IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR242/20

In the matter between:

ABEDNIGO JABULANI HADEBE **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from the Regional Court, Eshowe:

The appeal against conviction and sentence is dismissed.

JUDGMENT

Chetty J (Masipa J concurring)

[1] The appellant was charged in the Regional Court, Port Shepstone with one count of rape in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ('the Sexual Offences Act'), further read with the provisions of ss 51(1) and (2), and Parts I and Ill of Schedule 2 of the Criminal Law Amendment Act, 1997 ('the Amendment Act') and s 94 of the Criminal Procedure Act, 1977 ('the CPA'). The appellant was alerted to the applicability of life imprisonment in the event of his conviction as the complainant was under the age of 12. He pleaded not guilty to the charge and was legally represented at his trial. After considering the evidence before it, the trial court convicted the appellant as charged, and sentenced him to life imprisonment on 23 March 2020.

[2] This appeal comes before us by way of the provisions of s 309 of the CPA which provides for an automatic right of appeal to any person who has been sentenced to life imprisonment by a Regional Court in terms of s 51(1) of the Amendment Act.

[3] The facts of the matter are succinctly captured in the judgment of the court a quo. In as much as this appeal lies against both conviction and sentence, it is necessary to briefly have regard to those facts. The complainant, who is referred to by her forename, A[…], to protect her identity as she is a minor, testified with the assistance of an intermediary appointed by the court in terms of s 170A of the CPA. The appellant is her mother's boyfriend, although she refers to him as her stepfather.

[4] The complainant testified that at the time of the incident in June 2017 she lived with her mother, her younger sister and the appellant in an area called Bhethani. She was ten years old at the time, attending grade 4 at Z[…] Primary School. She related that the incident of sexual assault occurred during a week day while she was at home cleaning the house. She was not required to attend school as she had already completed her examinations. At the time, the complainant and her younger sister, L[…] who was eight years old, were alone in the company of the appellant. At around midday, L[…] went out to play with other children, at which stage the appellant called the complainant to the bedroom, where he pulled her in, closed the door, took off his clothes and undressed the complainant. She tried to scream but the appellant

warned her to be quite. She then described him making her lie down on her back on the bed, after which he “bumped on top” of her, describing the act in which the appellant inserted his penis into her vagina. After he had finished, he instructed her to have a bath and not tell anyone of what had taken place, including her mother, otherwise he would kill her. At the time of the incident, she testified that her mother was at work, where she carries out domestic duties at the nearby holiday apartments in Shelly Beach.

[5] The complainant testified that she was wearing pink tights and a T-shirt on the day. She recalled the colour of the underwear she had on. With regard to the appellant, she recalled that he wore a T-shirt, pants as well as his underwear. At the time when he inserted his penis into her vagina, she testified that she wanted to cry but was unable to because she was unaware of what he was doing. She does recall however that her vagina felt painful, even though the “bumping” was relatively short. She remained silent regarding the incident as she believed that he would kill her if she reported it to anyone.

[6] In December 2018, the complainant was visiting her grandmother at Izingolweni and she had difficulty walking as she, in her words, had sores between her thighs. Her aunt, N.V.N., who is a high school educator, was at her grandmother’s house and noticed that the complainant was walking with some difficulty. On questioning the complaint, it was ascertained that she had a rash on her genitalia. Her aunt then reported this to the complainant’s grandmother and another elder in the family, B.C. Ms N.V.N. testified that she reported the complainant’s unusual walk to her mother and aunt as she was suspicious that something may have been wrong, particularly because she teaches Life Skills to pupils at school. She also formulated a view that it was unusual for a child of the appellant’s age to have a rash on her genitalia.

[7] The next morning the complainant together with other young girls were subjected to an examination of their genitalia by the complaint’s grandmother and her aunt, Balungile. Having examined the complainant, her grandmother asked her who had “played with her”, a reference to the possible interference with the complainant’s genitalia by someone. At first the complainant cried and denied that anyone had “played” with her. Eventually she informed her granny and aunt that it

was the appellant. She testified that she cried upon being asked questions in relation to her genitalia as she was fearful that the appellant would kill her. However, she felt compelled to speak the truth.

[8] Critically, the complainant was asked whether her granny suggested the name of the appellant as the culprit. In this regard, the complainant testified that "my grandmother asked me if it was Jabulani, and I said yes, then my aunt took me to the police station". When probed further as to whether the name of the appellant had been suggested to her, the complainant provided the following response:

> 'I was about to tell her Jabulani's name, then she said, she uttered the word 'Is it Jabulani".? I then said yes'.

