IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 27/12

In the matter between:

PAPI PETER SENWEDI	**Appellant**
and	
THE STATE	**Respondent**

CRIMINAL APPEAL

HENDRICKS J, KGOELE J

DATE OF HEARING	**:**	**01 March 2013**
DATE OF JUDGMENT	**:**	**19 April 2013**
FOR THE APPELLANT	**:**	**Advocate R. J. Nkahle**
FOR THE RESPONDENT	**:**	**Advocate L. Van Niekerk**

JUDGMENT

KGOELE J:

[1] The appellant was convicted at the Regional Court of Taung on a charge of rape of a minor child aged 12 years (the complainant). He is

the complainant's cousin and was sentenced to imprisonment for life. This appeal is against both conviction and sentence.

AD CONVICTION

[2] The appellant seek this court to set aside his conviction on the following grounds:-

2.1 That the magistrate did not comply with the provisions of Section 164(1) of the Criminal Procedure Act of 1977 by not holding a formal inquiry whether the minor witness understood the nature and import of the oath, which led to the magistrate committing an irregularity;

2.2 That the evidence of the complainant as a single minor witness to the alleged rape should be treated with caution, especially in the light thereof that none of her siblings who, at all material times, were in the same room where the alleged rapes took place never witnessed any of the said rapes. The complainant is also criticized for not having reported these rapes.

[3] The evidence for the State comprised of three witnesses. The complainant herself, her cousin Evelyn Senwedi and her sister Tshepang Maleke. The medical certificate, (J88) and a copy of her birth certificate were also accepted as exhibits. From the complainant's evidence, it appears that the sexual encounters occurred six times between January and July 2009. At that time the complainant, her elder and younger sister, were staying at the appellant's parental place with the appellant, his mother and his two

sisters (cousins to the complainant), because the complainant and her siblings' parents had passed away. Appellant's father was working and only visited them during month end. The first, second, fifth and sixth incidents occurred in the sitting room where complainant and her siblings were sleeping. The third incident occurred in the bedroom whilst they were sleeping in their aunt's bedroom, as their aunt was not present. She could not remember whether the fourth incident occurred in the sitting room or in the bedroom. According to her, all of these incidents occurred in the presence of her siblings, who were asleep. The appellant would get into the blankets wherein she was sleeping, block her mouth with his hand, make threats to her not to tell anyone, and have non-consensual sexual intercourse with her whilst lying side by side to each other. She did not report all of the incidents because of the threats from the appellant and further, she was petrified. Fortunately for her, the last incident was witnessed by her sister Tshepang, who confronted her about it the following day. It is her sister that helped her to report it. A meeting with the parents of the appellant was held where appellant was reprimanded after admitting his guilt.

[4] Tshepang testified and corroborated in material respects, the evidence of the complainant as far as the witnessing of the last incident, (the sixth) is concerned. She further indicated that on that same night she called her aunt. Her aunt took long to arrive at the sitting room as she (the aunt) was sick. At the time she arrived, the appellant had already left the sitting room. The aunt called complainant and the appellant to inquire what happened. The appellant did not say anything about this incident and just kept quiet.

[5] Complainant's cousin, Evelyn, testified and corroborated the report that was made by Tshepang and the complainant to her. She further testified that the complainant told her what happened the previous night. She also related to her all other sexual encounters at the time when she was taking complainant to the clinic.

[6] Appellant, when testifying, denied all the allegations against him. He indicated that at all the material times during 2009 he was at work. He indicated further that he knows about the meeting which was held but denied having admitted the allegation of the alleged rape at that time.

[7] His father when testifying on the appellant's behalf, denied knowledge of the incidents. Furthermore he denied that he was informed about the allegation against the appellant. Lastly, he also denied that he attended a meeting where the rape allegation was discussed.

