

S v Masuku 2019 (1) SACR 276 (GJ)

| KEY CONCEPTS | |
|--|----------------------------|
| Rape of girls aged 7 and 8 | Protection of identity |
| Accusing complainant of lying | Cross-examination of child |
| Traumatising cross-examination | Minimum sentence |
| Substantial and compelling circumstances | Sentencing in rape cases |

The appellant in this case was 19 years old and charged with the rape of two little girls, aged 7 and 8 respectively. He was convicted on one count of rape and was acquitted on the other count, because the child had bathed and urinated and there was no physical evidence to support her allegation.

However, the court felt it necessary to comment on two aspects of the trial, namely the fact that the magistrate had not protected the identity of the children and had not controlled the cross-examination, thus exposing the child to humiliating and degrading questioning.

Protection of identity

The decision of the trial court to allow the naming of the children and their mothers resulted in a failure on the part of that court to protect their well-being and dignity. Based on the child's rights to protection in terms of the Constitution, in criminal proceedings involving sexual offences against children, the court is obliged to protect the child complainant in every possible way without undermining the rights of the accused to a fair trial. This protection must include protecting the identity of the child. Identifying the child compromises the future of the child and places them at risk of being ridiculed, stigmatised and pitied which diminishes the dignity of the child and their parents. It is, therefore, incumbent upon courts to ensure that the identity of the child is never revealed.

Cross-examination

The accused's defence was that he was not present at the flat when the alleged rapes took place and could, therefore, not have known anything about the rape. The accused did not and could not dispute that the girls were raped. Despite this, the accused was allowed to question the child in great detail about the act of rape.

D: Did this man who allegedly raped you use a penis by any chance to rape you?

P: Your worship, the state will object that this is an unfair question if she has never seen one and does not know one, and she clearly said in her evidence-in-chief that he took something out of his pants. She didn't look.

The magistrate ruled that the defence had to rephrase the question.

D: You said that now the person who allegedly raped you removed something from his pants, whatever he removed from his pants, was it part of his body?

Child: Yes.

.....

D: So this thing that he removed from his pants, do you know where about in his body was this particular item?

Child:Yes.

D: Can you please tell us or show us where in his body that is?

[The child was forced to show this on the anatomical dolls but she did not want to and started to cry.]

The child found the cross-examination and intervention from the magistrate, when he organised and instructed the questioning on the anatomical dolls, very distressing. She continued to cry during the adjournment and did not want to continue any longer. The court was informed and the matter was postponed for about 2 months. When the proceedings resumed, the cross-examination continued as before, and it appeared that none of the court role-players (not defence, prosecutor or magistrate) had taken into account the child's previous experience of cross-examination, because they carried on exactly the same way as they had left off.

D: Tell me when this alleged rape took place, did the person who raped you wear a condom?

P: Your worship, the state is going to object, maybe the defence should first determine whether the child knows what a condom actually is. I am just worried about the language and the use of that.

Court: Let us first find out from the child whether she knows, because if she does not, let her answer, she will tell us if she knows or not.

Child: No.

Court: Do you know what a condom is?

Child: No.

D: Did he use an object that is formed in a plastic like it is a balloon, but it is a plastic like on his penis?

Child: No.

D: So no object was used during the alleged rape like in a form of plastic?

Court: It may be like it is a rubber-like substance, rubber-like object.

Child: I did not see that.

D: So he inserted his penis on your vagina the way it is?

Child: No.

D: What did he do then?

Court: What is the question, what is your question, Mr Mabundla? What did he do, what is the question?

D: What did he do, yes.

.....

Court: Demonstrate to usAll right, show us what he did, what did he do with these dolls? There are now two dolls which are anatomically correct placed in front of the witness. The one is dressed as a female doll [indistinct] the witness is now demonstrating first by removing the pants of the male doll. Then she takes, she took then the female doll, wait, wait, wait and the witness..

Child: Firstly, he undressed, he undressed his trousers and then he took me and he undressed me.