According to the complainant, she was about to tell her granny the name of the appellant, when her granny asked her whether the perpetrator was the appellant. She was asked further whether she had been prompted to blame the appellant, which he denied. She further stated that she had no problems with the appellant that would cause her to falsely implicate him.

[9] The complainant was thereafter taken by her aunt. Ms N.V.N., to the police station at Izingolweni and thereafter to the Thuthuzela Care Centre where she was examined by Dr Cubelo. Importantly, the doctor confirmed that the complainant informed her that she had been raped in June 2017, almost a year and a half earlier. She further informed the doctor that she had been raped by her stepfather and related the sequence of events as has been set out earlier, including that the appellant threatened her that if she reported the incident to her mother, she would be killed.

[10] Dr Cubelo confirmed that the complainant was suffering from what is referred to in medical terms as the vitiligo of the genitalia, which is a discolouration of the skin where there is a lack of melanin, which gives skin its colour. As a result, the white patches, which the complainant interpreted as sores or a rash, was in fact a discolouration of the skin. The doctor concluded that such a condition is uncommon in children as young as the complainant as she was pre-pubertal. She also

confirmed that the examination of the complainant's hymen revealed a "big opening diameter", which she found to be unusual for a child of the complainant's age. There was also the absence of the posterior rim indicating that there had been vaginal penetration. Importantly, the doctor testified that her observations were of "old injuries" and not indicative of any *"fresh findings where the incident has occurred recently".* This is an important deduction as it lends credence to the complainant's version that the incident occurred a while ago.

[11] The critical aspect of the appellant's defence in the court a quo and before us is that of identity. The evidence of the doctor established without contradiction that the complainant had been vaginally penetrated. The complainant's evidence is that the perpetrator was her stepfather, the appellant. In the court a quo, he offered a bare denial, suggesting that the incident could not have taken place at the time when the complainant alleges it did, as she would still have been in school at the time. However, the evidence of the complainant is clear in this regard – when pupils finish their examinations, they are not required to attend further classes at school. This is also consistent with the court a quo taking judicial notice of such a practice in public schools. Moreover, the appellant contends that the incident could not have happened as testified to by the complainant as he would not have been left alone with the complainant and her sister. This is inconsistent with the evidence of the complainant and her mother, who testified that the appellant was not working in 2017. His only form of occasional employment was to cut grass. The complainant's mother worked Monday to Friday, and during school days the children would remain at home while she left for work. The appellant would remain at home with the children. She also refuted any suggestion that the appellant was driving a taxi during the period when the rape is alleged to have occurred. She conceded that she was not present when the complainant was examined by her mother and her aunt, B.C., nor was she present when the complainant was questioned with regard to the identity of the perpetrator.

[12] It was submitted on behalf of the appellant in his heads of argument that the court a quo failed to apply the necessary cautionary rules in assessing the evidence of the complainant as a single witness, and in doing so, failed to subject her evidence to the necessary scrutiny. Section 208 of the CPA provides that an

accused may be convicted on the evidence of a single witness, provided that such evidence is satisfactory in all material respects. As was set out in *S v Vilakazi* 2009 (1) SACR 552 (SCA), the prosecution of rape cases presents peculiar difficulties, calling for the greatest care to be taken, particularly where the complainant is young. The court added that judicial officers presiding in such cases should carefully analyse all of the evidence.

[13] It is contended on behalf of the appellant that the court a quo ignored the substantial delay in the reporting of the rape and when the complainant was asked what had occurred, she did not voluntarily proffer the name of the appellant. It is contended that the name of the appellant was in fact suggested to her, and that she agreed to it as she was surrounded by adults at the time.

[14] In dealing with the aspect of the delay in the reporting the rape, the complainant's version is that she was threatened with death by the appellant if she reported the incident to her mother. Her evidence, which is left intact, is that she believed the appellant would kill her. There is nothing before us to gainsay that impression. As is so often the case with young children, she was afraid to report the matter to her own mother, and eventually gave the details of the incident to her grandmother and aunt. [1] On the complainant's own version, she admitted that had she not been subjected to the vaginal examination by her elders, she would not have disclosed the incident to anyone. Despite what the appellant had done to her, she testified that she did not have a poor relationship with him. By all accounts, she appears to have respected him as a stepfather. This may in part account for the fear that she had in not reporting the incident to anyone, or if she did, whether she would have been believed. I am satisfied that the criticism of the delay in the complainant reporting the rape is without merit and that her explanation for doing so at a later stage is entirely plausible.

