

SOUTH AFRICA / JUDGMENT

N v S (A591/2014) [2015] ZAGPPHC 1133 (22 October 2015)

[2015] ZAGPPHC 1133

COURT

North Gauteng High Court, Pretoria

BEFORE

Jansen, Moseamo

CASE / FILE NUMBER

A591/2014

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IN

THE GAUTENG DIVISION THE HIGH COURT, PRETORIA
(REPUBLIC
OF SOUTH AFRICA)

CASE

NO: A591/2014

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

DATE: 22/10/2015
In

the matter between: N.
Appellant
and
THE
STATE
Respondent

JUDGMENT

JANSEN J

- [1] This matter has a long and tortuous history. As far back as 29 March 2003 the appellant was charged in the regional court of Hercules with the following charges: -
- [2] Charge 1: Rape in that the accused is guilty of rape (read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1977) in that in 2002, and at Pretoria, he unlawfully and intentionally had sexual intercourse with his six-year-old daughter ("the minor child").
- [3] Charge 2: Indecent assault (read with the provisions of section 57(2)(b) of the Criminal Law Amendment Act 105 of 1977) in that during 2002 and at Pretoria the accused unlawfully and intentionally committed an assault of an indecent nature upon his six-year-old daughter by penetrating her anus with his penis.
- [4] Charge 3: Indecent assault (read with the provisions of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1977) during 2002, and at Pretoria, in that the accused unlawfully and intentionally committed an assault of an indecent nature upon his daughter, aged six, by licking her private parts and forcing her to lick his private parts.
- [5] Bail was granted to the appellant on certain conditions, the most important of which was that he was not entitled to have any contact of whatsoever nature with his daughter, had to report to the police station at Hercules each Saturday and was not entitled to discuss the matter with his wife or the minor child's stepsister.
- [6] On the 1st of October 2004 the matter was transferred to the High Court for the purposes of sentencing in terms of article 52(1)(b)(ii) read with section 52A(1) of Act 105 of 1977 - as it then read. This provision provided that rape bore a life sentence in the absence of substantial and compelling reasons.
- [7] On the 20th of April 2005 a provisional high court date had been obtained but due to further evidence becoming available the matter remained in the district court for such evidence to be heard by the regional magistrate of Hercules. Due to the various further developments and reports the appellant was only sentenced on the 8th of April 2010 by the district magistrate, after further evidence had been led.
- [8] He was sentenced as follows: -
- [8.1] Count 1 :15 years imprisonment;
- [8.2] Count 2: eight years imprisonment; and
- [8.3] Count 3: four years imprisonment; and

[9] It was ordered that the sentences on counts 2 and 3 run concurrently and in terms of section 73(6)(b)(v) of the Correctional Services Act 111 of 1998 the regional magistrate lessened the non-parole period from four fifths to two thirds, in other words, the appellant became eligible for parole after ten years of imprisonment. The name of the appellant was also entered into the register of sexual offenders with a complete set of fingerprints in terms of Chapter VI of Act 32 of

2007. He was also declared unfit to possess a firearm in terms of section 103(l)(a) of Act 6 of 2000.

[10] It was also prescribed by statute that when physical harm could be proved in cases of indecent assault, a minimum sentence of ten years was prescribed. (One can only wonder at the callousness of the legislature which apparently paid no heed to the emotional harm caused by rape and indecent assault which are equally traumatic and emotionally destructive.)

[11] The charges were put to the appellant by the regional magistrate who had the luxury of private legal representation. The appellant denied all charges and did not proffer a plea explanation.

[12] Use was made of an intermediary for purposes of the minor child's testimony (the minor child was then seven years old). The

intermediary, one Charlotte Wanda Schoeman was duly sworn in as social worker. She was in the process of obtaining her doctorate and had previous experience of acting as an intermediary in court proceedings.

[13] The minor child testified in camera with the aid of the intermediary; and was duly tested by the regional magistrate to establish whether she knew the difference between right and wrong. The minor child identified the appellant as her father and a certain C du P as her sister. She testified that she was in court because her father had done certain "ugly" things to her.

[14] The minor child's testimony was that her father had forced his "thing" into her and had forced her to sleep in her

parents' bed and used the period in the morning when her mother went to make Milo, to lie on top of her. She tried to get out of the bed but her father forbade her, telling her he wanted sex with her. She defined "sex" as "ugly" things that her father did to her; such as pulling down her pants, forcing himself into her and moving up and down. She referred to her father's penis as a "tottie" and her vagina as a "maroggie" and stated that it felt to her as though he had pulled her legs up and was "swinging". She made use of dolls provided to her to demonstrate her father's movements. She correctly identified the male and female dolls' sexual organs, inserted the male's organ in the female doll's vagina and demonstrated an up-and-down movement.

