Republic of South Africa

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

REPORTABLE
CASE NO: A760/17

In the matter of:

S R **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT DELIVERED: TUESDAY 18 SEPTEMBER 2018

KUSEVITSKY AJ:

[1] The Appellant was convicted in the Wynberg Regional Court on 6 October 2016 on two counts of rape of an 8-year-old minor in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of sections 94, 256, 261 and 281 of the Criminal

Procedure Act 51 of 1977 ("the Act"). He was subsequently sentenced to life imprisonment on each count, which sentence was ordered to run concurrently in terms of section 280 of the Act.

[2] Leave to appeal was granted by the court below against conviction and sentence.

[3] During the trial, it was the State's case that the Appellant had committed the rapes during 2013 and 2014, which offence fell within the terms of section 94 of the Act. The Appellant denied the allegations and gave no plea explanation. The grounds of the Appellant's appeal is unclear, although in the heads of argument, counsel for Appellant questioned whether the State in the court a *quo*, had succeeded in proving it's case beyond a reasonable doubt, given the cautionary rule that is applicable to a single, child witness.

[4] It is common cause that the complainant was 9-years-old and in grade 3 when she testified at the trial proceedings. Those proceedings were held in camera and conducted *via* an Intermediary. The Appellant is the husband of the complainant's grandmother. She refers to them as '*Mamma* and *Pappa* respectively*'*.

THE FACTS

[5] The facts underpinning the appeal are as follows. During 2013, while the complainant and her cousin Z were playing '*housy-housy'*, the Appellant asked if he could play with them. The complainant was 8 years old at the time and Z,

approximately two years older. Z went to the bedroom and the complainant went home to her mother to fetch money. On her return to her grandmother's house, she knocked on the door and Z opened, dressed only in her panty. Z quickly ran back to the bedroom where the complainant saw Z and the Appellant under the blankets having sex. Afterward, Z told the complainant that she would hit her if she told anyone what she had seen.

[6] With regard to the 2013 incident, the complainant testified that she was living at her mother's home when her mother sent her to look for her brother at her grandmother's house. Her grandmother was not home but the Appellant was. She asked the Appellant to make her a sandwich. While she was looking through the window, which it later emerged, overlooked the park, the Appellant approached her from behind, picked her up and threw her onto her grandmother's bed. She first laughed but then the Appellant pulled down her pants and put his penis inside her vagina. She explained that she was lying on her back and the Appellant was lying on top of her. She testified that it was painful and she pushed him off although she did not do that so well. He told her that if she was going to tell anyone, he would go to jail. She then returned to her mother's house. She did not tell her mother because she was scared that her mother would beat her.

[7] She further testified that during the 2012 December holidays, she and other family members were at the grandmother and Appellant's house and slept over because they were going to the beach the following day. She was one of 5 children in the group. She explained that her aunt and three of the children slept on a mattress which was in the lounge. She slept next to Z on the top bunk bed and the

Appellant slept on the bottom bunk. Her grandmother slept in her own room. When everyone was asleep, the Appellant climbed on top of her, pulled down her pants, put his penis inside her vagina and she shouted, but no one woke up. The Appellant moved his penis in her vagina. She pushed him off and he went back to his bed. She pulled up her pants, said a prayer and went to sleep. She did not tell anyone because she was scared that no one would believe her.

[8] She described a further incident which she said she could not remember so well. It was M's birthday. Her grandmother was out buying clothes for a religious holiday. She and Z were laying on her grandmother's bed watching movies. The Appellant came to lay on top of her and he had penetrated her, moving up and down, while Z was also lying on the bed. She said that her private parts hurt and she pushed him off and continued watching movies.

[9] The complainant further testified that her "*Pappa*" raped her many times during 2013. In 2014, it emerged that the complainant's mother beat her often which caused her school authorities to arrange for a social worker to investigate. As a result, the complainant was placed in the care of her grandmother, the Appellant being the husband of her grandmother.