[8] The Gynaecological examination by the doctor as it appears on the J88, revealed the following:-

- ***Clitoris*** - *swollen and enlarged*
- ***Frenulum of clitoris*** - *swollen significantly*
- ***Urethral Orifile*** - *intact, slightly red*
- ***Para-urethral folds*** - *swollen, slightly redness*
- ***Labia & minora*** - *grossly enlarged, right side healed scar (deep)*
- ***Posterior fourchette scarring*** - *healed,*

  Tears - *yes,*

  Increased friability - *yes.*
- ***Fossa navicularisTears*** - *(healed scars)*

- ***Hymen Configuration*** – *Not intact*

  Opening - *12 Transverse and 14 Vertical*

  Swelling - *Yes*

  Fresh tears - *None (Healed)*

  Bumps - *Carunculae :Healed scars*

  Clefts - *Four*

- ***Perineum*** - *Shows recent abrasions*

[9] The conclusions of the doctor were:-

"Healed scars of genitalia implicated penetration that caused scars that healed. Anal scars (abrasions) happened more recently (within days ago). Perineal scarring are in different stages of healing".

[10] Anal examination revealed:

- ***Pigmentation*** - *Yes, (slightly darker)*
- ***Abrasions*** - *Yes, around the anus (healing)*
- ***Scars*** - *Healed scars*
- ***Orifile*** - *Tears – Overlapping scars*

  - *Swelling / thickening of rim (tyre sign) – slight*

[11] Counsel for appellant submitted the following as criticisms against the complainant's evidence which forms the basis of the fact that the trial court erred in convicting the appellant as charged;

11.1 The complainant is a single witness, therefore the cautionary rules should be applied to her testimony;

11.2 The complainant was 12 years old, and therefore, her evidence should again be treated with caution;

11.3 The admonishment to speak the truth was not done properly as the trial court should have held an inquiry to establish whether the witness understands the nature and import of the oath;

11.4 The complaint by the complainant and her sister to the effect that they had not been treated well by the appellant, can suggest that they had a motive to lie about the appellant;

11.5 The complainant was taken after two weeks for medical examination.

[12] The respondent's counsel disagrees with all of the above submissions.

[13] I fully agree with the respondent's counsel that all of the above submissions by the appellant have no merit. Although the complainant was a single witness in as far as the sexual encounters are concerned, there was overwhelming evidence that corroborate, strengthen and support her evidence that sexual intercourse took place. The evidence of Evelyn to the effect that she saw appellant during the last sexual encounter on top of her serve as corroboration of this fact. The other evidence is the injuries substained by the complainant that were depicted by the doctor in the J88. The consideration that I make in this paragraph are equally applicable to the issue raised and submitted by appellant's counsel that cautionery rules should be applicable because complainant was a young child. In my view, the trial court was alive to the cautionary rules applicable in this matter and did not just pay lip service to them.

[14] It is indeed correct that the trial court did not hold a formal inquiry to establish whether the minor child understands the nature and import of the oath. The Supreme Court of Appeal has on at least two occasions dealt with a set of facts very similar to what the trial court did in this matter. See: **S v B 2003 (1) SACR 52 (SCA); Director of Public Prosecutions, Kwa-Zulu Natal v Mekka 2003 (2) SACR (1) (SCA).** A proper reading of the two cases above holds the key to answer the submission by the appellant's counsel in this regard. It was held in these cases that an inquiry is not always necessary, the presiding officer is only expected to form an opinion that the child will / does not understand the nature and import of the oath, and can just simply admonish him / her.

[15] The evidence of a single witness should not be regarded as unreliable merely because he/she had "an interest, bias and/or motive adverse to the accused". The intensity of the bias must be established and its significance must be determined in view of the evidence as a whole. See: **S v Webber 1971 (3) SA 754 (A).**

The medical report also corroborates the evidence of the complainant that she was sexually violated, to the extent it can safely be assumed that this part of her evidence is not fabricated. The appellant himself testified that the meeting of parents / elderlies was held, although he did not admit the rape as complainant testified. This part of his evidence about the meeting, also corroborates that of the complainant. Furthermore, the complainant and all her witnesses testified that the relationship between them and the appellant was not very good and gave reasons for that. A fact which they could have easily not disclosed to the court to bolster their testimonies. They therefore, in

my view, did not show any biasness or motive towards the appellant. Their evidence cannot be said to have been fabricated.