- [15] The minor child further testified that her mother, when returning from making Milo, saw what was happening. She said her mother and father quarreled and she ran to the neighbour's house. She complained that her vagina hurt. She added that her father had also hurt her in the anus, by inserting his penis therein (apparently on previous occasions). She testified that it was very painful.
- [16] Furthermore, she testified that she had to use toilet paper to clean her father's penis, because it oozed yellow fluid. Over and above this, she testified that she was forced to lick her father's penis clean, and that he licked her vagina. This happened, apparently, when her mother was in the sitting room, smoking. On other occasions, when her father inserted his penis in her vagina her mother was working in the garden, and when he raped her in the anus, her mother was also not present and had gone, for example, to the cafe.
- [17] According to the minor child she told nobody about what had happened but stated that her sister C du P knew what had happened, because her mother had told her, because her mother had caught her father in the act, in the parental bed.
- [18] The minor child later admitted that she had discussed what her father had done to her with her sister, C du P.
- [19] Cross-examination led to the same damning answers including the fact that the yellow fluid which oozed from the father's penis had a bad taste, and tasted like urine. The questions put to the minor child, clearly on instructions from the father, bordered on the absurd. It was put to the minor child that when she was afraid, she would look down and play with her hands, whereupon her father would hold her hands and ask her to look him in the eye. The implication was clearly that she was playing with her hands, whilst testifying, because she was lying and hence afraid. Rather than furthering his case, this line of questioning, in the court's opinion, harmed the appellant's case.
- [20] She was then cross-examined as to whether her father did "ugly" things to her in the morning or in the evening. All that transpired is that the father had clearly raped the child on various occasions. Further cross-examination on what would or would not have transpired, such as whether the child had tried to get out of the bed and was ordered back into the bed by her father was simply a waste of the court's time. To expect from a child of her age to remember minutiae is far-fetched. What the cross-examination clearly demonstrated, however, was that the child clearly remembered being raped in her anus, vagina, being licked by her father on her private parts and having to lick her father's penis.
- [21] It transpired during cross-examination that the minor child's mother had asked the child to tell her sister what her father was doing to her. It was sought to be implied that the mother had put words in the child's mouth but given the minor's consistent testimony, the state merely weakened its case. It would appear from the record that the mother knew full well what the father was doing to the minor child but, for unknown reasons, decided to remain silent. (Much later, when she was cross-examined, she confessed that she still loved the appellant.)

[22] The minor child further testified under cross-examination that her sister had children and it was put to her under cross-examination

that the father would testify that her sister's children had told her how to play with naked dolls. Allegedly the father (after the minor child had visited her sister) would find her on her bed without her clothes, surrounded by her dolls and had reprimanded her. As a further bow to his string it was also put to the minor child that a certain "Uncle Eagle" had touched her private parts, to which she answered in the affirmative. No further detail surrounding this alleged occurrence was available to the prosecutor. Neither was Uncle Eagle called as a witness by the appellant. In any event the child had been bombarded with so many questions by then such as "(k)enjoy die polisie? ". Upon which she answered "nee". Even an adult would have found it difficult to answer the haphazard questions posed in cross-examination. Inter alia, she was asked whether she knew what had been written down at the police station when she accompanied her mother on one occasion and her sister on the other occasion.

[23] What did emerge was that she loved her father but feared him as well, in that she feared that he would hurt her. When confronted with various statements to the effect that her father would deny ever raping her and would state that she was lying she suddenly stated that he had never raped her. This court finds it incomprehensible that the magistrate allowed such lengthy and haphazard

cross-examination.

[24] Dr Karien Stolz, a medical doctor, testified that she examined the child on the 7th of September 2002 and that the minor child weighed only 20 kilograms. She reiterated that the child informed her that she was repeatedly raped by her father. Dr Stolz testified that the minor child's fossa navicularis was red and swollen and that her hymen had two clefts which were tears which had formed scarring. She was so swollen that no vaginal opening was visible, which Dr Stolz attributed to various penetrations or rubbing movements. She also testified to the fact that the child's anus had a red "tyre ring" around it which indicated previous anal penetrations. She likened it to a "callus"

caused over a long period of time. She ruled out any possibility that these injuries could have been self-inflicted. She emphasised that, in particular, a small object would not have injured the child's anus to the extent that she observed. She could give no evidence regarding any vaginal injuries because the entrance thereto was swollen shut whereas it should have been open. She emphasised that penetration beyond the lubia had taken place. She remained steadfast in her evidence during cross-examination.

