

SOUTH AFRICA / JUDGMENT

B C v S (A8/2020) [2020] ZAFSHC 180 (30 October 2020)

[2020] ZAFSHC 180**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe, J, Opperman, J

CASE / FILE NUMBER

A8/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE PROVINCIAL DIVISION****Appeal****Case No.: A8/2020****In the matter****between:**BC
Appellant
versus
THE
STATE
Respondent**Coram:**Chesiwe,
J et
Opperman,
J
Date
of appeal: 3
August 2020**Delivered:**The
judgment was handed down electronically by circulation to the
parties' legal representatives by email and release to SAFLII
on 30 October 2020. The date and time for hand-down is deemed to be
30 October 2020 at 15h00.

Summary:

Appeal
– Sexual offences perpetrated against minor in contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act
32 of 2007 (SORMA) – Conviction – Evaluation of evidence in sexual offences cases and of a minor –
Sentence
ORDER
On
appeal against
convictions: counts 1 to 8 and sentences: counts 1 and 8 by Regional Court Magistrate, Mr. CF Nekosi, Welkom Regional Court sitting in
Odendaalsrus, Free State on 19 February 2018. (Court a quo
case no.: RC 254/2014, A17/2019)

Order:

1. The appeal against the convictions is dismissed.
2. The appeal on sentence against count 1 is dismissed.
3. The appeal against sentence on count 8 (Rape) succeeds and the sentence is replaced with one of 20 (twenty) years imprisonment.
4. The sentences on counts 1, 2, 3, 4, 5, 6 and 7 are confirmed.
5. The order in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 is amended in that the sentences on counts 1, 2, 3, 4, 5, 6 and 7 shall be served concurrently with the sentence of 20 (twenty) years imprisonment imposed on count 8.
6. The order in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 is confirmed.
7. The order in terms of section 103 of the Firearms Control Act 60 of 2000 is confirmed.

JUDGMENT

Opperman, J (Chesiwe, J concurring)

I BACKGROUND

- [1] As indicated, the appeal is against all the convictions and some sentences. The appeal is without leave of the court a quo on counts 1 to 7.[1] It is only the sentence on count 8: Rape, on which life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) was imposed, that invoked section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA):

“309. Appeal from lower court by person convicted.—(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a Regional Court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).”[2]

- [2] The oversight had the potential to be legislatively and procedurally fatal in casu and should the appeal on count 8, only, have been entertained. That said, the appeal against the convictions lies primarily against the evaluation of the evidence a quo. The court a quo erred, according to the Appellant, in the evaluation of the evidence and the crimes were therefore allegedly not proven beyond a reasonable doubt.
- [3] The facts are so entwined that we decided to, in the interest of justice, entertain the appeal as brought by the Appellant in terms of the inherent jurisdiction of the High Court to do so. It will also bring expeditious constitutional finality to the matter.
- [4] The crimes are alleged to have been perpetrated against a minor[3] and involve general assault and sexual assault that culminated into rape over years. The Appellant implored the court to revisit the sentences on count 1 (assault with the intent to do grievous bodily harm) and count 8 (rape), should the appeal on the convictions

fail.[4]

- [5] The Appellant was convicted and sentenced as follows:[5]

Count 1: Assault with the intent to do grievous bodily harm.

Sentence: Three (3) years imprisonment.

Count 2: Sexual grooming of a child in contravention of section 18(2)(b)[6] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007).

Sentence: Ten (10) years imprisonment.

Count 3: Exposure or display of or causing exposure or display of child pornography or pornography to a child in contravention of section 19(c)[7] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007.

Sentence: Four

(4) years imprisonment.

Count 4: Sexual Assault[8] in contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007

Count 5: Compelling or causing a child to witness sexual offences, sexual acts or self-masturbation and exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”) to children in contravention of section 21(3)[9] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007.

Sentence: One (1) year imprisonment.

Count 6: Compelled self-sexual assault in contravention of section 7(b)[10] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007.

Sentence: Two (2) years imprisonment.

Count 7: Compelled self-sexual assault in contravention of section 7(a)[11] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007).

Sentence: Two

(2) years imprisonment.

Count 8: Rape in contravention of section 3[12] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007.

Sentence: Life imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it was ordered that the sentences on counts 1, 2, 3, 4, 5 and 6 shall be served concurrently with the sentence on count 8.

[6] This court, with further patients and indulgence, prior to the hearing of the appeal, granted leave to supplement the grounds of appeal. The Appellant’s Heads of Argument consist of an exhaustive and extensive document of 42 pages. Counsel for the Appellant addressed the court at length during the hearing. The Appellant relied on numerous issues. The judgement will accordingly be organised as follows:

1. The assessment of evidence on appeal.

2. The assessment of evidence in criminal matters in general and that involves sexual offences.
 3. The major parties involved.
 4. The assessment by the court a quo.
 5. The complainant's evidence and police statements; and inconsistencies in evidence.
 6. Memory refreshment: Exhibit A.
 7. The finding of the social worker.
 8. Assault with intent to do grievous bodily harm and justified disciplining of a child.
 9. Duplication of charges.
 10. The sentence.
- [7] Each case gets the judgment it deserves. The judgment demanded detailed attention due to the nature of the grounds of appeal and is extensive.
- [8] Reading of the Notice of Appeal and the Heads of Argument of the Appellant, as well as having heard argument from Counsel for the Appellant forced the judgment, first and foremost, to depict the Law of Evidence when a criminal matter of this nature is decided during trial a quo and on appeal. It is illegal to pick phrases from the record and base the adjudication of a case thereon. It distorts justice and the justice system and misinforms the lay-public.[13]

II THE ASSESSMENT OF EVIDENCE ON APPEAL

- [9] The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass.
- [10] The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89:

“Such findings are only overturned if there is a clear misdirection or the trial court’s findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from ST v CT:

‘In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following

dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

“Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.” (Accentuation added)

- [11] The same was law seventy-two years ago; and it is still true in the constitutional epoch and especially in cases where sexual offences

are involved. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The general principles according to which a court of appeal should consider the case are set out in *R v Dhlumayo* 1948

- (2) SA 677 (A). The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour.

- [12] The court of appeal will only reject the trial court’s assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court’s judgment must remain in place (*S v Robinson* 1968

- (1) SA 666 (A) at 675H).

- [13] Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities (*Minister of Safety and Security v Craig* 2011

- (1) SACR 469 (SCA) at [58]). In casu the evidence is of a direct nature.

- [14] The court of appeal does not zealously look for points upon which to contradict the trial court’s conclusions and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.

III THE ASSESSMENT OF EVIDENCE A QUO

- [15] The foundation of criminal cases was described by Willis, JA in *Ramaite v S* (958/2013) [2014] ZASCA 144; 2015 (2) SACR 79 (SCA) (26 September 2014):[14]

“[66] The highest degree of justice is not a guilty person walking free. It is that no innocent person should lose his or her most precious freedom by reason of a wrong conviction or that the accused person and his or her family should not have to endure the shame, humiliation and devastating financial consequences of imprisonment arising from that wrong conviction. The critical question is therefore brutal in its simplicity: did the appellant have a fair trial or did he not? The evaluation of the evidence in a trial requires regard to the totality thereof. By parity of reasoning, an evaluation of the fairness of a trial must be undertaken by having regard to the totality of facts and circumstances relating to the trial, including the evidence itself.” (Accentuation added)

- [16] Heath J professed in *Gqozo v S*

- (2) 1994 (1) BCLR 10 (Ck) that to give effect to the wishes of society and the purpose of the Constitution is to be guided by the historic and established principles that:

“ 1. An innocent person must never be convicted of a crime.

