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SS269/07-svs  
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JUDGMENT

IN SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: SS269/07

DATE: 22/10/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED

DATE 7-01-2012 *Cy... [Signature]*

SIGNATURE

In the matter between

10 THE STATE

and

JOHN HAROLD KOTZE

ACCUSED

J U D G M E N T

COETZEE J: A Regional Court convicted accused 1 on the following charges.

- 1) Indecent assault.
- 2) Indecent assault.
- 20 3) Attempted rape.
- 4) Attempted rape.
- 5) Attempted rape.
- 6) Rape.
- 7) A contravention of Section 39 of Act 75 of 1969, pointing a firearm.
- 8) Rape.

- 9) Rape.
- 10) Assault with intent to do grievous bodily harm.
- 15) Rape.
- 16) Indecent assault

Accused 2 was convicted on count 10. She was sentenced by the Regional Court which convicted her. Accused 1 was referred to this court for sentencing.

Accused 1 was charged with 17 counts. The Regional Court acquitted him on counts 11, 12, 13, 14 and 17. These charges dealt with alleged rapes and indecent assault, as well as a contravention of Section 39 of Act 75 of 1969. The complainants regarding those counts were G [REDACTED] J [REDACTED] and K [REDACTED] Kotze. They were found to be unreliable witnesses. This judgment does not deal with the evidence of the said two complainants and the witnesses who were called by the state in support of those charges.

The complainant in respect of counts 1 to 10, P [REDACTED] N [REDACTED], at present Mrs E [REDACTED], a 16 year old girl at the time that she testified, stated that her stepfather, accused 1, started molesting her when she was 6 years old. It started with sex talk and became an abuse with the passage of time.

Count 1: She stated that when she turned 7 he started putting his hand on her private parts and rubbing her. He usually did so in his bedroom. He told her to keep quiet and threatened to throw her, her mother and brother out of his home and leave them destitute should she tell. For that reason she did not tell anyone what he was doing to her. She thought that accused 2 must have been aware of what was happening because on occasions she would be standing at a door or a window whilst he was

molesting her. She did not then quite understand what was happening to her, but recalled that when he abused her she cried.

Count 2: She and her brother were removed from their parental home by the welfare. They lived with an aunt. When she was 9 year old they returned to their parental home. The accused started molesting her again. She complained to her mother, who did nothing to help her.

Count 3: The family moved around a lot. People became suspicious. Her mother was drinking and smoking and doing funny things. It was for that reason that they moved from Eldorado Park to Lenasia South,  
10 Kibler Park and back to Eldorado Park. She was then 11 years old.

Accused 1 told her on occasions to sleep with him on his bed. He would then molest her. He would put his penis against her vagina and rub it against her. He would kiss her. He gave her R10.00 or R20.00 on occasions. Her school work deteriorated. He would lie on top of her on occasions and move up and down, moving his penis against her vagina. He did not penetrate her. She complained to her mother who would not believe her. On one occasion she told the complainant that she had seen the accused on top of her.

Count 4: At some stage accused 1 left the home. They were still  
20 living in Eldorado Park. He returned. She was then 12 years old. He tried to rape her. She was too scared to report the incident to anyone. Only her mother knew what was happening. The accused threatened her that he will throw her and her family members out of his home should she tell.

Count 5: When she turned 13 she started menstruating. Accused 1 abused her notwithstanding her remonstrations that she cannot



accommodate him because she was menstruating. He would on occasions, lie on top of her and sometimes she would lie on top of him.

Count 6: The family moved to Kibler Park. She was 14 years old. She was not attending school. The accused took her out of school. It was the year 2000. Accused 1 went on abusing her, fondling her body, hurting her breasts and putting his finger into her vagina. It often happened.

Certain of the family members attended a braai at her parental home. She and the accused were left behind. She ironed his jeans and a T-shirt. He ordered her to lock the door, which she did. He instructed her to  
10 massage his back. She did so. He told her to undress. She did so. He also undressed. He pinned her arms to her sides and raped her. Afterwards they left for the braai. He kept on raping her on a daily basis over a period of time. She told her mother and two other persons what the accused was doing to her. She told one S [REDACTED], a neighbour and another woman, Ms D [REDACTED], that the accused was raping her. At the time her aunt, L [REDACTED] E [REDACTED], and members of her family were staying with them.

Count 7: On an occasion accused 1 pointed his 9 millimetre pistol at her back and threatened to shoot her. She thought he was going to kill her. She was very scared. It happened on three occasions, all on the same day.

20 Count 8: When she turned 15 they were staying in Kibler Park. One night her mother and a friend visited a casino. The other children were sleeping. Her aunt, L [REDACTED] and her brother were no longer staying with them. He again raped her in his bedroom. Afterwards she slept with him on his bed. When her mother returned and she heard her entering their home she ran to her bedroom. She stated that it was a very painful experience.

She bled profusely. He never used a condom when he raped her.