[15] Turning to the contention that the court a quo erred in not scrutinising the evidence of the complainant to ensure sufficient safeguards existed before accepting

---

[1] See: *S v Cornick and Another* [2007] ZASCA 14 where the rape was reported 19 years later and the court accepted the evidence as credible. The complainant was 14 years at the time the offence was committed)

her evidence over that of the appellant in circumstances where there were two conflicting versions, I am of the view that such criticism is misplaced. The court a quo carefully analysed the evidence of each witness against that of the complainant. The complainant, despite her tender years, was forthright in her evidence and was able to recall the colour of her clothing and that of the appellant on the day of the incident. When she was asked about the pain she experienced during the ordeal, she replied that it was because the appellant was much bigger and heavier than her. These are not responses that a child of ten years could have rehearsed. Moreover, the explanation which she gave to her elders when she reported the incident to them is consistent with what she reported to the doctor and to the police officer who took down her statement at the police station. Again, the likelihood of the complainant having fabricated a false narrative against the appellant, for no apparent reason, falls to be rejected.

[16] She testified that she was afraid of the appellant when he threatened to kill her if she reported the incident to her mother. This fear was heightened not only because he had previously chastised her when she had fought with her younger sister, but more importantly that she had seen him assaulting her mother. It should be noted that when the complainant's mother was questioned on this aspect, she denied that the appellant assaulted her - she downplayed the role of the appellant stating that he *"would assault the children but when it came to me, he would grab me roughly, but would not assault me".* Even the appellant's "rough" conduct towards her mother would have been sufficient to have instilled fear into a ten year old child.

[17] As regards the contention on behalf of the appellant that his identity was suggested to the complainant, resulting in his arrest, the sum total of the complainant's cross-examination on this aspect is limited to the following exchange:

> 'If your granny never said "Was it Jabulani? you would never have said so…. I was going to mention his name.
>
> You agree with me that it was suggested to you that it was Jabulani?'

As the complainant had difficulty in understanding the question being put to her, the

attorney acting on behalf of the appellant informed the magistrate that this aspect would be left for argument. Accordingly, the evidence of the complainant in chief stands largely intact and undisputed in so far as it is contended that the perpetrator of the rape was the appellant.

[18] The above response of the complainant should not be seen in isolation. When her aunt B.C. testified, she said that the child was asked whether the person who had 'touched' her was from lzingolweni (where her grandmother lived) or in Bhethani (where she lived with her mother and the appellant). The complainant cried and responded that "it is father Jabulani" who lives in Bhetani. When she was asked whether she was telling the truth, she said "Yes, it was him". Similarly, the complainant's aunt, Ms N.V.N. testified that the complainant was never threatened in any way to implicate the appellant. There is nothing in the record to suggest that either Ms B.C. or Ms N.V.N. were intent on fabricating evidence to implicate the appellant.

[19] In assessing the evidence of complainant the court a quo found that she was a good witness (albeit that it referred to her as a "a *good child").* The primary concern of a trier of fact is to ascertain whether the evidence of a young witness is trustworthy. (See: *Woji v Sanlam Insurance Co Ltd* 1981 (1) SA 1020 (A)). It also took into account that the evidence given by the complainant painted a clear picture of what had transpired in her home on the day in question. The complainant also did not embellish her evidence to suggest that she had been raped on more than one occasion. She was forthright and consistent that she was raped on one day only, during the course of the school week, by the appellant in June 2017. Again, if the complainant had been coached to falsely implicate the appellant, she would have exaggerated the extent of the sexual assault. She did not. It was stressed in *S v Haupt* 2018 (1) SACR 12 (GP) that where the state relies on the evidence of a single, young witness in cases of a sexual nature, it is imperative for the complainant to answer all material questions put to her or him. The complainant, on a reading of the record, clearly surpassed this threshold.

[20] In addition, the evidence of the adult witnesses who were at the scene at the time when the complainant was questioned by her grandmother as to who had

“played with her”, are consistent with each other. All of the adult witnesses present at the scene testified that there was no suggestion made to the complainant to implicate the appellant as the perpetrator. None of the adult witnesses had any reason to falsely implicate the appellant as there were no problems which any of them had with him.

