REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A 532/2010

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

19 April 2012 FHD VAN OOSTEN

In the matter between

WILLIAM RAMANYAI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU AJ:

[1] The appellant was convicted of rape in contravention of the provisions of section 3 read with other relevant provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in the Randfontein Regional court. He was sentenced to life imprisonment and also declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

[2]The appellant now appeals against both conviction and sentence with leave of this court on petition.

[3] The evidence adduced by the State consisted of the evidence of the complainant, a girl aged 6 years old at the time, and a neighbour of the appellant, Ms Meene. A summary thereof is the following. It was after school hours on the day of the incident when the complainant, who was playing in the street, was called by the appellant to his house. He told her to lock the door which she did. They went to the bedroom and he did "funny things" with her which she later in her evidence elaborated on as a sexual penetration. Her mother arrived from work and knocked on the dining room door. She opened the door. The appellant at that stage was in the kitchen. The complainant's mother then called Ms Meene and asked her to ascertain from the complainant what had happened to her. The complainant told her that the appellant had done "funny things" to her. Nothing further was asked or said and the complainant was taken to the police station by her mother. She was medically examined at 17h05 that same afternoon. The examining doctor was not called to testify. Instead the form J88 in which her findings and conclusions are recorded was handed in by agreement. Swabs were taken by the examining doctor but the subsequent preliminary tests produced a negative result.

[4] The appellant denied the sexual interference with the complainant. He ascribed a motive to falsely implicate him to the mother of the complainant (who has since died) with whom he had had a relationship which had turned sour. He had moved out earlier in the week from the house where he had stayed with the complainant's mother. On the day of the incident the complainant, who had been playing in the street, came through the open door of his house and took a seat on a bean bag. They had small talk until her mother arrived looking for her. The child went to her mother, who grabbed her roughly by her clothes and shook her. The child ended up crying. The mother asked him if he had raped the child, which he denied.

[5] The Regional Magistrate held that the complainant was an honest witness and found sufficient corroboration for her version in the J88 form and the evidence of Ms Meene. The appellant's version was rejected as false.

[6] In my view the credibility findings made by the trial court cannot be sustained. The inherent dangers in accepting the evidence of young children are well-known. In the present matter a consideration of the medical evidence contained in the J88 form is of vital importance. It reflects the conclusion that "clinically there's evidence of

forced genital penetration". But this must be read in conjunction with the following further conclusions: firstly, that "the injuries (bruises) are fresh, ie within 72 hours". No reasons are stated for the time margin of 72 hours. Many unanswered questions arise. The J88 report is unhelpful in the absence of clarity by the examining doctor. The conclusions continue to record that "the hymen is not intact: walls are thinned out & irregular. Not swollen, not torn: suggestive of not first episode". From these conclusions it is clear that the complainant must have had previous sexual intercourse. The possibility of a previous experience was raised by the Regional Magistrate in questioning the complainant. In response she was adamant that her experience with the appellant was the first one. On this aspect therefore the complainant's evidence is contradicted by the J88. From this the most obvious question that will naturally follow would be *when and by whom* was the child molested, in relation to the time and date of this incident?

[7] In the J88 the examining doctor recorded the "history from mother" as follows:

"*History from the mother: Saw child playing at her ex-boyfriend today at plus minus 13h00. Later on, saw door closing and on running there, the known male opened, trouser zip opened and his penis was erect and the child came out of the bedroom. Mother suspected sexual assault."*

Ordinarily, the statement would constitute hearsay evidence. In this case however, the statement was introduced by consent of the parties. The complainant's mother as I have mentioned, is deceased. An application during the trial for the admission of her statement to the police, as evidence, was refused. The Regional Magistrate did however find that the mother's version, as related to the examining doctor, corroborated the complainant's version. The finding is clearly wrong. The complainant testified that her mother knocked on the dining room door of the appellant's house, that she opened the door and that the appellant, at that stage, was in the kitchen. Her version accordingly materially contradicts that of her late mother. The importance of the contradiction is this: the appellant throughout the trial and in evidence maintained that the complainant's mother falsely framed him and that such motive resulted from their broken relationship. Assuming the mother's version to be false it tends to afford credence to the appellant's contention. Either the child lied or the mother did. The statements cannot be both true. The comments to

Ms Meene and to the doctor (the latter which were contradicted by the complainant), were clearly meant to bolster the charge.

