**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

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**Case number: A287/2015**

**In the matter between:**

**BOPAPE, JOHN MALESELA** **Appellant**

**And**

**THE STATE** **Respondent**

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**JUDGMENT**

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**SATCHWELL J:**

**INTRODUCTION**

1. This is an appeal from the Alexandria court against conviction on one count of attempted rape (competent conviction on count one being a charge of rape) and one count of rape (count 3), both assaults being perpetrated upon two girls aged 12 and 10.
2. The dispute on conviction is narrowly framed. It is common cause that the appellant, a security patrol driver, gave the two girls a lift in his security vehicle. They have both claimed that he threatened them and thereby lured them into the vehicle, where he raped both of them. His statement in support of a bail application is that he merely drove them around because they refused to pay him for the lift which he had given them. The issue for decision is whether or not anything untoward happened in the security vehicle.

3. Essentially the two complainants told the same story. Interestingly, it was neither word for word identical nor did it concentrate on the same aspects of events. The story emerged in a different format and a different chronological order. This suggests that there had not been collusion nor preparation between them.

4. In short, a twelve year old and a ten year old had gone to the shops in Midrand to the Spar. On their return, they were confronted by a man dressed in security clothes driving in a security vehicle, who alleged that they were guilty of theft and ordered them into his vehicle.

5. Once inside the security vehicle, the vehicle was driven into the bushes. The security official ordered them to remove their underpants. He then removed his security or 'protective' clothing or the 'clothes he wore to protect himself'. He then ordered the twelve year old to lie above the ten year old, open her legs and he penetrated her vagina with his penis. This was, she says painful and she was crying. He then ordered the ten year old to lie above the twelve year old and he raped her. He also ordered the ten year old to open her mouth and placed his tongue (not his penis) inside. All this happened inside the security vehicle.

6. Thereafter, the driver dressed himself in his work clothes. He threatened the girls in a number of ways, including that he would shoot them with his firearm. He dropped them off. The ten year old made an immediate report to her parents and a few minutes later the twelve year old did so as well.

7. The SAPS were called. Patrolling vehicles of the particular firm were called. One by one the members on patrol were called into the house. Both girls identified the third

driver who appeared. He is the appellant. Members of the SAPS were present as were the parents and they all confirmed this identification.

8. In addition, the ten year old had stated to the SAPS that the rapist had been wearing boxer shorts of a greyish maroon colour with dots. A member of the SAPS, Constable Segwane, instructed the suspect to undress at the SAPS cells and found him to be wearing greyish underpants which in his statement he described as "maroon and grey" and on which it had maroon blocks.

9. There was no DNA evidence linking the appellant with the rapes of these two girls. The medical examination conducted at the time confirmed discharge from the vulva, bruising in a number of areas and a perforated hymen of the 10 year old. The medical conclusion was that the injuries were "consistent with sexual assault" upon her. In respect of the 12 year old, the medical examination found only a yellowish discharge on her vulva.

10. The appellant, who was represented throughout, elected not to give evidence. The implications of exercising one's right to silence in the face of such *prima facie* evidence has been detailed in a number of cases not least *S v Boesak* 2001 (1) SACR 1 (CC).

**COUNT ONE**

11. The charge sheet in respect of count one is framed as the crime of 'RAPE' in that the accused committed "an act of sexual penetration with the complainant, to wit, [P……..] [M……..] by inserting his penis inside her vagina". When the charges were put and the appellant pleaded there was no reference to the details of the charges on the record. The learned magistrate commenced his judgment on conviction by referring to count 1 as "rape".

12. It is in this context that I note that on the charge sheet in respect of count one, three letters "att" were inserted in manuscript writing before the heading "Rape" which suggests that there may have been an intention to only charge the appellant with attempted rape. However, the repeated use of the word 'rape' without any reference to 'attempted' and the details of 'sexual penetration' and 'inserting his penis inside her vagina' indicate that the charge was always one of rape and not attempted rape.

