IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

APPEAL CASE NO: A151/12

CASE NO: CC03/2009

In the matter between:

R M **Appellant**

and

THE STATE **Respondent**

JUDGMENT: 16 OCTOBER 2012

INTRODUCTION

[1] On 9 November 2000 the Appellant was arrested on various counts of sexual assault. The four complainants were his two biological daughters (R and C M) born of his common law relationship with C B ("C") and two of C's daughters (J and L B) born of ..her marriage to G B

[2] On 23 May 2002 the Appellant appeared before the Regional Magistrate, Bellvilie having been indicted on six common law charges. In respect of each of the four girls it was alleged that during the period 1999 to 2000 and at Delft on the Cape Flats, the Appellant repeatedly raped them. In addition it was alleged that he had indecently assaulted J and L B by inserting his finger in their vaginas on various occasions and fondling their breasts. At the time of the alleged offences the girls ages were as follows:

- J 12-13 years
- L 8 years
- R 6 years
- C 5 years

[3] The Appellant pleaded not guilty to all of the charges and placed all the issues in dispute. He was, however, prepared to admit the respective ages of each of the complainants.

[4] On 22 July 2002 the Appellant was convicted by the Regional Magistrate on the four counts of rape relating to each of the girls and on the count of indecently assaulting J. He was acquitted on the charge of indecently assaulting L.

[5] Immediately after conviction the Regional Magistrate heard brief submissions from the defence regarding sentence. Thereafter the Appellant was sentenced to ten years' imprisonment on each of the counts of rape and to six years' imprisonment on the count of indecent assault. The Court ordered that certain of the sentences should run concurrently and that the Appellant should serve an effective period of imprisonment of thirty years.

[6] At the sentencing stage the prosecutor had asked the Court to refer the matter to the High Court for sentencing in terms of the Criminal Law Amendment Act No. 105 of 1997 (the so-called *"minimum sentencing provisions*"). The Court did not accede to this request, evidently believing that it was entitled to exercise its ordinary statutory jurisdiction to impose what it considered to be appropriate sentences in the circumstances.

[7] More than four years later, and on 5 October 2006, the Appellant applied for leave to appeal against the sentences. In granting him leave to appeal the Regional Magistrate remarked that in the interim the legal position had crystallized and that he believed that he ought to have referred the matter to the High Court for sentencing under the minimum sentencing provisions, rather than impose the sentences which he did.

[8] On 7 March 2008 the appeal against sentence was heard by this Court. Thring, J (with De Swardt AJ concurring), was of the view that the Regional Magistrate was not empowered by the legislation to impose the sentences and held that the Regional Magistrate should have terminated the proceedings and referred the matter to the High Court for sentencing in terms of the erstwhile Section 52(1) of the minimum sentencing provisions. The Court accordingly declined to hear the appeal, believing that the sentence was *ultra vires.* The Court exercised its powers of review under Section 304(4) of the Criminal Procedure Act No. 51 of 1977, set aside the sentences of the

Regional Magistrate and referred the matter to the High Court for sentencing under the minimum sentencing provisions. On 15 April 2009 the matter came before Saldanha J in terms of Section 52(1)(b) for sentencing under the minimum sentence provisions as they were applicable before the 2007 amendment thereof. Before he could consider imposing sentence, Saldanha J was obliged to confirm that the proceedings before the Regional Magistrate in regard to conviction were in accordance with justice.

[9] The State (very properly in my view) brought to the attention of Saldanha J that, subsequent to the sentencing of the Appellant, R and C had claimed that they had given false testimony before the Regional Magistrate and further alleged that it was not the Appellant who had sexually molested them. In light of this, the Court a *quo* directed that the evidence of all four complainants be heard along with the evidence of various other witnesses including C B.

[10] Having regard to the fact that the complainants and C may have committed perjury before the Regional Magistrate, Saldanha J required that they be legally represented at the hearing before him so that they could be properly advised of their rights against self-incrimination.

[11] After hearing the further evidence, the Court a *quo* was satisfied that the Appellant's conviction on the charges relating to J and L was sound and the learned Judge confirmed the judgment of the Regional Magistrate in that regard. As far as R and C were concerned, the Court *a quo* was not impressed with the integrity of their respective recantations but, nevertheless, had little choice in the circumstances but to decline to confirm the convictions relating to them.

[12] After hearing further evidence relevant to sentence, Saldanha J found that the provisions of the minimum sentencing legislation did not in fact apply to the case of the Appellant since he had not been cautioned of the applicability thereof by the Regional Magistrate at the commencement of the trial before him.[1] The Court a ***quo*** **proceeded to sentence the Appellant to thirteen years' imprisonment on each of the rape counts in respect of J and L and six years' imprisonment on the count of indecently assaulting J. The sentences imposed in respect of J were directed to run concurrently, thereby giving the Appellant an effective sentence**

[1] S v Ndhlovu 2003 (1) SACR 331 (SCA)

of twenty six years' imprisonment.