[10] The complainant stated that during 2014, the Appellant would grab her from behind during the day or he would lift her and push her onto her back if she was sitting on a chair, pull down his and her pants to their knees, penetrate her vagina, making movements up and down inside her, raping her. She would then have to go to the toilet to clean herself. She said it happened many times. She also said that the

sleeping arrangements also changed in the house. Initially, she would share the double bunk with M, where she would sleep at the top and M at the bottom and her grandmother and the Appellant would sleep in their bedroom. This arrangement changed however when M had a baby and she slept in the bedroom with her grandmother and the Appellant slept in the bottom bunk bed with the complainant, on the top. The complainant testified that the Appellant would go to the top bunk and lay on top of her and move up and down and rape her. She also testified about instances when the Appellant would come up behind her and push his penis against her buttocks. She would push him away and go to the toilet to wipe herself. This happened many times and always occurred when her grandmother and M were out.

[11] The day she told her mother, she was at her mother's house and it was time for her to return to her grandmother's house. She refused and lay underneath the blankets and started crying. Her mother asked her why she was crying and she told her that the Appellant raped her. After asking her daughter what she thought rape was, the complainant told her mother what it was. Both she and her mother cried. Her brother, sister as well as her step-father and his friend were also present when she told her mother during this first report. The following day, her mother took her to a clinic where she was examined by a doctor. They were thereafter sent to the police station.

[12] When asked if she was upset or angry with anyone, she answered that she was not cross with her grandmother. She saw her grandmother but she was scared that they were not going to listen to her, or that they would be rude or angry with her.

When asked how she felt about what had happened and how it had affected her, she stated that the Appellant had hurt her. She said that she felt sad and very angry and bad inside.

[13] In evaluating her evidence, this has to be viewed with due regard to the fact that she testified when she was a 9-year-old child living in Hanover Park in poor and dire socio-economic conditions where children do not each have the privilege of their own bedroom and privacy and where they are economically dependent on extended family for treats, such as being taken to the beach or getting to watch movies. Children reared in those circumstances are often fearful of blowing the whistle and jeopardizing their access to those treats or fearful of being chastised by unsympathetic adults who themselves don't want to jeopardize their security by accusing a person who contributes to their sense of security.

[14] It is patently clear that her cousin, Z who was approximately two years older than her, wasn't prepared to blow the whistle on the Appellant, neither in relation to what the Appellant allegedly did to her, nor what he did to the complainant. That is the context in which the evidence of Z lying or sitting on the same bed with the complainant must be seen, at the time when incidents of rape are alleged to have taken place.

[15] During cross examination the complainant said she heard and knew about rape because many people spoke about it, including her Aunty S, who was about 3 years older than her and who had spoken about it in 2011. She did not tell S about her being raped because whenever she told S things, she would say it's a joke and the complainant must not lie.

[16] After school, she used to speak with a male social worker about the arguments and fights that took place at her mother's home between her mother, her step-dad and the rest of the family. She however did not feel comfortable telling that social worker about being raped because she felt that no one would believe her.

[17] She denied the proposition put to her that she told M2 in the presence of Z that she was going to make trouble for the Appellant. In this instance, even if she had said that *after* she had been raped, in light of the Appellant having told her that if she told anyone, he will go to jail, it would have been logical for her to conclude that when she told someone eventually, that she would be making trouble for the Appellant.

[18] She was told that Z, her cousin, would deny that she and the Appellant had sexual intercourse, which was the incident which the complainant had described at the start of her evidence in chief. Clearly flustered, she first answered that she did not feel like answering the question. She then agreed with what Z was going to say by simply saying yes. In my view there can be no doubt that she did not feel comfortable disputing Z's potential denial because Z had been in denial all along and had picked fights with her before.

[19] She also denied the proposition that her grandmother would say that she told her grandmother that a boy had touched her at school. The complexity of loyalty towards the Appellant by potential witnesses is clear because the Appellant is the grandmother's husband. At that point of testifying the complainant broke down and

could not continue with the cross-examination so the case was postponed to a later date. Any adult person, and no less in the case of a child, would feel betrayed, scared and isolated upon hearing that her cousin that she played with and her grandmother that she lived with, would be testifying against her.

