IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A624/2017

In the matter between:

A AJOSE Appellant

And

THE STATE Respondent

JUDGMENT

NEUKIRCHER J:

1. The appellant was charged with one count of intimidation[1] and eight counts of rape in the Regional Court, Pretoria.[2]

2. The charges of rape all allegedly took place between the months of September and October 2012 and all are similar in their description and that is that the applicant was accused of:

> *"... unlawfully and intentionally committing an act of sexual penetration with the [complainant] (13 years) by penetrating her vagina with his finger and sucking her vagina without her consent."*

[1] A contravention of section 19(1)(a) read with sections 2 and 3 of the Intimidation Act, No. 72 of 1984
[2] As read with the provisions of section 51 of Act 105 of 1977

3. The charge of intimidation was founded in the allegation that the appellant threatened to kill the complainant if she told anyone about the alleged rapes.

4. As already stated, the complainant was 13 years old at the time of the rapes and was 17 years old at the time the trial commenced.

5. The appellant pled not guilty to all nine charges and was eventually found guilty and convicted on all nine counts on 10 July 2017 and sentenced as follows:

5.1 on count 1 of intimidation: to 3 years imprisonment;

5.2 on counts 2 to 9 (the rape charges): taken together for sentencing - life imprisonment in terms of section 51(1) of Act 105 of 1997;

5.3 in terms of section 260(2) the sentences were ordered to run concurrently.

6. Leave to appeal was granted against both conviction and sentence.

7. The State called four witnesses: the complainant, her mother (A C – "C"), Dr Seller, who performed the medico- legal examination on the complainant and Mrs M, the principal of X High School in Centurion where the complainant was In Grade 8 in 2013.

8. The appellant then testified as did Ajoke Oshodi ("O"), his erstwhile girlfriend, and Oyelouuo Rotimi ("Rotimi"), a friend of his.

9. It is important to note at the outset that, insofar as the charges are concerned, the complainant is in actual fact a *"single child witness".* None of the other witnesses saw any of the incidents, save one allegedly seen by Oshodi, but she denies this.

10. Insofar as the complainant's' evidence is concerned, one must approach it bearing in mind the cautionary rules relating to the evidence of a single witness. In **S v Sauls & Another**[3] It was held that:

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh*

[3] 1981 (3) SA 172 (A) at 180E- G

his evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence was well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."[4]

11. On this note, it bears emphasising that at no stage did appellants' counsel argue that the appellant was not guilty of intimidation and rape. Rather, the argument before us focused on whether the appellant was guilty of all eight counts of rape. It was argued that the State was only able to prove two counts of rape and two counts of sexual assault because, ln respect of the latter 2 counts, there was no penetration beyond the genitalia of the complainant and thus It was on these that the conviction should have been handed down and the sentences passed. This aside from the intimidation charge. Thus, at best for the State, the life sentences can only stand in respect of the two counts of rape according to the argument.

12. Given this argument the facts bear some analysis.

13. The complainant testified that at the time she was staying in Sunnyside, Pretoria with the appellant, Oshodi,[5] her baby and his cousin. The appellant was, at the time, her mother's boyfriend. Her mother had gone to Johannesburg to seek employment and had left her in the care of the appellant, for a period of approximately one to two months.

14. She testified that prior to her mother moving to Johannesburg, and when she and her mother was still staying together, when the appellant would visit them in their flat he would forbid her to wear towels around him. She testified to one incident[6] when she had a bad rash on her inner thigh and he Insisted on applying the ointment he

[4] Also S v Ndubane, 2017 JDR 0641 (GP)
[5] who she thought was the appellant's sister but in actual fact was his girlfriend
[6] Which I will call Incident number 1 and relates to count 1

bought for her himself. He asked her to put her leg on his knee and touched her labia.

15. After she moved to Sunnyside with to live with the appellant, there was another incident - he told her she was too fat and should do exercises. One day she was doing sit-ups on the bedroom floor and the appellant told her to lie on the bed to do leg exercises. She testified that she was wearing baggy shorts; he spread her legs apart and moved the shorts aside together with her panty and inserted his finger into her vagina.[7] She jumped up and asked him what he was doing and he responded by puffing his hand over her mouth, telling her to keep quiet and that it would not hurt. He kept Inserting his finger in and out of her vagina. He clenched her thighs shut too, to prevent her from kicking him. He then took off her shorts and sucked her vagina.

