Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 076/14

In the matter between:

A[…] E[…] K[…] **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *K[…] v The State* (076/14) [2014] ZASCA 136 (25 September 2014)

Coram: **Brand and Mbha JJA and Mathopo AJA**

Heard: **9 September 2014**

Delivered: **25 September 2014**

Summary: Rape of daughters by their father, a police inspector ─ younger daughter falling pregnant ─ pregnancy terminated ─ court finding evidence of complainants clear and satisfactory ─ rejected appellant's version. Sentence of life imprisonment imposed for both counts to run concurrently ─ rape horrendous enough to justify the imposition of the ultimate penalty.

ORDER

On appeal from: Limpopo High Court, Thoyandou (Makgoba AJ sitting as court of first instance):

It is ordered that:

The appeal against the convictions and sentences is dismissed.

JUDGMENT

Mathopo AJA (Brand and Mbha JJA concurring)

[1] The appellant Mr AK, a police inspector, was convicted by the Limpopo High Court, Thohoyandou of two counts of raping his two daughters Ms N and Ms T, during the period 1991 to 2001. By reason of the ages of the complainants at that time each count of rape bore a prescribed minimum sentence of life imprisonment under the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), unless there were substantial and compelling circumstances justifying a more lenient sentence. Makgoba AJ, who heard the matter, concluded that there were no such circumstances and, taking both counts together for the purposes of sentence, imposed life imprisonment. On the 26 April 2002 he mero motu granted leave to appeal to this court against the convictions and sentences.

[2] For reasons that do not emerge clearly from the record, this appeal was prosecuted after 12 years. This court has in many judgments,

especially those emanating from where this appeal comes from, bemoaned the fact that practitioners should guard against inordinate delays which have become rampant and systemic. It would seem that despite repeated warnings by this court, its advice has not been heeded. Such a state of affairs cannot be allowed to continue because such inexplicable delays will make society lose confidence in our courts and innocent persons may unduly or unjustly be incarcerated for a long period of time. Fortunately in this matter, as the analysis of the evidence will show, the appellant did not suffer any injustice.

[3] I now turn to the merits of the appeal. The crucial issue before this court is whether the appellant was correctly convicted of raping his two daughters over a considerable period, and whether the court below should have found that substantial and compelling circumstances existed to justify a lesser sentence. In view of appellant's denial and the allegations that the complainants were influenced by his wife to falsely incriminate him, the facts are relatively straight forward.

[4] The background facts are as follows: Ms N (the first complainant), was a first year student at the University of Venda at the time of the trial. She testified that in 1993 when she was ten years old and during her mother's temporary absence, the appellant called her to his room while she was playing with her friend. He made her sit on his lap, undressed her and inserted his penis into her vagina. She cried during the ordeal, which was her first sexual experience. In order to escape the consequences of his terrible deed, the appellant threatened to assault or kill her if she reported what he had done. The sexual acts continued until 1997. The appellant stopped for a while and then resumed the sexual assaults in 2000. When she protested, the appellant would beat her up. In February

2000 when she was sharing a room with her younger sister, Ms T, the appellant came to their bedroom and shared a bed with them. He later pulled Ms N down to the floor and raped her. When she resisted, the appellant assaulted her. After raping Ms N, the appellant then pulled her younger sister Ms T down and also raped her. She did not know at that stage that the appellant had been sexually molesting her younger sister as well. She testified that seeing the appellant raping her younger sister was emotionally distressing for her. She did not discuss the incident involving, her younger sister with anyone because of the threats by the appellant.

[5] On 10 November 2001, when the first complainant was busy with her school examinations, the appellant instructed her not to lock her door during the night. She did not obey his instructions. The appellant forcefully knocked on the door until Ms N opened for him. Upon entering the room, the appellant pulled her outside the room, beat her up and ordered her not to lock the door again. A few minutes, later he returned and found her crying and then raped her. This was the last time she was sexually penetrated by the appellant. She explained, that during the ordeal her vagina would be torn, rendering her unable to walk properly. Instead of assisting her and stopping with his unlawful activities, the appellant instructed her to walk properly and not to draw other people's attention to the fact that there was something amiss with her. It was her evidence that the appellant would rape her even when she was menstruating. She failed Standard 10 (Grade 12) as a result of the rapes because she could not properly concentrate on her school work. When her mother confronted Ms T about her pregnancy on 24 November 2001, Ms N told her mother that the appellant had raped both her and Ms T.

