S v JR

GAUTENG DIVISION, PRETORIA

MNGQIBISA-THUSI J and RANCHOD J

2014 AUGUST 11;

2014 NOVEMBER 26 CASE No A285/2013

Advocate *Van der Merwe* for the first appellant.

Advocate *Van der Westhuizen* for the second appellant.

Advocate *Coetzee* for the state.

First Appellant's Attorneys: *Petro de Witt Attorneys*.

Second Appellant's Attorneys: *Van Tonder Attorneys*.

Ranchod J (Mngqibisi-Thusi J concurring):

Introduction

[1] The two appellants were arraigned in the regional court, Heidelberg on the following charges:

(a) Count 1: Assault with intent to do grievous bodily harm;

(b) count 2: Deliberately neglecting to attend to the injuries of a 13-month-old child, D, in contravention of s 305(3)*(a)* of the Children's Act 38 of 2005; and

(c) count 3: Contravention of s 3 of Act 32 of 2007 by raping the said child.

[2] First appellant was sentenced to ten years' imprisonment for the first count; eight years for the second count and seven years as an accessory to rape for count 3. Five years of the sentence for count 2 was ordered to run concurrently with the sentence for count 1. The

effective sentence is 20 years' imprisonment.

[3] Second appellant was sentenced to ten years' imprisonment for the first count; five years for count 2 and life imprisonment for count 3. Five years of the sentence for count 2 was ordered to run concurrently with that for count 1. The effective sentence is life imprisonment.

[4] The trial court also ordered that the particulars of both appellants must be included in the National Register for Sex Offenders in terms of s 50 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In terms of s 103(1) of the Firearms Control of Act 60 of 2000, both appellants were declared unfit to possess any firearm.

[5] Both appellants come on appeal with the leave of the court a quo on both conviction and sentence. However, during the appeal hearing, first appellant abandoned her appeal on conviction for counts 1 and 2 but persists in the appeal on sentence on those counts.

Facts

[6] The facts as they emerged during the trial and accepted by the trial court are as follows. The first appellant is the biological mother of D, a 13-month-old child. The child was conceived out of wedlock. Shortly after the child's birth the first appellant moved out of the child's father's home where she was staying with the child and moved into the house of her mother, Mrs R senior. Not long afterwards she met the second appellant and the two became romantically involved. Appellant 2 stayed in the same house as appellant 1 at the time of the various incidents which form the subject matter of the charges against them.

[7] The first sign that something untoward was afoot was on 20 June 2010 when the first appellant phoned her mother and reported to her that the child D had developed blue spots on her face. Nothing was done about it. On 24 June 2010 she phoned again and told her mother that although the previous spots had disappeared, new ones had appeared on the child's back. Her mother thereupon made an appointment with Dr PJ Snyman for the next day. Dr Snyman conducted a cursory examination of D when he saw her on 25 June and had blood drawn for analysis. On 15 July the first appellant and her mother were back at Dr Snyman's consulting rooms with D and, for the first time, complained about blue spots all over the child. Dr Snyman conducted no further examination but immediately referred them to Dr N Thwala, a paediatrician.

[8] Dr Thwala saw them and examined D later that day. He too took a blood sample for further investigation to determine whether the spots were attributable to some underlying medical condition. While the results of the blood tests were being awaited, the matter came to a head. On 17 July (a scant two days after their visit to Dr Thwala) the first appellant phoned her mother and reported to her that D had started to bleed, inexplicably, from her vagina. D was rushed to Dr Snyman but he was not available. Dr CJ Lee saw them but was not convinced of the explanation furnished by the first appellant as to the cause of D's bleeding. He decided not to examine D but promptly referred her to Dr Thwala.

[9] Dr Thwala saw them the same day, examined the child and concluded digital penetration of the vagina had taken place and that a continual movement in and out, probably with a finger, had caused the hymen to roll up. As the injury was severe, an operation was immediately performed during which six to eight stitches were made and a blood transfusion done to stop the bleeding and save D's life.

