IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

(REPUBLIC OF SOUTH AFRICA)

Case No: AR296/12

In the matter between:

SIFISO SAMUEL ZULU APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

HARTZENBERG, A.J:

[1.] The Appellant, a man presently aged 33, was convicted in the Regional Court at Newcastle on 9 February 2012 of raping a child, aged 8 at the relevant time. He was sentenced to 25 years' imprisonment.

[2.] The appeal is directed against both the Appellant's conviction and sentence. The State has given notice that it intends asking that the Appellant's sentence be substituted with the minimum prescribed sentence of life imprisonment, as is provided for in terms of s 51(1) of the Criminal Law Amendment Act, 1997[1].

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[1] Act 105 of 1997

[3.] The background to the matter is briefly as follows: The complainant lived with her mother and grandmother. The complainant's mother was called by the complainant's teacher to inform her that the complainant was not coping at school. In response to questioning by her mother, the complainant disclosed that the Appellant had sexually interfered with her and has had sexual intercourse with her. The complainant's mother and her grandmother, then confronted the Appellant. According to both of them, the Appellant confessed to having raped the complainant. The Appellant also, according to the complainant's mother and grandmother offered to pay compensation. The mother then took steps to have the matter reported to the Police. The Appellant, so it seems, lived on the same premises as did the complainant and her mother and grandmother, but in a separate room, for which he paid rent. The Appellant in his evidence, denied that he had raped the complainant or that he made any confession to the complainant's mother and grandmother.

CONVICTION

[4.] The following issues arise on the question of the Appellant's conviction: First, whether the complainant's evidence was satisfactory in all material respects. Second, whether the confession relied upon by the prosecution was admissible against the Appellant. I turn to each of these issues.

[5.] The complainant was born on 14 December 2000. The medical report which was admitted without the medical practitioner being called as a witness revealed the following: The examination of the complainant took place on 16 September 2010. There were no clinical signs of physical trauma. There were no apparent mental health problems. The gynaecological examination revealed no fresh or recent injuries. The findings of the medial practitioner were thus recorded in the transcript of the proceedings:

"Point 1 enlarged hymenal oriface
Point 2 is an old partial tear 6 o'clock and 9 o'clock
Point 3 moderate vaginal discharge
Clinical findings fit with assault to vaginal penetration in the past
Injuries fit with the time and circumstances of the reported incident"

The medical practitioner's conclusions with regard to the anal examination were that the absence of injuries did not exclude the "possibility of penetration".

The charge, it must be noted, alleged that the Appellant had raped the complainant during or about September 2010, at Madadeni.

The complainant it appears, gave her evidence through an intermediary as provided for in terms of s 170A of the Criminal Procedure Act, 1977.[2] At the time when she gave her evidence was 11 years old and a Grade 5 pupil. According to the complainant the Appellant stayed at the same place as she did with her

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[2] Act 51 of 1977

mother and grandmother. The complainant further stated that she went with the Appellant to his room. He would lock the door. He would remove her panty, lift her onto the bed and would then have sexual intercourse with her. He told her not to tell anyone. He, according to her, was afraid that he would be arrested. She was afraid to tell anyone, since she believed the Appellant would assault her. She could not remember on how many occasions this happened. She said she was afraid to report the matter. The complainant's evidence, making due allowance for the fact that she gave her evidence through an intermediary, reads well and is consistent. I am not persuaded that the complainant's evidence is not satisfactory in all material respects. The fact that the complainant did not spontaneously report the matter to anyone, seen against the aforesaid background, and particularly her fear of the Appellant, is understandable.

[6.] I am alive to *inter alia* the following principles and considerations, which apply in matters of this kind:

- Evidence of a complainant reporting a sexual offence, at the earliest opportunity, is exceptionally admitted only as evidence of consistency in the account by the complainant, that is, it is evidence going to the complainant's credibility[3].

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[3] S v HAMMOND, 2004(2) SACR 303 (SCA), paras [15] and [16] at 308 i – 310 d

- Where material parts of the complainant's evidence are in dispute, Courts require corroboration of such parts of the complainant's evidence[4].

- By corroboration is meant other evidence which supports the evidence of the complainant and which renders the evidence of the accused less probable[5].

- s 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007[6] provides as follows:

  "In criminal proceedings involving the alleged commission of a sexual offence, the Court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof."