[13] On 29 March 2011 Saldanha J granted the Appellant's application for leave to appeal against his convictions. There was no application in respect of the sentences.

[14] On 23 July 2012, exactly ten years after his conviction in the Regional Court, the Appellant's appeal was heard by this Court. At that hearing (and as was the case before Saldanha J) the Appellant was represented by Adv. A Erasmus of the Cape Bar and the State by Adv. C. de Jongh of the office of the Director of Public Prosecutions in Cape Town. The Court is indebted to both counsel for their thorough heads of argument and their most helpful arguments in open Court.

THE APPROACH TO BE ADOPTED BY THE HIGH COURT IN MINIMUM SENTENCE MATTERS ORIGINATING IN OTHER COURTS.

[15] The role of the Court a *quo* in proceedings such as those before it have been euphemistically described by Davis J as that of a *"chain novelist'* who is required to complete a novel which began in another Court. [2] The turn of phrase employed by the learned Judge is a curious one if only because the penning of a judgment is intended to embrace facts upon which conclusions of law are based. As the most disturbing facts of this case so graphically demonstrate, we are dealing here with the harsh realities of the human condition in the poorest of this Court's neighbourhoods and not with this year's crime fiction best seller by one of our well known authors. But, if what the Full Bench in **Taliaard's case meant (as I believe it did) was that the role of Saldanha J in this matter was:**

> (i) to satisfy himself that the proceedings before the Regional Magistrate were procedurally in order; and
> (ii) that the evidential material before that Court was *prima facie* sufficient to sustain the convictions brought out;

then the Court a *quo* was entitled to enter its view that the earlier proceedings were *"in accordance with* ;justice" on the record and continue with the criminal proceedings before it by bringing them to finality. Such finality, the Legislature has determined, was to be reached by imposing a prescribed minimum sentence or deviating from there if the High Court was satisfied that substantial and compelling circumstances existed for

[2] S v Taliaard 2005 (1) SACR 370 (C) at 373c

it to do so [3].

[16] The Legislature has determined that the function of the High Court in such circumstances is primarily to impose an appropriate sentence in a case which commenced in another Court. But this function, as is the case with any sentencing Court, is exercised in the context of consideration of the fair trial rights protected under Sections 35 (2) and (3) of the Constitution, 1996, together with the rights protected under Sections 9 (equality), 10 (human dignity), and 12(1)(e) (not to be subjected to cruel, inhuman or degrading punishment) thereof.

[17] I have said that this Court's function in matters such as these is primarily to impose sentence, but of course that function can only be given effect to if the Court is satisfied that the convictions are in accordance with justice. That is a *sine qua non* for the exercise of the sentencing discretion (such as it is). What troubled many judges before the minimum sentencing provisions were amended in 2007 was what a court was required to do when it had reservations about the integrity of the conclusions arrived at by the trial court. In the bifurcated procedure which existed before that amendment the High Court did not sit as a court of appeal or review as it was composed of a single judge and so it was not able to set aside the trial court's findings on that basis. In my view the way in which Saldanha J went about dealing with the matter after being alerted to the recantation of the 2 witnesses was eminently sensible and correct. There was no complaint before us that the accused did not receive a fair trial in the two courts in which his matter was heard, nor could there have been in the circumstances.

[18] Fortunately the 2007 amendment did away with the bifurcated procedure and the type of problem which confronted Saldanha J is not likely to present itself much more in the future.

[19] After hearing the witnesses and considering the other evidential material before him, Saldanha J was only satisfied with certain of the convictions. In respect of those with which he was not satisfied the Appellant received the benefit of the doubt and was acquitted by the Court a *quo.*

[20] The notice of appeal filed in this matter attacks "*the confirmation of the ... [Appellant's]* ... *convictions on counts 2, 3 and 4 on 18 March 2010 by his Lordship*

[3] See Section 51 (3) of Act 105 of 1997

Justice Saldanha " The Appellant then sets out in quite some detail (9 pages) the specific grounds for his attack on the confirmation. This attack focuses on evidence given before the Regional Magistrate, as well as before Saldanha J and seeks to highlight, *inter alia,* alleged contradictions and/or improbabilities in the witnesses' testimony in the two Courts.

[21] In order for this Court to be satisfied that Saldanha's J confirmation of the convictions was justified, it is necessary to look at the totality of the available evidential material before both the Regional Court and the High Court relevant to count 2 (the rape of J), count 3 (the indecent assault of J) and count 4 (the rape of L).