[10] Dr Thwala also testified that on the basis of the blood analysis and the X-rays that had been taken, he could state that D had also suffered other severe injuries apart from the deep laceration in the vagina. The ones that he concluded were non-accidental in nature and had been caused by an assault were the following:
[10.1] Strangulation marks around the neck where a rope had been used;
[10.2] two separate fractures of the left forearm;
[10.3] a bruise to the left cheek caused by a direct blow to the face;
[10.4] a human bite mark to the upper arm;
[10.5] bruises on the back as D was pressed against an object; and
[10.6] five fractures of the ribs which were potentially fatal.

[11] According to Dr Thwala, whose evidence was confirmed by the radiologist Dr AS de la Rey, the injuries were inflicted over a period of several weeks. In addition, Dr Thwala testified that the child must have suffered constant and excruciating pain that would have been clear for all to see.

[12] The two appellants gave evidence in their own defence. First appellant had earlier prepared a written version of the events which she, to a large extent, confirmed under oath.

Although the versions of the two appellants differed in some respects regarding the vaginal bleeding, they both claimed that D started to bleed spontaneously after the second appellant had bathed her. (First appellant later falsely told the doctors that D had been in her care when it happened.) They also ascribed the injury to the neck of the child to her being chafed by the garment she was wearing at the time. The fractures to the forearm they put down to a fall from her cradle during a period that she was unattended. Both took issue with Dr Thwala's view that he observed bite marks on D's arm. According to them she sustained the marks when she lay on top of her dummy. Some injuries, such as the rib fractures, they could not explain at all. Where the appellants could furnish no explanation to certain injuries, they blamed each other. The trial court, however, rejected their explanations as false.

Evaluation of the evidence

[13] First appellant told both Dr Lee and Dr Thwala that D was in her care when she started bleeding spontaneously from her vagina when in fact the child was in the care of the second appellant. She testified that she did this to cover the second appellant because he appeared worried when they were on their way to take D for medical attention. She said he told her: 'hulle gaan dink ek het met haar gepeuter'.[1] ('they will think I interfered with her'). She must have suspected that the second appellant had done something to the child but did not realise how serious it was. If she had persisted in the untruthful statements she made to Drs Lee and Thwala and if the trial court had believed that to be true, the second appellant would not have been convicted of rape. Even though first appellant testified that she did not believe that D had been raped by the second appellant she reconciled herself with the possibility that he did something unlawful when she lied to the doctors. If she really believed that he had done nothing wrong it was not necessary to lie to the doctors.[2]

[14] Counsel stressed that first appellant was not present when the child was vaginally penetrated. Hence she could not be an accessory to rape. However, this misses the point made by state counsel that that is precisely why she was convicted as an accessory and not as an accomplice. A person is an accessory after the fact to the commission of a crime if, after the completion of the crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of or accomplice in the crime to evade liability for his crime, or to facilitate such a person's evasion of liability.[3]

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[1] Record vol 5 p 48 lines 10–13.
[2] Record vol 5 lines 15–19; vol 1 p 34 line 17 to p 35 line 5; p 100 line 20; vol 5 p 50 line 7.
[3] Snyman *Criminal Law* 4 ed p 274.

When second appellant expressed his concern that he would be suspected of having molested the child she came up with the plan that they would say it was she who bathed the child and she was with the child when the bleeding started. When she and her mother met Dr Lee they tried to explain the bleeding by saying the child had a blood disorder.

[15] Both appellants also tried to create the impression that the bleeding must have started earlier that day before she was bathed. It is not in dispute that both appellants, Ms R senior and the child had earlier attended a birthday function of first appellant's brother in the afternoon of 17 July 2010. The child had been with many of the guests. First appellant's mother testified that both appellants left the function at about 17h00 to go to first appellant's grandmother. She herself left the function at about 18h00 also to visit the grandmother (who was her mother). When she arrived there, first and second appellants left. At about 19h00 she received a phone call from first appellant telling her that D was bleeding from her vagina. They then took the child to Dr Lee, who, after examining her, referred the child to Dr Thwala, a paediatrician. It was then that they told Dr Lee that the child had a blood disorder, seemingly in an attempt to deflect the medical investigation to a natural phenomenon.