2. The conviction of a guilty person must be obtained with the best possible endeavours. The prosecution representing the community must fulfil their duties within the framework of the law and the available facts.
3. The right to remain silent and the satisfaction of the responsibility which is on the State must be satisfied as far as possible.
4. The rights of the accused are very important.
5. The right of the community to see that justice is done is equally important.
6. To achieve these goals instruments should be used in such a way that justice is done to everybody. (Accentuation added)”

[17] The adjudication of evidence in criminal cases of this nature and specifically the evidence and facts that came to the fore in this case, is the adjudication of the dysfunctional; it is, per definition,[15] to adjudicate people that do not function on the basic standards of a civil society; the basic standards that are etched and carved into our Constitution and that are not traversable.

[18] It is also to judge the being of a young emotionally and physically yet undeveloped person that has known nothing but the improper and adapted herself to the dysfunctional. It is to judge a man that is fighting for his freedom and integrity within this conundrum of alleged vulgarities and crime.

[19] The judging is confusing and daunting for the lay-bystanders and the observers; it is immense for the officers of court. The Magistrate must adjudicate in terms of the law. The bystanders and observers in this case judged with emotions and loyalty. The character assassination and praising and the manner in which it has been used in casu is legally worrisome.

[20] Tension might develop between the best interest of the child in terms of section 28(2) of the Constitution and the right to a fair trial in terms of section 35 in the Constitution, for the Appellant. Imperative is that both the accused and the accuser have a right to a fair trial; not only the accused. The evidence of the child and the adult must be adjudicated with substantive equality in the unique circumstances of the case.

[21] The mere fact that an individual is a child, 14 years old when she reported the case and 17 years old when she testified, the fact that the incidences occurred years before the trial, that she did admit to lying to her stepfather and mother that allegedly both abused her, that she did not report the abuse to her mother that turned a blind eye to the circumstances, that she as a child was sexually stimulated by pornography and “sex toys” with the knowledge of the

Appellant and the mother from when she was very young and over years, that she initiated some of the sexual interaction and that she is a single witness does not make for the evidence to be automatically rejected.

- [22] Sexual offences are notoriously committed with only the perpetrator and the complainant to witness; specifically, as is the allegation in this instance; that the complainant was abused in secrecy that was maintained by both the alleged perpetrator and complainant since the complainant was 9 years old.
- [23] A child cannot pinpoint the evil in the deed; hence the enhanced protection by the Legislator. A child may not be expected to carry the responsibility for the deed. The caregivers and adults must. The remark is in reflection of the grounds of appeal by the Appellant that M failed to report the incidents when she could reasonably have been expected to do so; she showed a propensity for lying; she admitted that she initiated several of the sexual encounters with the Appellant, the complainant admittedly experimented with pornography prior to the alleged actions of the Appellant; the complainant admittedly watched pornography DVD's and looked at the pornographic magazines on her own initiative, the complainant considered the concessions she had to make to the Appellant as a good idea. The mother and the Appellant knew about the conduct of the complainant; they should have addressed it and not have promoted her behaviour and now blame her of having had low morals and make it a defence for the crimes accused of.
- [24] The reality is that it will never be surprising that a victim of a sexual offence will be a single witness considering the act itself. There is no one that will have sexual intercourse with a minor in the open. Especially, if he is cheating on his wife with her daughter. All perpetrators of sexual offences will escape with impunity all the time should the suggestions in the arguments of Counsel for the Appellant be the law.[16]
- [25] Counsel for the Appellant argued that the complainant did not report any of the incidents at a time when she "could reasonably have been expected to" but he also did not indicate the "right time". Reporting of a rape is not an exact science. One of the accepted principles in sexual offences cases is that the complainant is expected to make a report at the earliest convenience. This, however does not mean that failure to report "timeously" or even not at all, means a person was not raped. The circumstances surrounding the fiasco must dictate the meaning of "timeously".
- [26] In fact, section 58 of SORMA decrees that: "Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent

statements." In addition, section 59 decrees that: "In criminal proceedings involving the alleged commission of a sexual

offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.” And further; section 60 decrees that: “Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

[27] In *Cele v State* (AR191/13) [2016] ZAKZPHC 4; [2016] 2 All SA 75 (KZP) (12 January 2016)

“[1] How does an appeal court approach the evidence of a single witness, a child testifying at the age of eight years about an accused allegedly raping her three years earlier? With caution and common sense, the authorities say. Children are both ‘highly imaginative’

and open to ‘suggestions by others’. Caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy. Caution cannot displace common sense. Credibility must be assessed ‘in the light of all the evidence’. Caution is exercised not inflexibly but practically to avoid ‘injustice to the innocent’ and, I add, the injured. The trier of fact should be aware of the risks of a wrongful conviction arising from the evidence of a single witness in the prosecution of a sexual offence and, I add, a guilty person being erroneously let loose on society. The traditional assumption that the motive to falsely implicate an accused is prevalent in sexual offences must be balanced with the ever-increasing prevalence of rape, particularly of children, often by people they know. Corroboration as independent evidence that confirms the testimony of a witness provides a safeguard. To be relevant and material such corroboration must point to the guilt of the accused. (Accentuation added)

[2] Consistency is another safeguard, bar the rule against self-corroboration. Reporting the offence is not corroboration

but goes to consistency of the complainant’s version. Demeanour is not decisive of a witness’s credibility but could reinforce an objective assessment on the possibilities. Against the backdrop of these trite rules of evidence I turn to analyse the evidence in this case. (Accentuation added)

[28] All the above said; an accused is innocent until proven guilty beyond a reasonable doubt. The court may not lean in favour of the child out of maudlin emotional sympathy. There were only two witnesses to most of the crimes in this case; the Appellant has the same dilemma as the State. He can only deny, have no witnesses to call and can only speculate on the reason for the accusations. The Appellant volunteered a conspiracy between the complainant and the mother to get rid of him during his evidence. He pleaded not guilty on all the charges and did not submit any defense.

[29] According to Hiemstra[17] the duty of rebuttal on the accused when the State has made out its prima facie case need do no more than give an explanation about which the court can say “It is reasonably possibly true”. This is the accused’s duty of rebuttal. This duty is, in the first place, the duty on the accused, after the State has presented

its evidence, to cast doubt on such evidence, either by presenting evidence in rebuttal or by breaking down the State's case through effective cross-examination. If the State's case is, on the probabilities, credible and the accused does nothing to reduce its force, he or she has not complied with the duty of rebuttal in that he or she has done nothing to cast doubt on the State's case.

IV THE DRAMATIS PERSONAE

[30] The identification of the parties is relevant and forms the basis of the appeal that the evaluation of the evidence was erroneous.

1. To reiterate; the complainant, M was born on 20 April 1998. She was between the ages of 9 and 14 when the alleged crimes were perpetrated

against her by the Appellant. Her mother ("G") played a major role in the events and the mother's boyfriend/partner is the Appellant.

2. The social worker[18] drafted a 39-page report on the case. The Appellant refused[19] to have a report compiled by an objective expert on his circumstances and defence and even in mitigation of sentence. He called witnesses to testify on his character and that of the complainant and her mother. The social worker did not consult with him. She obtained information via consultations with family.
3. M was 17 years old at the time of the trial. She was born from a short-term relationship between her mother and an American citizen,

Mr R. He returned to the USA and was and is not involved in her upbringing at all.

4. G was still in school when she fell pregnant with M. Since her birth and up to 2007 they resided with the maternal grandparents to whom the so-called first report was made.
5. The maternal grandparents played a pivotal role in her life. She trusted them unconditionally. They were and are the only adults that she trusts.
6. She is highly intelligent, hardworking and mature for her age. She represented her school at national level in athletics and was the captain of her netball team. She partook in chess and the teachers described her as one of the positive learners in school. She was throughout the trial described by witnesses, that includes the Appellant, as a "typical teenager". She did realise that their domestic situation was not within the norm of society and feared stigmatisation. She was adamant that the revelations not be made public.
7. The mother is apparently an adopted child. As said, she fell pregnant with M whilst very young. She was still in school. M was raised by her maternal grandparents. The relationship between mother(G) and daughter(M) was always doubtful and troublesome. The mother seemed to have been the breadwinner for some periods. The capacity of the mother to protect and guide her children is, from the evidence, questionable if not, non-existent. She partook in and allowed severe corporal punishment on M, made a vibrator (sex toy)

available to M and knew about M's exposure to pornography but did not manage the situation effectively. Appellant and M reported that she at one time grabbed her mother's hands to stop her from assaulting or "chastising" her further. Appellant reported that the mother would even hit M with fists.

