IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE SIGNATURE

Case Number: A623/15

15/6/2016

In the matter between:

PETRUS DINGWAYO Appellant

And

THE STATE Respondent

Coram: HUGHES J

JUDGMENT

HUGHES J

1. The appellant, Petrus Dingwayo, having been refused leave from the court *a quo* petitioned this court and was granted leave on sentence only.

2. The appellant was found guilty of one count of rape and one count of theft. He was sentenced to life imprisonment for the rape count and ten years on the theft count and both sentences were ordered to run concurrently.

3. The issue is a narrow one, in that the magistrate's finding that the complainant was raped on three separate occasions is vitiated by a material misdirection.

4. The events of the offences are briefly set out. The complainant, a 61 year old childless female was raped in her home on 7 August 2013 from 20H00pm to 1H30. She testified that during the course of the rape the appellant initially requested a condom from her. She advised that she did not have one and he requested her to fetch a plastic. He used this to cover his penis. The complainant testified that he was unsuccessful.

5. Her further testimony is that during the course of the ordeal the appellant on two different occasions demanded of her to make him coffee and eats after which she returned to the bedroom and the sexual violation continued. He at one stage sought Vaseline with which he covered his penis. She states that on his first attempt using the Vaseline he was unsuccessful but on the second attempt she states he was successful.

6. According to the complainant for the last sexual act the appellant demanded that she put her legs together and he put his penis between her legs penetrating and eventually ejaculating. She insisted and persisted that the appellant penetrated her three times.

7. The medical evidence was that of Dr Tinenbaum which confirmed that penetration did in fact occur approximately 2 to 3 cm into the genitelia, passing the labia majora and the labia minora, causing injury by way of bruises to the para-urethral fold and foss navicularis. He testified that in this rape there was no penetration to the hymen.

8. It is trite that the appeal court will only interfere with the findings of the court *a quo* if it has misdirected itself and the evidence shows that the court *a quo* was clearly wrong in its finding. Exceptional circumstances will have to exist for a court of appeal to interfere with the court *a quo's* analysis of the evidence. See *R v Dhlumayo and another 1948 (2) SA 677 (A).*

9. I find no fault in the magistrate's finding that the appellant raped the complainant on three separate occasions. The magistrate took into account the intervals for the appellant's coffee breaks and also when the complainant fetched the Vaseline. I also find no fault with the learned magistrate's reliance

on the medical evidence of Dr Tinenbaum that on every attempt by the appellant he passed the labia majora and the labia minora area of the vagina of the complainant. This evidence corroborates the complainant's persisting testimony that she was raped on three occasions by the appellant.

10. The Sexual Offences and Related Matters Amendment Act 32 of 2007 defines sexual penetration as it "includes any act which causes penetration to any extent whatsoever by-

(a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) Any other part of the body of a person or any object including any part of the body of an animal into or beyond the genital organs or anus of another person;

(c) The genital organs of an animal into or beyond the mouth of another person, and 'sexually penetrates' has a corresponding meaning;"

In section 3 describes rape as "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B') without the consent of B, is guilty of the offence of rape."

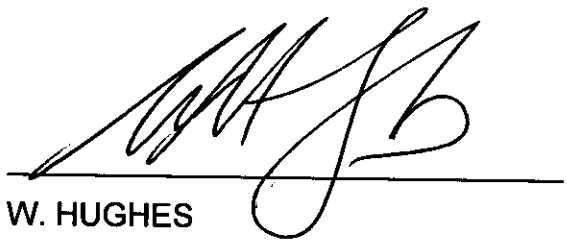
11. In the light of the definition above I am fortified in concluding that no misdirection is evident in the magistrate's analysis of the evidence and concluding that the complainant was raped on three separate occasions by the appellant. The evidence of the complainant corroborated by the medical evidence is in my view clear that the appellant entered into the genitalia area past the labia majora and labia minora area, about 2 to 3cm into the complainant's genital organ, on three occasions.

12. The appeal in respect of the sentence cannot succeed.

13. In the circumstances I propose the following order:

The appeal against sentence is dismissed.

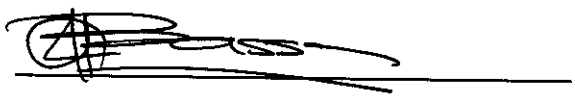
It is so ordered



W. HUGHES

Judge of the High Court Gauteng, Pretoria

I concur



AC BASSON

Judge of the High Court Gauteng, Pretoria

Date of hearing: 07 June 2016

Date delivered: 15 June 2016

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