[16] The appellants claimed that after they had left the birthday party and later arrived home the child's diaper was taken off (in preparation for bathing her) and it was noted that there was some blood on it. I will revert to this aspect further when I deal with the second appellant's appeal on count 3. Suffice to say for now (and it will become apparent later) that this evidence about the diaper was not true and was an afterthought.

[17] The first appellant initially decided to exercise her right to remain silent and not testify in her defence. It was only after the second appellant testified that she decided to testify.

[18] The second appellant gave his version of events on that day and when he was finished his counsel asked him:

> 'Goed voordat hulle gery het, weet jy of daar enige, het julle gaan kyk of het jy gaan kyk na [D] se klere of enigeiets?'

Only then did he speak about the diaper. The first appellant did not testify about this diaper in

her evidence-in-chief. It only came up when second appellant's counsel cross-examined her. As I said, she only testified after the second appellant. The learned magistrate concluded, in my view correctly so, that she realised that 'as sy voortgaan om te swyg daar groot probleme vir haar gewag het'. ('If she continued to remain silent big problems awaited her.')

[19] The first appellant clearly tried to assist the second appellant to evade liability for the crime of rape. In my view the first appellant was correctly convicted on count 3 as an accessory after the fact to the crime of rape by the second appellant whose appeal on that count I shall deal with presently.

[20] I turn then to the appeal against conviction on all three counts by the second appellant.

[21] In respect of count 1 the second appellant contends that there is no direct or circumstantial evidence that he assaulted D at any stage. It is further submitted that he neither had the means nor the time to assault the child nor was never alone with her. The latter submission is without merit as there is his own evidence that at one stage he fell asleep in the lounge when D allegedly fell out of the cradle she had been sleeping in. This was to explain how D might have sustained two fractures to her left forearm. It was submitted that there were other inferences to be drawn by the trial court than that the second appellant assaulted the child. However, the medical evidence controverts that probability.

[22] Dr Thwala disputed that the fractures to the forearm could have been caused as a result of a fall from the cradle. It was his opinion that hitting the child forcefully on the forearm would have caused the fractures. Dr De la Rey testified that twisting the wrist of the child could have caused the arm to break.

[23] Second appellant's counsel submitted that Mrs R senior had been dishonest when she testified and that she did so to protect her daughter, the first appellant. State counsel conceded during oral submissions that Mrs R senior clearly was not honest in her testimony and that she tried to protect the first appellant in doing so. I agree. It would appear that Mrs R senior could also have been charged for being an accessory. On the medical evidence the child had no illness. The injuries must have been visible and Mrs R senior must have seen them. First appellant herself testified that her mother tries to protect her. However, that does not mean that for that reason the guilt of second appellant is excluded. Counsel for second appellant

also submitted that there were others at Mrs R senior's house when the injuries were sustained. Hence, so the argument went, someone other than second appellant could have raped the child. However, from the mosaic that appears when all the evidence is viewed holistically, that appears to be improbable.

[24] From the evidence it appears that the first time that the first appellant reported to her mother (Mrs R senior) that she noticed blue marks on D's body was when both appellants had gone to Klerksdorp to second appellant's house with the child. That was on 20 June 2010. The child's grandmother was not there at the time and there is nothing in the record to suggest that anything like that had happened prior to 20 June. (The relationship between the appellants had apparently only started in the month before, that is, May.) Five days later, on 24 June, new blue marks were reported. The first ones had faded. It was on this second occasion that first appellant's mother suggested that they see Dr Snyman and an appointment was arranged for the next day. They returned to first appellant's house after consulting with Dr Snyman and second appellant remained there up until the time after the vaginal injury when she went home. It is apparent from these facts that when these first two injuries surfaced the appellants were at the second appellant's house. Neither Mrs R senior nor any other people who lived in her house were anywhere near the child.

