

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A97/2015

In the matter of:

FUSI STEPHAN SETLABA

Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* FISCHER, AJ

JUDGEMENT:

FISCHER, AJ

HEARD ON:

17 AUGUST 2015

DELIVERED ON:

20 AUGUST 2015

- [1] The appellant, Fusi Stephen Setlaba, was charged with the contravention of the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with Sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977, as well as Sections 92(2) and 94 of the Criminal Procedure Act 105 of 1977 in that it was alleged that on 16 January 2010 and at Botshabello in the Free State Province he unlawfully and

intentionally raped the complainant, to wit [.....] a 14 year old girl.

- [2] On 13 April 2011 the appellant was convicted of rape and on 26 May 2011 sentenced to 18 years imprisonment. On 9 June 2014 the appellant was granted condonation for the late noting of an appeal together with leave to appeal against his conviction by the court *a quo*.
- [3] It is unnecessary for purposes of this judgment to deal extensively with the submissions advanced on behalf of the appellant by Ms Smith, or for that matter the response of Mr Chalale on behalf of the state in view of the concessions made by Ms Smith from the bar it being common cause that the heads of argument were prepared and filed by her colleague Mr Reyneke.
- [4] I do however deem it apposite to deal very briefly with the basis of the appeal and the subsequent commendable and correct approach adopted by Ms Smith.
- [5] In brief the whole appeal was premised on the fact that the complainant was a 14 year old single witness and that, had the court *a quo* properly applied the cautionary rules to her evidence, the appellant should have been acquitted.
- [6] It has repeatedly been emphasised that in addition to honesty and sincerity, the court must be placed in a position to test the say-so of the single witness so as to determine

the reliability of this witness's observations in what were quite clearly traumatic circumstances (See **S v Ngcina** 2007 (1) SACR 19 (SCA) at para [17]). It is furthermore so that there must be certainty beyond a reasonable doubt of the identification of the alleged perpetrator, having regard to all the circumstances of the case (See **S v Sharzen and Another** 2006 (2) SACR 143 (SCA) at para [11] to [15]).

- [7] In *casu* the 14 year old complainant was not only able to describe in detail what the appellant was wearing but, in addition thereto, the detailed manner in which he went about confronting her, assaulting her and eventually raping her.
- [8] Despite her age, the complainant came across as a very good witness and her evidence was corroborated by the testimony of her uncle, her brother and, subsequently, that of the forensic clinical assistant who examined the complainant and filed a J88 as well as that of the arresting officer, Captain Monyane. The rape took place against the background of a festive occasion arranged by the complainant's uncle at his home and attended by both the complainant as well as the appellant. At some stage during the proceedings the complainant was sent by her uncle to a shop nearby to purchase candles and before she had returned, the appellant left the uncle's home allegedly to go home. The uncle thereafter become worried about the complainant's failure to return from the shop as a result of which he and complainant's brother went in search of her

only to see her coming towards them in the company of the appellant who then proceeded to run away.

[9] Not only was the complainant's version of the nature and extent of the assault corroborated by the forensic evidence, but, in addition thereto the forensic clinical assistant testified that the appellant had requested him to speak to the complainant's uncle about the incident as the appellant was afraid he would lose his job. This attempt by the appellant to avoid the consequences of his actions was corroborated by the complainant's uncle who testified that shortly after his arrest, the appellant had approached him and asked for forgiveness for what he had done.

[10] Ms Smith on behalf of the appellant, quite correctly conceded that not only did the court *a quo* apply the cautionary rules correctly and deal in an appropriate manner with unsatisfactory portions of the evidence of the state witnesses, but in addition thereto, could not be faulted in concluding in its judgment that the appellant's version could not be reasonably possibly true and as such inherently improbable.

[11] In the circumstances the appeal against the conviction cannot succeed.

[12] In the result the following order is made:

The appeal by the appellant against his conviction of rape is dismissed.

P. FISCHER, AJ

I concur.

B. C. MOCUMIE, J

On behalf of applicant: Adv. Smith
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondents: Adv. S. Chalale
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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