Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case No: 246/98

In the matter between:

ANDILE MDLETYE Appellant

and

THE STATE Respondent

CORAM : STREICHER JA, MELUNSKY AND MPATI AJJA

HEARD : 9 SEPTEMBER 1999

DELIVERED : 29 SEPTEMBER 1999

Criminal appeal - alleged incest

JUDGMENT

MELUNSKY AJA

MELUNSKY AJA:

[1] Despite his plea of not guilty the appellant was convicted in the Umtata

regional court of committing incest with his daughter in contravention of s 99 of the Transkeian Penal Code, 9 of 1983, during the period 1993 to 1996. He was sentenced to eight years imprisonment, two years of which were conditionally suspended. His appeal to the Supreme Court of Transkei (Miller and Madlanga JJ) was unsuccessful but the court *a quo* granted him leave to appeal to this Court against both conviction and sentence.

[2] The appellant is a schoolteacher. At the relevant time he lived in Umtata. His daughter, the complainant, was born on [date] 1979. She grew up under the care of her maternal grandmother, Mrs N.M., in an area of Transkei known as S…. Towards the beginning of 1993 the complainant went to live with the appellant in Umtata, where she attended school. She stayed with him until February 1996.

[3] The essence of the complainant's allegations against the appellant were that a few months after she came to live with him, the appellant asked her to rub his back, that he used to fondle her body, including her genitalia and that he later started the practice of having sexual intercourse with her, an activity that occurred regularly, perhaps three or four times a week. In January 1994 she ascertained that she was pregnant. The appellant arranged for her to undergo an abortion which was carried out at his home. Thereafter the appellant continued to have sexual relations with her until she eventually left him. As I understand the complainant's evidence, she was shocked and upset by the appellant's sexual demands. Although she did not resist, she was never a completely willing participant.

[4] According to the complainant's evidence, the appellant's attitude towards her was one of possessiveness. On the one hand he bought her expensive gifts and on the other he resented her associations or liaisons with young men. He assaulted her from time to time, sometimes severely, particularly when, as she put it, she had a boyfriend. She recounted that on one occasion, after he had noticed an inscription on her palm, he struck her with an iron bar on her head,

resulting in an open wound. The appellant threatened to commit suicide or to kill the complainant if she disclosed his sexual activities with her. Their relationship continued in this way until she returned home on 6 February 1996 after she had been out with her boyfriend. The appellant did not approve. He took her into the veld where he assaulted her. The complainant then left home and went to stay with her aunt, Ms M.M., in Soweto.

[5] The appellant denied that he had sexual intercourse or any other physical relationship with the complainant. He also denied any knowledge of the alleged abortion. He admitted that he used to "clap her and (that he) used a cane to thrash her". He called this "moderate chastisement" which, he indicated, he was entitled to administer because the complainant made love to "different and several men" while she lived with him.

[6] The question for decision, of course, is whether on the evidence as a whole the state has established the appellant's guilt beyond reasonable doubt. A convenient starting point in this regard is a consideration of the trial court's reasons for judgment. The magistrate made no specific findings in relation to credibility or demeanour, nor did he record that he regarded the complainant as a satisfactory witness or the appellant as unreliable. The reasons which he furnished for convicting the appellant, moreover, are not very convincing. He held, in effect, that the appellant had had "every opportunity" to commit incest with the complainant if he had wanted to do so. He also appeared to have been impressed with the evidence of a social worker (Ms Mgilane) and a clinical psychologist (Ms Mabusela) both of whom, in the magistrate's words, regarded the complainant as "a typical child who had been the subject of child abuse". In addition the magistrate pointed out that the complainant had no reason to make false allegations against her father, particularly allegations as serious as those which she had made.

[7] Counsel for the appellant invited us to hold that the complainant was an untruthful and unreliable witness and that the appellant, on the contrary, gave

satisfactory evidence and, at least, that his version could reasonably possibly be true. It was also submitted on the appellant's behalf that the magistrate had misdirected himself in various respects and that this Court should reassess the evidence in the light of counsel's submissions.

[8] The attack on the complainant's credibility was not without justification. Two illustrations will suffice. She initially stated in her evidence that although she had had sexual intercourse with a person in Qumbu in 1992, the appellant was the only person with whom she had sexual relations from 1993 until 1996. It later emerged from her own evidence that she had sexual intercourse with a young teacher on several occasions during the period September 1995 to February 1996; that she had liaisons with other young men; and that she had sexual intercourse "with other men because (she) wanted to console (herself)". She added that there was an age gap between her and the appellant and she needed her peers who could understand her.