- Evidence of a prompt complaint, moreover, does not provide corroboration for the complainant's testimony[7].

- A Court must approach a complaint or report made by an impressionable child, as a consequence of prompting or suggestive questioning, with appropriate and considerable caution.

[7.] Even if I am wrong in my assessment of the complainant's evidence, and assuming in favour of the Appellant that the complainant's evidence was not

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4 S v MATOME, (565/2011) [2012] ZASA 14 (16 March 2012), para [6] at page 4 of the judgment

5 S v GENTLE, 2005(1) SACR 420 (SCA), para [18] at 430 i – 431 a

6 Act 32 of 2007, which came into effect on 16 December 2007

7 S v MATOME, *supra*, para [8] at page 5 of the judgment

satisfactory in all material respects, I consider, for the reasons which follow, that the complainant's evidence was sufficiently corroborated by that of her mother and grandmother, as well as the medical evidence and the other circumstantial evidence, which illustrates that the Appellant did have the opportunity to rape the complainant.

[8.] Counsel for the Appellant made two submissions with regard to the admissibility of the confession made by the Appellant to the complainant's mother and grandmother. These were that the mother and grandmother were biased against the Appellant and that the confession was obtained while the Appellant was a suspect, without due observance of the Appellant's constitutional rights. With regard to bias, it is noteworthy, that the Appellant's attorney at the trial never put it to either the complainant's mother or grandmother that they were biased or that they were falsely implicating the Appellant for some ulterior purpose. The evidence of both the mother and grandmother makes it clear that the Appellant made the confession to them before the mother's boyfriend arrived at their home. The boyfriend is employed as a Constable in the Internal Stability Unit of the Police, at Newcastle. Once he arrived, the Appellant was taken to the Police Station. This was admittedly done on the evidence of the Appellant's mother, under some compulsion – she said "force was used". Prior to that, on both the mother's and grandmother's versions, no force or duress was applied to the Appellant. It was never put to either the mother or the grandmother, in cross-examination, that the Appellant was forced to confess to raping the complainant.

There is no factual basis for finding that the Appellant had not made the confession to the mother and grandmother, otherwise than freely and voluntarily, as the mother and grandmother testified.

[9.] With regard to the infringement of the Appellant's constitutional rights, I make the following observations: s 35(1)(c) of the Constitution[8] entrenches the rights of anyone who is arrested for allegedly committing an offence from being compelled to make any confession or admission that could be used in evidence against him. At the time when the Appellant, on the prosecution's version, made the confession to the mother and grandmother, he had not been detained. As indicated, it was not the Appellant's version that he was subjected to duress to make the confession. He denied making any confession at all. It was also not the Appellant's case at the trial that the admissibility of the confession was in issue.

[10.] A careful perusal of the evidence of the complainant's mother and that of her grandmother, satisfies me that the statements made by the Appellant and his conduct, at the relevant time amounted to a confession by him to raping the complainant. According to the mother, the Appellant was specifically told that he had raped the complainant. He at first remained silent. The mother then insisted to "hear from him whether it is the truth or not the truth". When asked by the

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[8] Act 108 of 1996

Regional Magistrate, the complainant's mother said that the Appellant, then said "yes", indicating that the allegation made against him was the truth. When asked why he did that, the Appellant, according to the complainant's mother, said that if they wanted him "to pay compensation", he wanted to know "what must he pay as compensation". The mother's evidence, in essence confirmed the grandmother's evidence. It is noteworthy that the grandmother did not make a statement to the Police. It was therefore not anticipated that she might be called as a witness. Her evidence appeared to be spontaneous. There can thus be no doubt that the Appellant indeed admitted all the elements of the crime of which he was accused at the time by the complainant's mother. By doing so, he also admitted all the elements of the crime with which he was charged.

[11.] For these reasons, I am satisfied that there was sufficient corroboration of the complainant's evidence, by the evidence of her mother and grandmother, in particular. The appeal against the conviction must therefore fail.

SENTENCE

[12.] I turn to the appeal against sentence and the State's request that the sentence should be altered to life imprisonment.

[13.] The crime of which the Appellant was convicted, being rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, is an offence referred to in s 51(1) of the Criminal Law Amendment Act, which carried with it a mandatory sentence of life imprisonment. The Regional Magistrate nevertheless imposed a sentence of 25 years' imprisonment. In doing so, the Regional Magistrate *inter alia* held as follows:

"Although you have pleaded not guilty and did not demonstrate or show any remorse in Court there was an indication that there was initially some acceptance and remorse when you were confronted. Perhaps your attitude has changed when you heard what the prescribed sentence is. As serious as this matter is because of the repetitive assault and rape of the complainant, and her age of course, I do not think that it deserved the maximum sentence."