[25] The next witness was the stepsister ("Ms C du P") of the minor child, who testified that the minor child was her stepsister. Ms C du P testified that she became suspicious when the minor child's father did not wish her to come and visit over the weekends.

- [26] Ms C du P questioned the minor child regarding her father's attitude towards her and was told that the minor child was not allowed to tell her certain things; because their father had forbidden her to do so.
- [27] Ms C du P testified that the minor child then told her that her father pushed his penis into her and that she was forced to go and fetch toilet paper and that she became nauseous. She told her that it happened in the mornings when her mother was in the kitchen. The sister then phoned the Child Protection Unit and took her to the doctor.
- [28] Ms C du P testified that she was suspicious that this was happening as her two young daughters had complained about the minor child's conduct and further testified that her mother had told her that she saw the minor child touching her husband's penis. She openly confessed that her mother had an alcohol problem and did not have a good relationship with the minor child. She also testified that the minor child had become very introverted and had, for reasons then unknown to her, asked a three year old little boy to climb on her.
- [29] During cross-examination Ms C du P's version did not change and she made it very clear that she and her mother never discussed anything in the presence of the minor child.
- [30] The minor child's mother was called as the next state witness. The mother testified that she saw the minor child touching her husband's penis. She also mentioned that the minor child complained about a burning sensation in her private parts but had attributed this to the fact that the minor child was not drying herself properly after urinating.
- [31] Under cross-examination there was much ado about nothing as to when, where and why she saw the incident in the bed between the minor child and her husband. Once again this cross-examination took the matter no further and need not be traversed.
- [32] The mother testified that she went with to the police with her elder daughter and then assisted at an establishment for abused children where she then lived. The mother passed away before the trial was finalized.
- [33] The next witness was Ms Coetzer, a forensic social worker. Ms Coetzer testified that victims of rape do not wish to testify as they have a fear of publicity, a fear of rejection and a fear that they will not be believed. In the minor child's case she added that there was a fear of intense physical punishment, both on the part of her father and her mother. As a result, children who have to endure sexual abuse seek a methodology to "accommodate" it. She testified that such a child will "accommodate" suggestions that sexual abuse never took place and rather blame herself for what happened. This, she testified, is in particular the case where the abuser is also the provider of the child. It is clear that the minor child could not rely on her mother, and it was Ms Coetzer's opinion that she was a prime example of somebody who would seek to "accommodate" sexual abuse as she had nowhere to turn and had nobody to assist her. She stated that sexual abuse accommodation is prevalent amongst children abused by a parent with another parent who does nothing about the situation.

[34] Ms Coetzer testified that such a child who confesses that she was sexually abused often retracts her confession. She testified that accommodation of sexual abuse happens more often than not within a family. She explained that they were phases akin to Kubler-Ross

stages of grief namely secrecy, helplessness, intertwined feelings, accommodation and then withdrawal.

[35] When cross-examined, Ms Coetzer was asked whether she had assessed the minor child herself and she testified that she had seen her for a session and that her role was to explain why sexually molested children, especially by a parent, will retract a confession. In her words: "Kinders wat seksuele misbruik akkwmmodeer het, minimaliseer altyd die seksuele misbruik".

[36] Ms Coetzer further testified under cross-examination that children, up to about the age of seven years, in general, are

egocentric and believe that everybody shares their feelings. They also wish to please people. From the age of seven and older they are "concretely operational" but cannot think in the abstract. This means that they are no longer egocentric and begin to think about the people around them and their feelings. At the age of eleven, children become abstract thinkers. Hence she concluded that the minor child was a prime example of a sexually abused, neglected child with no back-up system who would retract any confession the moment it was suggested to her that her father, who had molested her, would testify in a court that she was lying.

[37] Ms Coetzer testified that she had observed many emotions from the child when assessing her, and that she was definitely not told what to say because otherwise she would have stated facts only, unaccompanied by emotions. She was emphatic that a child is incapable of fantasising about sexual abuse. She testified that the minor child's father was clearly the most important person in her life and hence the minor child felt that she was the one at fault, not her father.

[38] The report prepared by Ms Coetzer was handed in as an exhibit and her expertise was not questioned or attacked by the defence.

