movements whilst hurting him. He told her not to be so rough with him. He also could not remember whether he had received any satisfaction from this incident, but later admitted that most probably he did. He could do nothing about the second incident, because he lay on his bed like a victim. He in fact thought about slapping her because the incident was wrong. Before that in fact, and this is also a new version, she had helped him to achieve an erection. At his

age, which was 54 at the time, he was not really interested in sex any further. He admitted that he was overweight at the time and that the complainant was slim and tender. The second incident happened, according to him, because the complainant wanted to satisfy herself. That is why she took control of the whole incident as she was very manipulative. This was so, although she was only 13 years old at the time. On the third occasion, her mother had again gone to church on a Sunday morning. He thought this had happened at the beginning of 2013. Complainant locked all the doors and walked around the house half-naked. She did however have her underclothes on, but nothing else. He added that it must have been during 2013 when she was 15 years old. She again came to sit on his bed and told him that she was not interested in any church stories and went to the toilet. At that time he told the Court that he was very confused and had to think. I was not surprised when I read this, because it is clear from the record that he made up all the detail that was never put to the complainant as he went along. He also went to the toilet, but she was not there and he had then noticed that she had climbed into his bed. She was naked. He climbed into the bed next to her and at that stage she stimulated him

sexually. He repeatedly took her hand away from him, but ultimately she grabbed him and pressed him against the bed. He told her that this was not in order, because he was in love with her mother. She replied that there was nobody at home and that nobody would know. He lay dead still in bed, and then she again climbed on top of him and made up-and-down movements, while she kissed him on the cheek. On this occasion he ejaculated. After that she returned to own bed. He then went to cook and whilst doing that complainant came to him and grabbed him between the legs.

17.

It will be observed that many of these details had never been put to the complainant for comment.

18.

The next morning, and this is also another new version, she again came to him and grabbed him between the legs. He then said that he would tell her mother about this

conduct and he did so. Her mother had paid no attention and told her simply to stop these activities. This was of course also never put to the mother. An hour or so later complainant came to him and kicked him between the legs without any ostensible reason. This is also a new version. A week or so later, whilst he was sitting on the bed she again grabbed him between the legs. He said to her that her mother had already told her to stop this conduct and because he was disturbed by it he again went to tell his wife about this incident.

19.

He then admitted that he had assaulted the complainant on one occasion, because of the lack of hygiene concerning the baby's nappies.

20.

He never had intercourse with the complainant after the birth of the child, although he was not certain about it. He repeated his version that a gynaecologist in Pretoria

had told him in the beginning of the 1990s that he was sterile. He himself had four children, the eldest being about 40 and the youngest about 32 at the time. He could not give any detail as to why and when he was told about this sterility, because of the lapse of time.

21.

Complainant underwent two pregnancy tests and when she told him about the result he said that he could not possibly be the father. After the child was born he did not accept it as his own, because complainant had told him that she had had sex with a boy at the school. Ultimately a DNA test was done.

22.

In summary, he denied that he had ever forced her to have intercourse against her will. She in fact, took the initiative on each occasion. He never assaulted her, except once. He could not see any blue marks in her face after that incident. Her brother

was mentally retarded according to him, because of some or other incident when he was young. He denied that he sent them into the streets to beg. He also admitted that when they lived in Nigel, as complainant had testified, he had worked for a garden service. He explained the discrepancy by saying he was not sure of the relevant dates. In 2007 he had in fact worked for this garden service. He could not explain why his legal representative would then have put the wrong version. He said he could also not remember what he had said in his plea explanation.

23.

As far as the assault was concerned, he explained later in more detail that it was possible that she could have struck the couch with her face.

24.

That was the case for the accused.

25.

The Magistrate's judgment:

The learned Magistrate analysed the evidence before him. He also noted that the complainant appeared mature and self-assured before him and at no stage did he notice that she suffered from any stress when she gave evidence in open Court. Her evidence was however given in camera and he noted that he had warned her to give truthful evidence in accordance with the provisions of section 164 of the ***Criminal Procedure Act.***

He mentioned that the Appellant's evidence was interrupted on a number of occasions because he either became emotional or because he mentioned that he could "not think anymore". His evidence was also analysed by the Court.