8. It is most probable that the matter would not have been reported if the school did not become involved by chance. Notwithstanding, M took it upon herself to protect her mother and little sister, A. A was born in 2011 from the relationship between the mother and Appellant. Appellant described G as an absent mother. G has married within a year or two after her separation from the Appellant and was already married at the time of her testimony in court on 1 November

2016. The Appellant testified that the relationship with the current husband was formed during or soon after the matter was reported to the police and implied that this could be the reason for the false accusations against him.

9. The social worker reported that at the time of arrest the Appellant was 34 years old and the father of a daughter, X, from a previous

relationship. He was employed with the office of the Sheriff of Court, but retrenched twice by this employer. He had a tuck shop that he operated with a partner and in April 2013 he started a plumbing business. At the time of sentencing he was in a relationship with a lady that lived with him.

10. He, on his own evidence, knew about and partook in the "corporal punishment" of M, that she was exposed to pornography and that the "sex toy" was made available to her to use.

V THE JUDGMENT A QUO[20]

[31] It is common cause that on 26 February 2014, M texted her maternal grandmother. She informed her that the Appellant abuses her and requested to be fetched by them from school the next day. She did not go into much detail. She has done this, years before in August 2012, but was severely punished by her mother and the Appellant for "talking out of the house". Her contact with her grandparents was placed under strict control by the mother and Appellant. She could only talk to her grandparents on speaker phone and with one of them present.

[32] The grandfather drove from Klerksdorp to the town where the complainant resided with her mother and the Appellant since 2007. He waited for her in the foyer at school during break. He needed the mother's permission to remove her from the school premises. The mother now had to be involved.

- [33] The revelations by M on 27 February 2014 that caused the criminal charges were made to the mother, teachers and the grandfather here and then at the school. She also reported her intention to report the Appellant to the Appellant's nephew on the way to school that morning. She, again, did not give any detail to him. She testified that she feared stigmatization.
- [34] The police were involved by the Principle of the school because he is statutorily obliged to do so. The Appellant was arrested. He was released on bail pending the finalisation of the case. Bail pending appeal was refused.
- [35] The police, wisely so, immediately requested an experienced forensic social worker (Joubert) [21] from Bloemfontein to assess the situation. Within two weeks she consulted with M for the first time and her report was submitted on 27 May 2014.
- [36] As stated, she did not consult with the Appellant and he refused[22] that a report be compiled on his personal circumstances and the circumstances of the case from his perspective. During his testimony
- he referred to the report by Joubert as one-sided. His Counsel did however use a section of a sentence[23] from the report to promote the case for the Appellant. I will deal with it later and in context.
- [37] The trial was marred with family and friends that mobilized themselves into two camps; one in support of M and the other
- sympathetic to the Appellant.
- [38] Appellant maintains that all the allegations and charges against him are false and he suspects it to be a conspiracy against him "to get rid of him." The conspiracy is concocted by M and her mother. It is trite that he moved out of their house on the day of his arrest in February 2014 and never had contact with the mother and the minor again until the trial that started in 2017. The matter took from 2014 to 2018 to be finalised a quo. The crimes were allegedly perpetrated between 2008 to 2014. By the time of the trial the parties have moved on with their lives. The mother got married and the Appellant was in a relationship with another lady at the time of sentence. The complainant also settled into a new more stable live.
- [39] In light of the basis and grounds of appeal as depicted by the Appellant and the fact that the averments in the Appellant's Heads of Argument is a complete contrast in presentation to the judgment, we are, out of the ordinary, forced to quote the judgment to enable the reader to compare the allegations by the Appellant against the judgment itself.

"The state called, on the evidence of the complainant MVS, her mother CT, Heidi Joubert and Mavis Kuba.

The evidence of the witnesses can be summarized as follows hereinunder.

The accused was at all material times the stepfather to – of the complainant and resided with her, her mother and young sister in the family home in Odendaalsrus the sister having been born after 2011.

The complainant though excellent academically and in sport had occasional indiscipline which needed to be kept in check. Initially

disciplining took place by chastising of the complainant. The complainant on one occasion was hit with a belt on the buttocks, on another occasion with a feather duster and on another occasion with a PVC pipe by the accused.

These was – there was an incident where the complainant was hit with a fist and her head was bumped against the wall. She had a blue eye as a result.

The family at the instance of the accused implemented a point system to discipline the complainant. She would receive credit for good behaviour and would be penalised by not receiving pocket money if she failed to finish the end of a particular month with positive marks.

The duties that were expected to be done by the complainant became progressively more difficult to do and therefore it became more difficult for the complainant to accumulate any positive points.

In order to get positive points occasional sexual favours referred to as concessions were granted by the complainant to the accused in exchange for positive points.

The first incident of a sexual nature occurred while the family was on the way from the Boertjie Festival and the accused put his hand high on the thigh of the complainant whilst he, the accused, was under the influence and they were driving in a vehicle.

She alerted her mother who reprimanded the accused. The accused apologized for his conduct the following day.

In 2011 she watched pornography on the home cell phone and the cellular phone was taken from her. The accused later approached her and showed her pornographic magazines and movies. He watched the movies with her skipping to different scenes. In one of the scenes a woman used the vibrator. The accused told her what a vibrator was and he also showed her scenes of a man and a woman having sexual intercourse.

The accused fetched a shoe box from the room and gave her a purple vibrator to use in her room. She did not use it but told the accused that it was enjoyable when he asked how it was.

Instead she had to perform oral sex on him and he put his finger in her vagina on that occasion. On occasions the accused would ask her to sit on the toilet seat and whilst she urinated on his hand, he would masturbate requiring her to finish masturbating him after she had urinated.

She would approach him on occasions herself whilst – for a request for a concession. This happened, according to her, once or twice a week from his side and two to three times from her side every six months.

She never told her mother because she did not think her mother would believe her.

There were at least three occasions when her mother almost caught them while she was doing sexual favours to the accused. She says the accused has a mark on the penis which she observed while doing the sexual favours.

She decided to make a disclosure at school by having her grandfather coming to school and fetch her. This had the consequence of her mother being called to school and the subsequent laying of a charge.

The evidence of the defence witnesses can be summarized as follows. The accused confirmed that he was the stepfather of the complainant during the relevant period. The relationship between the complainant and her mother was not a very good relationship, according to the accused, and in fact the complainant had a better relationship with him than she did with her mother at the time. The relationship between the accused and CT the mother of the complainant according to the accused became very distant and the mother was not paying not much attention, or there was a lack of participation in the relationship by CT.

The accused confirms that MVS was good at sports but states that she did not accept discipline very well.

He did – from time to time chastise her when she was ill disciplined. Her mother did so, in fact according to the accused she was predominantly the person to chastise the complainant.

They, referring to him and the complainant's mother realized that corporal punishment was ineffective and together initiated a point system which he found to be effective. The accused vehemently denies that the system was ever abused. He cannot recall that chastising took place after the point system was initiated.

He indicated that the mother of the complainant participated in the allocation of points inasmuch as he did.

On the allegation that the work allocated to the complainant was so exorbitant that she could not keep up and the accused indicated that it was not entirely true. What happened was when the complainant realized that she would be in the red with points she would attempt to catch up with the work, this attempt being an attempt in vain as the work would then be too much for her to do.