THE EVIDENCE GIVEN IN THE REGIONAL COURT

[22] In May 2002 the Regional Magistrate heard the evidence of R, J, L and C. At the time of testifying:

(i) R was aged 8 years and in grade I;
(ii) J was aged 15 years and in grade 7;
(iii) L was aged 10 years and in grade 9; and
(iv) C was aged 7 years. Her level of education does not appear from the record.

All of the complainants gave evidence in a different room to the Appellant and with the assistance of an intermediary.

[23] The complainants testified consistently of being repeatedly raped by the Appellant, *inter alia,* at their house in Delft. Since the family had been moved around from pillar to post, (Heideveld to Delft, to Mitchell's Plain, to Mannenberg and back to Delft), there was initially some uncertainty as to precisely when the assaults took place. Fortunately the existence of the District Surgeon's so-called J88 examination form fixed the date of examination of the complainants by Dr. Claire Edson as being some time prior to 9 November 2000. It was common cause before us that in 2000 the family was living in Delft for the second time. At that stage C had separated from G B and was living in a common law relationship with the Appellant who had fathered R and C.

[24] All four of the complainants testified about their desperate domestic circumstances in Delft. The family occupied a small council house with other relatives and it appears as if all six of them slept in one room. C and the Appellant had a drug problem and C

often went out at night, it seems, to earn something extra from prostitution. On occasion, C took J and L along with her and would use the girls as foils when she would beg for money from passing motorists at traffic lights. It is quite possible too, on the evidence before the Regional Magistrate, that the girls were present when their mother participated in acts of sexual contact with men whom she had picked up in the process of begging.

[25] It seems too that C suffered from mental illness and was admitted to Lentegeur Hospital from time to time. In such circumstances the care of the children was precarious to say the least and they were eventually placed in the care of Ms. F E, a Good Samaritan who lived in Delft. It was she who noticed injuries to some of the girls' genitalia while they were bathing at her house, and who raised the alarm.

[26] As a consequence of F's intercession the Appellant was arrested and all four girls were examined by Dr. Edson on 9 November 2000. She found various injuries which she believed were consistent with sexual assault. The girls were then placed in formal foster care.

[27] In May 2002 each of the girls gave evidence before the Regional Magistrate in the circumstances described above and, in general terms, testified as to how the Appellant systematically raped them over a period of time at Delft when C was not present. J also described acts of indecent assault.

[28] In a fairly terse judgment which was short on detail, the Regional Magistrate found the children to be credible witnesses, found some corroboration of their evidence and discredited the Appellant. He accordingly convicted the Appellant on four counts of rape and one count of indecent assault and acquitted him on another count of indecent assault.

THE EVIDENCE BEFORE THE COURT *A QUO*

[29] Because of the stance adopted by R and C in reneging on their previous testimony, Saldanha J approached the entire case with great caution. He heard the evidence of all four complainants as well as a number of other lay witnesses, including C. The Court a *quo* did not hear any medical evidence but relied on the testimony of Dr. Edson before the Regional Magistrate.

[30] Before the Court a *quo* R and C sang another tune. They claimed that their mother

had put them up to falsely implicating the Appellant in the Regional Court, because of the fact that she had found a new lover and wanted the Appellant out of her life. They claimed that C had exposed them to pedophiles at a drug-den in Woodstock, that they had been doped and that in the process they had sustained the genital injuries detected by Dr. Edson.

[31] Saldanha J, correctly in my view, was not persuaded that there was any proper factual basis for this recantation on the part of these witnesses and he clearly disbelieved them. However, he had little choice but to refuse to confirm the convictions relating to R and C, since this would clearly not be in the interests of justice.

[32] As far as J and L were concerned the Court *a quo* was satisfied as to their reliability with the evidence given before him and he confirmed the relevant convictions in respect of them.

THE CHARGE RELATING TO L

[33] At the time of testifying before Saldanha J, L was seventeen years of age and obviously a teenager of some maturity. She was required to testify about ten years later of events which had occurred when she was six or seven years old. She described acts of indecent assault which the Appellant allegedly perpetrated (by inserting his finger in her vagina and touching her inappropriately) as well. She had difficulty locating the events as to time and place, other than to say they had happened when the family lived in Delft.

[34] The evidence of L as to rape was not corroborated by Dr. Edson whose finding of genital injuries was inconclusive: it was possible too that the child exhibited the consequences of poor health care.

[35] Saldanha J delivered a very detailed and searching judgment in which he applied the cautionary rule, conscious of the fact that he had to consider the evidence of young women who were children when the alleged incidents occurred and who were single witnesses in respect of the individual charges relevant to them.

[36] But, Saldanha J also cautioned himself and noted that he was not sitting as a Court of Appeal in respect of the Regional Court proceedings. That approach is correct in terms of Taliaard's case *supra* but the Court *a quo* did have the additional benefit of receiving *viva voce* evidence in addition to the record of proceedings in the

Court of first instance.

