IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A1354/2002

NOT REPORTABLE **DATE: 26/10/2007**

In the matter between:

CJJ VAN RENSBURG Appellant

and

THE STATE Respondent

JUDGMENT

MURPHY J

1. The appellant was found guilty on 22 May 2003 by the Regional Court in Vereeniging of 2 counts of rape, 2 counts of indecent assault and 3 counts of assault and sentenced to an effective term of 26 years imprisonment. He appeals to this court against both conviction and sentence.

2. The charges arise from a situation of ongoing domestic abuse. The complainants on the charges are the stepdaughter and three daughters of the appellant.

3. The appellant's defence is one of general denial, however he pleaded guilty to the charge of assaulting his stepdaughter, E, (count 2).

4. The first complainant was E K, the appellant's stepdaughter to whom counts 1 (rape) and 2 (assault) relate.

5. E testified that she had been interfered with sexually by the appellant on more than one occasion. However, the main thrust of her testimony related to an incident that took place on 15 January 1997 at Koedoe Avenue, Leeuhof, Vereening. Her testimony in relation to prior incidents, including one at Richmond, is somewhat vague and she was not able to recall it clearly. During cross-examination it emerged that she did indeed allege that she had been raped earlier in Richmond and that in between the rape in Richmond and Vereeninging that she had also been indecently assaulted. However, she conceded that the other occasions were not as serious, because the appellant had not entirely penetrated her. It was the last assault, on 15 January 1997, that bothered her most and was the one that formed the basis of the magistrate's conviction.

6. Her testimony is that on that day her mother went to the shop nearby their home to purchase cigarettes and the like. While the mother was away, the appellant took her from her room and threw her onto the bed in his

bedroom. He lifted up her dress and pushed her underwear aside and penetrated her with his penis. She attempted to resist but was not successful. It is not clear whether the appellant climaxed on this occasion. However, the evidence of E was that he certainly penetrated her. After a short while she was able to leave his bedroom and return to her own bedroom. Not long afterwards the appellant followed her into the room and penetrated her again from behind. On this occasion too he lifted up her dress, pushed her underwear to the side and penetrated her while she was lying face down on the bed.

7. E did not report the rape to her mother immediately after the incident. During her testimony she offered two reasons for this. The first was that she did not wish to hurt her mother and the second that the appellant had threatened her in such a way that she feared she may come to harm if she did so.

8. Not long after the rape incident, the appellant assaulted E. This incident arose out of his disapproval of her relationship with one Kobus Oosthuizen, who seems to have been her boyfriend. The appellant disapproved of the relationship because Oosthuizen was considerably older than the complainant.

9. At some point after the incidents of the rape and the assault, E wrote a letter to Kobus Oosthuizen asking for help because she wished to make a rape case against her stepfather. Oosthuizen took this information to the complainant's natural father, Mr Hermanus K. Mr K testified that he did not directly ask E whether she had been raped by her stepfather, but instead asked simply whether she had written the letter and she had confirmed this to him. Under cross-examination, she added that she had also informed her aunt, "Tannie Mynie". It was these reports that clearly led to the police becoming involved at the instigation of Mr K and Tannie Mynie.

10. During cross-examination the complainant explained that prior to the rape the appellant had said to her that if she had sex with him he would not interfere with her relationship with Kobus Oosthuizen.

11. In cross-examination and in the submissions made on behalf of the appellant, the defence was offered that the time frame did not afford an adequate opportunity for the rape to have occurred. It is common cause that during alleged incident the mother had gone to the local shop. It is further common cause that it took no more than five to ten minutes to walk there and back. The complainant's version is that about a minute after her mother had left, the appellant came into the room, that the sex had lasted

for about five minutes and thereafter, about two minutes later, he came to her room and raped her again, and this incident lasted for three or four minutes. In other words, the defence's case is that the complainant's version indicated that the two events would have taken in total about twelve or thirteen minutes and the mother was only away for five to ten minutes.

12. I am not persuaded that the time frame gives rise to a plausible inference that the rape could not have occurred. None of the witnesses, including the complainant's mother who was charged as a co-accused and testified on her own behalf, was particularly precise about the timing. The events as described by the complainant were of such a nature that they could have occurred in a shorter duration or alternatively the mother may have been away at the shop longer than she thought. The mere fact that the shop was five minutes away does not mean that she was gone that long.

13. The defence also took the point that the testimony of E was unsatisfactory because of certain contradictions and the failure to report the incident immediately to her mother. The contradictions relate to the alleged previous incidents of molestation. At one stage the complainant testified "hy het dit altyd gedoen as ons alleen was". However, her ability to recall the details of the earlier sexual assaults was not entirely satisfactory.

