

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : A68/09

In the Appeal between:-

GEORGE JANSEN

Appellant

and

THE STATE

Respondent

HEARD ON: 14 MARCH 2011

CORAM: MOLOI, et LEKALE, AJ

JUDGMENT BY: MOLOI, J

DELIVERED ON: 24 MARCH 2011

APPEAL JUDGMENT

MOLOI, J

[1] The appellant was found guilty by the Regional Court of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 in that he unlawfully and intentionally committed an act of sexual penetration of the complainant, P N, by inserting his penis into her vagina without her consent. The trial court thereupon sentenced him to life imprisonment. He appealed against both the conviction and sentence having an automatic right to appeal in terms of section

309 (1) (a) of the Criminal Procedure Act No. 51 of 1977, as amended.

- [2] It was contended on the appellant's behalf that the state failed to prove the appellant's guilt beyond a reasonable doubt: S v Van der Meyden 1999 (1) SACR 447 (W). This contention was based on the fact that the complainant was a single witness in as far as the rape itself was concerned and that the trial court did not apply the cautionary rule relating to single witnesses as stated in R v Mokoena, 1932 OPD 79. It was also contended that the complainant being only 10 years old, the court must have guarded against admitting the evidence of a child without much ado.
- [3] According to the complainant on 6 January 2008 she visited her friend, Maria, to play. It was raining and cold. Maria was asleep. She started playing alone. The appellant waved at her to go to him. She did not comply. The appellant moved towards her and she tried to run away. The appellant, however, grabbed her arm and closed her mouth with his other hand as she was crying. The appellant dragged her to his house, closed and locked the door as he tied her hands with a handkerchief. She demonstrated how he lied on top of her on the bed and did "*funny things*" to her. In the

process she felt pain in her vagina but did not know what was hurting her. People outside forced the door open and entered the house. The police were called and found her at Sephamla's place. She did not know the appellant before but knew where he stayed. She testified that Sephamla beat her up on her legs with a stick while asking where she had been. Sephamla is Maria's mother and the first report was made to her.

- [4] Sephamla testified she was the appellant's neighbour. That on 6 January 2008 she was sleeping as it was raining while the complainant and Maria (her daughter) were playing outside. She called the complainant and Maria into the house but only Maria responded. When she called the complainant again the complainant was not there. She sent Maria to go and look for the complainant. When the complainant eventually arrived she wanted to know where the complainant had been and threatened to beat her up if the complainant did not tell her the truth. It was then that the complainant told her that the appellant took her to his house and he said to her it was cold outside. He also promised to give her money and sweets. The appellant took her to the bedroom. Another man knocked on the appellant's door. She saw a group of people in front of the appellant's house. Eventually the complainant

showed her what happened to her and the police were called.

[5] On 7 January 2008 a medical practitioner examined the complainant and noted his findings on the customary J88 form. He noted that the complainant was agitated as a result of emotional distress though there were no physical injuries save for the two tears to the hymen and vaginal discharge/bleeding consistent with sexual assault. The report was received in evidence by consent. The appellant was legally represented and the contents thereof were admitted. The complainant weighed a mere 20kg which was too low for her age. She was 10 years old.

[6] The appellant's defence was a denial of having had sexual intercourse with the complainant. He raised an alibi that on the day in question he had been to his sister's place since the morning. That in the afternoon when he came back to his house, he listened to the radio and heard his neighbour (Sephamla) calling for the complainant. He told Sephamla that the complainant passed his place earlier to her, Sephamla's, place. The complainant was dragged outside the neighbour's house and slapped three times on her head by Sephamla. He knew the complainant was sent to the shops.

[7] The court called a witness, Nelsie Moabi, a teacher who testified that she saw a group of people on the scene i.e. the appellant's house. She approached the complainant who was standing on the stoep of the appellant's house crying. She asked the people what was taking place and they referred her to the complainant. When she asked the complainant what was wrong, the complainant replied that "an old man caught me and took me to his house and then took me and put me on the bed". The complainant continued crying which broke her heart realising what had happened to the 'child', the complainant. The people around were also heartbroken by what happened to the complainant.

[8] Mr. Pretorius, of the Legal Aid Board, representing the appellant, argued before us that the evidence of Sephamla contradicted that of the complainant in that Sephamla stated that the complainant was playing with Maria outside when she called them into the house whereas the complainant said Maria was sleeping in the house and she continued to play alone before the appellant grabbed her. Mr. Lencoe on behalf of the respondent argued that the contradictions, if any, were not material in that they did not

relate to the allegations against the appellant. The court agrees with that view and rules that only if the contradictions are material, i.e relate to the elements of the offence charged, would they impact negatively on the evidence adduced.

- [9] The appellant's denial of having had sexual intercourse is directly contradicted by the evidence of the complainant that she was rescued by the people that opened the door from the outside of the appellant's house and the evidence that the complainant was standing on the stoep of the appellant's house and was crying. Moabi's evidence was further that a group of people were on the scene and were all heartbroken by what happened to the child. Moreso, the medical evidence of the doctor who examined the complainant and which was admitted as correct by consent confirmed that the complainant was sexually violated. This court cannot find fault with the assessment of the evidence by the trial court in that there was corroboration of the complainant's evidence though she was a single and child witness.

- [10] Mr. Pretorius further argued that the trial court should have found that there were substantial and compelling circumstances which

would justify the trial court's departure from imposing the prescribed minimum sentence of life imprisonment. His argument was based on the fact that the appellant was 63 years old and the complainant had not suffered any other physical injuries save for those caused by sexual intrusion. This argument falls far too short to prove the existence of substantial and compelling circumstances even if taken cumulatively. Mr. Lencoe, for the respondent argued that the fact that the appellant was 63 years old, had married daughters who could easily have been the complainant's mother, was, on the contrary, an aggravating factor. The fact that the appellant was a first offender in as far as rape was concerned was a neutral factor the legislature having ordained first offenders to be subject to the prescribed sentence. The court agrees and finds no fault with the trial court's ruling in this regard and confirms there were no substantial and compelling circumstances justifying a departure from the imposition of the prescribed sentence of life imprisonment.

- [11] The court is authorised to depart from the imposition of the prescribed sentence of life imprisonment only where substantial and compelling circumstances are found to exist: S v Malgas, 2001 (1) SACR 469 SCA at 482 e and S v Matyityi 2011 (1) SACR

40 SCA at 53 (f). The finding should be based on “truly convincing reasons” and not at the whim of the court.

[12] In the result the appeal against both the conviction and sentence is DISMISSED.

MOLOI, J

I concur and it is so ordered.

LEKALE, AJ

On behalf of the Appellant:

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