HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A66/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

DATE: 01 JUNE 2018

SIGNATURE

In the matter between:

MFANIMPELA NTOKOZA ZULU Appellant

and

THE STATE Respondent

JUDGMENT

DAVIS J

[1] This is an appeal by the appellant against convictions and sentences imposed in the Regional Court for the Regional Division of Mpumalanga held at Ermelo. The appellant had been convicted on three charges of rape and two of common

assault. In respect of the rape charges he was sentenced to life imprisonment on each of the charges and in respect of the two assault charges, he was sentenced to 3 months imprisonment each. All sentences were ordered to run concurrently.

[2] The complainant in respect of all three charges of rape was the same girl and the offences took place when she was 12, 13 and 15 years old respectively. I shall henceforth referred to her as "the minor". She was also the victim of the one assault when the appellant had slapped her with the open hand (which assault was admitted).

[3] How the rape charges came about, formulated as contraventions of section 51 of the Criminal Law Amendment act 105 of 1997 due to the age of the minor as being under 16 years of age, is as follows:

3.1 During 2009 the minor's mother became romantically involved with the appellant and they started living together. They were not married to each other and she described him as her partner. At that time, the minor was living with her maternal grandmother.

3.2 During 2010 the minor started staying with her mother and her partner, the appellant who then became her *de facto* stepfather. The mother testified that, whenever a "misunderstanding" would occur between her and her partner, suggestions would arise that the minor should go and stay with her grandmother again. These misunderstandings would more often than not be altercations following on the appellant's complaints that the minor does not want to listen to him and causes tensions in the house. The appellant also administered corporal punishment to the minor, to the extent that the

mother described it as "beating her up" to the extent further that she sometimes had to intervene.

3.3 The minor described the instances of rape in graphic detail through an intermediary. The appellant would usually approach her after school when no one else was present at home. He had gained her trust or told her to trust him and that he would show her what boys do to girls. He would then smear his penis with vaseline and gradually, over a period of time extending over weeks and months penetrate the minor vaginally with increasing depth. He told, that, unlike other boys, he would be gentle with her.

3.4 At some stage, prior to the start of the period of actual penetration, the minor had complained to her mother that the appellant touched her inappropriately when he was playing with her. This led to a confrontation with the appellant and an apology but however not to a cessation of his inappropriate conduct. The minor, when confronted about not having reported the commencement of the rapes until some years later, explained that she did not want fights between her mother and her partner and that she did not want to hurt the mother who was trying to have children with the appellant.

3.5 The repeated rapes did not only cause the minor to loose her virginity, but also to fall pregnant. More than once. On the first occasion she did not even know that she was pregnant. This was discovered at the clinic to which she was taken when her mother noticed that she was not menstruating. At the time the appellant told the mother that the

minor was seeing a boy and that he must have been the cause of the pregnancy. He also told the minor to confirm this. When the mother then wanted to confront the boy and his parents, the appellant stopped her, saying it would be to no avail and that what was done was done.

3.6 The appellant suggested that some pills should be bought from Nigerians to terminate the pregnancy, which was indeed what was done. In his evidence, however, he alleged that the suggestion of pills came from the mother. The minor testified that the termination of pregnancy by way of pills, happened with a subsequent pregnancy a year later when the appellant was the one who told the mother about the pregnancy. He again suggested that it was a boy which the minor was seeing who was the cause.

3.7 This sequence of events with minor variations repeated itself over the remaining years resulting in multiple terminated pregnancies. The minor conceded that at some stage she indeed started dating a boy and it was in him that she first confided about the appellant's conduct.

3.8 The boy was also to an extent a catalyst in the matter because when the appellant subsequently saw the minor in the company of the boy, he not only assaulted the minor but also the boy who became the complainant in the second assault charge. By this time the appellant had become increasingly aggressive at home and threatened the minor that if her mother were to find out about the rapes, they would both no longer be welcome and the mother would lose the lovely place she stayed at with the appellant. The appellant started carrying a knife

which was also used during his chase of the boy after the assault on him.

