|REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: SS256/2006

In the matter between:

THE STATE

and

HENRY KRIELING Accused

Coram: Yekiso J
Heard: 6 June 2007 & 1 August 2007
Delivered: 20 August 2007

Summary:
Quantum of proof/sufficiency of evidence: judicial officers to be vigilant in the assessment and the evaluation of evidence to eliminate any possible risk of a conviction on basis of evidence of doubtful quantum.
Women and children: vulnerable members of society; whilst accepting that women and children are vulnerable members of our society, their vulnerability should not be allowed to be a substitute for proof beyond reasonable doubt or cloud the threshold requirement of proof beyond reasonable doubt.

REASONS FOR THE ORDER GIVEN ON 1 AUGUST 2007

HANDED DOWN ON 20 AUGUST 2007

YEKISO, J

1] This is one of those matters which relate to the committal of an accused person to the High Court for consideration of an appropriate sentence after a conviction in the regional court of an offence referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act, 105 of 1997. The accused was charged in the regional court, Parow, with one count of rape. The allegation against the accused was that on two separate occasions on 9 October 2003, and at or near Durbanville, within the regional division Western Cape, the accused, an adult male person, wrongfully and intentionally had sexual intercourse with the complainant, one L, a female person, without her consent. It transpired in the course of trial that the complainant is the accused's stepdaughter.

2] The trial, which culminated in the conviction of the accused, commenced before Ms M C Lehman, regional magistrate, Parow on 11 August 2005 and was concluded on 7 March 2006, when the accused was convicted of rape as charged. Once convicted, the magistrate became of the view that the offence of which the accused was convicted is an offence referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act which carries potential punishment in excess of the jurisdiction of the regional court, hence the referral of the matter to this Court for consideration of an appropriate sentence. The magistrate adopted this view ostensibly because of the age of the complainant, who was fourteen years of age when the offence was allegedly committed and sixteen years of age when she tendered her evidence at trial. Thus the complainant's age appears to have been the prime consideration in the view and the conclusion of the magistrate that the matter be referred to

this Court for consideration of an appropriate sentence.

3] The view I take in the matter is that there was not presented before the magistrate a sufficient body of evidence on basis of which a judicial officer could return a verdict of guilt beyond reasonable doubt. Briefly stated, the complainant's evidence was that on the day of the alleged commission of the offence the accused had sexual intercourse with her, on two separate occasions, without her consent; on the first such occasion sexual intercourse took place in the main bedroom and on the second occasion in her own bedroom; that the accused was armed with a knife with which he threatened to harm her; that the beds on each of the bedrooms where sexual intercourse took place were covered with bedspreads; that she had her menstrual cycle at the time she was sexually molested; that the accused did indeed penetrate her on both occasions; that it was the first time she had a sexual encounter in her life and that the experience was extremely painful; that apart from having washed her face, she did not wash herself after the incident but only changed her sanitary pad and, finally, that after the accused had penetrated her, the accused's penis was full of blood and that she could see blood thereon.

4] When examined by a medical practitioner later in the day, the latter could not find any evidence of sexual assault; the medical report tendered in evidence does not contain any conclusion consistent with sexual assault and this was verified in evidence at trial by the medical practitioner who examined her shortly after the incident; she threw away the sanitary pad

she had on despite the probability that it could have contained incriminating evidence of sexual assault which probably could have been obtained through DNA analysis; the bedspreads on each of the two beds where the incident was alleged to have taken place were seized by the police, yet no evidence was tendered to indicate whether or not any incriminating evidence was found thereon arising from the analysis thereof.

5] Once I had considered this body of evidence, I addressed a letter to the magistrate and raised with her the issues indicated in the preceding paragraph. I sought to ascertain from the magistrate whether the issues I raised with her were not sufficient to constitute doubt if the accused's guilt was proved beyond reasonable doubt. In a lengthy response to my query the magistrate persists in her view that the accused's guilt had been proved. With the greatest of respect, the response by the magistrate did nothing to allay the concerns I had in the quantum of evidence on basis of which the accused was convicted. It is specifically for this reason that I could not confirm the conviction and subsequently made an order setting the conviction aside. When I made the order setting the conviction aside, I pointed out to the accused that such an order was not equivalent or tantamount to an acquittal. I specifically pointed out to the accused that the State would be at liberty in future to recharge the accused on the same set of facts should the State wish to do so, provided always that sufficient evidence would be tendered at any subsequent trial to justify a conviction.

6] Finally, may I point out that conviction of an offence referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act has a potential to attract a heavy punishment, particularly in the light of the seriousness of the offences referred to in the aforementioned Schedule. Judicial officers ought to be vigilant in the assessment and the evaluation of evidence to eliminate a risk of conviction on basis of evidence of doubtful quantum. The complainants in matters of this nature, unfortunately, happen to be the most vulnerable members of our society. But, I have said it in the past, and I am saying it once again, the vulnerability of this section of our society should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt. Judicial officers ought to and are expected to properly and objectively evaluate evidence as a whole and against all probabilities in order to arrive at a just and fair conclusion. Anything falling short of this test is nothing other than miscarriage of justice.

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N J Yekiso, J