IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 36/2010

In the matter between:

PHILEMON RAPOGADIE **Appellant**

Versus

THE STATE **Respondent**

JUDGMENT DELIVERED ON 24 FEBRUARY 2012

Allie, J

[1] The appellant was charged with 2 counts of raping an 11 year old girl in the Bellville Regional Court on 29 May 2009. He pleaded not guilty and had legal representation. He was convicted on both counts on 30 November 2010 and sentenced to life imprisonment on 20 December 2010 for both counts that were taken together for the purpose of sentence.

[2] He did not apply to the trial court for Leave to Appeal. Section 309 of the Criminal Procedure Act 51 of 1977 was amended by section 6 of Act 38 of 2007 to grant an automatic right of appeal to persons sentenced to life imprisonment. Section 99 of the Child Justice Act 75 of 2008 repealed the automatic right of appeal. The Judicial Matters Amendment Bill of 2011 includes a provision (in Section 10 thereof) to remove the repeal in part, and to re-instate persons sentenced to life imprisonment under Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentence Act) by a regional court, the right to note an appeal to the High Court without having applied for leave to

appeal. Section 63(2) of the Bill provides that Section 10 shall be deemed to have come into operation on 1 April 2010. The appellant was 52 years old at the time when he was convicted and sentenced and clearly not subject to the provisions of Section 84 of the Child Justice Act. (See the Case of **S v Alam 2011 (2) SACR 553 (WCC) at 555c-557b**). The offence was committed in 2006, before the commencement of the Child Justice Act which repeals Section 309(1) and the provision does not operate retroactively. We are accordingly of the view that the appellant ought to be afforded the automatic right of appeal in this case.

[3] The state alleged that the appellant raped the complainant, an 11 year old girl who lived next door to him in November 2006 and again in January 2007 in his bakkie while parked near Langa Power Station. It is common cause that the complainant was 11 years old at the time, that she accompanied the appellant in his bakkie to a Power Station one night in November 2006 and that she gave birth to a baby boy in July 2007.

[4] At the time when the complainant testified she was 13 years old. At the recommendation of a social worker, the state requested that the complainant testify directly in court and not through an intermediary. The magistrate established that the complainant could distinguish truth from falsehood and proceeded to administer the oath. The social worker sat near the complainant while she testified but did not assist her with her testimony.

[5] The complainant testified that the appellant asked her to accompany him one night in November 2006 to the shop as he had to buy something for his common law wife. She walked to the corner of the road where she lived and near the shop on the corner, she climbed into the appellant's bakkie which she alleged was a double cab. He drove to a service station in Langa where he filled petrol. There was a shop at the garage and she thought that it was strange that he did not go into that shop as he was supposed to buy something. Then he drove to a dark place near a gate in Langa. She recalled that it was near some maroon coloured buildings. He then allegedly pulled down her pants and panty to her knees and he tried to penetrate her vagina but he did not succeed. The complainant testified as follows: *"Hy het probeer om sy penis in my vagina te sit, maar hy was onsuksesvol."* She knew he did not succeed because her cousin previously told her that when she had sexual intercourse for the first time, there would be blood and on this occasion there was no blood. In response to a question from the prosecutor about whether she could feel anything then, she said, no.

[6] She claimed that appellant pushed the passenger seat a small bit back. For some inexplicable reason, the defence chose to interpret this evidence as an allegation that the back rest of the seat reclined backward. She alleged that appellant threatened to kill her if she told anyone about the incident. She believed him because he had previously threatened to shoot his daughter's friend. He left her at their local shop and she walked home.

[7] She alleged that in January 2007 he again asked her to accompany him to the shop and again took her to the dark spot in Langa after first filling petrol. On this occasion she wore a skirt, sweater and jacket. He pulled up her skirt and lay on top of her. He pulled down his pants and penetrated her vagina. This time she felt pain and bled. He left her at the local shop thereafter and she walked home.