[25] The incident when the child allegedly fell from the cot was around 1 July. Mrs R senior was not there at the time as she had gone to her father's house as he was dying and she stayed there to take care of him. He died on 30 June and on 1 July she was still at her father's house to take care of the funeral arrangements when she was informed that the child had fallen from the cot. None of the other occupants of the house were there, that is, first appellant's uncle and aunt.

[26] The first appellant testified that when she left the child in the cot there was no one else there but the second appellant. When she came back later, she found her uncle and aunt had also returned. When the child allegedly tripped on the toy box it was only second appellant who was with the child. Now, when the child allegedly fell out of the cot the child was in the care of the second appellant.

[27] Neither of the two appellants were consistent in their claims as to what had caused the fractures of the forearm. It was put to Dr Thwala that the arm had been broken when D had

fallen on top of a toy box and that the rib fractures had been caused by her fall from the cradle. These claims were disputed by Dr Thwala.

[28] The learned magistrate rejected the second appellant's version of how D might have sustained the injuries to her forearm. In my view, Dr Thwala's evidence is to be preferred and the court a quo was correct in accepting it. It follows then that the appellant is guilty of at least one incident of assault with intent to do grievous bodily harm.

[29] During the trial it was repeatedly put to some state witnesses that the second appellant's mother would be called to testify that he had telephonically informed his mother about the injuries the child sustained from falling out of the cot, yet she was never called as a witness. In my view when the totality of the evidence is considered the only inference that can be drawn is that the second appellant was involved in the injuries the child sustained every time she was with him and that they cannot be attributed to the reasons suggested by him and, for that matter, by the first appellant.

[30] If, as the second appellant averred, the injuries occurred accidentally whilst the child was under his guard, one would have expected him to seek medical attention for D. Instead, his explanation was that it was not his duty to do so. Yet, he intended to marry the child's mother and said he actually tried to raise the child as his own.

[31] It was argued on behalf of the second appellant that count 2 is a duplication of count 1, hence, he should not have been convicted on the second count. Section 305(3) of the Children's Act 38 of 2005 provides:

> '(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child *but who voluntarily cares for the child either indefinitely, temporarily or partially*, is guilty of an offence if that parent or care-giver or other person—
>
> *(a)* *abuses or deliberately neglects the child*; or
>
> *(b)* abandons the child.' [Emphasis added.]

[32] It is apparent that the subsection mentions three different offences, namely, abusing a

child, deliberately neglecting the child, and abandoning the child. Whilst abusing a child could conceivably overlap with a charge of assault, deliberately neglecting a child is clearly a different offence. The prosecutor in the court a quo had made it clear that he was relying on the latter offence. Count 2 states in part that the appellants committed a crime, 'deur nie voldoende aandag aan haar beserings te gee nie.' (Loosely translated into English: 'by failing to give adequate attention to her injuries'). Both appellants failed to seek immediate medical treatment for D after the various assaults. And when they did, they falsely attributed the blue marks on her body and the vaginal bleeding to a blood disorder.

[33] There are two tests that are applied by the courts to determine whether there is a duplication of convictions. The one is whether proof of the one charge does not, ipso facto, prove the second one. It is quite clear that proof of assault in count 1 does not, without more, prove deliberate neglect of the child. Different evidence is required to prove count 2. The other test is the so-called 'single intent' test. The appellants required a separate intent after the assaults to refrain from seeking medical help. Hence, there is no duplication of convictions and the appeal on that ground must fail.

[34] In my view, the learned magistrate correctly convicted the second appellant on both counts one and two.

[35] I turn then to count 3, which is the rape charge. Here, again, it is clear that the second appellant was the only one who was handling the child when she started bleeding from her vagina.