16. When he was done, she started crying and threatened to tell her mother. It was at this point that he threatened to kill her if she did so and told her that this would *"break (her) mothers' happiness".*

17. She then took a bath because she felt dirty and he watched her whilst she was doing so.

18. Her evidence was that *"this happened a lot"* - she would take bath, he would come into the bathroom and· sit on the toilet and watch her bath. If she wore a towel, he would take it off, push her onto the bed, insert his finger into her vagina and then suck her vagina. In her words:

> *"... it would happen for days on end ... he would molest me... .It was kind of like an everyday thing, it was a cycle."*

19. When she asked him why he was doing this and begged him to stopt the appellant told her:

> *"… I am doing this because I get money every time I do this. It is like a lucky charm to me."*

[7] This is incident number 2 and relates to count 2

20. He also told her he is only doing this to make her “a *big girl”* and for her to know what to expect when she gets into a relationship when she is older; for her to *“grow up and become a woman”.*

21. The third incident[8] was when she was watching TV, playing on her cell phone. At a stage, the appellant called her into his room and showed her some graphic cartoon pornography. When. she protested, he pushed her onto the bed, took off her panty and sucked her vagina. Again when she protested he told her that is only doing this because he is *“trying to be* a *loving father; to make her* a *woman and to raise her 'properly”'.*

22. The fourth incident[9] was an occasion when the complainant's mother came to visit from Johannesburg. The appellant insisted that the complainant accompany him to buy alcohol and to avoid a fight she did just that. He parked his car at the back of a club, unclipped her seatbelt, put his hand over her mouth, reclined his seat and put his other hand in her pants to touch her clitoris. She tried to stop him but he was too strong for her. He eventually stopped and after a few minutes went into the shop and bought what he needed and they went home.

23. She testified that whilst they were walking back to the flat, she was walking *“funny”* because she was uncomfortable and in pain. The appellant hit her on her back and told her to *“stop if,* that he mother would see - so she put on her *“brave face”.*

24. Her evidence was that her mother was too in love with the appellant to notice that anything was wrong.

25. Another Incident in the bathroom was interrupted when the complainant started screaming. The bathroom window faced onto the bedroom window and the complainant testified that when she screamed, she heard Oshodi scream at the window and ask what she and the appellant were doing – Oshodi denies that this ever took place.

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[8] Relating to the third count

26. A fifth incident took place at a club in Menlyn called Ties. According to the complainant's evidence, the appellant promised her that this would be the last time that he touched her. According to her, he said that this was his *"good luck charm"* and that *"he is just trying to raise (her) to be a good woman".* Her evidence was that he let his seat down, and that struggling got her nowhere, so she just *"gave up".* The appellant inserted his finger in her vagina and she testified that he "was *busy for* a *very long time".* When he was done, he then went into the club to collect his money and they went home.

27. According to the complainant's evidence she told a friend at school about all of this. In return, she was accused of being *"dirty'* by her friend and was told that no one would love her.

28. She told her mother of the molestation only after her mother and the appellant had ended their relationship after a quarrel that had turned violet between them. She did not do so before as she knew that her mother would have told then appellant, and she felt that her mother had, before this violent quarrel, loved the appellant more than she.

29. The complainant stood well under cross-examination. She was resolute in her answers with little to no contradictions that were of any import. At no stage during argument before us, was it argued that her version was improbable. Rather, argument was focused on whether the appellant had been correctly convicted on eight counts of rape and, in my view, correctly so.

30. The corroborating evidence was that of Mrs Malherbe who testified that the complainant was a child:

> *"... that presented with considerable anxiety, broke into panic attacks and fainted on a regular basis."*

31. She also testified that the complainant was:

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[9] Relating to the fourth count

"… such a tiny little girl, so fragile …"

32. Dr Seller testified that there was no physical evidence of the rape. He did testify that not all girls will have a tear to the hymen after their first sexual experience. He stated that the complainant was emotional and crying (which could have been due to the trauma of the examination) and that, in any event, the examination took place two months after the incident which could have influenced the issue of whether or not there he found any evidence of the rape.