[39] The mother was then recalled as a witness by a newly appointed prosecutor who, in the meanwhile, had taken over the case. The new prosecutor wished to clarify certain aspects. When asked about the incident between her husband and the minor child that she had witnessed, the mother testified that sexual abuse had occurred in her previous marriage and that she knew the signs.

[40] The mother testified that the minor child's behaviour changed and that she would lie on her dolls. She also told the court that she gave the child a hiding when she saw the child and her husband hiding under the blankets of the parental bed.

[41] Under cross-examination she confessed that that she, notwithstanding what had happened, still loved her husband.

- [42] She admitted that she did not see the minor child holding the appellant's penis, but that she suspected it, because her husband and daughter were next to each other under the blankets.
- [43] She was further cross-examined about the clothes her husband wore and other detail which is irrelevant. She also testified that she once found her elder daughter's child lying on the minor child. It was put to the mother that the minor child's deviant behaviour emanated from visits to her elder daughter and her children. She suddenly alleged that both she and the appellant had prohibited the minor child from visiting her elder daughter. She further admitted that the appellant often rubbed Vaseline on the minor child's private parts when complained about a burning sensation. This behaviour, in itself, of course raised a question mark and the mother readily conceded that it is a mother's duty to attend to such a private act.
- [44] The state then closed its case after duly accepting the child's police statement, birth certificate and the curriculum vitae of Ms Coetzer.
- [45] The appellant then gave evidence. His evidence consisted of a total denial: "ek weet nie waarvan die kind praat nie edelagbare". He testified about his love for his child. He allegedly played hide and seek under the blankets with his daughter, took care of her health, reprimanded the mother when she physically punished the child, mentioned a son-in-law who allegedly on certain occasions took the child to school, tried to protect her against her stepsister and the stepsister's children, belonged to a church "cell", introduced her to prayer and God, etc. When asked, under cross-examination, why he did nothing when he believed that she was being sexually abused or exposed to deviant behaviour at her sister's home he replied: "Ek weet nie edelagbare". He also told the court that he had told the minor child that Jesus would punish her if she were to lie.
- [46] The appellant admitted that he did not really have any sex life with his wife and allegedly, due to prostate gland problems, could not have sex. Significantly, this was never put to the state witnesses. It would have been his very first line of defence. When asked why this was never put to any of the witnesses he stated: "Ekweet nie".
- [47] The appellant's further fall-back position was to refer to the elusive Mr Eagle from whom he had purchased his house. His only response to the medical doctor's examination was not to deny the sexual penetrations but simply to say that he was not the culprit. He could proffer nothing further.
- [48] The appellant could not explain how the minor child knew about yellow fluid emanating from his penis and, in fact, literally laughed about it in court. In the evenings, so he alleged, he would spend time with his daughter in his room on the bed reading from the Bible and pray. When asked why this had to happen on a bed, his only answer was that it was silent there.

- [49] The version of the appellant borders on the absurd. Worst of all is his complete denial in the face of all the evidence against him. His version can, as the regional magistrate held, be rejected in its totality.
- [50] The district magistrate therefore found him guilty on all counts and referred the matter to the high court for sentence. However during 2009, due to new evidence, the convictions were set aside (as a result of the probation officer Krynau's report) and the matter was referred back to the regional magistrate and a Superintendent Strauss from the South African Police Force was called to proffer new evidence.
- [51] The minor child testified once again. This time she testified that her mother had told her to tell her foster mother that her father had not abused her sexually but that it had actually been an Oom Joggie. However, when asked who the actual perpetrator was, in court, she testified that it had been her father. She stated that Oom Joggie had never touched her. Neither had Oom Eagle.
- [52] The minor child testified that when she told her foster mother that it was Oom Joggie, she wished to protect her father. Oom Joggie was apparently a friend of her father.
- [53] Under cross-examination she confessed: "My pa het dit regtig aan my gedoen".
- [54] Superintendent Strauss prepared a detailed report of which she gave a copy to the appellant. She stated that the evidence given by the minor child about sexual abuse was consistent throughout.
- [55] Superintendent Strauss made it clear that children fantasise about things but made it crystal clear that the child can only fantasise about things to which she has been exposed. No child who has not been sexually molested would ever be able to fantasise about it because it would not fall within the child's field of reference.
- [56] Under cross examination Superintendent Strauss did not budge. She effectively gave the same evidence as the forensic social worker but in more detail. When questioned about a child who retracts her statements of sexual abuse she stated that various factors could give rise thereto: financial dependence on a person, disbelief, being ostracized, lingering love for the abuser, ambivalent feelings and the like. However, it certainly did not mean that the abuse never took place. She also emphasised that it was common cause that she was an only child - effectively left in the sole care of the appellant, whom she still loved and did not wish to send to jail. Due to the mother being an alcoholic, he was also the only person who could assist her financially.
- [57] It was put to the Superintendent Strauss (who works solely with allegedly sexually abused children) that the minor child had

confessed to her foster mother that her father had not raped or sexually molested her, who mentioned it to the probation officer.

