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

CASE NO: A261/2021

In the matter between:

K L Appellant

and

THE STATE Respondent

Coram: Justice J I Cloete et Acting Justice C N Nziweni
Heard: 10 June 2022
Delivered electronically: 13 June 2022

JUDGMENT

CLOETE J:

[1] On 28 February 2019 the appellant was convicted in the Wynberg Regional Court on 2 counts, one of rape and the other of attempted rape, and sentenced on 5 July 2019 to an effective 26 years imprisonment. He appeals against both conviction and sentence with leave of the trial court.

[2] The convictions arise from the trial court having found that the State had proven beyond a reasonable doubt that during October/November 2014, and on two separate occasions, the appellant raped and attempted to rape his 9 year old step-daughter in the bedroom which they shared with her mother and baby half-brother.

He had pleaded not guilty to both counts and exercised his right to decline a plea explanation. During the course of the trial however it emerged that his defence amounted to a simple denial.

[3] The State relied on the evidence of the complainant, her friend S (to whom certain reports were made) and Dr Ashima Narula, a clinical forensic medical practitioner with experience of close to 17 000 cases of sexual trauma, based at the Heideveld Thuthuzela Care Centre ("the Centre"), as well as various exhibits including the affidavit of W/O Luthando Tiya, handed in by consent as Exhibit "F". His conclusion was that the appellant's DNA was found on a semen swab taken from the complainant's bedding. The appellant testified in his own defence and called one other witness, the complainant's mother.

[4] During the course of the trial (which, due to no fault of the magistrate, ran intermittently over an extended period from 18 April 2016 until 28 February 2019) the following facts became common cause. The appellant married the complainant's mother on 11 March 2011, a few days before the complainant's sixth birthday, when she and her mother took up residence with him. The couple's son was born on 20 February 2013.

[5] During 2014 they resided in a one-bedroom granny flat. The appellant and the complainant's mother shared a double bed, the complainant had her own three quarter bed and her half-brother slept in a cot, all in the same bedroom. It would seem from the evidence that the only form of privacy was a cupboard dividing the space between the couple's bed and that of the complainant.

[6] Despite the predictable problems which the complainant experienced in adjusting to her new family members and an ongoing dispute between her biological parents in relation to primary care and contact, the complainant developed a parent/child relationship of sorts with the appellant. She certainly did not accuse him or report anything disturbing about his behaviour towards her for some 3 ½ years, until the latter part of 2014 ("the relevant period").

[7] The complainant and S were close since her father and his mother were in a relationship. She would spend at least every second weekend with her father and S would invariably be present as well. S is physically disabled, confined to a wheelchair and attended a school for children with special needs. They confided in each other and during 2013 the complainant developed a crush on him. At a point they kissed each other and the complainant wrote letters to him in which she fantasised about their future relationship.

[8] These letters did not find their way to S. The complainant's mother however discovered them in her school bag. She was so concerned about their contents (she subsequently destroyed these letters) that she took the complainant to see a social worker, fearing that although the complainant was only 8 years old at the time, she might already be sexually active with S. The social worker in turn referred her to the Centre where by sheer coincidence the complainant was examined by Dr Narula on 5 November 2013. Her J88 report (Exhibit "D") and her subsequent testimony confirmed that there were no signs of sexual trauma or injury at that stage.

[9] During the relevant period the complainant's mother worked shifts. One of these involved her leaving home at 4am to commence a 7-hour shift from 5am to 12pm. In these instances, from 4am to 6.30am the complainant and her half-brother were left in the sole care of the appellant, until his father fetched the children (to take the complainant to school and her half-brother to the appellant's mother to look after him during the day). The appellant was also in fulltime employment and would leave for work around 7.30am. In addition the complainant's mother worked late shifts from time to time, either from 12pm to 7pm or 4pm to 11pm, and on these occasions the children were also left in the sole care of the appellant.

[10] At a stage during 2014 the complainant reported to S that the appellant had behaved in a sexually inappropriate manner towards her. S said that she needed to tell her father but she replied that she would do so if it happened again. On 16 November 2014, which was S's birthday, the complainant made a further report to him about the appellant. S responded by saying that if she did not tell her father then he would do so himself. She asked him to help her in telling her father. By all

accounts the report was then also made to her father as well as other members of his family on the same day.