13. However, the learned magistrate did not find the appellant guilty of rape of [P…..] but only of attempted rape. His reasoning (set out at pages 129 and 130) was that "his penis was near her or on top of her. It appears it did not touch". But this is not the evidence led by any witness on this count. The learned magistrate misrecorded

the evidence and so misdirected himself in this regard. Accordingly, as I shall indicate below, the conviction of the appellant on count 1 on the lesser charge of attempted rape must be set aside.

14. This court must consider all the evidence before us in respect of count 1 – the alleged rape of 12 year old [P…….]. It may be summarised as follows:

    a. Firstly, it is common cause that both the girls were in the appellant's vehicle, for some time They account for the time spent in the vehicle as occasioned by their rapes, while appellant (in paragraph 11 of his bail application) simply stated that he was 'threatening' them by driving around.
    b. Secondly, [P……..] gave evidence that appellant told her to "sleep on top of [M……..] and open my legs. He then took off his clothes. He then inserted his penis inside my vagina and he started moving up and down. I then cried. It was painful [when he inserted his penis inside my vagina]. He was moving up and down on top of me and I was crying so I did not count as to how many times" (pages 78 and 79 of the Record).
    c. Thirdly, [M…….] gave evidence in corroboration of that which had happened to [P…….]. She said that "[a]fter he had taken off his clothes then he instructed [P……..] to put her hands between her legs. Then he took off his clothes and then inserted his penis inside [P…….'s] vagina. He then instructed her to put her legs on top of my legs and instructed [P……] to open her legs and then he inserted his penis inside [P…….'s] vagina." (page 87 of the Record).
    d. Fourth, both girls were dropped off by appellant. When they arrived home both were crying. [M……..] immediately complained to her father while [P……..] went to her home and made the complaint.
    e. Fifth, the medical evidence confirms the injuries sustained by [M…….] and that these were consistent with a sexual assault. The medical evidence states no more than that there was a yellowish discharge on [P…….'s] vulva (no swaps for DNA purposes were taken so we do not know the nature of the discharge).
    f. Sixth, both girls identified the appellant when the SAPS brought the security drivers to them. It matters not that they did not identify him in court – after all that would only have been a dock identification. In any event, he agreed in his bail application that the girls were in his vehicle. It is not identity which is in dispute, but the activities of appellant.
    g. Seventh, those activities (i.e. the rapes) are confirmed by [M…….] telling the police that he wore greyish underpants with maroon dots which, when he was undressed in the cells, were found to be greyish underpants with maroon blocks.

h. Eighth, it is somewhat surprising that appellant was capable of sexually penetrating and raping [M……] but, having selected [P……..] as his first victim, chose not to rape her – only to attempt so to do.

15. From this summary, one can see that the learned magistrate misdirected himself in finding that there was no allegation of penetration and no more than an allegation of appellant's penis being near or on top of her and that "it appears that it did not touch".

16. In assessing the evidence, I take into account the following:
    a. The time spent in the vehicle. This was not a lift from one place to another – appellant in his bail application accounted for the time expended by saying that he had a motive to punish the girls for not paying him for the lift and so he drove them around.
    b. [P……], aged 12, was very clear as to what had happened to her. She is corroborated by [M……..], aged 10. It is possible that [M……..], lying underneath [P……..], was assuming that what had happened to her must have happened to [P……..]. But she details the verbal instructions given by appellant to [P…….] and she obviously, as the body underneath, felt the up and down movements.
    c. The medical examination does not corroborate the sexual assault of rape. But, there was the yellowish crust on the vulva - not the labia. This discharge was not swabbed or identified. There was no evidence as to whether or not [P……..] had attained the time of menarche and whether she might then have been penetrated without sustaining injuries. Obviously, penetration for purposes of a finding of rape does not require rupture of the hymen.
    d. Appellant elected not to give evidence at his trial. There are consequences attached to that decision because there has been evidence calling for an answer and appellant chose to remain silent. In the face of the evidence which certainly has called for answer to which there has been no explanation by appellant, this court concludes that such silence contributes to acceptance of the evidence of [P……] and [M……].

17. In sum, the evidence of [P……..] is clear and unconfused. She is a child and her evidence must be viewed with caution. But it is corroborated by all the surrounding circumstances, by the evidence of [M…….], and by the rape of [M…….].