3.9 After the assaults, the appellant again raped the minor. When the appellant went to fetch money the next day and after he had again instructed the minor to remain behind while her mother intended going to Witbank, the minor told the mother everything. It was only then that the mother decided that there was no future with the appellant and accompanied the minor to the police station to lay rape charges against him. By this time the boy, being the complainant in the other assault charge, had already been to the police.

[4] I have above summarised the harrowing ordeal of the minor which took place over a period of almost 4 years. She testified about it at length in the court a quo and was also subjected to intensive cross examination. The principal criticism against her evidence then, and also on appeal, was that she could only in vague terms date the incidents of rape. The version given by her which I have summarised above was, however, corroborated by both the mother and the other complainant whenever reference was made to them.

[5] The minor was 16-year-old by the time she testified in court a quo and from the record it is clear that she testified in an open and forthright manner. She described detail which would be difficult if not impossible to do, had it not occurred. She made concessions about aspects not in her personal knowledge when it was proper to do so and overall answered questions put to her in cross examination in a direct and satisfactory manner. The learned magistrate, in the judgement in the court a quo, also considered all aspects in respect of which she

was a single witness in such a fashion that I find that the cautionary rules in respect of such witnesses have been satisfied. When one reads the minor's evidence, it appears that any vagueness as to dates is as a result of the fact that there were many more instances of rape than only the three formulated in the charge sheet. The possible explanation for the limitation to 3 might be because the mother only knew of three pregnancies (the minor said they were more).

[6] On the other hand, the appellant was equally vague about the dates of the minor's pregnancies but what he did confirm, was the fact that he had at least on one occasion funded one of the termination of pregnancies. He alleged that he was the one protecting the minor from the mother's wrath and conceded that if this was true it does not make sense for the minor to then falsely accuse him of rape. He alleged that the charges were a conspiracy between the mother and the minor following on his statement that the mother should go to her mother (maternal grandmother of the minor) to think about their relationship. His conspiracy theory also extended to the other complainant. Overall, the magistrate's evaluation of the evidence appears to be correct and, apart from the observances of the minor, her mother and the other complainant during the giving of their evidence, the finding that they appeared to be credible witnesses if regard is had to the manner in which they answered questions, correspond with the record. The criticism of the appellant appears to be equally justified when one considers the number of discrepancies and various versions, not all of which were initially put to the minor during her cross examination, particularly his reasoning as to why or how charges came about. In my view the magistrate correctly rejected the evidence of the appellant as being false.

[7] As a secondary attack, it was argued on appeal that the intermediary was not properly appointed. This attack was later narrowed down to the fact that her qualifications to act as an intermediary was not fully explored or placed on record. Her qualification as an intermediary was confirmed in a certificate deposed to under oath by her and which formed part of the record and in which she confirmed that she falls in the class of persons determined by the Minister as qualified to act as intermediaries. The reason why this aspect was not further explored or questioned was as a result of the fact that the appellant, who was legally represented at the time, not only had no objection to the minor's evidence being led through an intermediary, but that he expressly had no objection to the specific intermediary acting as such. On appeal reference was made to section 170A of the Criminal Procedure Act 51 of 1977 stating the requirements for the leading of evidence through a qualified intermediary. However, counsel for the appellant's attention was drawn to section 170A (5)(a) which provides that no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such an intermediary may not have been competent to be appointed as an intermediary. Section 170A (5)(b) further provides that if in any proceedings it appears to a court that evidence has been presented through an intermediary who was appointed in good faith but at the time of such appointment was not qualified to be appointed as an intermediary, the court must make a finding as to the validity or admissibility of such evidence with due regard to the reason why the intermediary concerned was not qualified to be appointed as such and the likelihood of whether this fact would affect the reliability of the evidence so presented adversely as well as the likelihood that real and substantial justice will be impaired if that evidence is admitted. In the present instance, apart from the argument that the certificate of the intermediary did not disclose her specific qualifications, even though it was confirmed on oath, no other reason appears from

the record why the intermediary was not qualified. Having regard to the manner in which the questions were put and related by her to the minor, the likelihood that the reliability of evidence was adversely affected also does not appear from the record. This likelihood further diminishes if one takes into account the age of the minor at the time at which she testified (as compared to her younger age when the instances occurred). She might as well as easily have testified without the intermediary. It appears to me that there was no real or substantial prejudice to the appellant in the manner in which the minor's evidence was presented and in fact real and substantial justice will be impaired if her evidence is not admitted.

