

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



CASE NO: A709/2014

DATE OF HEARING: 26 MAY 2015

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

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DATE

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SIGNATURE

In the matter between:

JEREMIAH MNISI

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

AVVAKOUMIDES, AJ

1. The appellant was convicted on a charge of contravening section 3 of the Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007 by the Regional Court of Pretoria, held at Pretoria, having pleaded not guilty to the charge and on 5 March 2014 was sentenced to life imprisonment. He was represented in the trial.
2. The sentence is the minimum prescribed sentence in accordance with the provisions of section 51 (1) read with section 51 (3) of the Criminal Law Amendment Act 105 of 1997 (the Act) the essence of which is that upon conviction of the rape of a child under the age of sixteen, the trial court is obliged to sentence the accused to imprisonment for life, unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence.
3. According to the notice of appeal the appellant has appealed against his conviction only. The appellant has an automatic right of appeal in terms of section 10 of the Judicial Amendment Act, 2013, Act No. 42 of 2013.
4. The grounds for appeal appear from the notice of appeal as follows:
 - (a) The trial court failed to take cognisance of the single witness cautionary rule; and

(b) The state failed to prove that the appellant is guilty beyond a reasonable doubt.

5. The state called the complainant who was [...] at the time. She testified that she knew the appellant and that he was the boyfriend of her grandmother. It appears from the record that the lady referred to is not actually the complainant's grandmother but rather an elderly cousin of the complainant's mother, whom the complainant regards as her grandmother.
6. The complainant testified that on the night in question the appellant and the accused were drinking in the dining room of her home. At approximately 23h00 she went to bed. She slept in a bedroom with her two brothers who were asleep and as was her mother. She slept with her one brother in the same bed. While she was asleep facing up she was woken up by something penetrating her vagina and she woke up and saw the appellant on top of her. She recognised the appellant from his dreadlocks and even thought it was dark there was enough light from the Apollo street light shining in the bedroom.
7. She screamed and this woke her mother. She was scared to tell her mother what happened but eventually did so. The mother also testified and stated that initially the complainant told her that the appellant penetrated her vagina with his finger but later told her mother that it was with his penis. The medical examination did not reveal any injuries but the testimony of the examining doctor

concluded that this did not mean that there was no penetration. The complainant testified that she had had intercourse with her boyfriend about one month prior to the incident and knew what a penis felt like. The examining doctor testified that because the complainant was sexually active this could be the reason that he could not find any injuries.

8. The appellant submitted that there were material contradictions in the testimony of the complainant but only relies upon the issue of the finger vis a vis the appellant's penis aspect to show material contradiction. In my view, even if there was initially contradiction in this regard it is immaterial. The complainant explained this by stating that she was initially afraid of telling her mother. The principles in this regard have been established in the instructive case of *S v Mafaladiso and others* 2003 (1) SACR 583 (SCA) and which has been followed in many subsequent cases.
9. Furthermore the appellant relies on the improbability of him having entered the complainant's bedroom whilst knowing that her brothers were sleeping in the same room. This is speculative to say the least. Insofar as the aforesaid contradiction is concerned, I have had regard to the decision in *S v Oosthuizen* 1982 (3) SA 571 (T) wherein the court held that: *"Contradictions per se do not lead to rejection of a witness' evidence. Not every error made by a witness affects his credibility, in each case the trier of facts has to take into account such matters as the nature of the contradictions, their*

number and importance, and their bearing on other parts of the witness' evidence."

10. The submissions made by the appellant in his heads of argument do not aid him at all. The majority of the submissions are made to cast aspersion on the probability of the incident having occurred as the complainant testified. For example the appellant argued that if the complainant was wearing a dress and underwear, as she testified, the appellant would have had move her body in order to lift her dress and shift her underwear to the side. These submissions are merely speculative and cannot be accepted in support of an argument that what the appellant says is reasonably and possibly true. They stand to be rejected.
11. The appellant called the grandmother to testify and her evidence was aimed at denying that the appellant could have got up in the night because she would have woken up if he did. Two aspects vitiate against this version: one is that it is common cause that she and the appellant had been selling liquor from the premises and drinking for some time before the complainant went to bed and secondly she told the complainant's mother that she did not see the appellant get up in the night.
12. The evidence of the complainant does not appear to me to be unsatisfactory and was accepted by the trial court as reliable and sufficient to sustain the conviction. Insofar as the cautionary rule in

sexual assault cases is concerned, I have had regard to the case of S v Jackson 1998 (1) SACR 470 (SCA) at 476 E-F where the court stated that: *"In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complaints in sexual assault cases as particularly unreliable. In our system of law, the burden is on the stat to prove the guilt of an accused beyond reasonable doubt, no more no less."*

13. In Director of Public Prosecutions v S 2000 (2) SA 711 (TPD) the court held that: *".....it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before a conviction can take place."* I am satisfied that the evidence of the complainant and that of her mother was credible and there is no reason to confirm the acceptability thereof for purposes of sustaining a conviction, as the trial court did.
14. The appellant submitted that the trial court misdirected itself in applying the minimum sentence. The Act provides that if there are substantial and compelling circumstances present, the court may deviate from the minimum sentence. I have had regard to the submissions of the appellant and his circumstances. He submitted, inter alia, that he is a single offender, his parents are deceased, he was one of three children, one of whom passed away, he does not know his biological father, his father's family never accepted him as his father's child, he is unmarried but has two children from a

previous relationship and two other children with his girlfriend and has worked as a hairdresser for a period of 14 years.

15. The appellant further submitted that he is gainfully employed, was the breadwinner in the family, that no violence used in the rape and that it was not one of the worst rapes. None of the reasons submitted by the appellant constitute substantial and compelling reasons for the court to deviate from the minimum sentence. Consequently I cannot find that the imposition of the statutorily prescribed minimum sentence by the regional court was grossly disproportionate to the offence. I am therefore of the view that the appeal should be dismissed.

16. I accordingly make the following order:

16.1 The appeal against conviction and sentence is dismissed.

AVVAKOUMIDES, AJ

ACTING JUDGE OF THE HIGH COURT

I agree:

HUGHES, J

Representation for the Appellant:

Counsel

H. B. Moloi

Instructed by

Pretoria Justice Centre

Representation for Respondent:

Counsel

M. T. Moetaesi

Instructed by:

The State