HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

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DATE	SIGNATURE

Case No. A350/2014

In the matter between:

DANIEL MOENG Appellant

And

THE STATE Respondent

Case Summary: Criminal Law – Rape – Conviction on one count of rape of a ten year old girl and sentence of 25 years' imprisonment confirmed on appeal.

JUDGMENT

MEYER J (RABIE and MOLOPA JJ concurring)

[1] Arising from an incident that occurred on 6 November 2005 at Tshing, Ventersdorp, the appellant was convicted in the Regional Court, Potchefstroom, on 25 August 2011, of raping a ten year old girl (the child). The trial court sentenced the appellant to 25 years' imprisonment and he was declared unfit to possess a firearm. Leave to appeal was granted by the trial court against both the conviction and sentence. The appeal appeared before a full bench of this division (Janse van Nieuwenhuizen J and Phatudi AJ) who, on 4 March 2015, referred the matter to a full court of this division.

[2] The child, who was residing with her mother and stepfather at the time, attended Sunday school at about 8:00 am in the morning on Sunday, 6 November 2005. She left church at around 11:00 am and went to her grandmother. At about 3:00 pm her grandmother told her to go home. Instead of going home she went to play at the residence of a friend from school ('the child's friend) where she spent most of the rest of the day until at about 8:00 pm. These facts are borne out of the evidence of the child, her grandmother, mother and the child's friend and were correctly accepted by the trial court.

[3] The appellant went to a local tavern at about 7:00 pm that evening where he bought a beer. Soon after the child left her friend's residence she and the appellant encountered one another at what was referred to at the trial as a 'thoroughfare' at the

place where the appellant bought the beer. The circumstances under which they encountered each other in the thoroughfare were in dispute and the child's evidence that the appellant, whom she used to see when he visited at the residence of her friend and who she believed was a family member of her friend's family, called her and told her that he would take her home because it was late and that he, under threat of stabbing her with a knife, raped her when they reached an area where there were trees, grass and water, were disputed by the appellant. He testified that the child appeared in the thoroughfare while he was drinking his beer. She, according to him, was crying and not well kept. He stopped her in order to find out what the matter was. He took pity on her and ultimately took her home to his wife and family where she was put up for the night.

[4] By way of interpolation it should be mentioned that it is common cause that the appellant is somehow related to the family of the child's friend and that he occasionally visited the residence of the child's friend. Moreover, the child's evidence that the occasion when she and the appellant encountered each other in the thoroughfare was not the first time that she had seen him, that she 'used to see him visiting' her friend's residence and that her friend told her that he was a family member is undisputed. The appellant, however, denied that the child was known to him or that he noticed her at her friend's residence although he conceded that she might have seen him there.

[5] The appellant testified that when he had asked the child what the matter was she told him that their neighbours had asked her on the Saturday to go and buy alcohol for them and because she refused they told her that they were going to tell her mother that she had slept with a boy. The child, according to the appellant, told him that her mother

had consequently given her a hiding on the Saturday and again on the Sunday before the appellant had met her, and that is why she was crying. The appellant further testified that she also had told him that her mother and her stepfather ill-treated her whenever they had consumed alcohol and that they did not care for her with the social grant money which they were receiving.

[6] The appellant testified that he wanted to help the child and he accordingly asked her where she was attending school and who her teacher was. She told him that she was attending school at Nshelemane and that her teacher was Ms Motsume. The child's teacher, according to the appellant, stayed too far and he accordingly took her to a residence where he knew a social worker was residing, but on their arrival there he was told by two boys that the social worker had moved to Potchefstroom. The evidence of the two boys is to the effect that the appellant arrived at their residence with a little girl asking where Sam, a social worker who resided there before, was. They informed him that Sam was no longer residing there. They could not identify the little girl who was in the company of the appellant on that occasion nor could they recall when it happened. The appellant testified that he then took the child to the house of a police officer who was known to him, but the policeman was not at home. He then took her to the house where he and his wife resided. The child denied that the appellant took her to a house where a social worker resided in the past or that he took her to the house of a policeman. According to her he took her straight to the house where he and his wife resided after he had raped her.

