

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

Case No: A52/09

Date heard: 23/02/2010

Date of judgment: 1 April 2010

Not Reportable

Not of interest to other judges

In the matter between:

M[...] M[...]

APPELLANT

and

The State

RESPONDENT

JUDGMENT

DU PLESSIS J:

The regional court found the appellant guilty on two counts of rape. The complainant was under the age of 16 at the time of the rape. For purposes of sentence the trial court took the convictions as one and, applying the provisions of the **Criminal Law Amendment Act, 105 of 1997**, sentenced the appellant to imprisonment for life. The appellant now appeals against the convictions and the sentence.

The state alleged that the appellant had respectively during January 2007 and on 25 February 2007 raped his 13-year old daughter, N[...] R[...] H[...].

According to the complainant, the first incident took place after midnight one night in January 2007. She and her younger brother, T[...], had been playing “machines”. Her father fetched them in his car. On the way home, T[...] fell asleep. The appellant stopped the car and reclined the complainant's seat. He undressed the

girl and himself, and had intercourse with her. He told his daughter that she was not to tell anybody about the event. He added that, if she did, he would no longer buy her the things she needed. The complainant said that she did not believe this threat. Although she lived with them, the complainant nevertheless did not report the incident to either her mother or her grandmother. She said that she did not tell them because her father, whom she loved and respected, had told her not to. She also did not report the incident because she did not think that the others would believe her.

Regarding the second count, the complainant testified that on the evening of 24 February 2007 she was visiting family. After midnight the appellant arrived and they started home in his car. On the way the appellant bought a cold drink for the complainant and liquor for himself. By then, according to the complainant's evidence in cross examination, the appellant was already drunk. He stopped and parked the car in a graveyard where he let the car seat down and started to undress the complainant. When she asked him what he was doing, he told her to keep quiet and proceeded to have sexual intercourse with her. The two of them then fell asleep. She woke up and was busy dressing when two policemen arrived. The police ordered the appellant and his daughter out of the car. The appellant told them that the complainant was his girl friend. One of the policemen took the complainant aside, asked her what had happened and she told him that her father had raped her.

In the course of her evidence the complainant mentioned that her father had given her a cellular telephone, but she denied that it had anything to do with the rape.

The complainant was taken to a doctor in the course of the day after they had been found in the graveyard.

The two policemen who found the appellant and his daughter in the graveyard gave evidence for the state. One of them, Snyders, said that they found the two asleep in the car at about 03h45. The appellant was naked from the waist down. Snyders said that his colleague, Molefe, took the girl to the police car while he (Snyders) asked the appellant what was going on. The appellant told Snyders that the girl was his girlfriend. Snyders then went to the police car where the girl told them that the appellant had offered her a cell phone so as to sleep with her. Snyders returned to the appellant's car and ordered him out. The appellant, who clearly was drunk, became quite aggressive but was arrested.

Although there were differences in the detail, the other policeman, Molefe, essentially confirmed Snyders's account of the events.

Dr MM Potolo examined the complainant on 25 February 2007. He testified that he found clinical signs in keeping with sexual assault and also with penetration. In cross examination the doctor, however, conceded that the clinical signs he found did not necessarily indicate recent penetration. Dr Potolo took specimens for

forensic analysis. It is common cause that on forensic analysis those specimens were found not to contain any semen. In fact, the analysis yielded no notable result.

When he testified, the appellant flatly denied the first incident on which he was alleged to have raped his daughter.

Regarding the incident on 25 February 2007 the appellant testified that he was drunk and could remember nothing from the time he had gone to his family to fetch his daughter until the police found them in the graveyard. He said that he did not believe that he had had sexual intercourse with his daughter.

As regards the first count, there is nothing to corroborate the complainant's evidence. The appellant denied that the incident took place at all. The evidence shows that, despite here incriminating evidence, the complainant still had regard for her father. I agree with the learned trial magistrate that, in the absence of any evidence indicative of the contrary, it is unlikely that the complainant would have falsely incriminated her father. On its own, the evidence regarding the first incident might not have been sufficient to secure a conviction. All the evidence, including that regarding the second incident must, however, be taken into account.

As regards the second incident, the complainant's evidence unequivocally shows that intercourse took place. Her evidence in that regard is borne out by the compromising circumstances wherein the policemen found the appellant and his daughter. It is also borne out by the appellant's reaction at the time, namely to tell the police that the complainant was his girlfriend. The latter evidence, if accepted, leaves no doubt that the appellant himself realised that the circumstances were compromising.