[9] It is important to emphasise that it is the appellant - and not the complainant - who is on trial for his sexual activities and that the complainant's sexual relationships are relevant for two reasons only: firstly, because she was clearly untruthful in this regard and secondly, because there is the possibility that her pregnancy and the subsequent abortion might have followed on sexual intercourse with someone other than the appellant.

[10] There are other unsatisfactory aspects of the complainant's evidence: at some stage while staying with the appellant she told a certain Mr Pongwana that she had had sexual relations with his son, A.. Subsequently she told the father of Pakamile Pongwana (who might have been Andile's brother) that she had had sexual relations with P.. Furthermore the complainant alleged in March 1994 that she had been raped by P. during February 1993. As a result she was examined by a medical practitioner who, not surprisingly, found that there was no indication of a sexual assault. The alleged rape was also reported to the

police. She testified that she had falsely implicated the young men because her father, the appellant, had put pressure on her to do so. It is, however, not at all clear what the appellant stood to gain by compelling his daughter to make false allegations against A. or P. and no evidence was led in this respect. The appellant's explanation, it may be added, was that shortly after the complainant's arrival in Umtata, he found her in a compromising situation with A. and after he had questioned her, she admitted having had sexual relations with the young man. He then took her to Andile's parents to complain about their son's conduct. The appellant also admitted that he took the complainant to a doctor in 1994 after she had claimed that she had been raped by P.. The allegation of rape was reported to the police but no trial ensued as, to use the appellant's expression, "the matter was finalised by members of (P.'s) family". The appellant denied that he had put any pressure on the complainant to induce her to implicate either A. or P..

[11] The appellant's counsel placed reliance on the evidence of Ms Babsy Ndimande, a school teacher, who stayed with the appellant and the complainant from some time in 1993 until February 1995. Initially she shared a bed with the complainant. In June 1994 the appellant bought a bed for the complainant who then moved to a separate room where she slept alone. Ms Ndimande testified that the appellant was a strict disciplinarian and that he hit the complainant, especially if she was late in arriving home. She had no knowledge of any sexual intimacy between the appellant and the complainant but it is clear from her evidence that sexual relations between them could have occurred before she came home from school or while she was away during school holidays or over weekends. She knew nothing about the complainant's pregnancy or abortion. After Ms Ndimande left the appellant's home, an aunt of the complainant, L., came to stay. L. did not give evidence and it is not clear for how long she lived in the appellant's house. According to the complainant, however, the appellant continued to have sexual relations with her after L. had

moved in.

[12] This is a convenient stage to consider the evidence of the two expert witnesses called by the State. Ms Mgilane, a qualified and experienced social worker, is no stranger to investigations relating to child abuse. She is trained to observe and assess complainants in child abuse cases. Ms Mgilane pointed to symptoms of sexual abuse in the case of the complainant, i.e. the complainant's apparent lack of concentration, which resulted in a deterioration of her schoolwork, and the nightmares from which she suffered. She indicated that, in her view, the complainant was manipulated by the appellant to such an extent that it was not surprising that she kept his activities to herself for three years. She pointed out that the complainant's decision to run away from home was a common occurrence in the case of victims of child abuse.

[13] Ms Mabusela holds a master's degree in clinical psychology. She had worked with cases of child abuse for a few years before she interviewed the complainant. The complainant presented with a variety of complaints, all consistent with her version of what had occurred between her and the appellant - tension headaches, poor sleeping, poor appetite, poor concentration at school and forgetfulness.

[14] The other witnesses, both of whom were called by the State, were Mrs N.M. (the complainant's grandmother) and her daughter, Ms M.M. (the complainant's aunt). Mrs M., who was employed as a nurse in Qumbu, told the trial court that she took the complainant to the appellant in 1993 at the suggestion of the appellant's father so that the appellant could see to the further education of the child. The complainant's mother, who had not married the appellant, lived some distance away at Tafalofefe and, as far as I can judge, did not devote much time or attention to her daughter. The responsibility for bringing up the child thus fell on Mrs M.. According to her, the complainant had been a well-behaved girl while she lived with her. Apparently Mrs

Mlambo did not know about the complainant's sexual experiences in 1992 as she testified that the complainant gave her "no problems concerning boys". She denied that it was the complainant's misbehaviour that had resulted in her being placed in the appellant's care and control at the beginning of 1993. It may be observed that the appellant gave evidence to the effect that the complainant had told him some two or three years before 1993 that she wanted to attend school in Umtata and that she arrived at his house in Umtata without any prior warning in January 1993. She then informed the appellant, he said, that she had been brought by her grandmother but that she had come to stay with him in fulfilment of her own wish to be with him in Umtata. It is of some significance that the appellant's version of this occurrence was not put to Mrs M. or to the complainant. What is more it was the appellant's contention, as expressed by his attorney at the commencement of the trial and repeated during the cross-examination of Mrs M., that it was the complainant's misbehaviour that had led her grandmother to place her in the appellant's custody.