This was the reason why the convictions were set aside by the high court but then the minor child re-testified that she had been raped and sexually abused.

[58] After the new evidence, the regional magistrate once again found the appellant guilty on all three counts.

[59] The matter was postponed for a pre-sentence report from a social worker.

[60] No previous convictions were proved against the appellant. Furthermore, the appellant was born on [.....] 1950, which means that he is currently 64 years old.

[61] The appellant's cognitive abilities were observed to be below average, and he had to attend a special school, and only studied

until Standard 10, when he was 16. Nonetheless he worked for 29 years with a very stable work record and is financially independent. He is also not well in that he underwent a heart bypass and requires chronic medication. It bears mention that he was on bail throughout

the proceedings - namely eight years up until 28 May 2010. His wife has died in the interim (as stated above) which means that the minor child no longer has a mother.

[62] In mitigation it was argued on behalf of the appellant, given his age and the fact that he is a first offender, that the case of *S v Heller* 1971 (2) SA 29 (AD) finds application.

[63] It was further strenuously argued that in terms of *S v Zinn* 1969 (2) SA 537 (A) that the triad of factors set out therein requires the court to have regard to the age and health of the appellant and the manner in which the legal system, in a manner, has failed him.

[64] It was also argued in mitigation that the three counts related to the same offence and that the appellant's sentences should run concurrently. The court was referred to the matter of *S v Maluleke* 2008 (1) SACR 49 (T) and the concept of restorative justice. At paragraph [26] Bertelsmann J stated: -

"Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasizes the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism. "

[65] This approach was once again underscored by Bertelsmann J at paragraphs [38] and [39]: -

"Restorative Justice is a concept that has received judicial recognition in recent judgments. If restorative justice is to be recognised in South Africa and in the light of the serious challenges faced by our country's criminal justice system and the perennial overcrowding of our correction institutions there can be little doubt that its application and integration into our law is essential. Then it must find application not only in respect of minor offences but also in appropriate circumstances in suitable matters of a grave nature."

- [66] The report also stipulated that "according to the accused he has never been involved in psycho social intervention or therapy; he is prepared to attend interventions and is open to rehabilitation".
- [67] The appellant also comes from a dysfunctional family, where alcohol was abused which lead to dysfunctional marriages and his last marriage was so dysfunctional that he had to take over the role of a mother. The minor child had to take over the role of a wife.
- [68] However there are numerous aggravating circumstances. The appellant showed no remorse. Giving the appellant correctional supervision as a sentence would send out a message to the public that one can commit a heinous crime which will be overlooked.
- [69] In this matter, however, the right to a speedy trial was breached in the extreme.
- [70] Kriegler J stated in *Sanderson v Attorney-General, Eastern Cape* (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (2 December 1997): "Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory. The bill of rights is not a set of (aspirational) directive principles of state policy - it is intended that the state should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage." The same was held in *S v Jackson and Others* (A 172/2006)
- [2007] ZAWCHC 66; 2008 (2) SACR 274 (C) (21 November 2007). The appellant was arrested on 7 September 2007.
- [71] Clearly the appellant suffered psychological harm but so did the minor child (a mere child who was only six years old) - *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at page 4411-J. What the father did, however, was to abuse his position of trust with his daughter and to rape her was a breach of trust in the most grievous and brutal sense.
- [72] The regional magistrate, in a very well reasoned judgment then imposed the sentences as set out at the commencement of the

judgment.

It cannot be said that he erred in any respect.

- [73] The application for leave to appeal against conviction and sentence was dismissed on 18 November 2010.
- [74] What happened thereafter is wholly unclear to the court, save that a petition, in terms of section 309 of Act 51 of 1977 for leave to appeal against conviction and sentence was granted by this court on 9 June 2014.

[75] However, given the fact that the regional magistrate who took enormous trouble in considering the evidence and writing his

judgments regarding convictions, sentence and the application for leave to appeal, which cannot be faulted, I propose the following: -

Order

[76] The appeal against both conviction and sentence is dismissed.

JUDGE OF THE HIGH COURT

I agree and it is so ordered

MOSEAMO J

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Prepared on 10 October 2026 · Esheria