The Magistrate took into account that the evidence of children had to be analysed carefully, and he noted that the complainant had been an excellent witness with an amazing memory. She was at no stage intimidated by the Appellant in open Court. He also noted that she clearly showed her obvious disgust when certain alleged facts were put to her for comment. He also noted that material parts of her evidence

were supported by her aunt. He noted on the record that when the Appellant's wife gave evidence, the Appellant clearly tried to intimidate her. The same happened when his stepson testified. This was in contrast to his conduct when the complainant and her aunt testified. During those occasions, the Appellant tried to avoid eye contact with them. He noted, as should be seen from my summary of the evidence, that the Appellant's evidence was riddled with contradictions. He spun a web of lies and repeatedly tried to recover from that situation by requesting time to think. The Court found that he was clearly a manipulating witness, and justifiably so.

26.

As far as the alleged consent of the complainant was concerned, the Court a quo dealt in some detail with the decision of the Supreme Court of Appeal in ***S v SM 2013 (2) SACR 111.*** It is not necessary to refer to this decision again in any great detail, except to say the following: "Consent, must be a real consent and it must be given by a person capable of doing so. Consent must be active and mere

submission is not sufficient". In this context the following quote from ***R v Swiegelaar 1950 (1) PH H 61 (A)*** is apposite: "The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is really the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless".

It is obvious that one has to have regard to the totality of facts in order to determine whether acquiescence to certain sexual conduct also constitute consent. Various factors may operate to nullify consent, such as age, considerations of public policy and the failure to appreciate the nature of the concept being consented to. The inequalities in the nature of the relationship between a child victim and an adult perpetrator are also of great importance in understanding the construction, nature

and scope of the child's apparent consent to any sexual relations. It is also clear that a child's vulnerability can result in openness to manipulation, must be carefully scrutinized. Where relevant, a web of rewards and punishments must be carefully considered as well.

27.

It is in my view clear from the evidence as a whole that the Appellant was a blatantly untruthful witness. Some of his descriptions of the acts of intercourse are preposterous and of such a nature that they could not reasonably possibly be true. Many of the details that he presented to the Court a quo were never put to the complainant for comment. In my view the learned Magistrate was quite clear in stating that the main intention of the Appellant had been to mislead the Court.

28.

There is another consideration of importance in cases on appeal: the fundamental rule to be applied by a Court of appeal is that, while the Appellant is entitled to a re-hearing, because otherwise the right of appeal becomes illusory, a Court of Appeal is not at liberty to depart from the trial Court's finding of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals those findings are patently wrong. The trial Court's findings of fact and credibility are presumed to be correct, because the trial Court, and not the Court of Appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

See: ***S v Hadebe and Others 1997 (SACR) 641 (SCA) at 645 E to F.***

I have analysed the evidence of all the witnesses carefully and the Magistrate did the same. No material errors of fact or law could be discovered by me after this exercise. The Appellant's version was rife with contradictions and it is clear from the record that he was evasive, manipulating and untruthful.

In my view the Appellant was correctly convicted. It is also clear from the evidence of the complainant that the State could have preferred many more charges against the Appellant, but obviously did not do so.

29.

After the Appellant was convicted, certain previous convictions were put to him which he admitted. Some of these occurred more than 20 years before the present events and one included an indecent deed with a minor under the age of 16, during 1986.

30.

Prior to sentencing, a pre-sentence report from the Social Development Department of the Gauteng Province was handed in by consent. This report sets out all the relevant facts after the Appellant was interviewed, his wife, the complainant, her brother and the aunt. As far as the Appellant's family background was concerned,

certain facts were reported which were however not dealt with during the evidence in these proceedings. One of these was that the Appellant allegedly suffered brain damage during 1996 and was unconscious "for three months and later underwent an operation to his brain". No details were given and neither the Appellant nor the prosecution took this matter further, if indeed it is relevant. The learned Magistrate in his judgment noted that although the Appellant was not particularly intelligent, his evidence certainly did not indicate that he was physically or mentally disabled, so as to not have had a fair trial or fair opportunity to defend himself to the relevant charges. The social worker noted that the lack of privacy in the family's home "seems to have contributed to the commitment of a crime concerned as the children seem to have been exposed to sexual activities from an early age and the family seems to not have placed priority on privacy". As I have said, as sad as this comment is, there is no evidence of these alleged activities apart from what the complainant testified about. The social worker noted that the Appellant seemed healthy at the time of the interview, although he complained of a number of conditions. As I have said, neither the Appellant, nor his legal representative,

