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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A175/2015

DATE: 19 NOVEMBER 2015

In the matter between:

PIERRE BOOYSEN Appellant

And

THE STATE Respondent

CORAM: MOLOI, J et MOHALE, AJ

HEARD ON: 09 NOVEMBER 2015

DELIVERED ON: 19 NOVEMBER 2015

MOLOI, J

[1] The appellant was convicted of rape of the complainant in contravention of section 3 of Act 32 of 2007 and two counts of contravention of section 5 (1) of the same Act. It was alleged that during 2009 at Dagbreek in Welkom the appellant committed an act of sexual penetration of the complainant by lying on top of her, penetrated her sexual organ with an unknown object, his finger and his tongue and that during 2009 and during 2012/13 he touched her sexual organ, played with it and licked it with his tongue. In 2009 the complainant was 10 years old. He was sentenced on count 1 to twenty years imprisonment and on counts 2 and 3 to three

years imprisonment. The sentences in counts 2 and 3 were ordered to run concurrently with the sentence in count 1. He appeals both the convictions and sentences with the leave of this court on petition leave to appeal having been denied by the trial court.

[2] The appeal against conviction is premised on three grounds, namely that the trial court erred in finding that the State had proved the case against the appellant beyond a reasonable doubt, that the trial court did not make a proper assessment of the contradictions in the State case together with the precautionary rules applicable to a single witness and that the trial court erred in rejecting the appellant's version. Against the sentence the grounds of appeal are that the sentence imposed is shockingly heavy and inappropriate and that the trial court did not give due consideration to the appellant’s personal circumstances.

[3] The complainant testified that during 2009 she, her brother [H……..] and the appellant were home. The appellant called her to the bathroom and told her what was going to happen she must not tell anyone and, if she did so, he was going to kill her entire family. He ordered her to go to the bedroom, undress herself and lie on her stomach on the bed. She did so and the appellant got into the room, lied on her back and fondled her vagina with his fingers and licked it with his tongue. She then said the appellant ordered her to lie on her back and that he made her stand halfway before he fondled her. His fingers did not penetrate her vagina but his tongue did. After appellant stood up he lied on her again and pushed a strange object into her vagina and asked her to guess what it was. His pants were down to his knees. According to the mother, the complainant reported to her that she was enticed to the bathroom, sent to the bedroom where she (the complainant) was touched on her private

parts and licked with a tongue and that the appellant touched her vagina with his fingers as well as her chest and that she lied on her stomach as she endured pain. This is said to be a direct contradiction of the complainant's version. The complainant's brother came down the passage to the bedroom and the appellant stopped him saying the complainant had fallen asleep.

[4] In cross-examination the complainant says the threat to kill the family was made because if the incident came out, the appellant would go to prison. She said she could feel the appellant's finger as she was on her knees. It was contended that she first said she was made to half stand by the appellant and that contradicts her previous evidence that she stood up on her own and could thus see the appellant's mouth. These are said to be serious contradictions. A further contradiction is said to be the complainant's denial that the appellant's pants were at his knees and that he pulled the pants down when he stood up. She had previously said the appellant stood up when her brother came down the passage and he told him (the appellant) the complainant was sleeping. The same evening the appellant slept next to the complainant and touched her vagina, licked it with his tongue

and touched her breasts. On occasion of Father's day in Kroonstad he did the same to her. The family was staying there and the appellant was fetched by the complainant's father from Welkom. It is not clear whether the Father's day referred to was in 2012 or 2013.

[5] The complainant was examined by a therapist, Ester Aletta Fourie and, said to her she was with the appellant only during the incident whereas in her testimony she stated her brother was also at home. A forensic nurse, M Khatatsi examined the complainant on 08 October 2013 and found that her hymen was not intact. She noticed old clefts in the complainant's vagina at 3, 6 and 9 o'clock. The complainant was then fourteen years old. The complainant's mother became aware of the cuts the complainant was inflicting on herself during 2013. The mother pressurised the complainant to explain what was happening to her. She thereafter told her mother of these incidents and the case was reported to the police.

[6] The appellant also testified. There was no version he told about the allegations against him. His was a bare denial of everything the complainant said. He even denied staying at his brother's (complainant's father) flat at Dagbreek in Welkom. During the evidence of the complainant and other State witnesses this was not raised as an issue at all. He denied having been at the Kroonstad house when Father's day was celebrated for the first time when he gave evidence.

He went to Kroonstad only on the occasion of his mother having had a heart attack. Gratuitously he raises his suspicions about his other brother, [J……], acting suspiciously towards the complainant and him not trusting him ([J……]) concerning the complainant the appellant, in effect, does not gainsay what the complainant testified about at all. He only removes himself from the scenes by saying he was not there.