[20] The evidence in chief of the complainant was transcribed in 54 pages while her cross examination spans 166 pages. The manner in which this child complainant was cross-examined leaves much to be desired and it is apparent from the record that the questions that were posed to her were done, seemingly to confuse the witness and where answers were elicited based on incorrect propositions, these were hardly rectified and the complainant left to answer, uncorrected.

[21] This happened in an instance when the defence attorney posed a question to her about the time when Z and the Appellant had sexual intercourse incorrectly without referring to her allegation that the intercourse took place between the Appellant and Z and not the Appellant and the complainant. The defence attorney's question created uncertainty in the mind of the complainant because it was a complete distortion of her testimony.

[22] Unfortunately, due to the length of time during postponements, which aspect will be returned to, the prosecutor and Magistrate did not correct the defence attorney's question. Although the complainant gave evidence about the incident between the Appellant and Z in response to the prosecutor's question as to when the first time was that the Appellant raped the complainant, it ought to have been clear to everyone listening that she did not describe the first time that she was raped. The

prosecutor failed to point that out to the complainant. That evidence was nonetheless helpful because it sketched the background and context to Z's subsequent behaviour of paying no heed to the Appellant raping the complainant in her presence.

[23] The questioning that followed the incorrect premise of the question outlined above, then led to further inaccuracies being put to the complainant, who was by now, an undoubtedly traumatized child. She began answering that she could not remember. Thereafter the defence asked the complainant why she had told the prosecutor that nothing happened to her that day. She then answered that nothing happened to her but that something happened to Z. It would appear that the defence attorney knew all along that her evidence in chief was that she wasn't raped in that incident but was referring to Z and the Appellant. Nonetheless he deemed it appropriate to deliberately create confusion in the mind of the complainant, a 9-year old child.

[24] All too often this court, when exercising its appellate jurisdiction, encounter that style of cross examination which presiding officers regrettably allow, namely the putting to witnesses, deliberately incorrect versions of their evidence in chief with a view to creating confusion. That is not acceptable cross examination because it is not fair to any witness, least of all to a child witness. The defence attorney again also incorrectly put to her that she said in her evidence in chief that Z told her not to tell anyone or else she will beat her - and that she said she was going home, but the record doesn't reflect that she was on her way home when it was said during her evidence in chief. That incorrect question led the complainant to once again say she

doesn't remember because it is most unlikely for a 9-year-old to correct an adult attorney in court especially when the Magistrate and prosecutor did not correct him.

[25] Fortunately, however, the Magistrate eventually did correct the defence attorney and read out the relevant part of her testimony.

She further testified that she was taught at school where on her body it was wrong for her to be touched and that she had to tell someone if it happened and that she knew this in 2012. She explained that she was confused by the defence attorney's question about whether anything happened to her the day that she saw Z under the blankets with the Appellant, hence she initially said in response to that question that she was also raped that day. In light of the generalized and inaccurate nature of the questions by the defence attorney, her explanation is reasonable.

[26] She said that she didn't feel like speaking to anyone about Z's threat. She slept over at her grandmother's house on weekends because her mother worked at a Club and her father also worked nightshifts. It was also put to her that her grandmother and M would testify that she stole her grandmother's money. This she vehemently denied.

[27] She further stated during cross examination that M slept under the double bunk. In her evidence in chief she said M slept on a mattress on the floor, which technically is below the double bunk but the defence attorney persisted in putting to her that she said M slept on the bottom bed of the double bunk. This led to her

answering in a confused manner until the prosecutor eventually corrected the defence attorney by repeating her answer to the defence attorney, namely that M slept under the double bunk. By then the complainant was hopelessly confused about all the differences of opinion on what she had said. She then said she can't remember where M slept followed by an answer that M slept at the bottom.