He was an avid supporter of the complainant's sports and would assist her with extra classes or rather extra training and also give her driving classes in his spare time.

They were however opposed to her leaving cross country for netball and this was a point in dispute which caused discontentment with him and her mother.

They, referring to him and the complainant's mother were the persons that would buy the necessary sports equipment and he, in particular, would drive as far as Johannesburg to buy particular shoes that the complainant would want.

He insisted that complainant was not afraid of him as they often – they were often home alone when the mother was away for work and she never indicated to her mother that in fact she was afraid of him during those times.

He confirmed that he did hit her with a belt but could not recall why.

When she spoke out to – out of the house it was her mother who chastised her for doing so. This speaking out referring to a telephonic conversation of what had transpired in the house with her grandmother.

This of course is contrary to what the complainant has testified insofar as who the person was who would chastise the complainant on that particular occasion. According to the accused this was the only time that the complainant had marks on her body when her mother had beaten her.

He confirms that was an occasion when the complainant was only permitted to speak to the grandmother on the cellular phone that was on speaker. This was subsequent to the complainant having spoken out of turn to her grandmother.

He confirms that he hit her with a feather duster but it was not very hard according to the accused and on reflecting back he realizes that maybe it was not necessary to do so.

He cannot recall an incident where the birds made a noise resulting in him throwing the complainant around in the room. He also denied hitting her with a fist and never saw a blue eye that he could remember. He also denied that he hit her after a CD fell and her mother had to intervene.

He indicated that the injury of – the only injury he could recall that the complainant had of the wrist and that was as a result of a fall from a bicycle.

He admits hitting her with a PVC pipe but cannot recall why, that pipe was in the kitchen at the time, again contradicting the complainant in that the complainant indicated that the pipe was at the water Jojo tank.

He admits that he had too much to drink at the Boertjie Festival and he was reprimanded the next day and apologised for what he was told he had done; he did not have any independent recollection of what had happened because of his intoxicated state.

The accused confirms that a phone was taken from the complainant because she was watching pornography on the phone. He however denies every introducing the complainant to pornography. She did one occasion watch him watching – caught him watching pornography but he does not know how much of the pornography he was watching she saw at the time.

In regards the issue of the vibrator the accused indicates that it was CP that came to him and said she suspects that the complainant was using her vibrator and the complainant later on confessed to doing so. They, referring to him and CP decided to give the complainant her own vibrator. He denies instructing her on the use of said vibrator.

In regards the mark on his penis the accused said it is not as she described; it differs on his description. He further says that she saw the mark when she inadvertently entered the bathroom while he was busy bathing.

He acknowledged that they – that there was an incident with Valentine's day where the complainant wanted a dress but denied that such incident coincided with any concession that the complainant had to give or make to him to obtain the dress.

The remainder of the evidence in the defence case, on which I shall revert, revolves around the character of the complainant. All the defence witnesses intimated that the complainant is undisciplined and to an extent promiscuous.

In *State versus Jackson* 1998 (1) SACR 470 SA 476 (e) to (f) the Supreme Court of Appeal held that the burden of proof is on the state to prove the guilt of the accused beyond reasonable doubt, no more, no less.

In evaluating the evidence, I have regard to *State versus Trainor* 2003 (1) SACR 35 SA 41 (b) where it states a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside

evidence that maybe found to be false. Independent verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of the evidence must of necessity be evaluated and there must be corroborative evidence, if any.

Evidence of course must be evaluated against the onus on a particular part, particular issue or in respect of the case in its entirety.

Caution is called for in that the complainant is a single witness, in regards to the instances of sexual penetration and sexual violation.

In *State versus Sauls* 1981 (3) SA 172 (a) to (h) it was stated as follows – there is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and demerits and having done so should decide whether it is satisfied that the truth have been told, despite the shortcomings or defects or contradictions in the evidence.

It has been said more than once that the exercise of the caution must not be allowed to displace the exercise of common sense.

Further caution is called for because the complainant is a child witness. In *State versus V 2002* (1) SACR 453 SA 454 (2) Zuman JA said as follows – in view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that while there is no statutory requirement that the child's evidence must be corroborated it has long been accepted that the evidence of young children should be treated with caution and the evidence in a particular case involving sexual conduct may call for a cautionary approach.

The evidence of MVS was to my mind consistent and seemed credible as witness. There were minor contradictions in her evidence in court and that – and with – in comparison with her statement to the police. In this regard I have regard to *State versus Mafaladiso [2002]* 4 All SA 74 (SCA) a well-known case where the court explained the approach to be followed in regards to the taking – regards to the evaluation of the contradiction with a statement.

She is corroborated in a number of aspects by her mother and to an extent by the accused. Both her mother and the accused confirmed her being – her chastisement with a feather duster and a PVC pipe. CP testified on the physical assault by the accused where she was present. Both confirmed the institution of the point system even though they differ on the implementation of it.

Both confirmed the first sexual conduct on the way from the Boertjie Festival even though the accused says he has no recollection.

Both confirmed she was given a vibrator but differs on what or who led to her being given a vibrator.

In regards to the other acts of sexual violation the complainant is a single witness as stated. She was consistent in her recollection of the events as can be evidence in the fact that she could to a great extent recount the events to Heidi Joubert though the court, not necessarily considering Heidi Joubert to be the first report.

What is most striking is the fact that in all of the incidents that accused agrees with the prelude to what the complainant says happened but denies that the actual sexual conduct actually occurred.

Most significantly the complainant never tries to exaggerate the conduct of the accused. She admits that she initially saw the accused as a father figure and had a very good relationship with him.

She acknowledges that he supported her in her sports activities, in fact she readily admitted that there were instances where she initiated the sexual conduct to get a concession.

She said she had a fear for the accused's rage but continued with the concessions because she accepted that the concessions were a way for her to get her freedom, as she put it.

The description and detail to the events in particular the penis of the accused and the fact that the accused wanted her to urinate on his hand while he masturbates is something that she could not have made up as it would be outside the normal experience of a child of her age of the complainant.

She is also corroborated by her mother with regard to the mark on the penis and the fact that urinating was part of their sexual relationship.

I therefore accept the evidence of the complainant as credible and reliable.

CP the mother of the complainant corroborated the complainant, as already indicated above. She too exposed herself to criticism acknowledging that she had a hand in the complainant getting a vibrator. This would be unusual to do if it was her intention to deceive the court. I therefore accept her evidence to be credible and reliable.

The evidence of Heidi Joubert is accepted in that it is indicative of the consistency of the complainant. The conclusion reached by her is merely a summation of the view that the conduct of the complainant is symptomatic of abuse. This conclusion can never be a final conclusion for the court make its final decision on.

The court's final decision lies with an evaluation of the evidence.

The evidence of Mavis Kuba did not take the matter further as the only aspect she testified on was the imperforated hymen noted in the J88 which, when considered in the circumstances of this case becomes a neutral fact.

The accused, in his evidence attempted to portray a picture of innocence, but could not at times hide his volatile temper when he got agitated at the questioning of Ms Van Niekerk for the State.

He blamed all except himself, for example the point system, he knew about but it was not him who initiated it. The chastising it was predominantly the complainant's mother and not him.

Where he makes admissions, it was always made with a caveat he admits that he hit the complainant but thought it was reasonable and was not too hard. Referring to the PVC pipe he only realizes now whilst testifying that it must have been excessive to hit the complainant with the PVC pipe.

He focussed his evidence on slandering the complainant whilst giving, what was essentially bare denials of the allegations against him in respect of the sexual abuse.

The accused was evasive in answering questions consistently indicating that he could not remember or that he could not recall such an event.

According to the accused the child made up this elaborate story to avoid being disciplined and in the alternative was put up doing so by her mother who no longer wanted to be in a relationship with him.

This does not hold water in the face of all the incidents described which with some detail and in the face of those already admitted by the accused.

