

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: P341/2010

In the matter between:-

ALBERTO ABRAM DE SOUSA

Applicant

and

STATE

Respondent

HEARD ON: 25 FEBRUARY 2011

CORAM: HANCKE et KRUGER, JJ

JUDGMENT BY: KRUGER, J

DELIVERED ON: 25 FEBRUARY 2011

[1] This is an application for leave to appeal against the dismissal of applicant's petition under section 309C of the Criminal Procedure Act 51 of 1977 by Hancke J and Claasen AJ. Because Claasen AJ is no longer acting as a judge, Hancke J requested me to sit with him in this application.

[2] The applicant was convicted and sentenced in the regional

court. Leave to appeal was refused by the regional magistrate, and thereafter his petition was turned down by this court. In order to obtain leave to approach the Supreme Court of Appeal, the applicant must ask this court for leave to appeal against the dismissal of his petition (**KHOASASA v S** [2002] 4 All SA 635 (SCA) pars [19] – [22]).

- [3] The applicant was convicted on three counts:
- (1) Indecent assault by kissing the 7year old complainant on her lower stomach on several occasions during 2005 - 2006;
 - (2) Indecent assault by putting his penis in the complainant's mouth on several occasions from September to December 2007;
 - (3) Rape under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (which came into operation on 16 December 2007) by putting his penis in complaint's mouth during the period January 2008 to December 2008, when complainant was 9 and 10 years old.

- [4] The applicant was sentenced as follows:

Count 1: 5 years' imprisonment

Count 2: 10 years' imprisonment

Count 3: 15 years' imprisonment.

The sentences were to run concurrently, thus the effective term of imprisonment was 15 years.

[5] The complainant testified when she was 12 years old, having been born on 9 February 1998. She testified through an intermediary. There were discrepancies in her evidence; she reported the incidents at a late stage; and there was no objective corroboration for her evidence. The magistrate considered all these factors in his judgment, but in my view there are reasonable prospects that another court may come to a different conclusion.

[6] As to sentence, the acts alleged in counts 2 and 3 are the same. The only difference is the expansion of the definition of "rape" by virtue of Act 32 of 2007. There are reasonable prospects that another court may find that the coming into operation of Act 32 of 2007 does not, for a series of events as happened in this case, warrant an increase from 10 years' to 15 years' imprisonment. Another court may find that there

were misdirections or that the effective sentence is shockingly inappropriate.

[7] There are reasonable prospects that another court can come to a different conclusion on the convictions and the sentences.

[8] An appeal from an order of two judges of this court cannot be heard by the full court, and must be heard by the Supreme Court of Appeal (see **S v McMILLAN** 2001 (1) SACR 148 (W) at 151j par [11] per Cloete J).

[9] Leave is granted to the applicant to appeal to the Supreme Court of Appeal against his convictions and sentences.

A KRUGER, J

I concur.

SPB HANCKE, J

On behalf of the applicant: Adv. J. Nel

Instructed by:
EG Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. F. Pienaar
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/wm