[6] On 15 December 2001, the appellant confronted Ms N and asked her why she had reported the incidents to her mother. He then instructed her not to close the door of her room, and told her that he would come that night. Ms N then informed her mother and Ms T of this, and her mother instructed her not to comply. When the appellant came at night the door was locked. He then kicked the door open. Thereupon he slapped Ms N with an open hand for refusing to obey his instruction. At that stage and because of the commotion, Ms N's mother came to her aid, but the appellant chased her away. On 16 December 2001, the appellant accused Ms N of causing all the difficulties and pointed a gun to his head, saying that she must watch him kill himself.

[7] In cross-examination, Ms N disputed that she had been influenced by her mother to incriminate the appellant. She reiterated that the reason why she did not tell her mother earlier is that the appellant had threatened to kill her, and that he assaulted her several times when she refused to submit to his sexual advances. During questioning by the court she testified in the appellant's favour that he paid her university fees. Yet she was adamant about the rapes and the threats he had made.

[8] Ms T, who was 16 years old when she testified in court, corroborated the evidence of her sister about the rapes that took place in her presence. According to her evidence, the appellant attempted to rape her when she was six years old in 1991 and still in Sub A (Grade 1). She testified that the appellant had called her to his bedroom and made her sit on his lap, undressed her and tried to insert his penis into her vagina. He could not penetrate her because her vagina was small. She described the ordeal as painful. Thereafter, the appellant had instructed her not to tell her mother or anybody else about what had happened. During early 1996,

the appellant succeeded in penetrating her and after that would rape her at least four times a month. The appellant then stopped, but resumed raping her in June 1996 when she was in Standard 4. During 2001, at a time when she was sharing a bed with her older sister, Ms N, the appellant came to them at night and raped both of them on the floor. The appellant continued raping her until September 2001 when she stopped menstruating. When she told the appellant about this, he promised to take her to the doctor. She confirmed that her mother confronted her on 24 November 2001 about her pregnancy. Because of the appellant's threats she refused to disclose that her father had impregnated her, until Ms N told her mother that the appellant was responsible. Ms T confirmed that her pregnancy was terminated on 30 November 2001. She also corroborated her sister's evidence about the appellant's visit on the 15 December 2001. In cross-examination she testified that, although she could not remember how many times the appellant had raped her, she was emphatic that from 1996 the appellant would rape her on a weekly basis. She disputed the allegation that she was influenced by her mother to incriminate the appellant and stated that the appellant threatened to kill her if she told anybody about the rapes.

[9] The doctor who examined the complainants came to the conclusion that there was indeed sexual penetration. In the Form J88 there is annotation by the doctor that the nature of the complainants' injuries is consistent with sexual assault.

[10] Ms K, the mother of the complainants and wife of the appellant, testified that on 24 November 2001 she observed that her daughter, Ms T, appeared to be pregnant. She confronted her and the latter denied it. She then asked Ms T whether she had a boyfriend or not. She threatened to

assault her with a belt. At that stage Ms N came to her rescue and told her mother that it was the appellant who had impregnated Ms T, and that he had raped her repeatedly as well. Ms K confronted the appellant who admitted his guilt and asked for forgiveness. The complainants were called into the main bedroom and in the presence of Ms K, the appellant repeated his admission that he had raped them and asked for their forgiveness. Ms K and the appellant then decided that Ms T should undergo an abortion and that the pregnancy should be kept a secret from other family members, and also not to report the rapes to the police.

[11] Under cross-examination, Ms K conceded that her marriage to the appellant was not a happy one, and admitted to having had an extra-marital affair, but emphatically denied the suggestion that she had influenced the complainants to falsely implicate the appellant. She conceded that she had never noticed anything abnormal or untoward with the children, until 24 November 2001. Ms K confirmed that on 30 November 2001 she attended at Dr Mutshembele's rooms with Ms T and the doctor terminated the pregnancy. Lastly, she testified that the appellant chased them from their home on 15 December 2001, and her pastor then advised her to report the matter to the police.