Nevertheless, I am of the view that she offered adequate testimony regarding the events in Vereeninging. As already stated she was reluctant to tell her mother of what had happened out of fear and secondly, because she did not wish to hurt the mother. This would seem to be a normal response in young sexual assault victims. Additionally, the incidents that took place at Richmond occurred when she was considerably younger and her inability to recall the details of them could be a natural consequence of her obviously conflicted feelings about what had transpired.

14. I agree with the learned magistrate that these contradictions, if indeed that, were not material. If anything one is struck by the consistency with which E gave evidence and how she remained unshaken in cross-examination. Moreover, it is clear from her testimony that she felt a sense of shame and hoped that the molestation would cease after time and that she felt powerless to do anything about it.

15. The medical evidence established that E was no longer a virgin in that her hymen had been perforated. There was some suggestion that she was independently sexually active with Oosthuizen, although she denied this and the magistrate correctly ruled she could not be examined on her previous sexual relationships.

16. The medical evidence further established that on 17 January 1997, two days after the alleged incident, there was red inflammation around the hymen.

17. At the time of the incident, E K was fifteen years old.

18. The second complainant, J J v R, is the biological daughter of the appellant. She testified that the appellant interfered with her sexually on a number of occasions. The first occasion she alleged took place at Richmond when she was ten years old. The second occasion at Vryheid Monument when she was eleven years old, and the third occasion at Kodoe Avenue Vereeninging when she was twelve years old on 14 January 1997.

19. J's evidence is also lacking in some detail in relation to the earlier incidents. She openly conceded that she could not remember precisely what had in fact happened on the earlier occasions. However, she gave the unsolicited evidence: "hy het sy verkeerde plek in myne gedruk". She too testified that her father threatened her with violence and death if she were to inform anybody about what had happened. When asked whether she believed that he could harm her, she replied spontaneously: "ek het nie gedink my pa is so 'n vark nie". She too described how her father

removed her underwear and his own underwear and lay on top of her. It is not clear from the evidence whether he in fact penetrated her on the earlier occasions at Richmond and Vryheid Monument. On the third occasion the complainant's mother and younger sisters had gone to the park and she was left alone with the appellant at home. She described how he touched her breasts and her private parts and how she put up some resistance but he persisted nonetheless. He then threw her on the bed and tied her to the bed in her own room. She could not remember what was used to tie her hands to the headboard, but maintained that he did this and did likewise with her feet. Once he had secured her in this way he removed her underwear and mounted her. She then described how he went up and down on her. Her evidence was to the effect that the appellant placed his penis "bo op my verkeerde plek". When asked whether she meant "bo op die klere", she replied in the affirmative. She did not witness her father ejaculate. Once again on this occasion, he threatened her with violence should she tell anyone.

20. With regard to the earlier incidents involving J, as I have indicated, she had little recall of what happened on the first occasion in Richmond. With regard to the second in Vryheid Monument it seems the appellant was interrupted in that J testified that while he wanted to put his "verkeerde plek" in her private parts, the mother arrived before he was able to do so.

Later in her testimony when describing the third incident, she said that she did not bleed but had bled on the second occasion. This testimony is inconsistent with her description of her mother interrupting the second occasion.

21. J was also medically examined on 17 January 1997, that is a few days after the third occasion. Her genitals reflected some inflammation. While the labia majora were normal, the labia minora were red and swollen. Nevertheless, the hymen was not torn and was intact although it was red around the edges. Doctor Kuhne testified that the redness around the hymen plus the abrasion of the fouchette were consistent with an attempt at penetration, even though penetration had not completely occurred. When asked whether the medical examination ruled out the possibility of penetration, doctor Kuhne replied:

> "Penetrasie deur die hymen, so erg dat die hymen geskeur is is uitgesluit. Maar 'n mate van penetrasie vind tog plaas, want as daar rekking van die hymen plaasvind wat dan die rooiheid op die rant aanteken soos ek dit hier gedoen het, wys dan 'n taamlike spanning op daardie area en dan 'n inbulting in die voorhof in."

22. She thus was of the view that penetration had in fact occurred even though the hymen remains intact. This evidence is consistent with J's spontaneous statement that the appellant "het sy verkeerde plek in myne

gedruk".

23. With regard to the charge of assault on J, count 4, J testified to an occasion on which her father was assaulting both her mother and her sister with his fists and she became involved in the fracas. During the incident the appellant struck her on her back with a knife. It seems the handle of the knife was used. This incident was confirmed in the testimony of her two younger sisters L and R. The medical evidence confirmed that there was bruising on the left part of the back in the scapula area.