[8] On a conspectus of the evidence I find that the learned magistrate had correctly accepted the evidence of the minor and the corroboratory witnesses and rejected the evidence of the appellant. Consequently the charges had been proven beyond reasonable doubt and the convictions were correctly imposed.

[9] Insofar as sentence goes it is abhorrent that a person in a position of a stepfather and having gained the trust of a minor would, under the guise of grooming or preparing her for adult life rob a young girl of her dignity and her virginity. Although there was no victim impact assessment report, the gradual and increasing penetration and repeated rapes and the psychological trauma forced upon the minor scream against any sense of sensibility, morality and justice. More than 20 years ago the late Mohamed CJ in S v Chapman 1997 (2) SACR 3 (SCA) stated: '*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. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the constitution and to any defensible civilisation... The courts are under a duty to send a clear message to the accused, to other potential rapists and*

to the community: we are determined to protect the quality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights'. These sentiments become even more grave and compounded when the rape is not a single event but in fact a series or sequence of repetitive events and then even more so when it is imposed on a vulnerable minor female. The abhorrence of this crime is reflected in the provision for a sentence of life imprisonment. Having regard to the evidence of the minor, the conduct of the appellant could have resulted in many more than only the three charges and consequently also a multiplicity of similar sentences compared to only the three of which he was convicted and sentenced. I find no substantial compelling circumstances justifying a departure from the prescribed minimum sentences and none were presented by the appellant. If any further confirmation is sought why no such departure should occur, it is to be found, in my view in the prior convictions of the appellant. He was convicted of murder and rape in 1998 and in respect of which a 12 year sentence of imprisonment was imposed. Clearly this did not have the hoped for rehabilitative or deterrent effect. The sentences imposed in respect of the common assaults were negligible in comparison to the three life sentences and the learned magistrate, in considering the cumulative effect of the sentences and in fact the sentences themselves, correctly in my view, ordered that they all run concurrently and I see no reason to interfere with this determination.

[10] However, that is not the end of the enquiry. Our courts have, in a series of judgments emphasised that one should not lose sight of the fact that life imprisonment is the most severe sentence which a court can impose and that the question whether it is an appropriate sentence in respect of its proportionality to the particular circumstances of a case requires careful consideration. See: S v Abrahams 2002 (1) SACR 116 (SCA); S v Mahomotsa 2002 (2) SACR 435

(SCA); S v Nkomo 2007 (2) SACR 189 (SCA) and S v GN 2010 (1) SACR 93 (T). In S v Ganga 2016 (1) 600 (WCC) it was further found that, even when a life sentence is a prescribed minimum sentence, as an ultimate sentence, it must not be imposed lightly. A court must still seek to differentiate between sentences in accordance with the dictates of justice and where a magistrate did not sufficiently give consideration to the approach adopted by our courts in the cases referred to above and simply considered whether the circumstances of the accused displayed substantial and compelling circumstances, such an approach would amount to a misdirection. Unfortunately, this is what happened in this present instance, necessitating interference by this court on appeal. Abhorrent as the appellant's; crimes may be, society has given us worse examples of the extent or brutality of crimes against women. To impose life sentences in the present instance would be disproportionate to the imposition of life sentences in such other matters which would deserve the ultimate penalty. I am bound by the precedents referred to above and as a consequence of which the life sentences are to be reduced to sentences of imprisonment of 20 years each, still to run concurrently with each other and the sentences imposed in respect of the assault charges. I have considered whether it would be necessary to distinguish different periods of imprisonment for the three rapes charged but, in my view they are to be sanctioned equally.

[11] In the premises, the appeal against convictions is dismissed and the appeal against sentences is upheld to the effect that the three life sentences are replaced by sentences of 20 years imprisonment each.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered

D NAIR
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 28 May 2018

Judgment delivered: 01 June 2018

APPEARANCES:

For the Appellants:	Mr M Botha
Attorney for Appellants:	Pretoria Justice Centre, Legal Aid, Pretoria
For the Respondent:	Adv. M. J Nethononda
Attorney for Respondent:	Director Public Prosecution, Pretoria