[21] The appellant on the other hand was found to be grasping for any possible defence in an attempt to sow confusion. He was adamant that he was employed in June 2017, which is contradictory to his partner’s recollection. He attempted to distance himself from the evidence of the complainant’s mother who stated that the complainant and her younger sister were often left alone in the company of the appellant. Later in his evidence, he retracted his answer and stated that “sometimes” he was left alone in her company, but was persistent that it was not in June 2017. The appellant was also evasive as to what he was doing during the June 2017 school holidays. When asked whether he was at home, he evaded the question by responding that he was “around the home”. Only when pressed further for a direct response did he admit to being at home during this time. Seemingly running out of excuses and under the weight of cross-examination, the appellant stated that his partner and the mother of the complainant, who had taken him into her care upon his release from parole in 2015, was lying to the court that her children would have been left in his care in 2017. He suggested that she was doing so because their relationship had soured since the complainant’s revelations of what had occurred.

[22] The complainant’s evidence has what is so often referred to as ‘the ring of truth’. The manner in which she described in detail how she was raped, the pain she experienced, the clothing worn by the perpetrator whom she knew as her stepfather; the period when the incident occurred (even though it was a year and a half ago from the time when she made the first report), as well as her version that she was about to mention the name of the appellant when her grandmother uttered his name. All of this points overwhelmingly to the court a quo having correctly analysed the evidence before it in concluding that the appellant was indeed the perpetrator. A careful application of the cautionary rule requires a close examination of all relevant factors. (See: *S v Dyira* 2010 (1) SACR 78 (ECG)).

[23] Although not referred to by either counsel, I have had regard to *Mugwedi v S* [2014] ZASCA 23 (unreported, SCA case no 694/13, 27 March 2014) where the identity of the perpetrator by the seven-year-old rape complainant was not spontaneous. She had been prompted in her identification, and had made it after an adult in her presence had first confronted the appellant. It was held that her evidence could not be relied upon to sustain a finding of guilt. The evidence of the complainant in the present case is corroborated in material respects by the two adult witnesses, Ms B.C. and Ms N.V.N., who confirmed that no one threatened the complainant to implicate the appellant. On the contrary, none of the adult witnesses or indeed the child had any reason to falsely implicate the appellant. All three witnesses testified that they got on well with the appellant.

[24] I am satisfied that the court a quo applied the necessary caution in assessing the evidence of the child witness together with the corroboration offered by the adult witnesses. I can find no misdirection in the judgment of the learned Magistrate, and conclude that Mr Hadebe was correctly found guilty of rape, read with the provisions of the Sexual Offences Act.

[25] Turning to the sentence of life imprisonment imposed, the trial court correctly considered the seriousness of the offence and the impact of such crimes on our society. The betrayal of trust placed in the appellant as the complainant's stepfather is an aggravating factor. The court a quo considered the appellant's personal circumstances, his age and that he is a father to a new-born child of five months with the complainant's mother. This, in addition to five other children that he has. It was contended that the trial court failed to show the appellant mercy when imposing a sentence of life. The Victim Impact Statement of the young complainant was also taken into account. It tells, in very simple language, of the innocence of youth ripped away from a young child, with the perpetrator being someone she trusted. The emotional scarring as a result of such incidents last a life time. The incident has also caused the complainant to be separated from her mother, for whom she still cares very much. The appellant is no stranger to the law and has a previous conviction for three counts of sexual assault in 2005, for which he received a period of 16 years imprisonment. He was released on parole in 2015, only to commit the present crime two years later. He clearly has not learnt a lesson from his previous incarceration, or

been sufficiently rehabilitated.

[26] The legislature has seen it proper to mandate a prescribed minimum of life imprisonment as a deterrent against this type of behaviour. In the absence of any substantial and compelling circumstances, of which I found none, I conclude that there is no basis to interfere with the sentence imposed. There is no evidence of any misdirection by the court a quo.

[27] In the result, I make the following order:

The appeal against the appellant's conviction and sentence is dismissed.

Chetty J

Appearances:

For the appellant:	Mr H N Mlotshwa
Instructed by:	Durban Justice Center
	22nd Dorothy Nyembe Street
c/o	Pietermaritzburg Justice Center
Ref:	H.N Mlotshwa/X 856382620
For the state:	Mr D S Magwaza
Instructed by:	The Director of Public Prosecutions
	High Court Buildings
	Pietermaritzburg
Email:	DMagwaza@npa.gov.za
Date reserved:	30 July 2021
Date of delivery:	5 August 2021