33. The complainant's mother ("C") also testified that it was only after she had broken up with the appellant and after she and the complainant moved back to Centurion together. that the complainant had told her about the rape and that when she took the complainant to the police station lay the charge of rape, the complainant had a panic attack and had to be rushed to hospital for an injection to calm her down. They had to go back to the police the following day to complete the affidavit.

34. As to the appellant, C testified that

"…I trusted him because he also portrayed himself as my daughter's father ... he would introduce my daughter as his daughter. That is why I trusted him so much."

35. The appellant denied all the charges against him. His argument was that the one bedroom flat in which they all resided was "busy" and had he actually tried to rape the complainant, someone would have seen him, whether it was the baby's nanny[10] or Oshodi or her brother, who was there during the day.

36. But from Oshodi's evidence it appears that she asked her brother to move out and he only came to the home to eat in the evenings and would then leave. She was also a hairstylist and would leave the home between 10h00 and 11h00 and not be home until the early evening. On her own version therefore, the probabilities that she would have seen anything were slim. The nanny was not called to give evidence and thus any allegations regarding what she may or may not have seen are simply

[10] Who worked during the week

hearsay and inadmissible.

37. Rotimi was not able to add anything to the appellant's case as he did not witness anything. His parting-shot evidence was that C had raised the complainant to be *"too familiar with men too aware of her sexuality"* and that she liked to spend too much time with the younger men in the pub that C frequented. Interestingly enough, this was not put to either the complainant or C during their cross-examination.

38. In fact, almost all of the appellant's evidence-in-chief consisted of versions[11] that were put to neither the complainant nor Cloete. The appellant's chief version was that the rape and intimidation charges were laid because the complainant was very angry when she found out that Oshodi was not his sister but his girlfriend and that the fact that the complainant thought of him as her father, had exacerbated the situation - this was also not put to the complainant in cross-examination.

39. Given the argument before us today, all that really need be said is that the appellant was not a good witness. His evidence was throughout evasive, argumentative and inconsistent. His witnesses were not of much corroboration and use to him, and their evidence left much to be desired.

40. I am left without doubt that the appellant raped the complainant and he only question left is: on how many occasions did the State prove this beyond reasonable doubt? In my view, this is where the court a *quo* materially erred.

41. I am of the view that, given the evidence of the complainant as. set out *supra,* the State proved two counts of rape and three counts of sexual assault. The appellant's attorney was given ample opportunity to cross-examine the complainant on her version.[12]

42. The fact that these rapes were a daily occurrence does not mean that the State has proven the eight counts that the appellant was charged with - evidence must be presented on each of the eight counts with the elements of the rape present in each.

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[11] There was more than one
[12] State v Bogtsu, 2017 JDR 0638 (GJ) at paras. 31 and 32

The fact that the complainant was 13 years old at the time excludes any form of consent and in any event. it Is clear from the evidence. no consent was given.

43. As regards the three counts of sexual assault, section 261 of Act 51 of 1977 provides that this is a competent verdict on a charge of rape.

44. Thus. in my view, the state proved that the appellant was guilty of:

44.1 one count of intimidation;

44.2 two counts of rape; and

44.3 three counts of sexual assault.

45. The court a *quo* imposed sentence as follows:

> *"On count 1 ... 3 years imprisonment. On count 2 to 9 the counts are taken together for sentence, the accused is sentenced to life imprisonment in terms of section 51(1) of Act 103(sic) of 1977".*

46. The appellant argues that the court a *quo* did not properly consider whether the prescribed sentence of life imprisonment on the charge of rape was a suitable sentence for the appellant in the present circumstances. He argues that his personal circumstances were not properly taken into account, nor was the fact that he spent four years and four months in custody awaiting trial, and he also argues the fact that any violence involved in the commission of the crimes, was minimal.