[7] The child testified that the appellant asked her numerous questions after he had raped her, such as whether her mother was drinking, where her father was, whether her

stepfather was drinking, whether she was living with her mother and stepfather, whether her parents were receiving a social grant, and that she answered his questions. The appellant, according to the child, then told her that he was going to take her to his wife and that she must tell his wife that her mother and stepfather were neglecting and abusing her, that they did not spend any of the social grant on her that they were receiving for her and that the appellant had found her 'on the street'. She testified that the appellant threatened to kill her if she did not do that, and that she believed him. The child testified that she was not abused and she was properly cared for by her parents. This evidence is corroborated by that of the child's mother and to some extent by that of the social worker who attended at the child's parental home a few days after the incident. She formed the view that the child was properly cared for.

[8] It is, as I have mentioned, common cause that the appellant took the child to the house where he and his wife resided and she spent the night there. The appellant, according to the child, sent his wife to buy her a cold drink during which time he repeated the threat to kill her if she did not tell his wife what he had told her to say. The child testified that she told the appellant's wife the 'lies'. The appellant testified that he told his wife that the child would tell her that he had found her and that she would explain everything to his wife. His wife took the child into a room where the two of them had a discussion. The appellant's wife, however, testified that the appellant had also been present in the room when the child told her what had happened. She testified that the appellant had told her that he had found the child 'on the street'. The child told her about being neglected and abused by her parents and that her mother had been assaulting her since the Saturday because of the allegation by the neighbour's wife that

she had slept with her son. The appellant's wife testified that she had asked the child whether they should take her to her mother or to her grandmother, but the child refused to go to either of them. The appellant's wife also testified that the child told them of her own accord that she had been raped in 2004.

[9] The next morning the appellant told the child that he was going to work and he, according to the child, again repeated the threat that she must say what he had told her to say otherwise he would kill her. The appellant testified that he had explained to his employer what had happened the previous day and that he did not know how to help the 'little girl'. She advised him that the only way in which he could help the child was to take her to a social worker. His employment inter alia entailed assisting in the conveyance of children to school by bus. The appellant's employer testified that the appellant had told her that he had found a child on the street during the evening and that he had taken her to his wife. She told the appellant that he should have taken the child to the police and because he did not do that he should tell his wife to take the child to a welfare officer. The appellant testified that at his request the bus driver stopped the bus in which they were conveying school children at the appellant's house and he then asked her to take the child to 'social workers'. The appellant's wife's evidence corroborated that of the appellant that he returned home from work and told her to take the child to a welfare officer.

[10] It is common cause that the appellant's wife took the child to a social worker. The child testified that she had told the social worker what the appellant had told her to say because he had threatened to kill her and she was afraid that he would kill her if she did not do that. The appellant's wife was present. The child testified that she was

afraid that appellant's wife would tell him if she had told the social worker the truth. The social worker testified that the appellant's wife had told her that the child's mother neglected her, that her husband found the child on the street and that the child was brought to their house where she stayed the night. The social worker also spoke to the child who told her about her being neglected and abused. The social worker required to see the child's mother in order to hear her side.

[11] From the social worker the appellant's wife took the child to the appellant's place of employment. The appellant's employer testified that she had asked the child why she was on the streets at the time when the appellant found her and that the child then told her that she was being ill-treated by her mother and stepfather. The child told her that she was afraid of her parents. The appellant's employer asked her domestic helper to look after the child and to give her food because she had to attend to business affairs and would only be able to 'search' for the child's parents upon her return. The appellant's employer was of the view that an adult person should accompany the child home. The domestic helper testified that she indeed had fed the child and had let her watch television. The appellant's employer testified that she had received a phone call from her domestic helper later in the day informing her that the police had arrived with the child's mother to fetch the child.

[12] It is common cause that two police officers, Cst Seghoto and Insp Smit, arrived at the appellant's employer's house accompanied by the child's mother and grandmother. The child testified that when she had been asked why she had not gone home she told the policemen 'exactly' what the appellant had told her to say. The appellant was watching her and she was afraid to tell them the truth. She told them about her being

abused and neglected at home and how the appellant tried to help her. Insp Smit testified that the child told him that she was afraid to go home. The appellant's evidence that the child resisted going home with her mother by holding onto a pole is corroborated by the evidence of Insp Smit and that of the domestic help.

[13] The child testified that she reported to her grandmother that she had pain after they had arrived home. Her grandmother examined her and concluded that someone had had sexual intercourse with her. Her grandmother asked her to tell her what had happened and she, although frightened, ended up telling her grandmother, because she had promised her 'that she will keep her safe.' The child's evidence on this aspect is in material respects corroborated by that of her grandmother who inter alia testified that the child had complained to her about pain she was experiencing, about her examination of the child, what the examination revealed and that the child had told her that she had been raped by the appellant under threat of a knife. The evidence of the child and that of her grandmother about her grandmother's examination of the child and the complaint of sexual abuse that the child had made to her grandmother was also corroborated by the evidence of the child's mother. The child's grandmother thereupon told the child's mother to take her to a doctor.