[15] The complainant's aunt, Ms M.M., testified that the complainant visited her during December 1995. The complainant had a head injury and weals on her buttocks and legs. She told her aunt that the appellant had inflicted the injuries. She also experienced nightmares and complained of headaches. The appellant, it would seem, telephoned the complainant every day. Ms M. felt that the relationship between father and daughter was very unusual and she raised the question of sexual contact between the two of them. The complainant did not, at that stage, admit to a sexual relationship between her and the appellant. It was only on 9 February 1996, when she returned to Johannesburg after finally leaving the appellant, that she told her aunt about the sexual relationship. This resulted in Ms M. contacting her mother, Mrs N.M., who, too, went to Johannesburg. The complainant then repeated her story to her grandmother.

[16] The only other witness whose evidence was before the trial court was the

appellant. His version, as I have mentioned, amounts to a complete denial of any sexual contact with his daughter. Save to the extent mentioned earlier, his evidence was not in itself unsatisfactory in the sense that it did not contain material contradictions or inconsistencies. Nor did he, on the face of it, appear to be evasive or blatantly devious.

[17] Prior to the decision in *S v Jackson* 1998 (1) SACR 470 (SCA), it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said that there was an "inherent danger" in relying upon the unconfirmed testimony of a complainant in a sexual case. This resulted in the courts adopting a cautionary rule of practice. The rule required -

a) the recognition of the "inherent danger"; and

b) the existence of some safeguard that reduced the risk of a wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the accused's failure to give evidence or his obvious untruthfulness.

(See *S v Snyman* 1968 (2) SA 582 (A) at 585C-H.)

In *S vJackson* it was pointed out at 476e-f that the application of the cautionary rule to sexual assault cases was based on irrational and out-dated perceptions. Although the evidence in a particular case might call for a cautionary approach, this, it was emphasised in the judgment, was not a general rule: the state was simply obliged to prove the accused's guilt beyond reasonable doubt. The factors which motivated this Court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in which an act of a sexual nature is an element. The reasons given by Olivier JA at 474f-477d in *S v Jackson* therefore require no elaboration or qualification in relation to the crime of incest and I proceed to consider the evidence without the restraints imposed by the cautionary rule.

[18] This is a worrying and vexing case. It is unlikely, but possible, that a daughter would falsely admit to the commission of sexual acts with her father. It is also unlikely that she would lie about having had an abortion at the tender

age of fourteen. Admissions of this nature would cast a grave slur on a child in the eyes of her community as much as they would stigmatise the father. Why, it may be asked, would the complainant have implicated her father unless her version was true. However, the fact that the complainant made serious allegations against her father is obviously not decisive. It is, in the circumstances of this case, only one of the factors that have to be taken into account.

[19] On a proper consideration of the evidence one cannot fail to be impressed with the comprehensive detail of the complainant's account. Her portrayal of the appellant as a possessive, domineering and jealous father has the distinct ring of truth but in itself is insufficient to establish the appellant's guilt. There is no doubt that he inflicted severe beatings - which went far beyond the bounds of "moderate chastisement" - on her. The beatings do not redound to the appellant's credit and lead me to doubt that he was a caring and loving father who was concerned only with his daughter's well-being.

[20] The evidence of Ms Mgilane and, perhaps more significantly, that of Ms Mabusela provide some support for the complainant's version. Counsel did not address any meaningful argument to this Court on the admissibility of the witnesses' opinions to the effect that the complainant had been sexually abused. However I will assume, in favour of the state, that the conclusions drawn by the witnesses are admissible in evidence. It nevertheless remains the function of the Court to decide upon the weight to be given to their views for we are not inexorably bound by what witnesses have said or the opinions which they have expressed. In weighing up their evidence it may be accepted that the complainant's symptoms, including nightmares, headaches and lack of concentration, were genuine and not simulated. Significantly enough similar symptoms had also been observed by the complainant's aunt in December of the previous year. I have no difficulty in accepting, therefore, that the complainant was a traumatised young person. The question is whether the symptoms of

which she complained were due to the appellant's sexual intimacy with her. It seems to be undisputed that the appellant was not a sympathetic father: he beat the complainant severely, he placed restrictions on her and he monitored her movements closely. Those factors alone might have played a role in her decision to leave home. And the fact that she left the appellant without his consent, coupled with his harsh behaviour, might have resulted in the symptoms from which the complainant suffered. In my view the trial magistrate should have approached the evidence of the social worker and the psychologist with more care and circumspection than he did. The complainant's symptoms were obviously consistent with her allegations of sexual abuse, but other possible reasons for those symptoms were not excluded by the evidence and this fact should have been recognised and taken into account by the trial court.

