REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

15/12/2021

DATE SIGNATURE

CASE NUMBER: A 309/2019

In the Criminal Appeal between:

DANIEL JAKOBUS BENJAMIN GRIESEL **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

BEFORE: **HOLLAND-MUTER AJ.**

(***The matter was heard via Teams in accordance with the Directives regarding the arrangements during the National State of Disaster; the Judgment will be uploaded onto Case Lines to the electronic file of this matter and will be electronically submitted to the parties/their representatives by Email).***

[1] The appellant was charged of contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in the Regional Court, Pretoria, in that he committed an act of sexual penetration with the minor, C[….] G[….], then between the age of 12 and 13 years, by inserting his finger into her vagina and /or his penis into her vagina without her consent. The Magistrate informed the appellant before he pleaded of the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant was convicted of rape of a minor child under the age of 16 years and sentenced to life imprisonment. He has an automatic right to appeal under section 309(1) of the Criminal Procedure Act, 51 of 1977 as amended when sentenced to life imprisonment by the Regional Court.

[3] Although he was legally represented, it was explained to him before he pleaded that should he be convicted on the charge, he would face a minimum sentence of life imprisonment if no substantial and compelling reasons existed justifying the court to deviate from the minimum sentence.

[4] The State called three witnesses namely C[….] N[….] G[….], the mother of the minor children, the complainant C[….] G[….] and Willem H[….] J[….] G[….] (referred to as "H[….]") younger brother of the complainant. The defence called the appellant and his mother (the grandmother of the minor children).

[5] The dispute is whether the appellant raped his minor daughter over an extended period (as averred by the daughter) or whether the denial by the appellant should be accepted by the court. The identity of the appellant was not in dispute. The state relied on the evidence of the minor daughter and her younger brother while the appellant testified in his defence and called his mother. The other witnesses did not shed any light on the charge of rape.

[6] C[….] N[….] G[….], the mother of the minor daughter and estranged wife of the appellant, did not know of the incidents until the two minor children informed her when her son refused to move back to the flat where the appellant and his mother lived. They were living away from the appellant for at least five months at that stage in a Wendy house in the Pretoria Gardens area. The son, H[....] refused to move back to the flat in Rietfontein where the appellant and his mother stayed and then spilled the beans about what the appellant had been doing with his sister and elder stepsister H[....] J[....].

[7] The alleged raping of the minor daughter occurred at the flat where they previously stayed with the appellant and his parents. She was very upset when she heard about it and this was some time after the alleged rape incidents occurred. Her evidence was further about the excessive drinking of the

appellant and his mother and his then violent conduct towards her and the children. She reported the matter to the South Africa Police.

[8] The complainant (the minor daughter) testified about the serial raping of her by the appellant (her biological father) over a period of time. She testified that the appellant raped her on at least 20 occasions. Her younger brother, H[....], testified that he witnessed two of the occasions, the first in the bedroom of the appellant in the flat shared by the appellant with his parents, his wife and the children. The second instance was one night in a park in the vicinity when the appellant and the children were on their way home. The appellant stopped next to the park the he took the complainant into the park and raped her while she was standing against a tree. H[....] observed this from a distance while waiting in the car. The complainant confirmed that the appellant raped her in the park one night while they were on route home in by car and that H[....] was waiting in the car.

[9] She testified that the raping started when she was 12 years old and they were still staying in Proclamation Hill in the west of Pretoria before moving to the flat in Rietfontein. During cross examination she persisted that the appellant raped her at least 20 times.

[10] The complainant testified that she was terrified of the appellant as he threatened to sell her to persons or “hurt” her should she tell anyone of the incidents. H[....] also confirmed the threats by the appellant to hurt and kill them should they report the incidents to anyone. H[....] also confirmed that the complainant pleaded with him to tell nobody about it as she was afraid that the appellant will sell her to other persons. The two minor children were afraid

of their father (the appellant) and they confirmed his excessive drinking and violent behaviour.

[11] The appellant's version was a denial of raping his minor daughter. He tried to paint a picture of a loving father for his children but conceded his alcohol abuse which resulted in aggressive outbursts and that during one such outburst he threw the complainant with a book and a small scissor. He could not advance any reasons why the children accused him of raping the complainant. Although he has no duty to show a motive of the children to accuse him, he said perhaps the children implicated him because of his drinking and abuse towards them.

[12] It is trite that the prosecution has the burden to prove the guilt of an accused beyond reasonable doubt. The accused need not assist the State in anyway discharging the onus. See **S v Mathebula 1997 (1) SACR 10 W at 19 E-20 B.** The accused is in terms of the Constitution of the Republic of South Africa, 108 of 1996 entitled to a fair trial. The State can discharge the onus of proof in a criminal case if the evidence establishes the guilt of an accused beyond reasonable doubt.