[36] The first point taken in the heads of argument of the second appellant (which were drawn up by a different counsel) was that the second appellant was not warned by the prosecutor that the minimum sentence of life imprisonment would be sought in the case of a conviction. The point was not pursued, in my view correctly so, by counsel who argued the matter before us. The charge sheet incorrectly referred to the provisions of s 38 as well as sch 2 to the Criminal Law (Sentencing) Amendment Act 38 of 2007. The correct Act is the Criminal Law Amendment Act 105 of 1997 and the correct section is s 51. In count 1 the Act is correctly identified. Furthermore, the reference to sch 2 is the schedule relating to life imprisonment. In any event, as I said, the second appellant was legally represented and he did not enquire about the incorrect reference, no doubt because he knew it must be an error and

also knew what the correct Act was. When addressing the court a quo on sentence, the second appellant's counsel specifically referred to the prescribed sentence of life imprisonment for rape of a child under the age of 16 years, which is provided for in Act 105 of 1997.

[37] An extremely lengthy submission (14 pages) in second appellant's counsel's heads of argument is made that the second appellant was not in any way responsible for D. I am not persuaded by the argument. Section 305(3) supra is clear. Even a person who voluntarily cares for a child temporarily or partially may be guilty of the offence of deliberately neglecting a child. It is clear from the wording that the legislature sought to spread the sub-section's net as widely as possible in relation to who is deemed to be a caregiver. It would seem that even if a person is a guest at the house of another who has a small child and the guest voluntarily cares for the child for a few minutes while the parent absents him- or herself, that guest falls within the ambit of the section. It is not strange that this is so if one has regard to the constitutional imperative that:

> 'A child's best interests are of paramount importance in every matter concerning the child'. (Section 28(2) of the Constitution of the Republic of South Africa, 1996).

[38] The second appellant testified in evidence-in-chief that when the first appellant was not available either he or the child's grandmother would care for the child. He also said that he and the first appellant planned on getting married and that he accordingly regarded D as his own child and tried to bring her up as such. He testified in so far as count 1 is concerned, that he on at least two occasions cared for the child, when she allegedly fell out of the cot and when he bathed her and she started bleeding vaginally. He also said that on several occasions he could see that D was in pain but he not only failed to inform the first appellant but also did not take her to a doctor for medical attention. His only excuse was that it was not his duty to do so.

[39] Insofar as the rape incident is concerned, the first appellant had left the child in the care of the second appellant to bath her whilst she went into the kitchen to prepare milk for D. The second appellant then informed her of the bleeding. He did not say it was an accident, nor is there any evidence that any one else was handling the child when she started bleeding. In fact, second appellant confirmed in his testimony that the child was in his exclusive custody

when she started to bleed from the vagina. He said this happened spontaneously when he laid her down on the bed and opened her legs after bathing her. However, Dr Twala testified that the child could not have started bleeding spontaneously. He said it must have been digital penetration, which, he explained, meant penetration with a finger. He went on to explain that if it had been penile penetration the posterior fourchette would have been injured, which was not the case here.

[40] The second appellant allegedly observed some blood on D's diaper when he removed her clothes to bath her. This was after they had come back from a party he, the first appellant and D had attended—the suggestion being that someone at the party could have raped the child. There are several reasons why this claim is beyond any doubt false.

[41] The first time that this was raised was when the second appellant testified in his own defence and then only after he had already testified about the alleged spontaneous bleeding that occurred when he removed D from the bathtub. Significantly, the evidence was never put to any of the state witnesses, not even Dr Thwala nor Mrs R senior. The first appellant initially elected not to testify. It was only when second appellant testified and stated this that she jumped on the bandwagon as it were, and repeated these facts. She claimed that the diaper was discarded but subsequently retrieved from the dustbin by Mrs R senior and that 'they' then gave it to the investigating officer. As I said, this assertion was never put to the state witness, Mrs R senior during cross-examination by first appellant's counsel so that she could respond thereto. If it had been put to Mrs R senior, the prosecutor could then also have called the investigating officer to testify in rebuttal.

[42] As I said earlier, the first appellant had prepared a written account of the events soon after her arrest. She did not include this vital piece of evidence—if it was true—in it. Her unconvincing response when the prosecutor cross-examined her on this omission was that she probably forgot to mention it.