[21] There is another unsatisfactory aspect of the magistrate's reasons. He held that the appellant arranged for his daughter to leave Mrs Ndimande's room for "an inexplicable reason". He concluded, therefore, that the appellant must have made this arrangement so that he could have easier access to the complainant. In fact Mrs Ndimande and the complainant shared not only a room, but also a bed, for at least a year. It was in June 1994 that the appellant bought a bed for his daughter. This enabled her to move to her own room. The magistrate's finding that the appellant bought a bed for the complainant so that he could have easier access to her is purely speculative. There was simply no evidence on this point. It is possible that the appellant was unable to afford to buy a bed earlier. The fact is that the appellant permitted his daughter and Mrs Ndimande to share a bed for over a year.

[22] Moreover, the magistrate failed to have due regard to Ms Ndimande's presence in the house during 1993 and 1994. The fact that she was staying in the house does not mean that the appellant could not have had sexual intercourse with the complainant while Ms Ndimande was out or away from Umtata. She might have been away when the complainant allegedly underwent

an abortion. Ms Ndimande testified, however, that she would have known about a sexual relationship between the appellant and his daughter. She noticed nothing untoward in their relationship and her only complaint about the appellant was that he was too strict a disciplinarian. Neither the state nor the appellant called the complainant's aunt, L., who also stayed in the appellant's house. From the complainant's evidence it would appear that L. might have provided corroboration for her version. There is no suggestion that L. was not available to give evidence and no explanation has been furnished for not calling her.

[23] It is to be regretted that the magistrate made no considered findings on the quality of the witnesses, particularly on the credibility of the complainant and the appellant. In his reasons for the conviction, hardly a word was said about the appellant's evidence. Moreover, he did not appear to apply his mind properly, if at all, to the highly unsatisfactory aspects of the complainant's evidence to which I have referred. The result is that this Court is called upon to reach a decision in a serious criminal case without the assistance of detailed reasoning which is usually required of a court of first instance. In my view this Court is entitled, therefore, to consider the evidence afresh.

[24] In March 1996, when the trial commenced in the regional court, the complainant was sixteen years of age. She appears to be a mature and intelligent young person. It has been established, however, that she was unreliable. She lied on an important aspect - by initially denying and later admitting that she had sexual intercourse during 1993 to 1996 with men other than the appellant. Moreover, on her own admission, she falsely told a medical practitioner and the police that P. had raped her. It is possible that shyness or modesty initially may have prevented her from telling the truth about having had sexual relations during 1993 to 1996 but this is pure speculation as no evidence was led to explain her contradiction. It is also possible that the appellant did, as the complainant alleged, persuade her to implicate P. but, as I

have earlier indicated, there was nothing to show what the appellant stood to benefit from doing so. The result is that the complainant's untruthfulness casts a shadow on her evidence and on her credibility as a witness.

[25] There is an additional matter which needs to be mentioned. In December 1995 the appellant's aunt, Ms M.M., suspected that the relationship between the appellant and the complainant might have had a sexual aspect to it. She then told the complainant about "fathers who love their children to such an extent that the father would make love to them". She added that "the father would say other fathers also do this to their children". At that time the complainant did not admit to her aunt that there was a sexual relationship between her and the appellant. When the complainant gave evidence at the trial some months later, she testified that the appellant had said to her that she should not have a guilty conscience about having sexual intercourse with him as this was a normal occurrence in other families as well. A consideration of this evidence gives rise to a suspicion that the complainant might have been influenced by her aunt to implicate the appellant.

[26] Although the appellant's evidence was also not free from blemish, his version cannot be rejected out of hand in the absence of adverse credibility findings by the trial court. The beatings which he meted out to the complainant, severe as they were, might indicate that he was not a caring father, but it cannot be inferred from this, even coupled with the fact that he gave her gifts, that he also indulged in sexual relations with her.

[27] Taking all of the facts into account, I am not satisfied that the state has proved the appellant's guilt beyond reasonable doubt. The result may be unfortunate as the complainant's version might be true and there is certainly considerable suspicion that the appellant might be guilty of the offence with which he was charged. The appellant, however, is entitled to the benefit of the doubt.

[28] In the result the appeal succeeds and the conviction and sentence are set

aside.

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L S MELUNSKY

ACTING JUDGE OF APPEAL