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

CASE NO: A69/16

DATE DELIVERED: 28/10/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

IN THE MATTER BETWEEN

STANLEY BOY NGOMANE

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN NIEKERK. AJ

[1] On 17 February 2015 the Appellant was convicted of two counts of rape as contemplated in Section 3 of Act 32 of 2007 and sentenced to life imprisonment in the Regional Court for the Regional Division of Mpumalanga held at Benoni. In terms of the Appellant's automatic right of appeal the Appellant noted an appeal against both convictions as well as the sentence imposed by the Court a quo.

[2] The two charges against the Appellant relates to the alleged act of sexual

penetration with two different complainants, being the [...] of the Appellant during the period 2011 until 2012 when they were respectively 5 years old (complainant no. 2) and 13 years old (complainant no.1). Both the complainants testified about the alleged incidents in the Court a quo, and at the time when they testified they were respectively 8 years old and 16 years old.

[3] The complainant in respect of charge no. 2 was called as the first witness for the State, and she testified about one incident which, according to her evidence, took place when she was younger. She was not able to recall how old she was when the alleged incident happened, but testified that it happened in the bedroom where she and her sister (the complainant in terms of charge 1) slept. She gave evidence which satisfies the elements of the charge of rape, and testified that this took place whilst her sister was in the same room, sleeping. Under cross-examination she did not depart from the version that she testified about in her evidence in chief, and it was put to her by the Appellant's legal representative in the Court a quo that the Appellant denies the accusations, whereupon she persisted with her version

[4] The complainant in terms of charge 1 then testified, and gave evidence to the effect that the Appellant frequently entered the room where she and her sister (complaint in charge 2) slept and gave evidence which satisfies the elements of the charge of rape. She further testified that the Appellant on various other occasions did the same to her sister. During cross-examination it was also put to her by the legal representatives of the Appellant that he denies the accusations, but she persisted that she was telling the truth.

[5] There are similarities as well as discrepancies between the versions of the two complainants. Their evidence regarding the modus operandi of the Appellant is very similar such as the place where these incidences took place, that he threatened them in order to procure their silence, and that both of them reported these incidents not to their mother but to a neighbour. The material discrepancy between the evidence of the two complainants is the fact that complainant in respect of charge no. 2, who was 5 years old during the incidents, testified about one incident whereas her sister who was 13 years old during the incidents, testified that it took place frequently.

[6] In terms of medical evidence presented in the Court a quo it was common cause that both the complainants were subjected to penetration of their vaginas, but in terms of what was put to both the complainants by the legal representative of the Appellant during cross-examination, it is clear that the Appellant accepted that the two complainants were raped, but that it was "another person".

[7] The Appellant failed to testify and the case for the defence was closed after the State closed its case. The Appellant was then convicted by the Court a quo on the evidence of the two complainants and the medical reports relating to their injuries. In essence, on appeal the Appellant contends that the State failed to prove its case beyond a reasonable doubt.

[8] The evidence presented by the State in support of the two charges made out a prima facie case against the Appellant, which demanded a response from the Appellant. The discrepancies between the evidence of the two complainants are understandable taking into consideration the ages of the respective complainants, and especially the young age of complainant no. 2. These discrepancies do not warrant a finding that both the complainants were unreliable witnesses, especially considering the similarities of their evidence on certain material issues. In the premises, there is no justifiable ground to interfere with the finding of guilty on both the charges by the Court a quo.

[9] As far as the appeal against the sentence of the Appellant is concerned, it was argued on behalf of the Appellant that the Court a quo did not take all the personal circumstances of the Appellant into consideration, and that the Court a quo may impose a different sentence should all the personal circumstances of the Appellant be placed before such Court and invited this Court to refer the matter back to the Court a quo for this purpose. This argument on behalf of the Appellant was based on the fact that a pre-sentence report was not obtained.

[10] Although a pre-sentence report was not obtained by the Court a quo, the personal circumstances of the Appellant including his age, his employment status, his marital status as well as his previous convictions were placed before the Court and in fact elicited by the presiding Magistrate. The prescribed minimum sentence for a finding of guilty on the respective charges in terms of Section 51(1) of the Criminal Amendment

Act, Act 105 of 1997 is life imprisonment. There are no grounds to find that the Court a quo misdirected itself in sentencing the Appellant to life imprisonment in terms of the aforesaid legislation.

[11] I propose the following order: the appeal against both the convictions on charges 1 and 2 as well as sentence is dismissed.

P A VAN NIEKERK
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

P. A. Van Niekerk
Acting Judge of the High Court,
Gauteng Division, Pretoria.

Hearing: 24 October 2016
Judgment: 28 October 2016

I agree and it is so ordered.

N JANSEN VAN NIEUWEHUIZEN
Judge of the High Court
Gauteng Division, Pretoria

Hearing: 24 October 2016
Judgment: 28 October 2016

APPERANCE ON BEHALF OF THE APPELLANT:

Advocate M.B. Kgarare

APPERANCE ON BEHALF OF THE STATE:

Advocate M.B. Moloi