[43] The allegation of blood having been noticed on the diaper before second appellant bathed the child contradicts his version as to how it came about that D started to bleed. According to him there was no blood in the bath when he bathed her. The first time he noticed the blood on D's vagina was when he removed the towel she was wrapped in and opened her legs. Dr Thwala testified that when he removed the packing of the wound, it immediately

started bleeding profusely again. If the second appellant's evidence was true, that is what would have happened when he removed D's diaper, if, indeed, she was bleeding before he bathed her.

[44] Second appellant also gave conflicting versions as to the time that he first saw the blood on the diaper, initially, he claimed that he observed the blood before they took the child to the doctors and before D had her bath. Later, however, he testified that he became aware of the blood on the diaper after returning from Doctors Lee and Thwala.

[45] It bears mentioning that when second appellant testified in-chief he related his version of events at some length and when he was finished his counsel asked him this question:

> 'Goed voordat hulle gery het, weet jy of daar enige, het julle gaan kyk of het jy gaan kyk na [D] se klere of enigeiets?' (Okay, before you (plural) drove off, do you (singular) know whether, did you (plural) go and look or did you (singular) go and look at D's clothes or anything?)

Second appellant only then relates the story about the blood on the diaper. The same thing happened when first appellant testified (after the second appellant). She did not mention in her evidence-in-chief at all. It only came up in cross-examination by counsel for the second appellant. She then claimed to remember the facts about the diaper.

[46] Neither of the appellants thought of immediately investigating why there was blood on the diaper. First appellant said she did not think it was important to do so. I agree with the submissions of state counsel that this version of something having happened to the child before he bathed her—perhaps at the party they attended—was concocted as an afterthought. It was a recent fabrication. It is clear that the first appellant had suspected that the second appellant had done something to D but she nevertheless sought to shield him from suspicion. Together with second appellant she agreed to say that it was she who had bathed the child and not the second appellant. The learned magistrate was correct in rejecting this version of events.

[47] I would dismiss the second appellant's appeal on count 3 as well.

The appeal against sentence

[48] There remains the question of whether the sentences imposed were appropriate. I will deal firstly with the appeal by first appellant, and thereafter the second appellant's appeal, on all three counts. But, before doing so I should mention that the court a quo incorrectly stated that second appellant would serve an effective term of life imprisonment plus 12 years. The magistrate ordered that the five year sentence imposed for count 2 should run concurrently with the ten year sentence for count 1. The effective sentence on those 2 counts is ten years, not 12. Where life sentence is imposed any other sentences would automatically run concurrently with the life sentence. Hence, the effective sentence imposed on the second appellant was in fact life imprisonment. However, in view of the decision this court has come to—as will become apparent presently—the error does not have any practical effect on the effective sentence of life imprisonment.

[49] The first appellant submitted that the magistrate erred in not taking counts 1 and 2 together for the purpose of sentence as the offence of abuse stems directly from the assault. Section 305(3)*(a)* of the Children's Act 38 of 2005 refers to where a caregiver or parent 'abuses or deliberately neglects the child'. Count 2 in the charge sheet refers to the alternative ('or') offence of deliberately neglecting the child and not abuse as submitted by first appellant's counsel in the heads of argument.

[50] It would be appropriate to state the applicable principles when an appeal court is asked to interfere with a sentence imposed by the trial court. Sentencing is essentially a matter within the discretion of the trial court. The discretion must be exercised judicially. An appeal court will interfere only if the sentence is vitiated by an irregularity or a misdirection, or is one which no reasonable court would have come to, in other words, where there is a striking disparity between the sentence imposed and that which the appeal court considers appropriate. If there was a misdirection, whether it is of such a nature or degree of seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.[4] A misdirection—

> 'simply means an error committed by the Court in determining or applying the facts for assessing the appropriate *sentence* . . . it must be of such a nature, degree,

[4] *S v Petkar* 1988 (3) SA 571 (A) at 574; *S v Collett* 1990 (1) SACR 465 (A) at 470–471 and *S v Siebert* 1998 (1) SACR 554 (SCA) at 559.

or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.'[5] [Emphasis added.]