24. The appellant denied all the alleged incidents of rape and assault. Beyond his denial he drew attention to the fact that there was no mention of the incidents at Richmond in her statement to the police. During cross-examination J stated that she had in fact informed the police of the earlier incidents.

25. Certain of J's statements during her testimony, mostly offered spontaneously, have a bearing upon her credibility. Thus when asked during cross-examination how she remained convinced of the truth of what she alleged, she replied:

"Ek weet wat is die waarheid want ek het in my kop gekom. En wat met my gebeur het bly nou nog steeds by my. Hulle kan maar die kinders ook vra en alles wat verby my gekom het en, ek kan dit nie vergeet nie."

26. When asked to explain why she was afraid of her father, she said:

"Omdat hy dagga en drank gedrink het en dan word hy van sy kop af en dan begin hy die mense te slaan en dit."

27. Later when it was put to her that her parents would deny the incidents she replied:

"Ek weet dit het gebeur. Ek sal getuig tot my dood oor is."

28. Later she said:

"My pa het my gelol en hulle kan getuig wat hulle doen, maar ek weet wat is die waarheid en Here weet wat is die waarheid. Eendag sal hulle in die hel brand, nie ek nie."

29. And finally when questioned about the conflict regarding Kobus Oosthuizen that took place on 14 January she replied:

"Ek weet niks van Kobus en E af nie. Niks. Dit is al wat my pa gedoen het,

my pa wil dat ons, hy het gesê vir ons as ons manne eendag, as wil trou moet ons eers saam met hom slaap. Dit is wat hy vir ons gesê het."

30. What we witness here is the spontaneous and compelling anger of a deeply aggrieved 14 year old girl, who, I suspect as a consequence of the abuse she has endured, had by then acquired a wisdom beyond her years, and a heart-rendering insight into the lesser nature of her father. Underlying that anger there is an apparent abiding fear and shame, as well as the need to reclaim her dignity, to cleanse herself from the wrongdoing inflicted upon her, by the simple, yet invariably effective expedient of telling the truth. The tone, content and spontaneous nature of her testimony, leave me with no doubt at all that this intelligent but sadly damaged young woman was abused by her father. She gave voice to her anger and shameful disappointment with conviction and candour. Any doubt created by inconsistencies or contradictions about the details is totally vanquished by her adamant determination to speak the truth. Her credibility and reliability are beyond question.

31. The strength, reliability and credibility of her testimony thus add credence to that offered by her stepsister E about a pattern of abuse that was ongoing in their family home.

32. The remaining charges relate to incidents involving the two younger daughters of the family L and R, also referred to as K.

33. L testified that she was sexually molested on one occasion when she was about 9 years old. She could not recall the exact date of the incident. She alleged that she was together with her parents and younger sister in one bed and was lying next to her father. She says that the light was already switched off when the appellant put his hand into her panties and touched her private parts. She immediately took away his hand and got out of bed and went to sleep with her other sister. She told her mother the following day about the incident. Her mother informed her that she should not be worried and said there is nothing they could do about it. It is clear from the evidence that the child understood that her mother was afraid of the appellant. There is some inconsistency as to when L told her mother about the incident. Initially she testified that she told her mother the following morning. Later she said that she told her mother in the evening. I am not persuaded that this is a material inconsistency, especially in view of the fact that the other elements of the child's evidence remain consistent. Thus during questioning she was consistent as to the fact that her mother told her not to worry about what had happened and said that her father would one day end up in prison. It was only the timing of the conversation between herself and her mother which was inconsistent.

Such a lapse is understandable in the testimony of a young child.

34. The fourth complainant Rika Johanna J v R testified that she remembered that the appellant had done certain things to her. She testified that on more than one occasion the appellant would put his hand into her panties and touch her private parts. When asked to describe precisely what he had done, she replied:

> "Hy het net sy hand in my privaat plek gedruk en hom uitgehaal."

When asked:

> "As hy sy hand daar ingedruk het, het hy iets gedoen by jou privaat plek?"

She answered:

> "Nee hy het hom net ingedruk en sy hand uitgehaal weer."

She was unable to remember how many times it happened and she could also not remember very well whether it happened during the day or the night. She testified that she told her mother about her father doing this to her on the last occasion on which it happened. From this it may reasonably be inferred that it happened on more than one occasion. She

also testified that her parents had a fight about what her father had done but was unable to give any details other that to say that her mother screamed at the father.

35. With regard to the various assaults on the complainants Rika testified that her father had given her a hiding with a belt one day when she was playing and making a noise in the house while her parents were trying to sleep. She also confirmed the assault on J, by testifying that the appellant had hit J on the back with the handle of a knife. She also stated that her father had broken her mother's ribs during one assault.