[28] She confirmed her evidence in chief that when the Appellant climbed on top of her, she shouted but not so loud and no one woke up. The complainant agreed that if the Appellant climbed the ladder on the double bunk, it would make a noise but she said it was a little bit of noise. She could also not explain why she did not shout louder. A 6-year-old child who is suddenly confronted by her grandfather climbing on top of her while she and everyone else was asleep could easily have been too shocked and scared to shout loudly and raise the alarm. There is no *onus* on a victim of rape to raise the alarm. Each case has to be considered on its own facts and circumstances when regard is had to why the alarm wasn't raised when the rape commenced. The defence attorney asked her if the Appellant's hands were on her pants or his when she shouted. She said that she did not know. Thereafter he asked if the Appellant tried to stop her when she shouted and she said that he put his hands over her mouth. She was then asked to explain her different answers and she said quite correctly, that the first question was about whether his hands were on her pants or his, while the second question was about whether he attempted to silence her when she shouted. The defence attorney resolutely refused to frame his questions specifically and accurately despite numerous requests from the Magistrate that he should do so.

[29] The defence attorney then put it to the complainant that she wanted the court to believe that the Appellant walked from her grandmother's room in the dark to her bed, past the people sleeping on the floor and climbed up the double bunk ladder to her. The record however doesn't reflect the complainant having said the Appellant walked from her grandmother's room in the dark to where she was sleeping. It was further put to her that the Appellant would say that on the night in question, he slept in her grandmother's room and that he did not rape her. She denied it.

[30] She was also asked on a separate occasion after the Appellant had allegedly already raped her before, why she went inside his home when she went to look for her brother and he wasn't there. She said that she went inside to look out onto the park from the Appellant's kitchen window. The Appellant's and her grandmother's flat is on a top floor and she could see the park from here. In this regard one must remember that the complainant is a child who felt scared to report the Appellant. She lived in conditions of limited resources, scarce parental attention and beatings by her mother, hence it is quite conceivable that she was compelled by those conditions to follow her mother's and all other family adult's instructions. There was no opportunity for her to recoil and not go back to the home of the Appellant.

[31] Dr Ashma Narula who is a clinical forensic practitioner testified that she examined the complainant and found that in her opinion, the injuries in the form of *inter alia*, healed tears, were compatible with forcible vaginal penetration with a penis or an object. The injuries sustained could have been caused by one incident and in some victims, may take more than two or three incidents.

[32] The Appellant testified and his evidence amounted to a mere denial of the allegations. He stated that he used drugs with the complainant's mother and stepfather, and that it was he who was usually out of the house and not his wife, complainant's grandmother. When asked if the complainant was a child that made up stories, he stated that he did not know about such incidents.

[33] The defence thereafter called M2, the ten-year-old cousin of the complainant, to testify. She was six years old when the events transpired. She was asked to testify about an incident when she and the complainant were having a bath at her grandmother's house. She stated first that the complainant told her she was going to make trouble for her aunt and for the Appellant but not for her grandmother. She was also asked about where all of the different family members slept the night during the December holidays. She also stated that the bunk bed was made of wood and was old and that she would have heard if the complainant had shouted.

[34] During cross-examination, she was asked several times why she remembered this time in the bath and what was said to her, so specifically. She could also remember exactly where everyone had slept the night before the beach outing. Her answers were unclear and inaudible and she eventually said that she did not understand the question. She later mentioned the trouble referred to was about a missing phone, then after court had adjourned for the day, she testified that the 'trouble' referred to, related to allegations by the complainant that the Appellant had raped her.

[35] S R, the complainant's grandmother, testified that according to her, the complainant did not always tell the truth. She did quite well at school and she was close to her grandmother. She stated that she would have noticed if something was wrong as her own daughter was raped before. If she found out that the Appellant raped the complainant, she would have reported the matter to the police. She also stated that she was firm, but that the complainant never seemed unhappy. She also stated that the complainant at some stage said that a boy had touched her private parts. She testified that she never had a good relationship with the mother of the complainant who never came to their house. She confirmed that the complainant wanted to return home and that her mother wanted her to return but there were concerns by the social worker regarding the mother's need for help for a drug problem. She also denied that it would have been possible for the Appellant to have raped the complainant.

[36] W P, who is the step-child of the Appellant, testified that she was sleeping on the mattress that night before the outing, and denied that a rape of any sort occurred; that there was no shouting and that she never heard any shouting on the night in question; or that her daughter was raped by the Appellant as this was denied by her daughter.