[12] Dr Mutshembele corroborated the evidence of Ms K and Ms T about the termination of the pregnancy and confirmed that the appellant came to his rooms later in the afternoon to check whether everything had gone well. According to the doctor, Ms T was about four months pregnant and he had prescribed tablets to terminate her pregnancy. It was successfully terminated on 1 December 2001.

[13] In his defence, the appellant denied all the allegations against him and called several witnesses, mostly his family relations, to support his case. He described himself as a good and caring father who was always attached to his children, because his wife was constantly away from home. He testified that his wife had influenced them to falsely implicate him because she no longer loved him and had hired assassins to kill him. He also accused his wife of conducting numerous illicit relationships. He denied raping his two daughters and suggested, quite implausibly, that he could not have done so because he normally had sexual intercourse with his girlfriends, when his wife was away from home.

[14] During cross-examination he was asked why he went to the complainants' bedroom on 15 December 2001. He responded by saying that he wanted to check if they had boyfriends in their rooms or not. This is entirely unconvincing. Again, when asked about the menstrual cycles of his daughters, he initially admitted and later changed his version and said he did not know. Confronted with the allegations that he impregnated his younger daughter, he could not offer any reasonable explanation. He also could not explain why he did not ask Ms T who had impregnated her. The reason for his silence is not difficult to understand. The appellant's witnesses misguidedly gave evidence that because the complainants had not reported the rapes to them, the rapes had not occurred. The trial court rightly regarded their evidence as unhelpful.

[15] In this court, the main thrust of the appellant's contention was that he suffered prejudice by reason of the admission of the evidence of the complainants, which ought not to have been admitted because the complainants were influenced by their mother to report the alleged rapes which they would otherwise not have reported. In support of his

submission, counsel for the appellant relied on the case of *S* v *T*.[1] He argued further that because the complaints were not voluntarily made but induced by the fear of assaults or threats, their admission as evidence should be rejected. In support of this argument he relied on the case of *S* v *Khorommbi*.[2] Reliance on these cases is misplaced. On the evidence of the State's witnesses together with other corroborative evidence, there are many serious inherent improbabilities in the appellant's evidence, which I will deal with later.

[16] I accept, as this court did in *Maseti* v *S*,[3] that an accused who claims to have been falsely accused is under no obligation to explain the motives of his accusers, and should not be asked to do so as there is no onus on him to convince the court. Where an accused proffers a reason for the accuser's motives, as in this case, such alleged motives must be analysed together with all the evidence given by the accusers. If, after all the evidence has been thoroughly examined, the trier of fact is convinced that there is no basis for imputing the false accusation on the accuser, the next enquiry is to establish whether the State has proved the guilt of the accused beyond reasonable doubt. In the present matter, the trial judge conducted a proper assessment and analysis of the evidence by, amongst other things, weighing the strengths and the weaknesses of the State's case as opposed to that of the appellant, including the probabilities and improbabilities of both versions. The judge correctly rejected the appellant's evidence. See *S v Van der Meyden*.[4]

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[1] *S v T* 1963 (1) SA 484 (A).
[2] *S v Khorommbi* 2013 JDR 2710 (SCA).
[3] *Maseti v S* 2014 (2) SACR 23 (SCA) paras 24-27.
[4] *S v Van der Meyden* 1999 (1) SACR 447 (W).

[17] The evidence of the appellant is inconsistent and improbable in various respects. He denied raping his two daughters. When confronted with the allegations that he impregnated his younger daughter, and arranged for the termination of her pregnancy with Dr Mutshembele, he denied the allegations in spite of the overwhelming evidence against him. He blamed their mother and suggested that she had influenced them to falsely incriminate him. This was clearly an attempt to deflect the allegations against him on flimsy grounds.

[18] The complainants were extensively cross examined during the trial and they did not lose focus when recounting the details of how they were raped by the appellant. The trial judge took into account the tender ages of the complainants when the rapes were committed, and carefully dealt with the inconsistencies in their evidence, which were not material. He commented favourably on their demeanour, a finding which an appeal court is slow to interfere (*R* v *Dhlumayo & another*[5]). A perusal of the evidence of the complainants confirms the findings of the trial judge that the complainants were good witnesses who satisfied the cautionary rules relating to the evidence of young witnesses and single witnesses.