36. The medical evidence was inconclusive in relation to Rika. There was no evidence of sexual molestation or any assaults. The only testimony with regard to an assault upon her was as follows. When asked by the prosecutor if her father had ever hurt her she replied:

> "Net partykeer, maar hy het my nooit deur my gesig geslaan nie. Hy het ons net partykeer met die belt geslaan want partykeer as hulle wil gaan slaap… want een Sondagmiddag hy wou gaan slaap het, hy en my ma, en toe maak ons 'n lawaai en toe kom hy hy daar in en toe gee hy ons 'n pak met die belt."

37. Under cross-examination she was asked whether her father usually hit her on the back. She replied as follows:

"Net party - nee, hy het my net partykeer op my, hy het my net partykeer pak gegee op die belt. Hy het my nooit op my rug geslaan nie."

38. As I have said, the appellant denied all charges against him and claimed that his former wife, Mynie J v R ("Tannie Mynie") sought to falsely implicate him. He also pointed to certain inconsistencies in the letter written to E to Kobus Oosthuizen, stating that it had been written prior to the alleged rape and that the letter was not written in E's handwriting. He testified that J, the second complainant, had also lied because there was no headboard to the bed where she claimed he had tied her hands.

The complainant's mother also testified. With regard to E she testified that there was no reason why the child should not have told her of any incidents had they occurred. She stated that J was a child that made up stories and further that the two young children L and Rika had not told her that the appellant had molested them. The first she heard of any untoward incidents was when the Children's Protection Unit arrived at her home. She added her voice in support of her husband's claim that his former wife was trying to falsely implicate him. She further confirmed that there were no headboards to the beds in the children's bedroom.

39. Two other witnesses testified on behalf of the defence, namely the appellant's eldest daughter from his previous marriage, Elizabeth Susanna Erasmus, and his sister Elizabeth Susanna Black. In my opinion their evidence does not take the matter much further. Both simply testified to the effect that they had not been molested by the appellant despite having lived with him at various stages of his life. The appellant's eldest daughter in fact had initially incriminated the appellant by making a statement to the police that she too had been molested by him in the past. However, she changed her evidence stating that what was recorded in her statement was that which her mother had told her about her father having molested her when she was about 4 or 5 years old. As I have indicated though, I do not consider that the testimony of either of these witnesses adds much.

40. The magistrate found the appellant guilty of the rape of E K, the rape of J and the indecent assault of L and Rika. In view of the guilty plea in respect of the assault on E he likewise found the appellant guilty of assault on E. He also returned a verdict of guilty of assault on Rika, but a verdict of not guilty in respect of the assault of L.

41. With regard to the conviction on the charge of the rape of E K, I agree with the magistrate that the first complainant was a good witness and that her evidence is largely supported by the medical evidence and that of her

sisters. The evidence of the letter to Kobus Oosthuizen is of obvious relevance. Admittedly there appears to be some inconsistency in the handwriting of that letter and other letters written by E which form part of the record. Be that as it may, the evidence of Hermanus K is of particular importance in that he was informed by Oosthuizen of the letter alleging rape and he confirmed this with E by enquiring whether the content of the letter was true or not.

42. Moreover, what is perhaps most compelling is the fact that all four complainants testified consistently as to a pattern of abuse of one kind or another inflicted upon them by the appellant. Given the pattern of abuse, the testimony of Hermanus K and the medical evidence together with the clear and consistent nature of E K's evidence, I am satisfied that the rape did indeed occur.

43. With regard to the count of rape involving J J v R, as I have already indicated, like the magistrate I am persuaded that she was an honest and credible witness. Her evidence is supported by the evidence of the other witnesses regarding the pattern of abuse. The adamant manner in which she gave her evidence lends considerable support to her credibility. The medical evidence also supports her claim. The question though is whether the penetration was of such a nature as to constitute the crime of

rape. At various times during her testimony, J gave the impression that the appellant merely rubbed his genitals or on the outer part of her genitals on top of her clothing. At other times though she directly stated that he had inserted his penis into her private parts. This is consistent with the medical evidence which suggests that there was some attempt at penetration or a lesser form of penetration into the mouth of the vagina which did not result in the perforation of the hymen. Such, in the opinion of the doctor, was tantamount to penetration even though it was not full penetration. The learned magistrate accepted this evidence and concluded, correctly in my view, that the penetration was of such a nature as to constitute rape, despite the hymen remaining intact.