Count 9: Whilst living in Lenasia lots of things happened. She hated ever second and every minute of it. Accused 1 did the same thing to her that he did in Eldorado Park and Kibler Park. He slept with her every night whilst her mother was caring for the newborn baby of Mrs O [REDACTED], a neighbour. He continued raping her. Should she refuse him he threatened to chase her out of the home in the middle of the night. She was afraid to phone for help because the accused worked for Telkom and would have picked up any foreign phone calls from his phone bill. He told her that the  
10 police will not assist her. Her private parts became infected at times and she had a discharge.

Count 10: On a certain day she went to see a doctor. On her return home her mother hit her on her breasts with a hanger. Accused 1 assisted in the assault upon her. She hit her with a shambok on her legs. Accused 1 stood at the door of the room whilst the assault took place. He closed the door and encouraged the assault.

Her aunt alerted the police regarding the abuse. She made a statement. She was taken to a doctor who examined her. She left home and stayed with Mr and Mrs O [REDACTED]. Mrs O [REDACTED] is her mother's sister.

20 She came to know her elder brother's friend, Terrance. She told him that ~~the~~ accused 1 was sexually abusing her. At the time she wanted him to put her out of the home so that she could go and live elsewhere. She and Terrance made up a story in order to attain that goal. They told accused 1 that they slept together. She hoped that that information would result in an escape from the accused. Under cross-examination she elaborated on this

matter. She made arrangements with T [REDACTED] to tell accused 1 and her mother that she was expecting T [REDACTED]'s child.

She said that T [REDACTED] told them that he had slept with her. Accused 1 chased him out of the home and almost hit him in the process. Terrance made a statement to the police in which he said that they did in fact have a sexual relationship and that she told him that she was pregnant. The defence gave notice that T [REDACTED] would be called as a defence witness. She denied that she had sex with him. She went on to say that she was his girlfriend. T [REDACTED] was not called as a witness by the defence.

10 Mrs E [REDACTED] supported her evidence. She stayed with the accused and their children whilst they were living in Kibler Park. She stayed with them for three to four months. She was not happy with the way in which accused 1 treated the children, particularly P [REDACTED]. P [REDACTED] reported to her that the reason why she wore very short night dresses, skirts and shorts, was because accused 1 had asked her to do so. The witness related various incidences which occurred between P [REDACTED] and accused 1 which created a convincing idea in her mind that he was sexually abusing her. P [REDACTED] would not tell her what was happening because she was afraid.

20 The witness went to the Ennerdale Police Station and reported the matter. She made a statement regarding what she had seen and heard at the home of the accused. She said that accused 1 avoided contact with her because he realised that she had seen him abusing P [REDACTED].

Dr Govender examined P [REDACTED] on 30 March 2001. At the time of the examination she completed a J88 form. It was handed in as Exhibit H. She confirmed the correctness of the contents thereof. She stated that the



patient's hymen was completely perforated. She did not expect a 15-year old girl not to have a hymen. She detected a discharge. She said that Perine's perineum was as wide as that of a 25 year old woman. What the complainant alleged was consistent with her findings. The findings were indicative of recurrent sexual intercourse. She concluded that the findings support the allegation of sexual abuse. She could not find any evidence or signs of force having been used. No bleeding or bruising were noticed. She went on to say that P█████ reported to her that accused 1 had threatened her by saying that if she did not cooperate he would cause the family members harm.

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Inspector Shadrack testified that he received a complaint from P█████'s aunt regarding P█████'s situation. It was reported to him that she was being sexually abused. He went to the accuseds' home and spoke with P█████. She informed him that accused 1 took her with him to the bathroom on a daily basis, made her bathe him and sexually abused her. What she allegedly told him does not accord with her evidence. She told him that accused 1 had threatened to shoot her. He had been abusing her since she was 6 years old.

In respects of counts 15 and 16 N█████ Kotze stated that she went to school in 2002, before she went to school on a date that she could not remember, whilst being in Eldorado Park an incident occurred during which incident she was injured. She testified in March 2003 and was then 8 years old.

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She recalled that one afternoon accused 1 called her to her mother's bedroom and fastened her hands behind her back. They were alone in the

house. He pulled off her long pants and panties. He laid her on the bed. He raped her. His penis was halfway inside her vagina. She felt pain but did not cry. Afterwards he sent her out to play. He untied her hands before doing so. Accused 1 told her that should she tell what had happened he will hear, he has good ears. For that reason she did not tell anyone. Her mother was outside the house at the time. She was with G [REDACTED] and K [REDACTED].

It happened many times. It happened in Kibler Park. Her mother had left to visit her granny in Lenasia. Her brother and sisters were outside the home. Her father called her to her mother's room. He pulled off her shorts and panties, tied her hands and raped her. He again told her that he has good ears. She did not tell anyone what he did to her.

On another occasion whilst she was in the bathroom accused 1 called her to his room. Her mother was not in the home, she had gone out to visit a friend who lived opposite them. The accused repeated what he had done to her on previous occasions. At a later stage she told her aunt C [REDACTED] what had happened. Later she said that the first person that she reported to was her aunt A [REDACTED]. Her aunt took her to a doctor. Her father on occasions hit her and the other children with a shambok. She was hit on her buttocks. It was painful but she did not suffer cuts, apparently neither bruises, nor abrasions.