[16] Although the J88 was completed two weeks after the last incident, it still revealed that the complainant was injured, not physically on the body, but on her private parts. Both on her anus and vagina. It goes without saying that these injuries are usually and normally consistent with sexual acts or intercourse. Although they do not indicate who the culprit is, they tend to show some consistency in as far as the evidence of the complainant is concerned that she was sexually assaulted in her vagina and anus. They serve as corroboration of her evidence as already indicated above. When confronted with this difficult question as to how the complainant as young as she was, could have sustained these kind of injuries, the appellant suddenly came up with a crucial version that was not even put to all the witnesses of the State to the effect that "there was something walking around at night during that time that could have caused the penetration and/or the injuries". He further intimated that his mother even requested a traditional healer to come and assist. (the witchdoctor story).

[17] The reason why none of the sibling's attention was drawn during the incidents and why it was never reported to them was, according to the complainant's version, because of the threats that were made by the appellant about what would happen to her. According to her, she was constantly reminded by the appellant that she should not forget that it is not her and her sibling's home that they were living in. In my view, it is understandable how a child at the age of the complainant at the time and in the vulnerable circumstances that she and her siblings had

found themselves in, can easily be sworn to silence by those kind of remarks that were made by the appellant.

[18] It is in the light of all the afore-mentioned reasons, I am not persuaded that the trial court erred in its conclusion that the appellant was guilty of the offence of rape.

[19] Despite the conclusion that I had reached above, I am of the view that it is necessary to say something about the disturbing features emerging from the record, which cannot be lost sight of.

[20] The question that immediately comes to one's mind is the following:- **Was the conviction on multiple rape charges attainable if cognisance is taken of the fashion in which the charge/s in the charge sheet was framed?** It is trite law that the charge sheet forms the basis of the charges against the accused, to which he/she should answer. Furthermore, an accused is entitled to be informed with sufficient detail of the charges preferred against him or her. See **S v Fielies and Another 2006 (1) SACR 302 (C).**

[21] The charge sheet in the instant matter were framed as follows:- "*on or about January 2009 – July 2009 at or near Morokweng in the Regional Division of Taung ,the accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, Refilwe Malele (12 years) by inserting his penis into her anus".*

From the indication of the period stipulated in the charge sheet and the manner in which the prosecutor led the evidence of the complainant, it is clear that the prosecutor was aware of the multiplicity of the rapes that occurred. Nevertheless, the appellant faced one count of rape. The charge sheet is furthermore regrettably in contrast with the reality.

[22] In the matter of **S v Mponda 2007 (2) SACR 245 (C)** the learned judge had much to say about the formulation of charge sheets. Amongst those he had remarked about the following are of essence: **(not complete phrases are quoted)**

> "It is most unsatisfactory that too frequent sufficient care is not paid to the appropriate formulation of the charge sheet, especially in serious cases where the potential sentence faced by the accused person can be of the highest severity, particularly where a multiplicity of counts is involved."
>
> "The slovenly formulation of the charge sheet is potentially prejudicial not only to the accused, but also to the administration of justice."
>
> "An inadequately formulated charge sheet may well, by its failure to inform him or her of the charge with sufficient detail to answer it, infringe an accused person's basic constitutional right to a fair trial."
>
> "The prejudice to an accused person in the circumstances described is illustrated by the magistrate's remarks during sentencing from which it is apparent that notwithstanding the content of the charge sheet the appellant was treated for sentencing purposes as having recurrently raped the complainant. This was a material misdirection."
>
> "The administration of justice is potentially prejudiced because the allegation of only a single count of rape in the charge sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single count offender. As mentioned this is cause for particular concern in matters where the legislature has determined that offenders convicted of multiple counts should receive prescribed higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal justice system into public disrepute"
>
> "a Charge sheet must set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may reasonably sufficient to inform the

accused of the nature of the charge. See Section 84 of the Criminal Procedure Act 51 of 1977. **(**the CPA**)**. If, however, it is intended by the state to adduce evidence that the offence was committed on diverse occasions (each of which it is not practicable to individually specify) during a particular period, that much must be expressly alleged in terms of section 94 of the CPA".

[23] What the learned Judge in the matter supra warned about is exactly what happened in the instant matter. The accused was sentenced on a multiplicity of rapes, whereas the charge sheet supported only one single count. I am of the view that, although the trial court misdirected itself in this regard, the whole trial does not become unfair, and the appellant is still guilty of the rape on a single count of a minor complainant. The consequences warned about by the learned judge now comes to live, if one takes into consideration what the impact incidents like these in the instant matter has on the image of the criminal justice system in the public eye. This could easily have been avoided if more attention was afforded to the proper drafting of the charge sheet.