I am mindful of the remarks by Ponnan JA in **S v MATYITYI**[9] where he said:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in Court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a Court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or

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9 2011(1) SACR 40 (SCA)

her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions….."[10]

In this case the Appellant has not been remorseful in the true sense of that term. His offer to pay compensation for his crime, as testified to by the complainant's mother and grandmother, was no sooner made than the Appellant chose to deny that he had ever made such offer.

Counsel for the Appellant submitted that the fact that the complainant did not suffer any serious physical injuries, constituted "substantial and compelling circumstances" as contemplated in terms of s 51(3) of the Criminal Law Amendment Act and that, to the extent that the Regional Magistrate did not impose a sentence of life imprisonment upon the Appellant, he was correct. Counsel for the Appellant further submitted that the Regional Magistrate had sentenced the Appellant on the basis of him having repeatedly assaulted and raped the complainant.

s 51(3)(aA)(ii) of the Criminal Law Amendment Act, provides as follows:

"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(ii) an apparent lack of physical injury to the complainant."

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[10] At 47 a - d

In **S v NKAWU**[11] Plasket J (as he then was) expressed the view that s 51(3)(aA)(ii), literally and disjunctively interpreted, is unconstitutional. He however held that the provision should be interpreted in a manner which would harmonise it with the Constitution. He further stated as follows:

"I am of the view that it is possible to read s 51(3)(aA)(ii) in a way that would render it constitutional. That is to interpret it, and the other provisions of s 51(3)(aA), to mean that any one of them on their own may not be regarded as a substantial and compelling circumstance justifying a departure from the prescribed sentence, but that each one of them may be considered along with other factors cumulatively to amount to substantial and compelling circumstances. On this interpretation I am not precluded from considering the fact that the complainant suffered injuries that were neither serious nor permanent, along with a basket of other factors, in order to arrive at a just and proportionate sentence."[12]

The latter approach was endorsed by the SCA, in **S v MUDAU**[13], where Majiedt JA held as follows:

"In respect of the severity of the rape, referred to in the preceding paragraph, it is plain form the medical report that the doctor did not find any serious physical injuries…. And there was no further violence in addition to the rape. Similarly in S v NKAWU the complainant had not suffered any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances exist justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(aA)(ii) of the Criminal Law Amendment Act, 105 of 1997, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J, expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it

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11 2009(2) SACR 402 (ECG)

12 Para [17] at 406 g - h

13 (764/12) [2012] ZASCA 56 (5 May 2013)

unconstitutional, since it will require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences. I agree with the learned Judge that 'to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied'. He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually."[14]

In my view the Regional Magistrate was clearly alive to all the relevant circumstances of the matter. Those circumstances included the fact that the complainant suffered no serious physical injuries. In my view, the Regional Magistrate also did not sentence the Appellant, on the basis of having committed multiple rapes on the complainant. He did, however, in my view, with justification, take into account the improper behaviour of the Appellant, over a period of time. On that basis, the Regional Magistrate, in my view, did not misdirect himself in imposing a lesser sentence than life imprisonment upon the Appellant. On the other hand, the offence of which the Appellant was convicted was a serious offence and warranted a commensurate sentence. In the latter regard, the complainant was of tender years. The complainant was known to the Appellant and to this extent, the Appellant abused the trust placed in him by the complainant. The complainant, as is clear from the evidence, was unable to cope at school and therefore did suffer significant psychological stress and trauma. It is regrettable that the prosecution did not present any evidence or any

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[14] Para [26] at pages 13 and 14 of the judgment

report on the impact of the offence on the complainant. I am not persuaded that the Regional Magistrate, in any way misdirected himself imposing the sentence which he did, upon the Appellant.

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

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HARTZENBERG, A.J.

I agree and it is so ordered.

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VAN ZÿL, J.

COUNSEL FOR THE APPELLANT:	Adv J. Butler, Pietermaritzburg Justice Centre
COUNSEL FOR THE STATE:	Adv W. Smit, instructed by the Director of Public Prosecutions, Durban
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