The version of the accused in my view, is not credible and not reliable. His evidence is therefore rejected.

The witnesses called by the defence Cherice Steyn, his sister and Christoffel Steyn did not take the dispute in my mind any further.

Their evidence appeared to have been led to portray the complainant as promiscuous young girl who liked boys. Little value, if any can be placed on their evidence, for I am of the view that their evidence reeked with bias.

Anna Smith, also known as Ouma Kitty in my view did more damage than good to the accused's case.

She is the illustration of how manipulative the accused is, if any, she showed an unwavering affection for the accused. Her evidence, if anything else she showed an unwavering affection for the accused out of bias. Her evidence is therefore rejected.

With the accepted evidence in mind the court has to ask itself whether the version of the accused is reasonably possibly true. The answer to this question, in my view, is a resounding no.

The accused's version speaks against logic. There would be no reason why the complainant would falsely incriminate the accused and with regard to the vibrator and in so doing also incriminate her mother.

She even illuminated her part in suggesting the on certain occasions she was the one who initiated the conduct. This is contrary to a made-up story. In my view the accused's version except for confirming that he was with the respective complainant on the days in question on the instances as mentioned cannot possibly be reasonably true.

In respect of count 1 the court has to consider whether the conduct of the, went further than reasonable chastisement by a parent. I say this despite chastisement being declared unconstitutional it being declared unconstitutional for a parent to hit a child.

In State versus YG case number A263/2016 the South Gauteng High Court delivered on the 19th October 2017 where the court made it clear that the unconstitutionality of chastisement is not – have no retrospective effect thus the court in respect of the accused would be applicable.

In this instance the child was hit on accepted evidence with a wooden handle of a feather duster, a PVC pipe and on occasion with the fist. This conduct, in my view can never be reasonable for a parent to hit – to commit upon a child and therefore I find that the accused failed to show that he was justified to act in the manner he did in respect of count 1.

It is indeed so that this particular count makes reference to a number of conducts that was made upon the complainant all of which, if one considers the annexure to the charge sheet was referred to and testified upon by the complainant.

I am therefore satisfied that with regard to count 1 that the state has proved its case beyond reasonable doubt.

With regard to count 2, the count of sexual grooming this count is unique because it encompasses all acts of a sexual nature committed on the complainant. It involves a series of events that has as its aim to gain the complainant's trust and ultimately to have sexual intercourse with the complainant. The acts described therein as a sequence was testified upon by the complainant and I'm therefore satisfied that the state has proved that charge.

Charge 3 the exposure or display of – or causing pornography to be displayed to a child, on both versions' pornography – the child was exposed to pornography. On the accused's version, which has already been rejected, he cannot say how much the complainant saw and it was not at his instance.

However, on the accepted evidence he was responsible for the complainant viewing video material on several occasions and therefore I am satisfied the said charge was proved.

Count 4, the count of sexual assault in that it is alleged that he touched the complainant's breasts and private parts and making her to touch his private parts and letting her masturbate him.

The evidence is abundantly clear on this issue and I'm satisfied that this charge has been proven by the state.

Count 5, compelling or causing children to witness acts of self-masturbation and exposure or display of genital organs.

Now it is clear from the evidence of the complainant firstly that she was exposed to the genitals of the accused and furthermore that indeed he made her to watch him masturbate.

Count 6 compelled self-sexual assault asking or demanding that the complainant exposes her breast or body and private parts to the accused.

This aspects (sic) would be distinguished from the previous count in that it to my mind refers to the part where in the beginning stages of events the accused only looked at the complainant and not touching her.

Count 7 compelled self-sexual assault by committing sexually suggestive lewd acts making or asking the complainant to urinate on the accused. This aspect was also testified to and was confirmed by the complainant to have been done by the accused.

Count – the alternative to said count of crimen injuria then becomes non-applicable.

Count 8, being the final charge that being of rape. On the evidence of the complainant it is so that as the interaction between the parties progress the complainant – the accused had put his finger into her vagina whilst masturbating. On a further occasion he had compelled her to put his penis into her mouth and that both these acts qualify as penetration under the Act and therefore I'm satisfied that the state has proven said count.

In consequence – stand sir – in consequence I'm satisfied that the accused is GUILTY of all eight charges as charged."

VI COMPLAINANT'S EVIDENCE AND THE POLICE STATEMENTS AND OTHER INCONSISTENCIES

[40] A specific challenge to the evidence of the complainant and her mother was some contradictions. The contradictions were situated

within their own evidence, between the two of them and with their statements. The Law of Evidence in regard to the use of

documents is applicable to both the State and the Accused. The authenticity of the content of a document needs to be proven by the party that relies on the veracity thereof.

[41] In *S v Govender And Others* 2006 (1) SACR 322 (E) Nepgen J discussed the issue extensively. He pointed out that it is important that it should always be borne in mind “. . . that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable. . .” (*S v Xaba* 1983

(3) SA 717 (A) at 730B - C.)

“Furthermore, as was pointed out in S v Bruiners en 'n Ander 1998

(2) SACR 432 (SE) at 437h, the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court. Quite apart from that, however, there are other problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required and, invariably, such interpreter is also a policeman and not a trained interpreter. The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness. I am of the view that the fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising. Whenever there are contradictions between the police statement of a witness and the evidence of such witness, or where there is no reference in a police statement to what can be considered to be an important aspect of that witness' testimony, the approach to be adopted in regard thereto is as described in *S v Mafaladiso en Andere* 2003

(1) SACR 583 (SCA) at 593e - 594h.”

[42] I agree and will apply the approach that:

“[34] The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to [establish] that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with [circumspection] by a court. Firstly, it must be carefully determined what the

witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what the precise nature thereof [is]. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there I may be language and cultural differences between the witness and the person taking down the statement which can stand in the way [of the correctness] of precisely what was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain [his or her] statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations

- and the connection between the contradictions and the rest of the witness' evidence [must], amongst other factors, be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings”

“It would seem that, because of their station in life, their lack of education, their immaturity, and/or a variety of other reasons, they are so in awe of the police that when they are told that a policeman has written down something which purports to be what they told that policeman they feel that they could get into trouble if they deny that they in fact said that. But even intelligent, educated and sophisticated people at times react inappropriately when faced with a situation such as that under discussion. Quite obviously these are factors which must be taken into account when assessing the credibility and the reliability of that particular witness, but it does not necessarily mean that an unsatisfactory and unfavorable reaction requires the evidence of that witness to be rejected. What is necessary, is that regard must be had to the type of person the witness is when deciding what weight should be attached to his or her evidence. The reaction of such witness in the witness box when he or she is asked to deal with contradictions in the police statement of that witness must be evaluated by also having due regard thereto. Finally, on this aspect, even if it is concluded that a witness has been untruthful in his or her endeavors to explain any contradictions between his or her police statement and evidence, this does not mean that all the evidence of that witness should be rejected.”

VII REFRESHING OF THE MEMORY OF A WITNESS

- [43] During the hearing of the appeal Counsel for the Appellant argued that Exhibit A at page 752 of the record that was used to refresh the complainants’ memory caused an unfair trial. This is not the case as depicted on record. There was no objection to the use of the document and it is a mere perspective of dates, age and the grades the complainant was in at a certain time. The basis for it was properly placed before the court and so admitted.[24]

VIII THE WORDS IN THE SOCIAL WORKERS’S REPORT[25]

[44] “Alhoewel M oor n’ motief tot valse verklaring beskik,” is the part of the sentence relied upon by the Appellant. The sentence as a whole read: “Alhoewel M oor n’ motief tot valse verklaring beskik, voldoen die inhoud van haar verklaring aan die vereistes van waarskynlikhede van seksuele misbruik.” The sentence is first of all in a report that the Appellant rejected. Secondly is the sentence one in a whole paragraph that extent the whole page and 16 other sentences that in so many words opinions that the complainant is a typical victim of sexual abuse. The argument is rejected.