47. In my view the court a *quo* erred in the manner in which it imposed sentence. For each conviction on each count a separate. sentence is warranted.[13] At the end of the day and because these rape charges carries with them a life sentence (if there are no substantial and compelling circumstances warranting a deviation), multiple convictions of rape will have the effect that there were will be multiple life sentences passed. Section 280 of Act 51 of 1977 will apply and the sentences will therefore run concurrently[14].

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[13] Hiemstra's Criminal Procedure; LexisNexis; pg 28-41

[14] One must bear in mind the theory of punishment expressed in S v Khumalo 1984 (3) SA 327 (A) at 330D-E:
"in the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA In R v Swanepoel 1945 AD 444 at 455, namely, deterrent,

48. And so to the question as to whether the appellant demonstrated substantial and compelling circumstances sufficient to warrant the imposition of a lesser sentence:

48.1 the appellant has two previous convictions: in 2004 In respect of fraud for which he received a suspended sentence and in 200”5 for assault, for which he paid an admission of guilt fine of R 500.00;

48.2 the appellant was 41 years old and unmarried at the time of his arrest. His studied security management in Nigeria and did a three month security certificate in South Africa. He ran a security company. He has two children - a 13 year old son In Nigeria and a 6 year old daughter In South Africa and he supported both children.

49. These circumstances were taken into account by the court *a quo.*

50. What was not taken into account was the fact that the appellant had spent 4 years and 4 months in prison awaiting trial, but this in itself would not be sufficient to overturn the sentence.

51. What is aggravating in the present matter is the fact that the appellant stood in a position of trust towards the complainant: she regarded him as her father; he introduced her as his child; her mother left her in his care for two months while she sought employment in Johannesburg. He abused both their trust; he violated the body of this young and innocent child and abused her on a level that transcended the physical.

52. Counsel submitted that the violence involved in the commission of this rape was minimal. I disagree. The complainant testified that the appellant hurt her on more than one occasion - he forcibly restrained her on the bed and would clench her thighs to keep her still or prevent her from jumping up. On the one occasion she testified that after the rape, she was in pain and could not walk property and the appellant hit her on the back to force her to walk normally so that others would not see what he had done to her.

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preventative, reformative and retributive ...”

53. Furthermore, the evidence is that the appellant was unrepentant, unremorseful, callous and oblivious to the pain he was causing - the complainant was his *"lucky charm"* and he was teaching her what to expect from a relationship when she was older. He was helping her to *"grow up and become* a *woman".* Thus, in his mind, he was doing her a great service.

54. Accordingly, given all of the aforementioned, in my view no substantial or compelling circumstances exist to warrant the imposition of a sentence on of the rape charges other than a life sentence.

55. In respect of the sentence for sexual assault, in general, a sentence of 5 to 6 years is appropriate. However, the complainant is a minor and these sorts of predatory crimes are particularly heinous. They snatch at the youth and innocence of the victim and are particularly prevalent in our society today.

56. In this matter, the complainant testified that she felt dirty. She received no support from the friend she confided in and she felt that she could not confide in her own mother, or her school teachers. She suffered from panic attacks at school and would have to go home and the cycle of abuse would start all over again.

57. In light of all of this, I am of the view that the sentence of 8 years on each count of sexual assault is appropriate.

58. The sentence of 3 years for the charge of intimidation is appropriate and is upheld.

59. Given the life sentence, all the other sentences shall run concurrently with that.

60. Thus, the order that I make Is the following:

60.1 the convictions and sentences in the Regional Court are set aside.

60.2 The convictions and sentences are replaced with the following:

60.2.1 the appellant is found guilty of:

(a) count 1. (intimidation);

(b) counts 3 and 6 of rape; and

(c) counts 2, 4 and 5 of sexual assault.

60.3 The appellant is sentenced on each of the charges as follows:

(a) on the count of intimidation, to 3 years of imprisonment;

(b) on each of the counts of rape, to life imprisonment:

(c) on each of the counts of sexual assault, to eight year's imprisonment.

60.4 The sentences on charges 1, 2, 4, 5 and 6 shall run concurrently with the sentence of life imprisonment Imposed in respect of charge 2.

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NEUKIRCHER J

I agree, and it is so ordered

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RANGATA AJ

Date of hearing: 2 May 2019

Date of judgment: 14 May 2019