18. It is my view that, on account of the aforesaid misdirection, the judgment of the learned magistrate in the court *a quo* must be set aside and that this court should substitute a conviction of rape in respect of count 1.

19. Section 304(2)(c)(iv) of the Criminal Procedure Act provides that a court of appeal is generally empowered to give such judgment or impose such sentence as the magistrate's court ought to have imposed. Section 19 (d) of the Superior Courts Act empowers the court of appeal to "render any decision which the circumstances may require". Of course, the powers must always be exercised with due regard for the principles of justice and fairness and as required by the Constitution. A court of appeal has the power to substitute the conviction of the court *a quo* with a conviction upon a more serious offence of which the appellant should have been convicted in the first place (see *S v E* 1979 (3) SA 973 (A)).

20. Although, the state did not cross appeal the conviction on count 1, Satchwell J wrote to appellant's legal representatives on 2nd February, advising that the appeal may give consideration to increasing the sentence and inviting submissions in this regard. The issue of substitution of conviction of the more serious offence of rape and increase in sentence was fully debated at the appeal hearing.

21. As it turns out, the result on sentence is that, instead of one life sentence with which a sentence of 10 years imprisonment runs concurrently, there will now be two life sentences running concurrently. It is appreciated that this may impact upon consideration of appellant for early release on parole.

**COUNT THREE**

22. From the summary of the all the evidence set out above, I cannot find that there is any misdirection in the finding of the learned magistrate that appellant is guilty of the rape of Melissa.

23. She is a child, she was raped, the circumstances thereof are partly confirmed by the appellant in his bail application, wholly confirmed by [P…….] and substantially corroborated by her evidence as to the details of the underpants worn by appellant which turned out to be correct.

24. That conviction must be upheld.

**SENTENCE**

25. The rape of a victim under the age of 16 years is an offence set out in Part 1 of Schedule 2 of Act 105 of 1997 which, in terms of section 51(1) of the Act attracts the minimum sentence of life imprisonment. It is only where a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence that a court can deviate from the prescribed minimum sentence.

26. Plaintive reliance upon marriage, seven children, and employment does not assist the appellant. That he was a man in a uniform performing security duties in a security vehicle is, to my mind, a most aggravating factor.

27. I am in agreement with the learned magistrate that no substantial or compelling circumstances have been shown in respect of count 3, the rape of [M…….]. I take a similar view in respect of count 1, the rape of [P…….], no substantial or compelling circumstances exist to justify the imposition of a lesser sentence than the prescribed minimum of life imprisonment.

28. I should place on record that, as has always been the practice in this division, on 2nd February 2016 written notice was sent to the legal representatives for appellant that consideration would be given to an increase in the sentences imposed upon appellant and that he would be given the opportunity to make further submissions in this regard. Counsel appearing for appellant availed himself of the opportunity.

**CONCLUSION**

In the result an order is made as follows:

1. On count 1, the finding of the magistrate in the court *a quo* is set aside and the following is substituted therefore:
   "Appellant is convicted of the rape of 12 year old [P……..] [M……] on 7th October 2011 by the insertion of his penis inside her vagina".
2. On count 2, the conviction of appellant of the rape of 10 year old [M…….] [N…….] on 7th October 2011 by inserting his penis inside her vagina is confirmed. The appeal against conviction on court 2 is dismissed.
3. On count 1, a sentence of life imprisonment is imposed.
4. On count 2, the sentence of life imprisonment imposed by the court *a quo* is confirmed. The appeal against sentence is dismissed. Both life sentences are to run concurrently.

**DATED AT JOHANNESBURG 17TH MARCH 2016**

**SATCHWELL J**

I agree.

**MOKOENA AJ**

Counsel for Appellant: Adv JL Kgokane
Attorneys for Appellant: Legal Aid South Africa
Counsel for Respondent: Adv N Kowlas
Attorneys for Respondent: Office of the DPP
Dates of hearing: 14th March 2016.
Date of judgment: 17th March 2016.