IX ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM AND JUSTIFIED DISCIPLINING OF A CHILD.

[45] To hit a frail build girl child between the ages of 9 and 14 years old with fists, a PVC pipe, the wooden stick of a duster, a belt and strangle her and push her against a wall is to commit assault with the intent to do grievous bodily harm and it is not the mere chastising of a child. This is the law.[26] The Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2020

(1) SACR 113 (CC) ruled that:

“[72] It suffices to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault. The effect of relying on this common-law defence was to exempt parents from prosecution or conviction. Identical conduct by a person other than a parent on the same child would otherwise constitute indefensible assault.”

[73] The High Court was correct in its conclusion that the common-law defence of reasonable and moderate chastisement is constitutionally invalid and that this declaration be prospective in its operation.

[75] How law-enforcement agencies would deal with reported cases of child abuse flowing from this declaration of unconstitutionality is a matter best left to be dealt with on a case-by-case basis.”

X DUPLICATION OF COUNTS 2, 4 and 6[27]

The Charges

[46] The facts proven is classic to what culminated into the promulgation of the SORMA and links with the issue of duplication of charges.[28] Count 2 is “sexual grooming” in contravention of section 18(2)(b), count 4 is “sexual assault” in contravention of section 5(1) and count 6 is one of “compelled self-sexual assault” in contravention of section 7(b) of the SORMA.

[47] Sexual grooming is a process over time on several and different occasions to prepare a child for sexual assault. The intent is to groom. To groom[29] is to tutor, to train, to prepare and to coach. It is to gain control to commit among others, sexual assault or rape. Jeglic EL(PhD) [30] described the techniques that reflects the intend of the perpetrator as follows:

“Grooming not only involves the manipulation of the intended victim, but also the child’s parents and the community at large. On the surface, child molesters who use grooming techniques often appear to be charming, kind, and helpful, and therefore these behaviours are hard to identify and, in many cases, appear innocent. It is only after the abuse is disclosed that the behaviours are reinterpreted in the context of sexual grooming...”

While there is no scientifically established model of sexual grooming, experts generally agree that grooming typically follows a series of stages such as those delineated below before the abuse actually takes place. (Accentuation added)

Victim selection. The first stage of sexual grooming often involves selecting a victim. Studies have found that victims are often selected due to their perceived physical attractiveness, ease of access, or perceived vulnerability. Children who may have less parental supervision are at particular risk. Further, child

molesters may also target children who have low self-esteem, low confidence, or who may be unduly trusting or naïve.

Gaining access. During the second stage of the grooming process, the offender seeks to gain access to the child by separating them emotionally and physically from their guardians. In cases where the child molester is a family member, they have easier access to the child. In fact, in almost half of family abuse cases, the abuse takes place in the child’s bedroom after everyone is asleep.

Trust development. In the third stage of sexual grooming, the abuser works to gain the trust of the victim, their guardian(s) and the community so that they can engage in the abuse without detection. During this stage, the offender works to gain the trust of the intended victim by giving them small gifts, special attention, or sharing secrets. This makes the child feel special and gives them the belief that they have a caring relationship with the perpetrator.

These types of behaviours will change depending upon the age of the child. For younger children, it may involve playing games, going on outings, or getting presents while for adolescents it may involve the discussion of their personal lives, access to cigarettes, drugs, or alcohol, and sharing “secrets” that they don’t tell their guardians.

During this period, the perpetrator may also work to groom the guardian not to believe the child by telling the guardian that the child is acting out or telling lies. (Accentuation added)

Desensitization to touch. This is generally the last stage of the grooming process before the actual abuse begins. During this stage of grooming, the abuser

increases the non-sexual touching that will prepare the child for the abuse. For instance, this may include hugs, snuggles, wrestling, and tickling.

Other tactics include taking a bath/shower together, swimming in the nude, drying a child off with a towel, giving massages or showing the child pornography.

At this stage, the perpetrator may also start discussing sexual behaviours and content with the child/adolescent so that they feel more comfortable with this type of material.

Ultimately the goal of sexual grooming is to provide the perpetrator the opportunity to offend against the child without detection.

These sexual grooming techniques will confuse the child as they believe the person to be a friend or parent-like figure and thus they may fear that if they report the abuse that their special relationship may end.” (Accentuation added)

- [48] Count 4, sexual assault as defined in the SORMA, is when a person unlawfully and intentionally sexually violates a complainant without consent.[31] It is trite that a child cannot consent to sexual interaction with an adult. The elements of sexual assault are (1) sexual violation; (2) unlawfulness; (3) without consent; and (4) intention. Elements (2) to (4) are identical to the stated elements in respect of rape. The focus is on the element of sexual violation.[32] The intent is sexual violation of the perpetrator on the complainant.
- [49] Count 6, compelled self-sexual assault has yet different elements and the intent is different. The elements of the offence are: (1) compelling another person; (2) to engage in conduct in the definition of the crime; (3) unlawfulness; (4) without the consent of the compelled person; and (5) intention. It is to: (a) engage in-(i) masturbation; (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or (iii) sexually suggestive or lewd acts, with B himself or herself;
- (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or
- (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus. This is the offence of compelled self-sexual assault.
- [50] Smythe, Pithay & Artz[33] remarked that prior common law on indecent assault has included forced self-masturbation. It is clear that this offence is a catch-all meant to cover any remaining aspects of indecent assault not covered by the previous offences set out in the Act or any other degrading sexual behaviour that was previously not covered under common law. (Accentuation added) The crime is thus different than any other offence in the SORMA. This includes the intent. It is for the complainant to “self-sexual assault”

The Law in general

- [51] Miller[34] discusses the issue in detail in relation to the matter of *S v Dlamini* 2012 (2) SACR 1 (SCA). The article opens with: “The recent case of *S v Dlamini* 2012
- (2) SACR 1 (SCA) highlighted divergent views on the test for a duplication of convictions in a criminal matter.” Hiemstra[35] and Du Toit et al [36] give a detailed expose of the subject and with the same conclusion.

[52] Section 83 of the CPA permits that: Charge where it is doubtful what offence committed

“If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.”

[53] In practise section 83 resulted in prejudice to the accused in some instances. The end result of a single criminal act could be numerous convictions and exposure to undue harsh sentencing. The situation compelled the courts to develop a common-law rule against the "splitting of charges" or "duplication of convictions".[37] *S v Mutawarira* 1973 (3) SA 901 (RA) [38] investigated the issue:

“The law on the subject of splitting of charges was extensively examined by the Appellate Division of South Africa in S v Grobler and Another, 1966

(1) SA 507 (AD), and by the General Division of this Court in *S v Petersen and Others*, 1970

(1) R.L.R.

49. Petersen's case, *supra*, in effect, adopted all the reasoning in Grobler's case, *supra*. The principle which appears from Grobler's case, *supra* (I quote from p. 518D where WESSELS, J.A., quotes from the judgment of KOTZE, J.P., in the case of *Gordon v R.*, 1909 E.D.C. 254), is that:

"It is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule, which will apply with justness in every instance..."

WESSELS, J.A., summed up the approach to this problem at p.523 B - C thus: 'Having regard to the genesis of the rule (which could in my opinion be more aptly described as a rule of practice against the duplication of convictions) I am of the opinion that it was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused.'

The Law: The "test"

[54] Again; it is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule, which will apply with justness in every instance. It is a matter of sound judgement according to *R v Kuzwayo* 1960 (1) SA 340 (A) at 343H-344A. In *S v Benjamin and another* 1980 (1) SA 950 (A) the court stressed (at 956E-H) that the "tests" are aids which should be applied in their particular factual context. The focus and outcome must be constitutional compliance.