The appellant's defence has two legs. Firstly, it was his evidence that he was drunk to the extent that he did not know what he was doing, thereby implying that even if he had had intercourse with his daughter, he did not know about it. The undisputed fact that the appellant drove his car to the graveyard is a strong indication thereof that he could not have been as drunk as he wanted the court to believe. Also, the undisputed fact that he coherently communicated with the police a few hours after he had parked, belies his version. Finally, if it is accepted that he had intercourse with the girl, that in itself shows that he could not have been as drunk as he said he was. The evidence of the police and of the complainant also shows the "drunken stupor" defence to be false.

The second leg of the appellant's defence was that he did not have intercourse with his daughter. In the light of the circumstances wherein the police found him, this defence was rightly rejected by the trial court. There is no basis to doubt the evidence of the police in this regard. In addition, of course, the complainant's own evidence and her immediate report to the police supports the finding of the trial court that the appellant's

denial was false. Finally, the evidence that the appellant told the police that the girl was his girl friend also indicates the he knew that intercourse had taken place.

To sum up, I agree with the learned magistrate that, as regards the second count, the state has proved beyond reasonable doubt that the appellant had had sexual intercourse with his daughter.

The next question is whether the intercourse was without consent. The policemen testified that on the scene the complainant told them that the appellant had promised her a cellular telephone in order to have, as Snyders'sput it, sex with him. In her evidence the complainant said that the promise of the telephone had nothing to do with the sexual intercourse but in the light of the policemen's evidence that cannot be relied on. We are therefore bound to consider the question of consent on the footing that sexual intercourse took place after the complainant had been promised a telephone if she had sex with her father.

I accept that the promise of the telephone had the effect that the girl did not actively resist the sexual intercourse but does it show a reasonable possibility that she actually consented? The complainant in so many words said that she did not consent. The appellant did not say the contrary because he denied intercourse. What we have to do, therefore, is to consider whether the complainant's direct statement might be false in view of all the evidence, particularly that regarding the promise of the telephone.

When the police asked her, the girl's immediate reaction was that her father had raped her. That in itself indicates that she did not consent. Moreover, the girl was in an impossible situation in which the appellant had placed her. Her drunken father had promised her a telephone if she had intercourse with him.

She was alone with him in a car in a graveyard. In my view she was left with no choice. In the circumstances, to the extent that she did not actively resist, that does not show consent. In that context the fact that the medical and forensic evidence does not show non-consensual intercourse is insignificant.

It is concluded that the sexual intercourse took place without the complainant's consent.

Returning to the first count, the circumstances surrounding the complainant's report of the second rape obviously gave her the opportunity also to complain of the first. The manner in which the second rape was doubtlessly committed lends credence also to the complainant's evidence regarding the first count. In my view, any doubt that might have existed regarding the first rape, is removed by the evidence of the second rape.

It is concluded that the appellant was rightly convicted on both counts.

Because the complainant is under the age of 16, section 51(1) read with Part I of Schedule 2 to the **Criminal**

Law Amendment Act, 105 of 1997 prescribes a minimum sentence of imprisonment for life unless the court can find substantial and compelling circumstances that dictate a lesser sentence. The trial court found no such circumstances. The essential question before us is whether such circumstances exist.

The appellant was about 39 years old at the time of the offences. He had a relatively stable relationship with the victim's mother albeit that a victim impact report that was put before the trial court by agreement, shows that he had various other affairs. The appellant has previous convictions for theft and related offences but the trial court, correctly in my view, did not take that into account.

As regards the crimes, it is evident from the victim impact report that the complainant was severely traumatised by the incidents. Her emotional soundness has been compromised as also her perception of sexual relations. The fact that the victim is the appellant's daughter further aggravates the crimes. Most people would term such conduct egregious even. It must, however be borne in mind that at least the second rape was committed when the appellant was drunk. That is no excuse but goes some way towards explaining his conduct.

Having regard to all the circumstances, the question is whether the ultimate penalty is just in this case. While serious, the appellant's crimes do not fall in the category of extremely serious or even most serious crimes. That being the case the trial court should in my view have held that the full spectrum of circumstances in this case render imprisonment for life unjust. In my view the appellant should be sentenced to 18 years imprisonment on each count. The sentences should be ordered to run concurrently.

In the result the following order is made:

1. The appeal against the convictions is dismissed.
2. The appeal against the sentence is allowed. The sentence is set aside and in its stead the following sentence is imposed: "On each of counts 1 and 2 the accused is sentenced to 18 years imprisonment. The sentences are ordered to run concurrently."
3. The sentences are antedated to 22 September 2008.

B.R. du Plessis

Judge of the High Court

I agree

M.J.Dolamo

Acting Judge of the High Court

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On behalf of the Respondent: Director of Public Prosecutions

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