

SOUTH AFRICA / JUDGMENT

S.M v S (Appeal) (A14/2025) [2025] ZAWCHC 221 (27 May 2025)

[2025] ZAWCHC 221

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete, N C De Jager

CASE / FILE NUMBER

A14/2025

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case No: A14/2025

In

the matter between:

S[...]

M[...]

Appellant

and

THE

STATE

Respondent

Court: Justice J

Cloete et Acting Justice De Jager

Heard: 23 May 2025

Delivered

electronically : 27 May 2025

JUDGMENT

CLOETE J:

[1] The appellant was convicted as charged in the Wynberg Regional Court on 29 April 2024 on two counts of contravening s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act [1] (rape) and one count of contravening s 5(1) of the aforementioned Act (sexual assault). Given that the complainant was

13 years old at the time of commission of the offences, the counts of rape attracted the prescribed minimum sentence of life

imprisonment in terms of s 51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act [2], commonly referred to as the so-called minimum sentence legislation.

[2] On 16 May 2024 the appellant was sentenced to life imprisonment on each count of rape and 5 years imprisonment on the count of sexual assault. These sentences automatically run concurrently in terms of s 39(2)(a)(i) of the Correctional Services Act.[3] The appellant has exercised his statutory right of appeal to this court in terms of s 309 of the Criminal Procedure Act[4] in respect of the convictions and sentences for the rape counts. He was granted leave to appeal the conviction and sentence in respect of the sexual assault count by the trial court on 3 September 2024.

[3] The following facts became common cause during the trial. The complainant's date of birth is 3 March 2008. The appellant is her stepfather, who at the time of the alleged offences was 47 years old and had been married to the complainant's mother in terms of customary law since 25 December 2018. The incidents resulting in the appellant being charged occurred sometime during August to December 2021. The complainant fell pregnant and gave birth to the appellant's son on 6 May 2022 when she was just 14 years old. It is apparent from the record that the appellant had little choice but to admit paternity given that DNA results proved that there was a 99.9% probability that he was the child's biological father.

[4] The complainant did not report the incidents to anyone until on Sunday 17 April 2022 her mother noticed white pre-lactation fluid on the complainant's black bra she was wearing as she prepared to take a morning bath in preparation for church. Her mother asked the complainant directly, and she disclosed the incidents to her. The complainant's mother, under the guise of attending church since the appellant was in the house, took the complainant to the police station where the matter was reported. The appellant was arrested the same day. The J88, handed in by consent, reflects the complainant's report to Dr. Matanda of the Thuthuzela Clinic at Heideveld, who conducted her medical examination two days later on 19 April 2024, that '..her stepfather raped her three times last year ...'. Dr. Matanda also recorded the complainant was approximately 27 weeks pregnant (ie 6 to 7 months) but recommended an ultrasound examination; and that his clinical findings were consistent with the complainant's report (which he referred to as evidence) of sexual

assault.

- [5] The appellant's plea explanation and subsequent defence was that of consent. Importantly, he made formal admissions in terms of s220 of the Criminal Procedure Act at the outset of the trial. [5] These were that, as alleged in the charge sheet: (a) on count 1, he had penetrated the complainant's vagina with his penis;
- (b) on count 2, he had penetrated her vagina with his tongue; and (c) on count 3, he had touched her breasts. He disputed however that the incidents occurred on diverse occasions (as also alleged in the charge sheet) during the period in question. According to him, all three incidents occurred on the same day, but he could not recall the date. Further details of his version emerged during the evidence led by the state. These were that the complainant seduced him by showing him photographs of naked individuals having sexual intercourse, and that she willingly participated in the incidents. Ultimately, therefore, the only two material issues in dispute were : (a) whether the incidents occurred on three occasions over the period in question, or all on the same day; and (b) whether the complainant was a willing participant. (In terms of s 57(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, a child under the age of 12 years is incapable of consenting to a sexual act).
- [6] During the trial the complainant and her mother gave evidence on behalf of the state. The appellant testified in his defence and called no other witnesses. It is not necessary to deal in detail with the evidence given by the complainant about precisely what occurred, given the s220 admissions. On the disputed issues, it is clear from her evidence that she was consistent in her account of how, on three separate occasions on a Thursday morning after her mother left for work and only she and the appellant (apart from her infant brother) were in the house, the appellant instructed her to remove her clothing, lie on the bed he shared with her mother, and committed the offences.
- [7] She was also consistent in her testimony that she was scared of the appellant because he had previously assaulted both her and her mother, and felt threatened into submitting. Similarly she was unshaken in her evidence that on each occasion she had tried to push the appellant away but he was too strong; on the second occasion he warned her not to tell her mother; and on the third occasion the appellant only desisted after her friend from next door arrived at the front gate, the complainant shouted out the friend's name, and the friend opened the gate to enter the property. Finally,

the complainant gave a consistently clear and cogent explanation why she did not tell her mother earlier, namely that she was scared of what the appellant might do to both of them.