[8] She claimed that an employee at the local shop spread rumours that she was pregnant some months later. Her grandmother took her to a friend, Mrs Bertha Vraagom who lived in Plumstead in June 2007 and asked her to establish what was wrong with the complainant and why she was becoming fatter. Mrs Vraagom arranged for a home pregnancy test to be taken from the complainant and it was positive. Mrs Vraagom asked the complainant if she had a boyfriend and when she said no, she asked whether she had been raped, whereupon the complainant said that she had been raped by the appellant. There can be no doubt that the question of rape was at least suggested to the complainant.

[9] The complainant was taken to the police station and thereafter to a doctor who found that the complainant was 8 months pregnant. On 12 July 2007 she gave birth to a son. She said that the last time she menstruated was in November 2006 and she did not menstruate between December 2006 and June 2007. The complainant said that her grandmother and father did not allow

her to go out late at night but she was difficult to control. She also explained that she was a friend of the 16 year old daughter of the appellant.

[10] The state led evidence of DNA tests which showed that there is an overwhelming likelihood that the appellant is the father of the son of the complainant. The veracity of the tests was challenged by the defence and further tests were conducted after fresh samples of blood were taken from the appellant, the complainant and her son. The veracity of the conclusions made from the second set of tests were also challenged by the defence.

[11] The complainant's testimony has to be considered with due regard to her age at the time and her life experience. She had some prior discussion with her cousin about sexual intercourse. She was rebellious and not controlled by her caregivers. She associated with friends much older than she was, like the daughter of the appellant. Her testimony that the appellant did not penetrate her and rape her in November 2006 cannot be explained as the magistrate does, by taking account of her age and her innocent explanation of how a virgin experiences sexual intercourse for the first time. There was a social worker present during her testimony and the state and the court a *quo* could hear that her testimony about the first incident did not set out sufficient facts to prove rape. They could accordingly have arranged for the use of anatomical dolls to test the complainant's understanding of rape and to have her give more detail about the alleged attempt to penetrate her. As a court of appeal, we are bound by the record and can only comment on the extent to which the state has failed the

complainant by conducting its case in a cavalier manner while being content to rely on DNA tests to prove that the appellant is the father.

[12] Section 51 of Act 105 of 1997 (the Minimum Sentence Act) does apply to an offence of common law rape because paragraph (b)(i) of Part 1 of Schedule 2 deals with sentences for the rape of a child under the age of sixteen years. The appellant did not raise the defence that he did not know that the complainant was younger than 16 years at the time. His defence is that he did not have sexual intercourse with the complainant at all and the child is not his.

[13] Even though the DNA tests are conclusive, at best for the state, the appellant ought to have only been convicted on one count of common law rape. The magistrate also seemed content to conclude that because the appellant was found to be the father through DNA tests, his guilt on two counts of rape was established beyond reasonable doubt because the results of those tests serve as a guarantee for the reliability of the complainant's evidence. Clearly a finding of guilt on one count of common law rape is the only reasonable inference to be drawn from the proven facts in *casu.*

[14] The further difficulty with the complainant's evidence concerning the second count of rape is that she gave no reasonable explanation why she went with the appellant for the second time after what he did to her the first time. She also did not explain why she told no one about the alleged second rape until a pregnancy test was conducted some 5 months later. Her evidence of not having

menstruated since November 2006 accords with the date when she gave birth as it is more likely that the date of conception was November 2006 than January 2007. If the date of conception was January 2007, then the baby was born premature at 7 months and the evidence that the doctor found her to be 8 months pregnant in June 2007 would be incorrect.

[15] The state however failed to clarify these aspects with the medical experts who testified. The date when she was allegedly raped for the second time was accordingly not proved. The complainant gave very scant evidence of how she was raped the second time, relying on the detail she gave for the first incident as applying also to the second incident.

[16] The court has to apply common sense when evaluating the evidence and events leading up to the second incident which could not have unfolded in exactly the same way as it did with the first incident. For example, would the appellant have filled petrol the second time at the exact same place as well and would he have taken her to the same place?