[37] In summing up the evidence of J and L the Court a *quo* held as follows:

> *"in respect of the testimony of J and L I do not have any dilemna or doubt in accepting their version as opposed to the dilemna I have in accepting the evidence of R and C in their recanting of their evidence that they had given in the Regional Court.* "

[38] After considering the evidence of J and L "*in the context of the mosaic created by the totality of all the evidence including that of the accused*",

Saldanha J was persuaded that *"what clearly emerged with credence and consistency ...[was]... the high probability of the allegations of sexual abuse by the accused of his female children*."

[39] I shall deal with the evidence of J below, but having read the evidence of L I am unable to come to the same conclusion as the Court a *quo* as regards her consistency and reliability.

[40] In argument Ms. Erasmus highlighted a number of inconsistencies in the evidence of L before the Court a *quo* when considered in the light of her testimony before the Regional Magistrate. These included the fact that she could not remember whether she had been raped more than once (whereas she had earlier testified that this was certainly so) and where in the house the incidents took place.

[41] In the Regional Court, for example, L had testified about an incident in which a man called Ashraf had *"made off"* with her, but in the High Court she was equivocal as to whether anyone else had sexually assaulted her. And, under probing, yet sensitive, cross-examination by Ms. Erasmus on a number of pertinent issues, the witness's testimony is littered with phrases such as *"I'm not sure"* or "/ *don't know".* These answers were given, *inter alia,* to questions relating to her earlier testimony before the Regional Magistrate and the important question as to whether she was raped by anyone else in Delft, to which she replied *"I'm not sure Miss, I don't know*."

[42] in the light of this equivocation one looks for corroboration, particularly in the medical evidence. Regrettably, in respect of L this is sorely lacking, in evidence Dr. Edson handed in the J88 form regarding sexual assault in respect of L but was not asked to testify in regard thereto. And, the form itself does not assist one in

determining conclusively whether the nine year old child sustained any injuries to her genitalia when she was examined by the District Surgeon on 9 November 2011.

[43] While the suspicion is strong that L was also one of the Appellant's victims, I regret to say that I do not agree with the Court *a quo* that the totality of the evidence presented by the State in the Regional Court and the testimony before Saldanha J, was sufficient to establish the guilt of the accused beyond reasonable doubt. In my view there is sufficient doubt to justify the Appellant's acquittal on the charge of rape relating to L (count 4).

THE EVIDENCE RELATING TO J

[44] When she testified before the Court *a quo* J B was a mature woman of 22 who was employed and was engaged to be married. [4] J's evidence was clear and appears to have been given in a forthright fashion. She was under no illusions as to what had happened to her or who the perpetrator was.

[45] The Court a *quo's* findings in respect of J are clearly borne out by the record, the pain and trauma of the events all those years ago still being very evident from her testimony. The assault giving rise to J's complaints occurred at a time when she was about twelve or thirteen. She was required to testify for the first time about them when she was 15 and then again seven years later before the Court a *quo.* Throughout therefore J was an older and more reliable witness than her younger siblings.

[46] The most important aspect of the case in respect of J, however, is that her claims are fully supported by the evidence of Dr. Edson and the medical examination conducted on her in November 2000. There is therefore sufficient independent corroboration for her testimony.

[47] In argument Ms. Erasmus correctly pointed to some inconsistencies in the evidence given by the witness before the Regional Magistrate and later before the Court a *quo*. I have had regard to the record and I am satisfied that those inconsistencies are not of sufficient materiality to undermine the witness's evidence when considered in the entirety of the "*mosaic*", as the Court *a quo* called it.

[48] In the circumstances I am satisfied that the Appellant was correctly convicted of the

[4] The Court was informed from the Bar by Ms. Erasmus during argument on appeal that Judith had since married and had her first child.

charges relating to J (counts 2 and 3).

CONCLUSION

49] In light of the aforegoing, I would uphold the appeal against the Appellant's conviction on count 4 but otherwise dismiss the appeal against the conviction on count 2 and 3

GAMBLE, J

FOURIE, J: I agree.

The appeal succeeds in respect of count 4. The confirmation by the Court a *quo* of the Appellant's conviction on count 4 and the sentence imposed upon him in regard thereto, are set aside and an order setting aside the conviction of the accused by the Regional Court on count 4, is substituted therefor.

The appeal against the confirmation by the Court a *quo* of the Appellant's convictions on counts 2 and 3 is dismissed.

In the result the sentences of 13 years' imprisonment and 6 years' imprisonment imposed in respect of counts 2 and 3, respectively, as well as the order that such sentences are to run concurrently, are confirmed. The effective term of imprisonment is accordingly 13 years with commencement date 22 July 2002.

FOURIE, J

ZONDI, J: I agree.

ZONDI, J