[51] A misdirection could also flow from a misapplication of or misappreciation of a rule of law whether arising from our constitution, a statute, the common law or judicial precedent.[6]

[52] In *S v Kekana* it was held:

'Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity.'[7]

Olivier JA held in *S v P*:[8]

'The rights of children are all too frequently and brutally trampled over in our society. Abuse of children is sadly an all too common phenomenon. Those guilty of violating the innocence of children must face the wrath of the courts.'

[53] Neither counsel for the respective appellants in their heads of argument or during oral argument seriously criticised the ten years sentence imposed on both appellants for count 1—in my view correctly so. There are a number of very aggravating factors in this matter. A defenceless 13-month-old baby was severely assaulted. The nature, extent and seriousness of the injuries, inflicted over a period of some three months and culminating in the rape of the child can only be described as horrific. Not only was she completely defenceless, but she was totally dependent on the appellants to care for and feed her—more so as far as first appellant

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[5] Per Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 535E–F; *S v Blank* 1995 (1) SACR 62 (A) at 65–66; *S v Petkar* supra n 4 at at 574C.
[6] Per Moseneke J in *S v Van der Walt* A909/2002 (TPD) (unreported).
[7] Per Mathopo AJA in *S v Kekana* (SCA, case NO 629/2013; [2014] ZASCA 158 (1 October 2014) para 20.
[8] 2000 (2) SA 656 (SCA) at 660D–E.

is concerned—something which the court a quo took into account when differentiating in the sentence imposed for count 2 in respect of the appellants. The two appellants (particularly first appellant), were in a position of trust over the child. They scandalously abused that trust.

[54] Counsel for first appellant submitted that the magistrate erred in not properly considering that the convictions on counts 1 and 2 stem from one continuous criminal transaction and for that reason the sentence on these counts should have been ordered to be served concurrently to ameliorate their severity. However, the magistrate did make such an order but only to the extent that five of the eight years' imprisonment be served concurrently. This cannot be criticised.

[55] First appellant further submits that the disparity between the sentences of eight years imposed on her for count 2, as compared to five years for second appellant, was unfair. The learned magistrate correctly took into account the different positions held by the respective appellants over the child in that she was the biological mother of the child whereas the second appellant was not D's father. She had a greater responsibility towards the child.

[56] First appellant further submits that the seven years' imprisonment imposed on her for being an accessory to rape, is, with reference to S *v Rudman and Another*,[9] excessive. In *Rudman* supra a sentence of ten years' imprisonment was imposed on the first accused as an accessory to murder where the victim was a 2-month-old baby who had suffered severe abuse which led to his death. The second accused was sentenced to 13 years' imprisonment. I have already alluded to the fact that the crime of being accessory after the fact is one that is entirely sui generis. Its seriousness does not depend on the nature of the crime which the main perpetrator commits, but on the manner in which an attempt is made to enable the perpetrator to escape liability. In this regard the crime overlaps with the offence of attempting to defeat or obstruct the course (or ends) of justice and it has been argued by some authors that there is no justification for the existence of the former crime.[10] What is, however, important is that in those cases where a person was found guilty of being an accessory or of attempting to defeat the ends of justice, a period of direct imprisonment was invariably imposed. See *S v Phallo and Others*[11] and *S v Pakane and Others.*[12] In both these cases the accused were sentenced to

[9] 2013 (2) SACR 209 (GNP).
[10] Snyman *Strafreg* 4 ed (1999) at 279.
[11] 1999 (2) SA 558 (SCA).
[12] 2008 (1) SACR 518 (SCA).

eight years' imprisonment.

[57] I would dismiss the appeal on sentence by first appellant.

[58] In broad terms, what has been stated in respect of the first appellant's appeal relating to counts 1 and 2 is applicable to the second appellant and I would dismiss his appeal on sentence on counts 1 and 2.