[11] On 17 November 2014 the complainant made a statement in the presence of her father to Sgt Maxine Charles (Exhibit "G") in which she gave the following information. During 2014 and on a date and at a time unknown, she was asleep in her bed when the appellant woke her wearing only a t-shirt. He got into her bed and lay down next to her. She was wearing only a nightgown and panties. He pulled her onto him in a sitting position *'on top of his private parts'* and it was very painful. When he *'was finished'* he left her bed and after going to the kitchen returned to his own.

[12] The information was further that on a second occasion in 2014 the appellant again woke her while he was naked. He got into her bed and tried to pull down her panties. When she told him not to do so he returned to his own bed without protest. On 11 November 2014 her mother was working late and the complainant was home alone with her half-brother and the appellant. He climbed into her bed naked and, jumping out, she told him that she wanted to move to live with her father. He became angry and told her to lie down, which she did and he returned to his own bed.

[13] About two hours before making this statement the complainant was again examined by Dr Narula. Her notes as recorded in her (second) J88 report (Exhibit "E") reflect a *'healing/healed tear/scar'* at the 6 o'clock position of the posterior fourchette as well as two clefts in the hymen at the 10 and 4 o'clock positions. Her report concluded that her findings were compatible with forcible vaginal penetration with a penis or object.

[14] The appellant was arrested on the same day. On 4 December 2014, S also made a statement to Sgt Charles (Exhibit "C") which reflects that on a date and at a time unknown the complainant reported the following to him. One night when her mother was working late, she woke up to find the appellant in her bed, naked, and her pants and panties pulled down. She felt what the appellant was doing to her because her vagina was very sore. When making the report to him the complainant

was nervous and tearful. She did not want to tell her father what had happened but at the insistence of S, she did so.

[15] I now turn to deal with the evidence on the disputed issues. It bears mention that both the complainant and S testified through an intermediary and further that, given the delay in the trial commencing, the complainant's evidence was only adduced during April and July 2016, and that of S during August 2016, a considerable period of time after the incidents are alleged to have occurred. In turn, the appellant and the complainant's mother only testified in June and September 2018, roughly two years after the State witnesses. This is indeed most regrettable and serves to highlight the very real challenges faced by judicial officers in dispensing swift justice in the current system. It also impacts on the quality of testimony, since recall of detail fades over time, and this makes the job of a judicial officer even more difficult, particularly where one is dealing with child witnesses.

[16] By the time the complainant eventually testified she was already 11 years old. It is understandable, in these circumstances, that she would not be able to recall specific dates and times. It is also understandable, given how young she was at the time when the incidents are alleged to have occurred, that her account was not entirely consistent with her reports and her previous statement. The same applies to S who only testified when he was 15 years old.

[17] In summary the account given by the complainant in her evidence of the incidents themselves was as follows. On the first occasion her mother had left for an early morning work shift. The appellant came to lie in her bed, pulled her on top of him and, while she lay face down, started removing her pyjama bottom and panties. He felt to her as if he were naked. She pulled her garments back up and told him that she was warm enough, thinking this would deter him. He tried again and she responded in the same manner. He then left her alone, went into the kitchen and thereafter returned to his own bed. She later reported this incident to S when she saw him on her next weekend visit to her father.

[18] On the second occasion her mother had also left for her morning shift. This time the appellant pulled her on top of him again, removed her pyjama bottom and

panties to below her knees, and put his penis into her vagina. It felt as if he was positioning her to make penetration easier. It was not long thereafter that he moved her off him, put her onto her bed and got up, going into the kitchen. She was frightened and confused but did not dare tell S because he would insist that she report it to her father. She did not tell her mother because she would have sided with the appellant and refused to believe her. The appellant himself also told her that no-one else would believe her either.

[19] The third incident also occurred when her mother had left for her early morning shift. The appellant climbed into her bed and tried to lift her up. Knowing by now what was going to happen, the complainant pushed him away, jumped out of bed and tearfully told him that she wanted to move to live with her father. The appellant then offered to buy her a gaming console that he knew she wanted if she would climb back into bed with him. She refused and he left her, going into the kitchen. It was following this incident that she made the second report to S.