[19] The following aspects of the evidence are destructive to the appellant's credibility and reliability as a witness: the first and the most damning evidence against the appellant is that he raped the complainants separately and in the presence of one another over a long period of time. They corroborated each other in all material respects regarding the instances when the appellant came to their room and raped them on the floor. Secondly, the complainants described in graphic detail how he raped them and were able to give accurate and consistent evidence with

[5] *R v Dhlumayo & another* 1948 (2) SA 677 (A).

regard to the number of times and years that the rapes took place. Thirdly, the appellant threatened to kill or assault them should they report the rapes. When the complainants mother confronted Ms T about her pregnancy she was therefore reluctant to tell her the identity of the perpetrator until her sister, Ms N, did so. Fourthly, the fact that Ms T fell pregnant as a result of the rapes, that the appellant admitted that he was responsible and that he arranged for the termination of the pregnancy makes his denial of the rapes utterly unconvincing. Finally, the evidence of Dr Mutshembele that the appellant consulted with him two days before to arrange for the termination of the pregnancy and then came back to enquire whether it had been successful, is another factor indicative of the falsity the appellant's denial of guilt.

[20] The reprehensibility of the appellant's conduct, is exacerbated by the fact that a few weeks after he had apologised and had Ms T's pregnancy terminated, he instructed Ms N not to lock the door. Clearly he was unrepentant and wanted to continue with his heinous activities. His evidence that he went to their rooms to check if they had boyfriends or not was an afterthought and was correctly rejected by the trial court.

[21] In the light of the findings of the trial judge on the reliability of the complainants and their mother, I am satisfied that the evidence of sexual penetration found by the doctor was compatible with the complainants' evidence. This evidence cannot be reconciled with the version of the appellant that he did not rape them. I am also satisfied that, on the test set out in *S* v *Sauls*,[6] the truth was told by the complainants as to the various incidents of rape by the appellant. Accordingly there is no merit in the appeal against the convictions and it must fail.

[6] *S v Sauls* 1981 (3) SA 172 (A) at 180E.

[22] In this court the sentence was attacked on two grounds. Firstly, that the court below applied the provisions of the Act without prior warning to the appellant, and thus that the trial court erred in applying the provisions of the Act. Secondly, the trial court should have found that substantial and compelling circumstances existed to justify a departure from the Act and impose a lesser sentence.

[23] Dealing solely with the offences, there is no doubt that the rapes had a serious effect on the complainants. What is more aggravating is the fact that the rapes were committed by their father in the sanctity of their own home, where they ought to be safe. The rapes were committed over a long period of time when they were still young and immature. The appellant abused his position of trust. The complainants looked to him for protection and guidance. As a result of the rapes, the trial judge correctly remarked that the complainants' future has been ruined. Their whole life is in tatters. Ms T fell pregnant as a result thereof. She endured the humiliation and pain of having the pregnancy terminated. This must have been emotionally devastating. The fact that the appellant stood in a father and daughter relationship makes his offences more serious. He preyed on his daughters' weaknesses because they were young, defenceless and vulnerable. He threatened to kill them if they divulged his nefarious deeds.

[24] The evidence reveals that after the appellant asked for forgiveness, the complainants and their mother forgave him and were prepared to not report the matter to the police. Sadly for them, the appellant was unrepentant because shortly thereafter he went to the complainants' room under false pretences, wanting to continue with his unlawful activities.

This is aggravating in the extreme. Cameron JA described the rape of a minor by her father eloquently as follows in *S v Abrahams*:[7]

'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 a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.'

Later in the judgment (para 23) Cameron JA proceeds to say:

'Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes.'

Importantly, in para 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 (I exclude foster and step-parents, and rapists further removed in family lineage from their 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.'