[59] For count 3, the rape of D, the trial court imposed the maximum sentence of life imprisonment. Act 105 of 1997—the so-called 'Minimum Sentences Act', provides for certain prescribed minimum sentences for specified offences.

Part 1 of sch 2 provides for life imprisonment if an accused is found guilty of raping a child under the age of 16 years. It also provides for life imprisonment where grievous bodily harm was inflicted when the victim was raped unless substantial and compelling circumstances justified departure from the prescribed minimum sentence. In this case before us D was 13 months old and the digital penetration caused severe internal injuries which required suturing and blood transfusion. Dr Thwala testified that there must have been repeated movement of a finger in and out of the vagina to cause the hymen to roll up and the tearing of the very friable internal lining. The learned magistrate took into account the personal circumstances of the second appellant, the prevalence and the seriousness of the offence. It was the seriousness of the offence that weighed particularly heavily on the mind of the magistrate—in my view correctly so. In argument counsel submitted that the second appellant had limited intellectual capacity and this was, as I understood the submission, a substantial and compelling factor to justify the imposition of less than life imprisonment. In *S v Mahomotsa*[13] and *Rammoko v Director of Public Prosecutions*[14] it was held that while all cases of rape are serious some are more serious than others and a sentence of life imprisonment should be reserved for cases which fall in the most serious category. There is no doubt in my mind that this case falls within the most serious category of rape cases. D was a completely innocent child, trusting or dependent upon the safety of her home and the protection of her mother—and of second appellant. That innocence and trust was shattered when she was repeatedly assaulted over an extended period of time until she was raped.

[13] 2002 (2) SACR 435 (SCA) ([2002] 3 All SA 534).
[14] 2003 (1) SACR 2000 (SCA) ([2002] 4 All SA 731).

[60] Counsel for second appellant submitted that there was no evidence that the child suffered any psychological trauma. The child could not express herself verbally so no psychological profile could be drawn. A victim impact report[15] was compiled by Ms Petra Tromp, a senior probation officer at the Department of Health and Social Development, Sebokeng. She says that at the age of 3 years and 2 months the child still experiences nightmares from time to time. She then does not want to sleep in her own bed for a while. She feels safer sleeping in her (paternal) grandmother's room. At three years of age she still wears diapers. Ms Tromp concludes, in my view on the probabilities correctly so, that the nightmares and that D still wears diapers could be the consequences of the abuse she suffered. Ms Tromp says because D is still very young there is the possibility that she could recover completely. But, as the magistrate observed, one does not know.

[61] It was contended that second appellant showed remorse. This was correctly rejected by the court a quo because the appellant refused to take any responsibility. In *S v Matyityi*[16] remorse was aptly described:

> 'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[15] Report dated 12 September 2012; exh R in court a quo.
[16] 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424).

[62] It was also contended that he had limited intellectual capacity. However, that was not his defence nor did he tender it in mitigation as an explanation for poor judgment which may have been a substantial and compelling circumstance. Instead he refuses to take responsibility and shows no remorse. It should also be noted that the trial court carefully considered the pre-sentence report by Mrs Roos, a social worker, who conceded that a term of direct imprisonment was called for but, naturally, left it to the court to determine its length.

[63] In my view, having regard to the aggravating factors in this case as opposed to the extenuating ones and particularly the age of the child and the injuries sustained by her, called for imposition of the ultimate sentence. The magistrate had no alternative but to impose it. The appellant's personal circumstances were outweighed by the seriousness of the offence and the need to protect society from any possible repetition of this kind of offence.

[64] I would dismiss the appeal on sentence in respect of count 3 as well.

[65] I propose the following order:

(1) In respect of first appellant the appeal against conviction for count 3 and the appeal against sentence on counts 1, 2 and 3 is dismissed and the conviction and sentence on all counts is confirmed.

(2) In respect of second appellant the appeal against conviction and sentence on counts 1, 2 and 3 is dismissed and the conviction and sentence is confirmed.