Dr Fick examined her. He found very little damage to her hymen. He stated that if she had been raped on more than one occasion he would have expected more serious injury.

Both accused testified. They denied the allegations of assault and sexual abuse. Accused 1 at some stage discovered that P [REDACTED] and



T [REDACTED] had a sexual relationship. T [REDACTED] admitted it. He came to know about the fact that P [REDACTED] was expecting T [REDACTED]'s child. Accused 2 stated that family members plotted the case against them.

The magistrate accepted the evidence of P [REDACTED], N [REDACTED] and the supporting evidence. He found the children to have been truthful and reliable. Mrs E [REDACTED]'s evidence was found to be credible. The evidence of the accused were rejected as false. The convictions followed.

After I had perused the record I requested the magistrate for reasons regarding the conviction of accused 1 on counts 15 and 16. The magistrate  
10 responded in a detailed and helpful document which almost convinced me that the problems I saw in Nikita's evidence were more imaginary than real.

I have given much thought to the reasons furnished by the Magistrate, I am not convinced that the conviction of accused 1 on those counts pass the test of being in accordance with justice. N [REDACTED] was an extremely poor witness. The quality of her evidence is of such a low standard that it cannot outweigh the denial by the accused of her accusations. If she had been raped, Dr Fick would have noticed and recorded serious injuries to her private parts.

Her failure to report the rapes to Perine is inexplicable. P [REDACTED] often  
20 bathed her younger step siblings. If N [REDACTED] had been raped P [REDACTED] would surely have noticed it. N [REDACTED] would have confided in P [REDACTED], her older sister. She would have told her what was happening to her

On 3 February 2009 N [REDACTED] made a statement to the police in which she stated, amongst others, that she was told by certain aunts and by P [REDACTED] that she must say what she said in court. She was told that she must lie. On

4 February 2009 she was called as a witness in this court, by Mr Moosa. She confirmed the correctness of the contents of the affidavit.

The matter was postponed to 3 March 2009 to afford Mr Muvhulawa an opportunity to inform those persons who N [REDACTED] had accused of having defeated the administration of justice to come to court and to respond to the accusations. These persons were so informed. On 31 March 2009, two aunts, Mrs P [REDACTED] and Mrs J [REDACTED] as well as P [REDACTED] attended court. They denied that they had defeated the ends of justice by telling N [REDACTED] to lie. I am unable to confirm the convictions on count 15 and

10 16.

P [REDACTED]'s evidence is not unblemished. Her evidence that she and T [REDACTED] made up a story about their sexual relationship to ensure that the accused would put her out of his home appears to be untrue. He had threatened to throw her out of the home should she refuse his advances. All she had to do was to refuse him and that would have rid her of his presence on a permanent basis.

However, P [REDACTED] did not have a baby. There is no evidence that she aborted. Accused 2 would have known if that had happened. That fact lends some credence to P [REDACTED]'s evidence regarding the making up of the story.

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According to Inspector Shadrack P [REDACTED] told him of sexual abuse that she did not mention in her evidence. That evidence also puts a questionmark over the veracity of her evidence. However, it must be borne in mind that the police officer testified approximately two years after he interviewed P [REDACTED] and appeared to not have a very clear recollection of the

interview. He might have made a mistake when he said that she told him about the bathroom incidents.

P [REDACTED]'s evidence, as the magistrate correctly observed, was detailed and chronological. She was cross-examined at great length and although discrepancies and contradictions arose during cross-examination. It cannot be said that she was shaken under cross-examination. It is unlikely that she could have fabricated what she told the court.

It does not appear to me that P [REDACTED] had a motive for fabricating evidence against the accused, clearly knowing that if a conviction followed he might be imprisoned for life. That would probably have put her on the street.

Her evidence is supported by Mrs E [REDACTED]. There is no reason to question the credibility of her evidence. On occasions she saw accused 1 grabbing P [REDACTED] and kissing her in a way a boyfriend would kiss a girlfriend. She saw accused 1 fondling P [REDACTED], massaging her, including her buttocks. P [REDACTED] was, so she said, very embarrassed and clearly not a willing partner to these incidents.

She saw accused 1 sleeping next to P [REDACTED] on his bed and not next to his wife. She stated that P [REDACTED] wore scanty clothing and that P [REDACTED] told her that she did so because that is what the accused wanted. Her evidence constitutes very important corroboration for the evidence of P [REDACTED]. Furthermore it is clear from the evidence of Dr Govender that P [REDACTED] had had sex on many occasions. P [REDACTED] told the witness that she did not sleep with a boyfriend but that it was accused 1 who was abusing her.

Viewing the evidence as a whole my view is that P [REDACTED]'s story is



true and that the versions of the accused are false. In the result the convictions on count 1 to 10 must be confirmed. I record as the Act obliges me to do that accused 1 is convicted as charged on counts 1 to 10. the convictions on counts 15 and 16 are set aside.