[8] In my view, there was no serious attempt by the trial court to evaluate the evidence in light of the probabilities and the facts before it. The trial court simply surmised the appellant's version as motivated by "*bad blood between him and the complainant*". The appellant, the trial court further reasoned: "... *the question is, is his version a reasonably possibly the truth* (sic*). Now comparing that to the state's case and the rules of common sense where one plus one equals two it is the court's ruling that the accused's version cannot be the truth and in light of the documentary and medical evidence that was found the accused version is ruled out as being false and, fabricated*". There was no duty on the appellant to prove his innocence as the trial court sought to suggest. It is trite that the onus lies with State to prove an accused person's guilt beyond a reasonable doubt.

[9] In my view the appellant's version was reasonably possibly true (see *S v Shackell* 2001 (4) SA 1 (SCA) para [30] where the Brand AJA (as he then was) held: "*...in view of this standard of proof in a criminal case, a court does not have to convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version*"). It is common cause that he had a love relationship with the complainant's mother which he terminated a few days before the day of the alleged rape. Appellant had lived together with her until he moved out and took with him his belongings which included a head-board that he gave to a neighbour. The probability of a false motive to implicate the appellant cannot be excluded. For these reasons, although there are a number of factors counting against the appellant, I am not satisfied that he was correctly convicted. A reasonable doubt exists and the appeal against conviction and sentence accordingly must succeed.

[10] In the result, I propose the following order:

1. The appeal is upheld.

2. The appellant's conviction and sentence are set aside.

T P MUDAU
ACTING JUDGE OF THE HIGH COURT

VAN OOSTEN J:

[11] I have read the judgment of Mudau AJ. I agree with him that the appeal against the conviction should be upheld. I however, regrettably, consider it necessary to comment on the judgment of the Regional Magistrate on sentence.

[12] Having heard argument on the question of compelling and substantial circumstances and sentence the Regional Magistrate proceeded to deliver judgment on sentence. The judgment commences with a reference to the well-entrenched triad applicable in the consideration of sentence and the provisions of the "Minimum Sentences Act". The Regional Magistrate then proceeded, at length, to deal with other similar cases having served before him where no compelling and substantial circumstances had been found "to deviate from the minimum prescribed sentence". To this he added:

'As sentences were the accused took me (sic) on appeal those appeals were dismissed those people are serving life imprisonment. There are other cases also where this court convicted a person where the minimum prescribed sentence were (sic) applicable where life imprisonment was also the sentence where which was prescribed to this court to impose.'

[13] The Regional Magistrate then proceeded to mention a case involving a "mental disturbed (adult) person" where compelling and substantial factors were put before the court and in which he sentenced the accused to 25 years imprisonment. Having said that the Regional Magistrate, without more ado, concluded:

'In this case there is nothing before me accused does not want to put compelling and substantial substantive factors before this court so I am doing what the legislature is dictating to me to do accused is sentenced to life imprisonment ...'

[14] The approach adopted by the regional Magistrate was inappropriate and deserves some censure. Firstly, the judgment shows an absence of consideration of the fundamental and appropriate approach to be adopted by a court in deciding whether compelling and substantial circumstances are present. A reading of the seminal judgment of the Supreme Court of Appeal in *S v Malgas* 2001 SACR 469 (SCA) would have provided the Regional Magistrate with the proper guidelines and principles to be applied in the court's exercise of its discretion in these matters. The

consideration of the SCA judgment would further have made it clear that the court could, and should not, decide these aspects solely on the basis, as the Regional Magistrate did, of a minimum sentence having been "dictated" or "prescribed" to the courts.

[15] But it does not end there. The Regional Magistrate did not refer to, and therefore seems not to have considered a single factor of those that were put before him by the defence. Instead, he indulged in references to, and discussions of, other similar cases which were not relevant at all to the case before him, and in particular could not have made sense to the appellant who was obviously eagerly awaiting reasons for his committal to jail for life. This cannot be countenanced. This was a serious case where the possibility of the imposition of the ultimate sentence our courts can impose, arose. The Regional Magistrate was therefore, as has been spelled out in numerous judgments by our courts, constitutionally obliged, as in all matters, to adopt a cautious, responsible and judicial approach to ensure that justice is manifestly done. This he has failed to do.

[16] It is just as well to remind the Regional Magistrate of the obligation imposed on judicial officers to provide reasons for their judgments (see *S v Maake* 2011 (1) SACR 263 (SCA) [19]). The Regional Magistrate's judgment, in this regard, was seemingly unhelpful to this court in the consideration of the appeal.

[17] An order is made as proposed by Mudau AJ.

F H D VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV E TLAKE***
COUNSEL FOR THE RESPONDENT	***ADV RN MOGAGABE***
DATE OF HEARING	***17 APRIL 2012***
DATE OF JUDGMENT	***17 APRIL 2012***