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



15/5/15

CASE NUMBER: A693/2014

-
- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....13.5.2015.....

DATE

SIGNATURE

In the matter between:

SIBUSISO PETROS SIBANYONI

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted on one count of rape in the Ermelo Regional Court (Mpumalanga Division) and sentenced to life imprisonment.
- [2] Leave to appeal against the conviction and sentence was granted on petition by this court.

FACTS AND EVIDENCE

- [3] The allegations pertaining to the rape charge emerged during September 2012 when the complainant, a [...] year old girl, was living with her father in New Castle. From the evidence it appears that the complainant stayed with her mother in Breyten, Mpumalanga until approximately June 2012.
- [4] The appellant, a [...] year old male, is the [...] of the complainant's mother and according to the evidence of the complainant, the appellant visited her mother every day after work.
- [5] The complainant testified that the appellant raped her twice during the period she resided with her mother. She further testified that the rapes occurred in the bedroom whilst her mother was in the kitchen.
- [6] The complainant did not tell her mother about the rapes because she was afraid. It appears that her fear emanated from a threat made by the appellant to the effect that, should she tell her mother *"he will see what he will do"*.
- [7] Save for the evidence of the complainant, the State called Dr Longolongo and the complainant's neighbour in New Castle, Ms Mkhwanazi.
- [8] Dr Longolongo examined the complainant on 1 October 2012 and came to the following conclusion:

" THIS IS A [...] YRS OLD GIRL WITH A NORMAL GENERAL MEDICAL EXAMINATION, BUT PRESENT AN ANNULAR HYMEN, OPENED AT MORE THAN 10mm OF TRANSVERSAL DIAMETER AND HAVING 2 OLD TEARS AT 15:00 AND 17:00 THAT MAY BE VERY SUGGESTIVE OF ANY KIND OF HYMEN PENETRATION."
- [9] During cross-examination, Dr Longolongo conceded that it was not possible to determine when the injuries to the complainant's vaginal area occurred.

- [10] Ms Mkwanzazi, the neighbour, testified that the complainant played daily at her house with her children. She was previously informed by the mother of the complainant (most probably referring to the complainant's stepmother) that the complainant had problems with passing urine and stools. Ms Mkwanzazi told the court that she had seen a program on television about children that were sexually assaulted and the problems experienced by the complainant correlated with those she saw in the program.
- [11] She took it upon herself to question the complainant and when asked whether she was raped at some stage, she told Ms Mkwanzazi that someone did put his private part into her private part. When asked who the person was, the complainant said "*Sibusisu*" (the appellant). Upon further questioning, the complainant told Ms Mkwanzazi that the appellant lived in Mpumalanga and that he was in a relationship with her mother.
- [12] Ms Mkwanzazi informed the complainant's stepmother and they took her for an examination to verify the allegations.
- [13] During cross-examination, Ms Mkwanzazi testified that she arrived in New Castle some nine months prior to the incident and that the complainant was already living with her father at that stage. This evidence contradicts that of the complainant in respect of when exactly she moved to New Castle.
- [14] During the evidence of the appellant, he confirmed that he knew the complainant and he further testified that he is still in a relationship with the complainant's mother. He further stated that he visited the complainant's mother over weekends, during the time the complainant resided with her mother.
- [15] The appellant confirmed the complainant's version that she moved to her father during June 2012.
- [16] The appellant confirmed that he had a good relationship with the complainant and bought fruits for her and her siblings. He could not understand why the complainant would implicate him as the perpetrator of the crimes.

CONVICTION: GROUNDS OF APPEAL

[17] From the heads of argument filed on behalf of the appellant, the following salient grounds of appeal appear:

- i) in view of the fact that the complainant is a child and a single witness, the court *a quo* erred in not treating the evidence of the complainant with caution;
- ii) the complainant did not explicitly say that the appellant inserted his penis into her vagina;
- iii) it is improbable that the appellant would have raped the complainant whilst the complainant's mother was in the house;
- iv) the evidence of the complainant did not establish exactly where and when she was raped;

[18] I have carefully considered the judgment delivered by the court *a quo* and am satisfied that the court properly dealt with each of the grounds relied upon by the appellant in this appeal. The court *a quo* carefully examined the evidence and applied the correct legal principles thereto.

[19] In the premises, no reason exists to interfere with the conviction of the appellant in the court *a quo*.

SENTENCE: GROUNDS OF APPEAL

[20] It was submitted on behalf of the appellant, that the court *a quo* erred in not considering the cumulative effect of the appellant's personal circumstances to constitute substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment.

[21] The court *a quo* had due regard to the seriousness of the crime, the interests of the community and the personal circumstances of the appellant.

- [22] The approach of the appellant, in relying only on his personal circumstances to justify a deviation from the prescribed minimum sentence of life imprisonment, is misguided.
- [23] The seriousness and prevalence of the rape of young girls need not be elaborated upon. The most precious possession the complainant possessed, her innocence and bodily privacy, has been rudely taken away from her by the appellant. The appellant's actions will have a lifelong impact on the complainant.
- [24] I could not find any established ground in law to interfere with the sentence imposed by the court *a quo*.

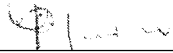
ORDER

In the premises, I propose the following order:

The appeal against conviction and sentence is dismissed.

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree,



T P MUDAU

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

It is so ordered.

APPEARANCE ON BEHALF OF THE APPELLANT:

Advocate V J Dhomo

APPEARANCE ON BEHALF OF THE RESPONDENT:

Advocate F W VAN DER MERWE