- [8] The complainant denied having shown the appellant photographs as alleged (she was cross-examined about mentioning videos rather than photographs but nothing turns on this because her denial that she showed him anything was emphatic throughout her evidence.) Questions put to her on behalf of the appellant about the intimate details of each incident were irrelevant, given his earlier formal admissions in terms of s 220.
- [9] The complainant's mother confirmed the report was made to her after she questioned the complainant on 17 April 2022. She corroborated the complainant's testimony in relation to the report and what occurred thereafter in all material respects. In particular, she confirmed her observation of the complainant's bra; that she took the complainant directly to the police under the guise of going to church; and testified that she did so because both she and the complainant were scared of the appellant, having both been assaulted by him previously. She also repeated that the complainant feared the appellant and she was thus not surprised that in the circumstances the complainant had not made an earlier report to her. In any event, in terms of s 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, a court may

not draw any inference solely from the length of a delay between the alleged commission of an offence and the reporting thereof.

- [10] In his testimony the appellant gave what was clearly an embellished version of how the complainant allegedly seduced him, including a number of salacious details that were not put to the complainant on his behalf during her evidence. He even went so far as to claim the complainant had "craved" sexual attention from him. Contrary to his earlier version that all three incidents occurred on the same day, he testified that they constituted one single continuous event. Again, contrary to his earlier version that he could not recall when this occurred, he was suddenly able to remember that it was in August 2021. He downplayed the evidence of the complainant that he had previously assaulted her, maintaining it was only a matter of two slaps because she asked him for money, was insolent, and he had become "a little bit angry". This too had not been put to the complainant or indeed her mother, who according to the appellant was present at the time. He admitted however that the alleged slaps were given only a month before the complainant, according to him, could no longer resist his physical charm and seduced him, and that she was generally a very obedient child. He had apparently been bemused by the sudden change in her behaviour.
- [11] The falsity of his version is also demonstrated by his belated claim that the complainant threatened him with the words "I will get you" if he did not succumb to her sexual demands. The appellant repeatedly contradicted himself on what had occurred during the commission of the offences; and during cross-examination conceded that he had not only previously slapped the complainant but "might have kicked her" too. He also admitted smacking the complainant's mother and kicking her on the same occasion when the mother tried to defend her. Importantly he eventually conceded that both the complainant and her mother were already afraid of him prior to the rapes and sexual assault.

[12] The trial court accurately summarised the evidence and the law, including that pertaining to the evidence of a single witness. She was correct in her finding that the complainant was a credible and reliable witness; that the complainant's mother corroborated her version in all material respects in relation to the prior assault, the report and what occurred thereafter, and that the appellant adapted his version whenever the shoe started to pinch. She was also correct in her conclusion that the state proved its case beyond reasonable doubt and the appellant's version should be rejected as not reasonably possibly true. This dispenses with the appellant's grounds of appeal as contained in his notice of appeal, and the appeal against conviction fails.

[13] Turning now to sentence. The appellant was a first offender who reached the age of 47 years without any known brushes with the law. He was in custody from the date of his arrest (about two years). His personal circumstances are unremarkable. This was a particular heinous series of offences, and the record reflects the devastating impact on the complainant and her mother, both in their evidence and the complainant's victim impact report. This is one of those cases where the appellant's personal circumstances and clean prior record must necessarily recede into the background : *S v Vilakazi*[6]. In her carefully reasoned judgment the trial court again referred to the applicable legal principles and weighed all relevant facts and circumstances. She correctly concluded that there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence, or that the imposition of life imprisonment would be disproportionate to the crimes of which the

appellant was convicted. There is no basis for this court to interfere. It follows that the appeal against sentence must also fail.

[14] The following order is made:

The appellant's appeal against both conviction and sentence are dismissed.

J I CLOETE

Judge of the High Court

I agree

N C DE JAGER

Acting Judge of the High Court

[1] No 32 of 2007

[2] No 105 of 1997

[3] No 111 of 1998

[4] No 51 of 1977

[5] No 51 of 1977

[6] 2009(1) SACR 552 at para 58

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