[13] The evidence must establish the guilt of the accused beyond reasonable doubt which will only be so if at the same time no reasonable possibility that an innocent explanation which has been put forward by an accused might be true. See **S v Van der Meiden 1999(1) SACR 447 W at 448 F-I and 449 H - 450 B; S v Sithole 1999(1) SACR 585 W at 590 F- 591 B.**

[14] The question in this matter is whether the version by the two minor children that the appellant raped the minor complainant, if evaluated and compared with the denial of the appellant, proves the guilt of the appellant beyond reasonable doubt; or whether the appellant is entitled to a discharge because the evidence did not prove his guilt beyond reasonable doubt.

[15] The proper approach in resolving factual disputes where there are two irreconcilable versions is that the court should have regard to the probabilities inherent in the respective conflicting versions. See **Dreyer v AXZS Industries 2006 (5) SA 548 SCA**, **Stellenbosch Farmers' Winery v Martell et Cie and Others 2003(1) SA 11 SCA in paras [5] – [7] and [14] & [15].** The proper approach is that the court should have regard to the inherent probabilities in the conflicting versions and when compared, which version is true and which be rejected. I am satisfied that the trial court was correct to accept the version of the complainant and her brother that these horrific sequel of rapes of the complainant by the appellant and to reject the denial thereof by the appellant. It is not for this court to intervene with a judgment unless the court a quo was wrong in its finding. In my view the trial court did not err in this regard.

[16] The complainant and her younger brother only reported the raping when they faced the probable return to the flat when this was proposed by their mother. The complainant and her brother were faced with the reality to return and then reported the past abuse of the complainant by the appellant to their mother. The late reporting of the alleged continuous rape is not an obstacle to discredit the complainant. In the matter where the international tennis star,

Bob Hewitt, was accused of raping two minor girls many years ago, the Supreme Court of Appeal held that it was indeed regrettable that it took so long to bring Hewitt to justice, but that this was not an unusual phenomenon in these types of cases. See **Hewitt v The State (637/2015) [2016] ZASCA 100 (9 June 2016) par [17], also in Hewitt v The State 2017 (1) SACR 309 (SCA).** In my view the fear for the appellant experienced by the complainant and her younger brother was real and the late reporting of the incidents should not be held against them.

[17] The medical evidence by Dr Seller does not exclude that any penetration occurred, particular if the penetration occurred some months before he examined the complainant. He has vast experience in similar matters and testified that in about 30% cases on this nature is it possible to find any type of injuries to the hymen of a complainant this age. There was no expert evidence contrary and there is no reason to reject Dr Seller's evidence.

[18] The balance of the evidence does not take the matter on the rape any further and needs no further attention.

[19] The version of the two minor children is accepted and proves the case against the appellant beyond reasonable doubt. The appeal against the conviction ought to be dismissed.

SENTENCE:

[20] The appellant was made aware of the prescribed minimum sentence when the trail commenced. He was legally represented. The court a quo took into account the trite factors: personal circumstances of the appellant; the interest of justice and the society; the seriousness of the offence; the time in custody trial awaiting and the contents of the probation report by Me R H Nel. The court a quo found no compelling and substantial circumstances to deviate from the prescribed minimum sentence.

[21] I am of the view that the court a quo did not misdirect itself in sentencing the appellant to life imprisonment and cannot find that the imposed sentence is shockingly inappropriate. The appellant violated his own minor daughter over a period and threatened her with “hurt” or to sell her to other persons. In my view this is one of the most serious cases imaginable and the psychological damage inflicted on the minor complainant cannot be undone. She will live with this for the rest of her life.

[22] The appellant displayed a total disrespect towards the complainant, and although not convicted therefore, admitted similarly violating the complainant’s elder half-sister in the past. The appellant’s threats that he will sell the complainant to other people should she report the matter is indicative of the total lack of any compassion and respect he had for the complainant.

[23] There are annual campaigns against gender violence and rape in our country but these campaigns seemingly had no impact on the appellant. I am of the view that the sentence of life imprisonment for the appellant is fitting

under the circumstances and that it should be confirmed. If this court interfere and alter the sentence it will send the incorrect message to the community. The appeal against the sentence ought to be dismissed.

ORDER:

[24] I therefore propose that the appeal be dismissed and that the conviction and sentence be confirmed.

_____

J HOLLAND-MUTER

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

_____

S POTTERILL

JUDGE OF THE HIGH COURT

CASE NUMBER: A 309/2017

HEARD ON: 24 November 2021

FOR THE APPELLANT: ADV. H. ALBERTS

(Instructed by Legal Aid South Africa)

FOR THE RESPONDENT: ADV. K. GERMISHUIS

(Instructed by: Director of Public Prosecutions, Pretoria)

DATE OF JUDGEMENT: 15 December 2021