Court: The witness firstly now they are taking the male doll, removing the pants of the male doll, take the female doll, remove the panty of the female doll on the female doll. Proceed. And the witness now takes the male doll, places it on top of the female doll, and the female doll is

facing upwards lying on its back. The male doll is facing down on top of the female doll and then the witness demonstrates with her hands on top of the buttocks of the male doll making a jerking movement up and down, up and down.

- D: As he was making those up and down movements had he penetrated you by then?
- Child: Yes.
- D: Do you know how big was his penis?
- Child: Yes.
- D: Can you depict or show us how big it was?
[The child demonstrates the size of the penis.]
- D: Thank you, your Worship. Are you sure it was that big?
- Child: Yes.
- D: At that stage, your vagina was it dry was it wet or not?
- P: Your worship, the state is going to object.
- Court: Why do you ask the child this question, how will a child know that?
- D: Thank you, your worship, I will rephrase my question, I withdraw that question ... Did you feel or suffer any injuries when he penetrated you?
- Child: Yes.
- D: What kind of pains did you feel?
- Court: Now just let me find out, wait, wait, wait. I do not understand your question. Pain is pain, the difference between pains, are you talking about the severity of the pain or was it just not that severe, is that what you want to find out?
- D: Thank you, my worship, I will rephrase my question. What kind of injuries, you said that you suffered injuries, am I correct?
- Child: Yes.
- D: What kind of injuries did you suffer?
- Child: I was injured severely.
- D: Did you bleed in the process?
- Child: No.
- D: Do you know if ever the person who raped you ejaculated on you?
- Child: No.
- D: Did you see the doctor about it?
- Child: No.
- D: Do you know why you did not go to see the doctor?
- Child: No.

The other child was also subjected to the same intense and crude questioning. Her reactions also indicated that she was very traumatised by the cross-examination. According to the three judges in the High Court, the cross-examination of the children crossed the bounds of common decency and the defence conducted himself in a manner contrary to the ethical duty as an officer of the court.

“To ask a child questions about the details of a man’s anatomy, or to query her knowledge about intricate sexual matters is to show grave disrespect to the child. In my judgement it is generally wrong for a child to be subjected to such crude cross-examination. There was nothing to be gained by asking the child questions which only made the child relive her ordeal. There was no probative value to the questions as none of them addressed any matter that was in issue. The size of the appellant’s penis or whether BK’s vagina was wet or not was not in issue. As a result, the questions elicited nothing of substance. They only served to embarrass BK and her parents. They were prejudicial to the dignity of BK and BK’s parents who had to silently and helplessly endure watching their child being forced to

suffer the attack on her dignity and the pain she was experiencing while testifying. Apart from damaging BK's dignity, they caused BK significant mental stress, anguish and long-term psychological harm."

The High Court also found that it was not only the questions asked by the defence that demeaned the court, but also the tone used by the defence:

"The questions as well as the tone used by Mr Mabunda demeaned the court and its processes. It is important that legal representatives avoid becoming overzealous in the pursuit of their client's case and losing all sense of proportion. The court is not a venue for the kind of gratuitous conduct that Mr Mabunda engaged in, nor is the process of cross-examination availed for such conduct. The questions quotes above should never have been allowed or asked. It is the kind of questioning that deters many rape victims from reporting their ordeal to their authorities and from seeking justice. The result is an undermining of the public interest in seeing all sexual assaults reported and prosecuted. The magistrate should not have allowed them: it is the duty of presiding officers to vigilantly guard against allowing such pointless questions being raised whose only effect is to cause embarrassment and psychological harm to the victims of these brutal assaults. Presiding officers should remind legal representatives of their duty not to disrespect the child (and even an adult for that matter) they are cross-examining and not to demean the court and its processes."

In addition, the High Court also addressed the issue of the defence accusing the witness of deliberately lying to the court. The defence was not deterred by the fact that they had no basis or doing this. The defence accused both the girls of lying, without any basis, which caused them to become very upset and cry.

"It certainly does not serve the best interests of the child to subject her to gratuitous cross-examination or to allow cross-examination that accused her of being untruthful. The duty of the court to vigilantly guard the best interests of the child in cases such as these was emphasised by the Constitutional Court."