[37] Z P testified with the assistance of an intermediary. She denied ever playing with the complainant or that they played '*house-house'*. She also denied that the Appellant had raped her. During cross-examination she stated that she and the complainant never really had a relationship, and that she in fact did not really like the complainant because she thought the complainant was a troublemaker and that she

still disliked her. It was put to her that she could not deny that the Appellant did not rape the Appellant because she never lived at their house and was only there on occasion.

[38] At the conclusion of the trial, the Appellant was convicted on two counts of rape and after hearing argument in mitigation and aggravation of sentence, the Appellant was sentenced to life imprisonment, the court having found no substantial and compelling circumstances to deviate from the minimum sentence.

[39] It is trite that the correct approach to be adopted by an appellate tribunal has been enunciated as follows by Marais JA in **S v Hadebe and Others** 1997(2) SACR 641 (SCA) at 645e-f:

> *"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary". (See also R vs Dhlumayo and Another 1948 (2) SA 677 (A) at 705-706)*

[40] During her judgment, the Magistrate systematically dealt with the evidence of the defence witnesses, ultimately questioning their credibility as in some instances, particularly with regard to the minor child witnesses on the one hand and the evidence of the Appellant and his wife on the other, that it appeared that they were coached or the matter was discussed prior to them testifying, with the sole purpose of protecting the Appellant. When she dealt with the evidence of the complainant, she found her evidence unwavering as to the events surrounding the rapes.

Furthermore, those aspects of the complainant's testimony which seemed unclear, which was dealt with above, is perfectly understandable against the backdrop of her tender age of 9 when she testified and the fact that her evidence took more than ten months to complete, together with the fact that the defence elected to call her family to testify that she was a liar. In this matter, the complainant's evidence commenced in June 2015 and was adjourned or postponed on no less than seven occasions. In my view, it is undesirable for child witnesses in rape trials, to have to endure such lengthy cross-examination and over such a long period of time. If indeed such postponements are necessitated, they should ideally only be limited to such instances where the child witness need time to compose themselves, or are tired and Magistrates should ensure that rape trials where young children are testifying, take preference and that their evidence is completed within the shortest time period possible.

[41] The acceptance therefore by the Magistrate of her evidence in my view cannot be viewed as a material misdirection and cannot be faulted.

[42] With regard to sentence, it is trite that an appeal court has to determine whether there was any misdirection by the court a *quo* in determining the sentence of the Appellant. Crimes against children are endemic and on the rise. There is no room in our society to be complacent or to be anaesthetized by the prevalence of these heinous acts perpetrated against children simply because of the seemingly frequent occurrence thereof. Just because it is frequent does not make it normal and courts are to guard against the notion that, in the absence of serious physical injuries, that the crime of rape is of a lesser degree. Courts have often found that absence of severe physical injuries amount to substantial and compelling reasons to

deviate from the minimum sentence. However, it has to be accepted that abusers seldom need to use force to ensure the submission of their child victims. Sexual predators come in various forms. On the evidence, the Appellant also violated another minor child. It is therefore clear that the Appellant is a danger to society and his conduct perpetuates the cycle of female oppression.

[43] Rape by a family member, no less a person considered to be a grandfather is the most reprehensible, vile act of domination and abuse imaginable. Their wanton acts of abuse strips the innocence of their children and have their memories of their ordeal etched in their minds forever. The courts must not hesitate to show its abhorrence of such behavior, in these and other rapes where, especially young children are involved.

[44] The Magistrate rightly rejected that the Appellant's argument that as he was a first time offender, that this amounted to substantial and compelling circumstances.

[45] The Magistrate also reiterated that the complainant was placed in his and his wife's care by the Social Services Department, and that he used this, not to protect her, but to continue to sexually violate her and take advantage of her vulnerability, finding that he showed no remorse.

[46] I cannot find that the Magistrate misdirected herself in this regard and accordingly, I am of the view that the Appellant was correctly sentenced to life imprisonment.

[47] In the result, the following order is made:

1. The appeal against conviction is dismissed and sentence is confirmed.

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KUSEVITSKY AJ

ALLIE J:

I agree, and it is so ordered.

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ALLIE,J