[24] Furthermore, in the event that the prosecutor was caught unaware, he could also have applied for the amendment of the charge as provided for by the Criminal Procedure Act, 51 of 1977. The effect of a poorly formulated charge-sheet can also have an impact on sentence in certain circumstances. This brings me to deal with the submissions with regard to sentence.

AD SENTENCE

[24] The appellant's counsel submitted that the sentence imposed is excessively long and induce a sense of shock and warrant interference

by this court. Further that, it is trite law, that the trial court should consider the basic triad, namely:-

- the nature and seriousness of the offences;
- the interest of society; and
- the personal circumstances of the appellant, which were:-

  - that the appellant has no previous convictions and he, is therefore a first offender;
  - that the appellant was 23 years old, and relatively very young at the time of commission of the offence;
  - that the appellant has one minor child;
  - that he was employed and was earning R1300-00 every fortnight with which he maintained his girlfriend and his child;
  - that the mother of the child was not working, thus the appellant was a sole bread winner;
  - that complainant was not assaulted during the commission of the said offence;
  - that there was no weapon used in the commission of this offence;
  - that mercy is an element of justice in our

legal system.

[25] Appellant's counsel's argument is to the effect that the court failed to adequately take the above mentioned personal circumstances of the appellant into consideration. Further, that this matter does not fall within the worst category of rape and therefore a departure from the minimum sentence is justified. He quoted some decisions of the Appellate division to demonstrate the fact that the sentence imposed by the trial court is out of proportion.

[26] The respondent's counsel submitted that in the instant matter, although the charge sheet was poorly formulated, the minimum sentence applicable on a conviction of a single count of rape of a minor child, remains imprisonment for life. Even though this rape may not be the worst kind of rape (if the charge sheet was correctly formulated it could have been) but according to him it is still horrendous enough to justify the minimum sentence applicable. The same reasoning was followed in **S v Mahomotsa 2002 (2) SACR 435 (SCA).**

[27] The aggravating factors that, in the respondent counsel's view, justify the sentence imposed by the trial court are the following:-

- the complainant was of a tender age;
- the complainant was dependant on the family of the appellant where the appellant also stayed since she was orphaned;
- the appellant abused this vulnerability of the complainant to enable him to take advantage of her situation;
- he then also use her misfortune as a method to silence the complainant;
- the complainant suffered injuries as a result of the rape;

- the appellant showed no remorse whatsoever, instead he maintained that he was innocent and even used an absurd version in an attempt to explain away his guilt.

[28] In the unreported case of **S v Bailey (454/11) [2012] ZASCA 154 (1 October 2012) Bosielo J A** remarked:-

> "[13] It can hardly be disputed that rape of young girls by their fathers is not only scandalous, it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer threatening the well-being and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our society and moral fabric".

[14] Dealing with the rape of a minor by her father, Cameron JA described it graphically as follows in *S v Abrahams* paragraph 17:-

> "Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in the daughter's best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter's body, constitutes deflowering in the most grievous and brutal sense"

Later in the judgment paragraph 23 Cameron JA proceeded to say:-

> "Second, rape within the family has its own peculiarity reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes"

Importantly in paragraph 23 (c) dealing with the effect of incestuous rape as is the case here, he states that:-

> "Third, and lastly the fact that family rape generally also involves incest (1 exlclude foster and step parents, and rapists further removed in family lineage from victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture".

The facts of this case amply demonstrate this.

[15] It is true that *Abrahams, Sikhipha* and *Nkomo* all involved rapes that fall under section 51(1) of the Act. Yet the court after having considered all the relevant facts came to the conclusion that, in those cases, a sentence of life imprisonment was disturbingly disproportionate to the offence to a point where it could be described as unjust. The court then imposed various terms of imprisonment in respect of each of the cases in the place of the ordained life imprisonment.