44. With regard to the indecent assault of L and Rika there was an air of spontaneity about both children's evidence which convincingly points to a pattern of a lesser form of abuse in the form of touching the private parts of these younger children. The evidence does not go so far as to indicate that the appellant penetrated them with his finger. The evidence of L was persuasive and credible particularly on account of consistency of her evidence in chief with that under cross-examination on the question of the conversation she had with her mother. The mother's evidence on the contrary is less credible and in my opinion ought to be rejected on the basis that she obviously was significantly under the influence of the

appellant and sought to exculpate him, insofar as it was possible. By contrast, the younger children did not in any way exaggerate the indecent assaults and were almost reluctant in giving their testimony. They did not exaggerate the assaults in any way and were clearly saddened and conflicted by being called on to testified as they were.

45. With regard to count 8 the charge of assault on Rika, I am not persuaded that the State discharged its onus beyond a reasonable doubt. The only testimony is that the children received a hiding as a result of their misbehaviour on a single occasion. The details of this incident are not clearly spelt out in the testimony and it may be that the appellant merely administered reasonable chastisement in his position as a parent. Unfortunately this aspect was not canvassed during his testimony. Nevertheless, I am of the view that he should be given the benefit of the doubt and should be acquitted on this charge by reason of there being insufficient evidence to sustain it.

46. Accordingly, in the light of all the evidence, I am persuaded that the State has discharged its onus to prove beyond a reasonable doubt the charges of rape and indecent assault against the four complainants. Given the reluctance of the younger complainants, the shameful anger of J and E, the medical evidence and the report to and ultimate involvement of

Hermanus K in reporting the matter, I am satisfied that the offences were committed and that the evidence as such was reliable and credible to the extent of justifying a conviction on the four charges.

47. Turning to the question of sentence, these offences were committed at a time when the prescribed minimum sentence legislation was not in operation. Under the legislation the rape charges would have invited a sentence of life imprisonment unless substantial and compelling circumstances were present. The sentence of 10 years imprisonment on each of these counts thus appears to be in order. They take account of the fact that the appellant at the time of sentencing was 53 years old and had no previous convictions. The sentences of 3 years each in respect of the charges of indecent assault, given that these assaults were most likely part of a grooming process engaged in by the appellant in fulfillment of his paedophilic tendencies, are also in order. The sentence of 6 months imprisonment in respect of the assault on E is also sound. There was some debate as to whether the assault was inflicted with a fist or an open hand. In my opinion, in either event the sentence of 6 months imprisonment seems appropriate by virtue of the fact that the assault resulted in bruising and bleeding, was done in the presence of the other children and was one of an older strong man upon a young helpless girl.

48. The learned magistrate erred in his calculation of the sentence in that he stated it to be an effective sentence of 26 years imprisonment. In fact the sentence he handed down was one of 26 years and 9 months imprisonment. However, I am of the view that the magistrate failed to take sufficient account of the cumulative effect of the sentences on a man as old as the appellant. Imprisonment of 26 years imposed upon a 53 year old man is a damning sentence leaving little hope for any prospect of rehabilitation. Admittedly, the offences are serious and deserve to be severely punished. However, sentencing should not aim at the total destruction of an individual and should leave some prospect of hope for the offender, especially when as in this case he is a first offender. For that reason the sentence of the magistrate is disproportionate and unreasonable and should be substituted with one in which parts of the sentence run concurrently.

49. For the foregoing reasons, the appeal partly succeeds and the following orders are accordingly issued.

1. The conviction and sentences of the magistrate are varied and substituted with the following.

2. The appellant is found guilty on counts 1, 2, 3,4,5 and 7. The

appellant is found not guilty on counts 6, 8 and 9.

3. The following sentences are imposed:

i. On count 1, the charge of rape of E K, the appellant is sentenced to 10 years imprisonment.

ii. On count 2, the charge of assault of E K, the appellant is sentenced to 6 months imprisonment.

iii. On count 3, the charge of the rape of J J v R, the appellant is sentenced to 10 years imprisonment.

iv. On count 4, the charge of assault of J J v R, the appellant is sentenced to 3 months imprisonment.

v. On count 5, the charge of indecent assault of L J v R, the appellant is sentenced to 3 years imprisonment.

vi. On count 7, the charge of indecent assault of Rika J v R, the appellant is sentenced to 3 years imprisonment.

vii. It is ordered that the sentences on counts 2, 4, 5 and 7 will run concurrently with the sentences on counts 1 and 3 with the result that the accused is sentenced to an effective term of 20 years imprisonment, such sentence to run from 14 December 2000, being the date of the magistrate's judgment.

JR MURPHY

JUDGE OF THE HIGH COURT

I agree

TM MAKGOKA

ACTING JUDGE OF THE HIGH COURT