[14] The appellant was arrested during the course of that day. The child was taken to the Ventersdorp Hospital where, according to the child, she was referred to the Potchefstroom Hospital because she was so 'badly injured'. She was examined and received treatment at the Potchefstroom Hospital. This evidence of the child is also corroborated by that of her mother. Dr Joseph Mnisi, a medical doctor who was employed at the Potchefstroom Hospital, examined the child on 7 November 2005 at

21:30 and he completed a medico-legal examination form (J88). His examination revealed a three centimeter scratch on the child's right cheek, a one centimeter abrasion on her right leg and certain gynecological injuries that led him to conclude that she was 'sexually assaulted' and 'penetrated vaginally'. The injuries, in the opinion of Dr Mnisi, could at most be 72 hours old at the time when he examined the child.

[15] I am not persuaded that in convicting the appellant the trial court misdirected itself in any relevant respect in its assessment of the evidence. The totality of the evidence justifies the trial court's findings and conclusions that the exculpatory version of the appellant was not reasonably possibly true and that the guilt of the appellant was proved beyond reasonable doubt. The trial court treated the complainant's evidence with caution. There are many features that show her evidence to be trustworthy and unquestionably true. The opinion of Dr Mnisi and his findings noted on the J88 medical report corroborate her evidence that she was raped. The statement which she made to her grandmother shortly after the incident shows the consistency of her evidence and serves to rebut any suspicion that she fabricated her incrimination of the appellant. The learned regional magistrate's favourable finding about the child as a witness can, on the totality of the evidence, not be faulted.

[16] The trial court correctly rejected the exculpatory version of the appellant. It is, on a conspectus of the evidence, inherently improbable and clearly false. The child never reported to the appellant, who portrayed himself as the Good Samaritan and in whom she immediately and spontaneously confided, or his wife according to whom the child also confided that she had been raped very recently. It can safely be accepted that being threatened to be killed and being raped were most traumatic for the child and it is

highly improbable that she would not also have confided the sexual assault upon her in the appellant and later his wife. Apart from telling the appellant of her parents' abuse of alcohol and she being neglected and abused she, according to the appellant and his wife, also confided in them that she had been raped in 2004. And yet, she did not tell them about the sexual violence that had just been committed against her prior to the appellant stopping her in the thoroughfare.

[17] Furthermore, the medical examination of the child revealed that she inter alia had tearing of, bleeding and a yellow discharge from the vagina. It is improbable that the child's gynecological bleeding would not have been noticed by the appellant or at least his wife. It is undisputed that the appellant's wife told the child the next morning to take a bath and to wash her panty. It is common cause that the appellant's wife gave the child a different dress to wear before they went to the social worker. The child testified that the appellant's wife had given her a torn one to wear instead. No plausible reason could be proffered by the appellant or his wife why she instructed the child to wear a different dress. The ineluctable inference, therefore, is that the child was instructed to wear a different dress in order to portray her as a neglected child or to conceal evidence of the rape. The appellant or his wife never returned the dress to the child or to her family and it was also not handed to the police. The appellant's appeal against his conviction of rape must, in my judgment, accordingly fail.

[18] In sentencing the appellant the trial court exercised its discretion judicially and the sentence of imprisonment for 25 years is not inappropriate and does not induce a sense of shock. The relevant factors and circumstances were properly considered and taken into account by the trial court. The rape of a ten year old child is dreadful. It is an

enormous and heinous crime. This is an aggravating circumstance of substance and the commission of this type of offence against an innocent ten year old child undoubtedly demands the imposition of long term imprisonment. The sentence imposed upon the appellant was proportional to the offence. The physical injuries were severe and serious for a child of ten years old to sustain. It must also be accepted that a child would not be left unscathed by sexual assault. Interference with the imposed sentence is in all the circumstances of this case not warranted.

[19] In the result the following order is made:

The appeal against the appellant's conviction of rape and against the sentence imposed upon him pursuant to his conviction is dismissed.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	27 November 2015
Date of judgment:	11 December 2015
Counsel for appellant:	RS Matlapeng
Instructed by:	Pretoria Justice Centre
Counsel for respondent:	AJ Fourie
Attorneys for respondent:	The Director of Public Prosecutions, Pretoria