deemed these health issues, if they are indeed true, of such importance as to mention them to the Court, or to give evidence in that regard. The social worker also noted that the accused ... "is very manipulative but not in need of additional psychological intervention". The following comment is also noteworthy: "The injuries suffered to the brain of the accused do also not seem to have played a contributing role in his sexual deviant behaviour as he was already convicted of a sexual offence involving a minor child in 1986 before he sustained the head injury in question. The accused seems to be average when compared cognitively to his peers and can express himself well in Afrikaans and English. The accused thus appears to be mentally and physically healthy enough to take part in Court proceedings and knows the difference between wrong and right".

31.

As far as the victim is concerned, the following appears from the report: "The child suffered emotional trauma as a result of the incident and was also teased at school for being pregnant as well as ostracized by the M family who also reside on the

plot... She has never undergone counselling but however seems to be resilient and indicated that she is not in need of psychological intervention currently. The minor victim could not concentrate on her school work due to the sexual abuse which caused her to struggle academically and later she could not cope physically with the demands of pregnancy while at school and dropped out of ... high school. She returned to school in 2014 but the family could no longer afford to pay her transport ... every day and she again dropped out of school and started working on a temporary basis. The victim was encouraged to complete her schooling career through adult based education".

32.

In the light of the conviction, the Appellant's admission that he had intercourse with a minor incapable of giving lawful consent, the learned Magistrate analysed all relevant considerations. He mentioned that the rights to dignity and bodily integrity are fundamental to our humanity. He referred to the interests of the community in the present context. He took all personal circumstances of the Appellant into

account. He analysed the rights of the minor child and the fact that she was regularly raped over a number of years. He took into account that her youth had been forcefully taken away from her and that she was forced to act as a struggling adult at an early age. The relationship of trust had been grossly abused. As a result he could not find any substantial mitigating circumstances in the context of what was said in ***S v Malgas 2001 (1) SACR 464 (SCA)*** and ***S v Vilakazi 2009 (1) SACR 552 (SCA)***.

33.

As a result the Court imposed the sentence required by law and sentenced the Appellant to imprisonment for life. On Charge 5 he was sentenced to six months imprisonment. It was ordered that all the sentences run concurrently.

34.

A trial Court enjoys an unfettered discretion to impose a proper and proportionate sentence depending on the context. A Court on Appeal is not free to interfere with such a sentence, unless it is convinced that the trial Court could not reasonably have imposed the sentence it did. The fact that the Court of Appeal, as a Court of first instance, might for instance have imposed a different sentence is not regarded as sufficient to interfere with the sentence imposed by the trial Court.

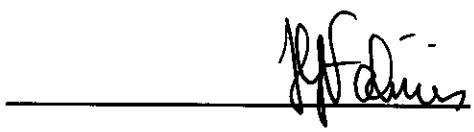
See: ***S v Holder 1979 (2) SA 70 (A) at 75 C to D.***

In this context I may just mention that I would not have imposed a different sentence than the learned Magistrate. It is again necessary to refer to ***S v Chapman 1997 (2) SACR 3 SCA***, where the following was said at 5 b and further: "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim".

There is nothing to be said in the favour of the Appellant. The relevant circumstances are rather aggravating than mitigating. The Appellant showed no remorse during the trial, although prior to sentencing he handed up a letter which he

read to the Court in which he suddenly expressed regret, and also suddenly relied on the possible intervention of a Higher Being. It is in this instance ironic, if I can use that phrase, that he committed many rapes on a Sunday morning whilst other people attended church. Clearly, at that time the intervention of a Higher Being was not of importance to him.

In the context of all of the above, there is no merit whatsoever in the appeal against the convictions or the sentences imposed, and the appeal is accordingly dismissed.

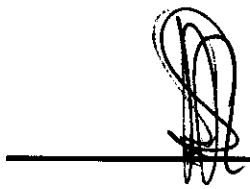


JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

I Agree



JUDGE S. S. MPHAHLELE

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

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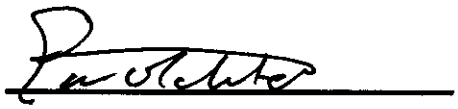

ACTING JUDGE E. MOLAHLEHI

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

Date of Judgment: 23/08/2016