Sentencing

The magistrate sentenced the appellant to a period of 15 years' imprisonment. He departed from the prescribed minimum sentence on the basis that there were compelling and substantial circumstances. These included:

- the appellant was young
- he was a first offender
- the rape was not serious because it did not result in serious physical harm to the anatomy of the child
- the appellant spent 26 months in prison awaiting finalisation of the case.

The High Court found the magistrate to be "simply wrong" in concluding that the rape was not serious. This, they found, caused the magistrate to trivialise the experience of BK and the harm (physical and psychological) that she suffered. The children were found crying and the trauma manifested itself during the testimony of the child when she was forced to reliver her ordeal.

"Rape in general is no minor offence. It is a brutal violation of the humanity of the victim. It causes significant permanent harm to the victim. In the case of a child

who is incapable of fully grasping the import of sexual activity the wound caused by rape hardly ever heals. Once grown up and entitled to engage in consensual sexual activity the danger of the wound opening during her most intimate moments and thereby depriving her of engaging in and enjoying what is simply a natural activity for most human beings is real and cannot be underestimated. To conclude that the rape of BK was not serious because there was no significant physical harm detected on the anatomy of BK was a significant misdirection. The court a quo did not, in my view, accord sufficient weight to the fact that the rape of BK was brutal.”

In looking at the crime of rape, the High Court highlighted the following points:

- Rape is a very serious offence, constituting a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim
- The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution
- Women are entitled to the protection of these rights
- The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community (**S v Chapman** 1997(2) SACR 3 (SCA))
- There is the emergence of a disturbing trend of rapes involving young children which is becoming endemic – hardly a day passes without such an incident
- Public demonstrations by concerned members of society condemning such acts are a common feature of everyday news
- Rape of women and children has become cancerous in our society
- It is a crime which threatens the very foundation of our democracy, which is founded on the protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms
- It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society
- Courts are obliged to impose sentences for such a crime (particularly where it involves young, innocent, defenceless and vulnerable girls) of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would have the effect of eroding public confidence in the criminal justice system (**Director of Public Prosecutions, North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA))
- There have been some cases where the courts have held that there are degrees of seriousness of rape (**Rammoko v Director of Public Prosecutions** 2003 (1) SACR 200 (SCA); **S v Abrahams** 2001 (1) SACR 116 (SCA)), but trying to draw out the degree of seriousness of rapes is not without problems:

“Furthermore, the responses of rape survivors are surely as complex and multi-layered as are the individuals who experience rape. We must therefore expect the manifestation of the impact of rape to be varied in every respect. Some responses will be publicly displayed and others privately endured. Some rape survivors will collapse while other will bravely soldier on ... It would seem that sentencing courts are expected to view rape as ‘more serious’ where a rape survivor cannot sleep, fears men and sex, is unable to concentrate and cannot complete school, or has a career or relationship destroyed. If this is so, then other rape survivors may question why their rapes are viewed as ‘less serious’ because they may have been fortunate or privileged enough to receive professional assistance, be endowed with

different personalities and psyches, exhibit fewer post-traumatic effects and so on. The Legislature does not seem to have intended the rapist to be less morally and legally blameworthy because the rape survivor appears to or actually does survive, or continues life with less apparent trauma.”

The High Court was of the opinion that the harm caused to the two children in this case was very serious. They were very young (only 7 and 8) at the time of the incident. They had to undergo the trauma they did at that tender age. The court was mindful of the fact that the legislation had not removed the discretion of the court to impose a sentence it deems fair and appropriate, and there have been a fair number of judgements where it has been held that the minimum sentence preferred by the Legislature ought to be departed from in certain cases where the rape had not resulted in significant physical harm to the victim.

The High Court was of the opinion that the sentence of 15 years' imprisonment imposed by the trial court was much too lenient. The High Court was of the opinion that a sentence of 20 years would be appropriate which would be reduced to 18 years in view of the 26 months already served. The appellant's name must also be entered onto the National Register for Sex Offenders.