[55] The South African law of sentencing have been much enhanced. It directs the application and interpretation of section 83 and the common law that evolved pre-1994. The words of Terblance,[39] with reference to case law, describes it aptly:

“The basic principles and values of the Bill of Rights must be kept in mind throughout the sentencing process, not only because they give expression to and protect the rights of the offender but because courts must interpret legislation in ways that give effect to these basic principles and values. A statutory provision that might appear to be unconstitutional at face value, will often not be declared unconstitutional, such as when it can be interpreted in a way that will ensure a constitutional outcome.” (Accentuation added)

[56] The Constitution states the foundation for adjudication of these issues. The Bill of Rights in the Constitution of the Republic of South Africa, 1996 forbids a duplication of convictions for an offence in respect of an act or omission. This does not only apply to the so-called double jeopardy in two separate cases, but also dual convictions in one case.

[57] Section 35(3)(m) of the Constitution decrees that: “Every accused person has a right to a fair trial, which includes the right ... not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.”

[58] In terms of section 12(1)(e) of the Constitution: “Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way”.

[59] *S v Dodo* 2001 (1) SACR 594 (CC) dealt extensively with this point and *S v Bull* 2001 (2) SACR 681 (SCA) at paragraph 11 pointed out that proportionality between the seriousness of the offence and the extent of the punishment goes “to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading”. If duplications of convictions occur the sentence might become distorted from the real gravity of the crime.

[60] Stacking convictions upon an accused for what might be one act or one omission and thus one offence might cause bias in regard to previous convictions. It is trite that the detail of the charges is not depicted in the list of previous convictions (the so-called SAP 69) and ineffective sentencing might follow.

[61] The common law developed processes to establish unconstitutional duplication of convictions. Firstly; if the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (*R v Gordon* 1909 EDC 254 at 268 and 269). This is “the same evidence test”. Secondly; if there are two acts, each of which would constitute an

independent offence, but only one intent, and both acts are necessary to realize this intent, there is only one offence (*R v Sabuyi* 1905 TS 170). There is a continuous criminal action. This test is referred to as “the single intent test”.

- [62] Emphasise must be placed on the fact that the Criminal Law Amendment Act 105 of 1997 does not create new crimes; it created a sentence jurisdiction. The fact that rape with the intent to do grievous bodily harm is aggravating for sentence purpose does not establish the crime of rape with intent to do grievous bodily harm in Criminal Law. The elements of the crime of rape are different than assault with the intent to do grievous harm. Sentencing circumstances must not be conflated with elements of a crime.
- [63] The provisions of the CLAA do not create different or new offences, but are relevant to sentence. Thus, murder remains murder, as a substantive charge, irrespective of whether section 51(1) or section 51(2) applies. Simply put, there is no such charge as ‘murder in terms of section 51(1) or section 51(2)’.
- [64] As Cameron JA explained in *S v Legoa* 2003 (1) SACR 13 (SCA) paragraph 18, with reference to Rumpff CJ’s observations in *S v Moloto* 1982 (1) SA 844 (A) at 850C-D:

“It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus, “robbery with aggravating circumstances” is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed “(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions.”

Conclusion

- [65] The three events are disconnected in time and space. The facts show that the grooming and assaults are in actual deed detached, the elements of the crimes committed are unrelated and the intent of the accused was to harm the complainant in three differently statutorily prohibited offences.
- [66] The presiding officer was also careful to curtail the effect of undue harsh sentencing by applying section 280(2) of the CPA.

XI EVALUATION OF THE EVIDENCE BY THE TRIAL COURT IN CONCLUSION

- [67] The adjudication of the evidence in the trial by the presiding magistrate cannot be faulted in any manner whatsoever. He applied his mind in detail on fact and law. He was cautious as he pondered the evidence of the complainant. He was indeed correct to reject the version of the accused; it evaporates in the detail, chronology and bona fide naïve simplicity of the evidence of the complainant and the reality of the rest of the evidence.

XII SENTENCES

- [68] The sentence of 3 years imprisonment on count 1 for the assault with the intent to do grievous bodily harm is proper. The sentence on count 8 for the rape remains to be adjudicated.
- [69] Counsel for the Appellant is correct in his submissions that the trial court should have considered the factors as a whole to prevent the possibility of the injustice that a life sentence might bring. The Supreme Court of Appeal found that certain rapes are more serious than others and that the differences in seriousness should receive recognition when it comes to the meting out of punishment.[40] In this instance there was no penile-vaginal penetration during the rape. The strength and wisdom of the complainant and her actions in the end rescue the Appellant in a bizarre way from a sentence of life imprisonment. Her mother also indicated that she is “recovering well.” The long-term effects will, nevertheless, remain. There is no evidence that the Appellant is the type of person that must be removed from society permanently. The sentence is too severe to give effect to constitutional punishment and deterrence. He may still serve a purpose in society and has two children that suffers his absence. He is registered in terms of section 50 of the SORMA.
- [70] Although the reaction of the magistrate to sentence as he did is understandable and Counsel for the State remarked that in history this kind of conduct would have caused the death sentence; we live in an era where justice prescribes a lesser sentence. A sentence of 20 years imprisonment will suffice. The Appellant is 40 years old currently and has served some time in prison already. He will be in his late fifties when he had served the total of his sentence; this is punishment enough.

XIII ORDER

- [71] The grounds of appeal do not reflect the reality of the case. The court a quo did not misdirect itself or erred but for the sentence on count 8. In result, the following order is made:
1. The appeal against all the convictions is dismissed.
 6. The order in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 is confirmed.

M. OPPERMAN, J

I concur.

S CHESIWE, J

APPEARANCES

On behalf of Appellant Advocate J Nel SC

Chambers Bloemfontein

Instructed by D Milton

Bezuidenhout's Incorporated Bloemfontein

Ref: D MLTON/nv/Ld2085

On behalf of Respondent Advocate J Botha

Office of the Director Public Prosecutions: Free State

Bloemfontein

Ref: A8/2020

[1] Record page 638 to 639.

[2] Section

302. Sentences subject to review in the ordinary course. Section 302(2): For the purposes of subsection (1)—(a) each sentence on a separate charge shall be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that subsection, shall not render those sentences subject to review in the ordinary course.

[3] “M”.

[4] Appellant's Heads of Arguments page 36 paragraph 13 to page 40 paragraph 15.

[5] Record page 637.

[6] Section

18. Sexual grooming of children. Section 18(2) A person (“A”) who—(b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to— (i) perform a sexual act with A or a third person (“C”); (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching; (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation; (iv) be exposed to child pornography or pornography; (v) be used for pornographic purposes as contemplated in section 20 (1); or (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B; is guilty of the offence of sexual grooming of a child.

[6] Section

18. Sexual grooming of children. Section 18(2) A person (“A”) who—(b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to—

- (i) perform a sexual act with A or a third person (“C”);
- (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;
- (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
- (iv) be exposed to child pornography or pornography;
- (v) be used for pornographic purposes as contemplated in section 20 (1); or
- (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B; is guilty of the offence of sexual grooming of a child.

[7] Section

19. Exposure or display of or causing exposure or display of child pornography or pornography to children.—A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of— (a) any image, publication, depiction, description or sequence of child pornography or pornography; (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law, to a child (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

[7] Section

19. Exposure or display of or causing exposure or display of child pornography or pornography to children.—A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of—
- (a) any image, publication, depiction, description or sequence of child pornography or pornography;
 - (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or

- (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law, to a child (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

[8] Section

5. Sexual assault.— Section 5(1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.

[9] Section

21. Compelling or causing children to witness sexual offences, sexual acts or self-masturbation. — Section 21(1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence. (2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch— (a) A while he or she engages in a sexual act with C or another person (“D”); or (b) C while he or she engages in a sexual act with D, is guilty of the offence of compelling or causing a child to witness a sexual act. (3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a child to witness self-masturbation.