[20] It is clear from the record that S was an extremely nervous witness. It is difficult at times to follow his testimony, and he needed prompting in cross-examination to recall additional detail. The impression gained however is not that S was dishonest, but rather that his anxiety and lack of recall got the better of him. That being said, the salient aspects of his testimony were as follows.

[21] The complainant made two reports to him, one in October and the other in November 2014. The first report pertained to the alleged rape. The second related to the appellant's further attempt to make advances on her which she successfully rebuffed. The complainant also told him about the appellant's attempt to bribe her with a gaming console.

[22] As to the rape itself, the complainant told S that one evening when her mother was working a late shift, she was asleep in her bed and *'felt something'* which made her private parts sore. She realised that she was without her panties and turned over, only to see the appellant leaving her bed *'…but he also had nothing on and she told me that he did put his private part in hers'*.

[23] Upon critical evaluation there were thus indeed contradictions between the full account of what the complainant told the police; what she said she told S; what S said she told him; and her subsequent testimony. These pertained to how many occasions the appellant made advances; precisely what happened on each occasion; and whether the incidents occurred in the morning or evening.

[24] However as far as the vaginal penetration itself is concerned, the complainant was consistent that the appellant forcibly inserted his penis into her vagina and this made her private parts sore. She told this to the police, to S, and she was unshaken on this aspect in her testimony. So too was S when he testified about this part of her report to him.

[25] Furthermore, the evidence of both the complainant and S that it was a matter of a few weeks after the rape that she told her father, as well as the fact of the rape itself, was borne out by the independent testimony of Dr Narula. She was clear that the complainant had suffered sexual trauma between her first examination on 5 November 2013 and her second examination on 17 November 2014. That sexual trauma, as detailed in both her second J88 report and subsequent testimony, was consistent with forcible vaginal penetration with a penis or object. The complainant's injuries were still healing. Dr Narula was of the opinion that they could have been inflicted within a week or so prior to examination, but carefully explained why it was not possible from a clinical or scientific point of view to pinpoint an exact lapse of time and testified that it could have occurred earlier than that, i.e. two weeks before examination.

[26] During her evaluation the magistrate considered the DNA evidence but ultimately decided to exclude it on the basis that the report of W/O Tiya gave no indication of when the semen was deposited on the complainant's bed and *'the accused and the mother said that they did have sex there on the bed on a previous occasion'*. I respectfully hold a different view. The appellant testified that he and the complainant's mother slept in the complainant's bed when she was spending weekends with her father because hers was more comfortable than theirs. However he could not say how often this occurred and whether or not they had done so on the weekend when the complainant made the report to her father.

[27] On the other hand the complainant's mother gave a materially different version. She did not mention that they slept on the complainant's bed because it was more comfortable, but rather that the appellant would sleep there on his own when she was upset with him. On the weekend when the complainant made the report to her father, the complainant's mother had later joined the appellant in the complainant's bed, and this was the only occasion on which they had sexual intercourse there.

[28] None of this had been put to the complainant and was raised for the first time during the defence case. It also seems highly improbable that the couple would have chosen to sleep in a smaller bed than their own. In addition during argument it emerged that the semen sample was collected from the complainant's bedding on 21 November 2014, within days of her report to her father and after the appellant's arrest. To my mind therefore the explanations given by the appellant and the complainant's mother were rather an attempt on their part to explain away the presence of the appellant's semen on the complainant's bed. They materially contradicted each other in their respective versions, and accordingly it is my view that the presence of the appellant's DNA in semen found on the complainant's bed provides further independent support for her version.

[29] In addition to the appellant's flat denial of the allegations against him, he maintained that the reason why her mother took the complainant for a medical examination in 2013 was because she had told her mother that S *'touched her'*. This had not been put to either the complainant or S when they testified and the complainant's mother did not mention it in her testimony either. Accordingly this too appears to have been a vain attempt by the appellant to suggest that S might be the culprit.

[30] The above analysis of the evidence demonstrates that as far as the rape count is concerned the appellant was correctly convicted. There is also no merit in the criticisms levelled by the appellant at the magistrate's approach to the applicable legal principles, which are trite, in particular that the complainant was a single witness to the rape itself and a child to boot.