[17] There are undoubtedly aspects of the appellant's evidence which can be rejected as not reasonably possibly true, such as evidence that he took her to Langa and then took her home without touching her in November 2006, the most likely date of conception, while the DNA tests which could not be disproved as invalid by the defence witness Dr Olckers, show that the appellant is the father of

the baby. The state cannot rely on the appellant's weak evidence to supplement its case. It must make out a case for the accused to meet first.

[18] The conclusions that Colonel Otto made about DNA results and testing methodology generally were challenged by Dr Olckers, the DNA expert called by the defence. Dr Olckers said the following concerning the validity of the data used by Colonel Otto: "*I cannot make a valid conclusion about, for instance, data that is not valid, which I'm not saying happened in this case. I'm merely talking about scientific process...*" The highwater mark of Dr Olckers evidence can be found in the following part of her testimony: *"No evidence was offered to prove that it's (database) validated. Secondly the aspect of the fact that if you type 9 loci, that one should not use 9 loci to even go further and say no, I want to calculate probability, because the statistical probability that he is not the father, must be taken into account and the fact that we've seen evidence where this can exclude an individual if more loci is typed has to be taken into account and statistical experts will be able to make that calculation."* Dr Olcker's reason for holding the view that the use of more loci could exclude the appellant as the father is based upon a practice not applied in South Africa. Dr Olckers conceded that she had not worked in a forensic science laboratory and that she was confused about which database Colonel Otto used, yet she was content to question the validity of the database used. Dr Olckers also questioned the operating procedures followed by Colonel Otto without first establishing what the Standard Operating Procedures were. The information obtained, conclusions reached and results of the DNA tests performed by Colonel Otto in this case

could however not be seriously challenged given the paucity of Dr Olcker's practical experience in forensic science laboratories and her lack of statistical knowledge.

[19] The state has shown by virtue of the DNA evidence and the common cause fact that appellant took the complainant out in the night in his vehicle in November 2006, that he had sexual intercourse with her. The circumstantial evidence proves that the appellant had sexual intercourse with the complainant, an 11 year old minor. The complainant, as a child under the age of 12 could not consent to sexual intercourse. (see **R v Z 1960 (1) SA 739 at 742 D – F (AD)**). Accordingly the appellant should be convicted of one count of common law rape on count 1 and acquitted on count 2.

[20] Turning to the sentence. Since the conviction has been substantially altered, sentence has to be considered afresh. The social worker's evidence on how the rape and birth of her child has affected the complainant reveals that the complainant has developed deep psychological damage and still endures trauma. The appellant was in a position of trust being an older person, a neighbour and the father of the complainant's friend. He abused that trust and manipulated the complainant into a situation which she ought not to have been in at that young age.

[21] The appellant is a 53 year old who has at least 3 minor children to support. At the time of his arrest, he was productively employed. The trial court

treated the appellant as a first offender and we will do likewise. Taking into account the interest of society, the circumstances of the appellant and the nature of the offence, I am of the view, given the serious impact that the offence has had on the complainant, a term of direct imprisonment is appropriate.

[22] To the extent that the appellant may be serving a term of imprisonment for an unrelated offence, the court is willing to consider the cumulative effect of the sentence imposed in the unrelated case and the sentence imposed in this case.

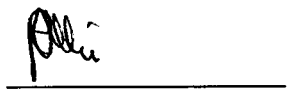
It is ordered that:

1. On count 1, the conviction is confirmed.

2. On count 2, the conviction is set aside.

3. The sentence of life imprisonment is set aside and replaced with the following sentence: The appellant is sentenced to 15 years direct imprisonment, such sentence to be effective from 20 December 2010, being the date when the sentence was imposed by the court a *quo*.

4. If the appellant is serving a term of imprisonment in an unrelated case, the sentence in this case will run concurrently with any unexpired part of the sentence imposed in the unrelated case.



ALLIE, J

I agree

CLOETE, AJ