Asked why the young complainant would incriminate him he stated she must have being influenced by her parents because they did not approve of his relationship with a black woman. This explanation can safely be ignored as thumb- suck in view of the fact that both the complainant's parents knew about his relationship with the black woman and had nothing to do with it. The existence of that relationship was not a problem for them and never made them dislike him.

[7] The trial court was thorough in its judgment and dealt with all the issues comprehensibly. It started by pointing out that it was bound to evaluate all the evidence placed before it as a unit It quoted from S v Civa 1974 (3) SA 844 (T) at 846 H, see also S v Trainor, 2003 (1) SACR 35 (SCA) par 9. The trial court correctly pointed out that the State bore the onus to prove its case beyond a reasonable doubt and, importantly, that there was no onus on the appellant to prove his innocence and referred to S v Jackson 1998, (1) SACR 470 (A). It dealt with the caution that the court must apply in considering the evidence of a minor person who is also a single witness regarding the actual sexual complaints. He referred to S v Sauls and Others 1981 (3). In S v Hanekom 2011 (1) SACR 430 (W) it was said that evidence of young complainants in sexual cases needs to be considered with special caution as they may be susceptible to external influence. The trial court found that the complainant was fourteen years of age when she testified about incident that took place when she was merely ten years old. Her tender age, her mental development and life experience aside, he found that she was consistent despite few non-material contradictions in her evidence. From the detail of the complainant's evidence regarding the fingers used, the tongue, the unknown object used to penetrate her and the question as to, whether she knew what was penetrating

her, it becomes clear that she could not have been couched what to say against the appellant. One cannot draw any inference from her leaving the room from which she was giving her evidence. What is important is that despite the lengthy cross- examination she came back and endured further cross- examination. The trial court had to bear in mind that it was not dealing with a static situation here and the fact that she was lying on her stomach or back, on her knees or on her feet, are all things that are possible in an assault of this nature and there was no suggestion that her penetration could not take place in any of those positions.

[8] The appeal against the conviction was based on three grounds - (a) the trial court erred in finding that the State had proved its case against the appellant beyond a reasonable doubt. Looking at the record and the arguments advanced one fails to see in which respect this submission

can hold. The evidence of the complainant is not challenged at all and finds corroboration in the other evidence adduced, (b) The court erred in not taking into account the contradictions in the State case as well as the cautionary rule relating to a single witness.' The trial court dealt extensively with the contradictions referred to and found them to be immaterial. The cautionary rule has clearly been uppermost in the mind of the court as illustrated above. The cautionary rule is "not laying down a requirement of law that must be strictly complied with[5]' R v Mokoena 1956 (3) SA 81 (A) at 85; R v T 1958 (2) SA 676 at 678 - the cautionary rule should not be equated to an absolute rule of law. What the rule emphasize is that the court must be vigilant when dealing with the evidence of a single witness to ensure that a case has been proven beyond a reasonable doubt. The rule is not a substitution of common sense which must be used in search of the truth. Assessment of

credibility of witness requires experience, insight, knowledge of human nature, common sense, detachment, patience and humility: See Albert Kruger in Hiemstra's Criminal Procedure, Lexis Nexis Service Issue 2 at 24.3. (c) The trial court erred in rejecting the appellant's version. I have pointed out above that the appellant's defence was a bare denial of what the complainant and other witnesses testified about and this came for the first time when he gave evidence. Nowhere in the record did he deny he lived in the complainant's flat and slept with her in the same room when the incidents occurred. It was equally never denied that he was at the house in Kroonstad on a Father's day when events in count three took place. *Alibi* was never the appellant's case for, if it was, the

gruelling extensive cross-examination of the state witnesses as to how, where, when the events took place, would be redundant. It was never put to any of them that during those happenings, the appellant was sleeping in his own flat and never went to Kroonstad except when his mother had suffered a heart attack. The trial court was, therefore, right in rejecting the *alibi* that came as an afterthought that even surprised his own legal representative from what can be gleaned from the record.

[9] In as far as the sentence is concerned it is not correct that the trial court did not take into account the personal circumstances of the appellant. In fact it did and even found that there were substantial and compelling circumstances that moved it from imposing the prescribed minimum sentences and that this was based purely on his personal circumstances. The sentences imposed and the order that they should run concurrently shows that the court went even so far as to consider their cumulative effect on the appellant. The sentences imposed are not shockingly inappropriate as contended. On the contrary they are lenient and appropriate in the

circumstances.

[10] In the result the appeal against both the convictions and sentences imposed is dismissed.

K. J. Moloi J

I concur. **J.MVIOLOI, J**

MOHALE, AJ

On behalf of the Appellant: **Adv. L Smit**
Instructed by:
Bloemfontein Justice Centre
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On behalf of Respondent: **Adv A Bester**
Instructed by:
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