[31] However the conviction on the count of attempted rape presents with difficulty. The appellant was charged in terms of s 55 (amongst others) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act ("the Act"),[1] namely an attempt to commit a sexual offence. The definition of *'sexual offence'* in the Act includes attempted rape. In turn *'rape'* is defined in s 3 as the unlawful and intentional act of sexual penetration without the consent of a complainant.

[32] The particulars of the charge (in the charge sheet) read as follows: *'attempt… to commit a sexual offence by putting* [the complainant] *on top of him, positioning her over his penis and trying to pull her pants down whilst she was under the lawful age of consent'.*

[33] It will be recalled however that in her statement to the police the complainant's version was that the appellant raped her on the self-same occasion when he pulled her into a sitting position on top of him. Her subsequent testimony was to similar effect. Accordingly, there was no separate incident on the State's version which supported the particulars of the charge in respect of the account of attempted rape. Despite this the charge was not amended as envisaged in s 86 as read with s 84 of the Criminal Procedure Act ("the CPA").[2]

[34] Section 85 of the CPA provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. In the present case there is simply no such evidence.[3]

[35] Moreover the complainant's accounts of what occurred during the other two incidents varied. In her statement to the police she conveyed that on one occasion the appellant climbed into her bed and tried to pull down her panties. On the other he climbed into her bed naked. On both occasions he desisted when she protested.

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1 No.32 of 2007
2 No.51 of 1977.
3 See also *S v R and Another* (13919/2013, 17/2013, BSH 9/2013) [2016] ZAWCHC (7 January 2016), esp at paras [5] to [9].

[36] In her testimony, her evidence was that on the one occasion he pulled her on top of him and twice tried to remove her pyjama bottom and panties. On the other he climbed into her bed and tried to lift her up. Again he did not pursue his attempts on both occasions in the face of her resistance.

[37] Having regard to the aforegoing it is my view that this falls short of proof beyond a reasonable doubt of attempted rape. On the evidence the appellant should have instead been convicted on the competent verdict of attempted sexual assault, namely the attempt to unlawfully and intentionally sexually violate the complainant.

[38] Turning now to sentence. I do not intend repeating the appellant's personal circumstances as they are fully set out in the trial court's judgment. That court was also in possession of pre-sentence, correctional supervision and victim impact reports and clearly had regard thereto, as well as all other relevant sentencing factors, in arriving at the conclusion that the prescribed minimum sentence of life imprisonment should be deviated from, and the appellant sentenced to 22 years imprisonment for the rape. Suffice it to say that the magistrate's reasoning cannot be faulted and the sentence on this count was not vitiated by material misdirection, nor was it shocking, startling or disturbingly inappropriate or disproportionate.[4]

[39] As far as the second count is concerned, for the reasons already given, this Court is at liberty to impose a fresh sentence. While of course the particular circumstances of each case are considered in arriving at an appropriate sentence, perusal of the more recent decisions indicates that in cases of attempted sexual assault sentences have been imposed of between 2 and 5 years imprisonment.[5] It appears however that the victims in question were adults. Particularly aggravating in the instant case are the following factors. The complainant was completely defenceless in the sense that she was at the mercy of the appellant. The appellant abused his position of trust. The complainant was only 9 years old. In my view an appropriate sentence in all the circumstances would be 8 years direct imprisonment, to run concurrently with the sentence imposed on count 1.

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4 See *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Dodo* 2001 (1) SA 594 (CC).

5 *S v Stevens* 2015 JDR0616 (ECG); *S v Larry* 2014 JDR1291 (WCC); *S v Velaphi* 2017 JDR1737 (ECP).

[40] **The following order is made:**

1. The appeal against conviction and sentence on count 1, namely rape, is dismissed. The conviction and sentence are confirmed.

2. The appeal against conviction and sentence on count 2, namely attempted rape, is upheld and substituted with the following:

2.1 The appellant is convicted of attempted sexual assault and is sentenced to 8 years direct imprisonment.

2.2 The sentence imposed in 2.1 above is antedated to 5 July 2019 in terms of s 282 of the Criminal Procedure Act 51 of 1977. It is further ordered that such sentence shall run concurrently with the sentence imposed on count 1 in terms of s 280(2) of the aforesaid Act.

J I CLOETE

NZIWENI AJ

I agree.

C N NZIWENI