[9] Section

21. Compelling or causing children to witness sexual offences, sexual acts or self-masturbation.

—

Section 21(1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence.

- (2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch—

- (a) A while he or she engages in a sexual act with C or another person (“D”); or
- (b) C while he or she engages in a sexual act with D, is guilty of the offence of compelling or causing a child to witness a sexual act.
- (3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a child to witness self-masturbation.

[10] Section

7. Compelled self-sexual assault.— A person (“A”) who unlawfully and intentionally compels a complainant (“B”), without the consent of B, to— (a) engage in— (i) masturbation; (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or (iii) sexually suggestive or lewd acts, with B himself or herself; (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault. Part 3: Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation,

exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”), child

pornography to persons 18 years or older or engaging sexual services of persons 18 years or older

[10] Section

7. Compelled self-sexual assault.— A person (“A”) who unlawfully and intentionally compels a complainant (“B”), without the consent of B, to—
- (a) engage in—
 - (i) masturbation;
 - (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
 - (iii) sexually suggestive or lewd acts, with B himself or herself;
 - (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or
 - (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault.

Part 3:

Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation,

exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”), child

pornography to persons 18 years or older or engaging sexual services of persons 18 years or older

[11] Section

7. Compelled self-sexual assault see footnote 10.

[12] Section

3. Rape.— Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape. “sexual penetration” includes any act which causes penetration to any extent whatsoever by—the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person, and “sexually penetrates” has a corresponding

meaning;

[12] Section

3. Rape.— Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.

“sexual penetration” includes any act which causes penetration to any extent whatsoever by—the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and “sexually penetrates” has a corresponding

meaning;

[13] S v Trainor 2003

(1) SACR 35 SCA, S v Chabalala 2003

(1) SACR 134 SCA and S v Hadebe and others 1998

(1) SACR 422 SCA.

[14] With reference to R v Hlongwane 1959 (3) SA 337 (A) at 340H-341B; S v Hlapezula & Others 1965 (4) SA 439 (A) at 442F; S v Khumalo & Others

[1991] ZASCA 70; 1991 (4) SA 310 (A) at 327H-I; S v Van Der Meyden 1999 (2) SA 79 (W); S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101A-F; S v Trainor

[2003] 1 All SA 435 (SCA) paragraph 8; S v Heslop 2007 (4) SA 38; [2007] 4 All SA 955; 2007 (1) SACR 461 (SCA) paragraph 11.

[15] The Preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 states: "...WHEREAS the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary; (Accentuation added) WHEREAS the South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual

offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatising; (Accentuation added) WHEREAS several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination

Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children; AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance,..."

[15] The Preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 states:

"...WHEREAS the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary; (Accentuation added)

WHEREAS the South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual

offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation; (Accentuation added)

WHEREAS several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination

Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;

AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance,..."

[16] Appellant's Heads of Arguments at pages 5 to 17.

[17] Hiemstra's Criminal Procedure, Kruger, Last Updated: May 2020, LexisNexis at Page 22–10(1).

[18] Exhibit C.

[19] Record page 599 line 21 and further.

[20] Also see record pages 725 to 735.

[21] Record: Exhibit C pages 659 to 697.

[22] Record: Pages 599 to 600.

[23] Appellant's Heads of Argument page 18 at 5.3.

[24] See SE van der Merwe, Principles of Evidence, Chapter 24, Refreshing the memory of a witness, Principles of evidence, (4th Edition), Internet: ISSN 2074-6911, Jutastat

e-publications, <https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>

[25] Report page 660.

- [26] See CR Snyman, Criminal Law, LexisNexis, Last Updated: 2014 at “Assault” pages 453 to 455 and S v YG 2018
- (1) SACR 64 (GJ).
- [27] Appellant’s Heads of Arguments at paragraph 10 page 28 to 30.
- [28] Sexual Offences Commentary Act 32 of 2007, CD-Rom & Intranet: ISSN 2224-3860 Internet: ISSN 2224-879, Jutastat,e-publications, <https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>, the legislation section is updated to 30 September 2020
- [29] <https://www.merriam-webster.com/dictionary/groom>
- [30] Understanding the stages of sexual grooming can help to protect your child. Posted Jan 16, 2019, <https://www.psychologytoday.com/za/blog/protecting-children-sexual-abuse/201901/what-parents-need-know-about-sexual-grooming>
- [31] Section 1(2) “Consent” of SORMA: For the purposes of sections 3, 4, 5 (1), 6, 7, 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22, “consent” means voluntary or uncoerced agreement. (3) Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following: (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of— (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or (ii) a threat of harm by A against B, C or D or against the property of B, C or D; (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act; (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that— (i) B is committing such a sexual act with a particular person who is in fact a different person; or (ii) such a sexual act is something other than that act; or (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act— (i) asleep; (ii) unconscious; (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected; (iv) a child below the age of 12 years; or (v) a person who is mentally disabled.
- [31] Section 1(2) “Consent” of SORMA: For the purposes of sections 3, 4, 5 (1), 6, 7, 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22, “consent” means voluntary or uncoerced agreement.

- (3) Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:
- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
 - (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
 - (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
 - (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

[32] Sexual Offences Commentary Act 32 of 2007, CD-Rom & Intranet: ISSN 2224-3860 Internet: ISSN 2224-879, Jutastat,e-publications, Chapter 3

<https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>, the legislation section is updated to 30 September 2020

[33] Sexual Offences Commentary Act 32 of 2007, CD-Rom & Intranet: ISSN 2224-3860 Internet: ISSN 2224-879, Jutastat,e-publications, Chapter 3 at 5.

<https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>, the legislation section is updated to 30 September 2020.

- [34] "Two for one - duplicate convictions for one crime." DR, Jan/Feb 2013:4= 2 [2013] DE REBUS 19.
- [35] Hiemstra's Criminal Procedure, Kruger, Last Updated: May 2020 at section 83. LexisNexis.
- [36] Du Toit et al, Commentary on the Criminal Procedure Act, CD-Rom & Intranet: ISSN 1819-7655 Internet: ISSN 1819-8775, Jutastat e-publications. Updated until 30 September 2020.
- [37] Hiemstra's Criminal Procedure; Albert Kruger, Last Updated: May 2018 at section 83 pointed out that the issue has a long history. The rule in South Africa can be traced back to *R v Marinus* (1887) 5 SC
349. After the rule had become firmly established, section 126 of the first Union Criminal Procedure Act 31 of 1917 made its appearance, practically speaking in the same form as the present
- section 83. Section 126 apparently opened the door to the splitting of charges and the courts consequently considered whether the common-law rule had not been abolished by it. The question was raised for the first time in *Ex parte Minister of Justice: In re R v Moseme* 1936 AD 52 at 60 (a decision in which the origin of the rule is investigated) but not answered there. But in subsequent decisions, which are discussed in *S v Grobler* 1966 (1) SA 507 (A), the conclusion was reached that the rule against splitting remains intact. The question still arises quite frequently in practice: see, for instance, *S v Toto* 1993 (1) SACR 654 (EC) (such a close connection between all the acts complained of that they should be viewed as a single continuous event), *S v Labuschagne* 1997
- (2) SACR 6 (NC) (all the actions upon which the charges were based were committed at the same time and place against the same complainant) and *S v Wehr* 1998 (1) SACR 99 (C) (driving under the influence of intoxicating liquor and negligent driving).
- [38] At page 903 E.
- [39] The Guide to Sentencing in South Africa: Last Updated: 2016
- Third Edition at 5.6.1, <https://www.mylexisnexus.co.za/Index.aspx> on 6 March 2019.
- [40] *S v Mahomotsa* 2002 (2) SACR 435 (SCA), *S v Abrahams* 2002 (1) SACR 116 (SCA) and *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2020/180.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/b-c-v-s-unknown-topic-afshc-2020>

Prepared on 12 October 2026 · Esheria