[16] What then is the value of such comparative analysis of previous cases. Can this trend, if it can be called that, qualify to be elevated to the status of a precedent which is intended to bind all the courts which have to consider sentence whilst sentencing an accused who has been convicted of rape read with section 51(1) of the Act? Is a court expected, without proper consideration of the peculiar facts of this case, to slavishly follow the so-called trend not to impose life imprisonment for rape? By doing so, a court would be acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court albeit in a similar case. It follows in my view that such a sentence would be appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all. Commenting on the utility of such a comparative approach Marais JA in *S v Malgas 2001 (1) SACR 469 (SCA)* paragraph 21 said the following:-

> "It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. <u>As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done</u>. (own emphasis)

[17] Van den Heever JA put it more succinctly in *S v D 1995 (1) SACR 259 (A) at 260e* when she stated that: "I agree that decided cases on sentence provide guidelines not straightjackets". I also agree with this correct approach.

[29] And in paragraph 19 of the same judgment he further emphasized that:-

"[19] the minority judgment in the court below appears to reflect the misunderstanding that the refusal by this court to endorse the life imprisonment

imposed in the three case of *Abrahams*, *Sephika* and *Nkomo* constitutes a benchmark or a precedent binding other courts. That is a misconception. Such an approach or trend can never be elevated to a benchmark or binding precedent. Those cases remain guidelines. Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing as enunciated in a long line of cases which include *S v Zinn 1969 (2) SA 537 (A)* which espoused a proper consideration and balancing of the well-known triad; *S v Rabie 1975 (4) SA 855 (A) SA 855 (A) at 862;* and *S v de Jager and Another 1965 (2) SA 616 (A) at 628-9***.** This salutary approach has recently been endorsed by Marais JA in *S v Malgas paragraph 12"*.

[30] In **S v D 1995 (1) SACR 259 (A) at 260 f-i** the court remarked:-

> "Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and too often do.
> …….
> Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the Court's strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desire with helpless children".

[31] In another unreportable matter of **S v Piet Kwanape, case no 422/12 [2012] ZASCA 168 (26 November 2012)** the court remarked as follows in **paragraph 20**:-

> "[20] It was further submitted on behalf of the appellant that this was not the worst rape imaginable. Thus, concluded the argument, that consideration, viewed with other mitigating factors, justifies a lesser sentence. I do not agree, In *S v Mahomotsa* this court made plain that the fact that more serious cases than the one under consideration are imaginable is not decisive. Mpati JA said.
>
> "[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be corresponding lighter than the severer sentences that such hypothetical cases would merit there is always an upper limit in all sentencing jurisdictions,

be it death, life or some lengthy term of imprisonment, and there will be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty".

Accordingly this case, on its facts, is indeed horrendous enough to justify the imposition of the maximum penalty".

[32] Also in paragraph 24, the following were said by the same court:-

"Whilst persisting in this argument in this regard counsel for the appellant nevertheless accepted that long term imprisonment is called for on the facts of this case. In dealing with a similar argument in *Vilakazi* this court said:

[O]nce it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided".

Thus the appellant 's argument on this score cannot be upheld".

[33] In *casu* the appellant steadfastly maintained that he was innocent even in the face of overwhelming evidence against him. He did not show any remorse. He subjected the complainant to the agony, pain and indignity of rape. The age of the complainant when she was raped, her vulnerability coupled with her immaturity and the type of injuries she sustained both on the vagina and anus render this rape, (although appellant was convicted of a single count), horrendous and a dreadful one. The fact that she sustained some old scars as evident from the J88, possibly from the previous rape encounters, underlines this fact. This constitute deflowering in a gross and brutal manner.

[34] For all the foregoing, I am not persuaded that the trial court below erred in its conclusion that substantial and compelling circumstances were absent. To come to a contrary decision in this matter would constitute a failure to heed the caution in **S v Malgas 2001 (1) SACR 469 (SCA)** that the "specified sentences are not to be departed from lightly or for flimsy reasons" and that "speculative hypothesis

favourable to the offender, undue sympathy, aversion to imprisoning first offenders" ……. are to be excluded. See: Kwanampe case referred to above. See also: **S v Matyityi 2011 (1) SACR 40 (SCA)**.

ORDER

[35] Consequently the following order is made:-

35.1 The appeal against both the conviction and the sentence thereof is dismissed.

35.2 The conviction and sentence are confirmed.

_____
A M KGOELE
JUDGE OF THE HIGH COURT

I agree

_____
R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	MAFIKENG JUSTICE CENTRE
FOR THE RESPONDENT	:	STATE ATTORNEY