[25] It cannot be denied that the rape of young girls by their father is not only scandalous but morally reprehensible. Rape is undeniably a despicable crime. In *N v T*[8] it was described as 'a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In *S v Chapman*[9] this court said it is 'a humiliating, degrading and virtual invasion of the privacy, the dignity and the person of the victim'. Its gravity in this case is aggravated by the fact that the victims were 10 and 6 years respectively when the appellant

[7] *S v Abrahams* 2002 (1) SACR 116 (SCA) para 17.
[8] *N v T* 1994 (1) SA 862(C) at 864G.
[9] *S v Chapman* 1997 (2) SACR 3 (SCA).

commenced with his unlawful activities. In *S v Jansen*[10] rape of a child was said to be 'an appalling and perverse abuse of male power'. The court there went on to say:

'It is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background . . . and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer the added psychological trauma which resulted in a marked change of attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.

It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

The appellant showed no remorse for his actions and persisted in his innocence and subjected the complainants to the nightmare of the trial. This experience was traumatic. It cannot be disputed that the impact is both devastating and far-reaching. The complainants will be left with permanent emotional scars for the rest of their lives.

[26] The appellant did not testify and inexplicably his counsel did not address the court in mitigation of sentence nor adduced any evidence aimed at establishing whether substantial and compelling circumstances existed to justify a departure from the prescribed sentence. It also does not appear from the record that the trial judge ascertained what may constitute mitigating factors or substantial and compelling circumstances.

[10] *S v Jansen* 1999 (2) SACR 368 (C) at 378h-379a.

[27] The reluctance on the part of the appellant and his counsel to adduce evidence to assist the court in establishing whether substantial and compelling circumstances existed to justify the imposition of a lesser sentence could have occurred as a result of the appellant having realised that the evidence against him was overwhelming and that it would be futile to attempt to convince the court otherwise. This is the choice that the appellant made and it is also not without consequences. As a result of the strategy adopted by the appellant in the court below, there were no facts placed before the trial court to determine what constitutes mitigation and/or substantial and compelling circumstances.

[28] Regarding the trial court's alleged failure to forewarn the appellant of the applicability of the Act, counsel for the State rightly contended that the appellant was legally represented and he ought to have been aware of the provisions of the Act. This is because during the sentencing stage, his counsel alluded to the provisions of the Act. In my view the provisions of the Act were clearly brought to the attention of the appellant and he clearly conducted his case fully aware that upon conviction the minimum sentence would be applicable to him. See *S* v *Ndlovu*.[11] In this court counsel for the appellant conceded correctly in my view that the provisions of the Act are applicable. His argument that the trial court should have found that substantial and compelling circumstances existed is not supported by any evidence due to the appellant's reluctance to adduce any such evidence. As a result of that approach, the trial judge had no option but to apply the provisions of the Act and not deviate therefrom for flimsy reasons. See *S* v *Malgas*[12] and *S* v *Matyityi.*[13]

[11] *S v Ndlovu* 2003 (1) SACR 331 (SCA).
[12] *S v Malgas* 2001 (2) SA 1222 (SCA).
[13] *S v Matyityi* 2011 (1) SACR 40 (SCA).

[29] The sentence was undoubtedly one befitting the crimes committed by the appellant. The most aggravating feature of this matter is that the appellant raped his own children over a long period of time. He knew that his actions were wrong and dastardly. Even when he was afforded an opportunity by his wife to make amends, he again attempted to rape Ms N. I am mindful of there being different reasons for an accused to deny a crime and that such denial does not necessarily indicate lack of remorse. However where the overwhelming evidence points towards his guilt and the accused persists in protesting his innocence, finding of remorse cannot be made. In the present matter the appellant elected not to testify, and the evidence demonstrates that he was unrepentant. In my view there are no prospects that he will be rehabilitated. It follows that the appeal against sentences must also fail.

[30] One final aspect requires comment. After expressing himself emphatically, the trial judge, after sentence, mero motu decided to grant leave to the appellant. It is unclear why the trial judge saw fit to grant leave. As the evidence indicates, leave to appeal was granted inappropriately and this has the result that cases of greater complexity have to compete for a place on the roll with a case which has no merit at all. See *S v Monyane & others*.[14]

[31] The following order is made:
The appeal against the convictions and sentences is dismissed.

R S Mathopo
Acting Judge of Appeal

[14] *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 28.

Appearances

For the Appellant:	M Madima Instructed by: Justice Centre, Thohoyandou
For the Respondent:	R J Makhera Instructed by: Director of Public Prosecutions, Limpopo High Court, Thohoyandou