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



Case number: A662/2014

Date: 18/8/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

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DATE SIGNATURE

In the matter between:

SIFISO TREVOR CINDI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] The Appellant was charged with 2 counts of raping a mentally and physically disabled person and one count of housebreaking and theft.
- [2] He was convicted as charged and sentenced to 15 years imprisonment on each of the rape counts and 10 years imprisonment on the housebreaking and theft charge. All the sentences to run concurrently, which means that he will serve an effective term of 15 years imprisonment.
- [3] The Appellant was granted leave to appeal against the convictions only.

THE RAPES

- [4] The complainant a 22 years old woman whom the state indicated is mentally disabled testified after the magistrate determined whether she understood the difference between the truth and a lie. His questions were simple but in my view it was clear from her answers and later on her evidence that she did understand and that she was a competent witness.
- [5] She testified that on the day in question she was playing with her friends K. and M.. Her younger sister S. was also present. It would later transpire that these friends and her sister were young girls who were approximately 8 or 9 years old at the time. The testimony of other

witnesses would confirm that she would always spend time with children who were much younger than herself. She said that the Appellant approached her and she tried to run away but he tripped her with a stick. The evidence would later show that the Appellant himself is physically disabled and uses a walking stick. She said that she fell and he got hold of her. He then pulled her to his gate. He took her into his house where he raped her twice, once vaginally and once anally. He also put a tape around her mouth to prevent her from screaming. She said that she resisted but that she is cripple and her left arm and leg does not function properly. When he was done he left to join his friends and she went home. She said she told her father what had happened when she got home, she also told the neighbours and her mother. The neighbours that she said she told were not identified but a little later she mentioned that K. and M., the friends that she was playing with, are her neighbours. Her mother phoned her sister who is a police official and her sister called the police. She was taken to the police station and later to the hospital where she was examined by a doctor.

- [6] S. T., a 10 years old girl and the younger sister of the complainant testified that she was playing with the complainant and a certain T. on the day in question. While they were playing T. became ill and went home. The complainant went to the shop where she met the Appellant. She saw complainant and the Appellant entering his gate, and he was “slightly pushing” her. They were a long time in the Appellant’s home

before complainant came out. When she came out the complainant was holding her hands over her face. She asked the complainant what was wrong and the complainant told her the Appellant undressed her. They went to the complainant's home where they found her grandmother who asked complainant what was wrong. Initially complainant did not want to tell her but her grandmother threatened to fetch the belt, implicating that she would get a hiding, and the complainant then told her that Appellant raped her.

[7] Ms D. T. testified that she is the mother of the complainant. She described the complainant as a slow learner who also suffers from epileptic seizures. She said complainant behaves like a child and plays with children. On 24 June 2012 she noticed that Z. appeared to be shy when she returned home with S. . S. said that the complainant was at the Appellant's house.

[8] The complainant initially didn't want to tell Ms T. what was wrong. Ms T. confirmed that she threatened to fetch the belt if complainant continued to refuse to tell her what happened. The complainant then told her that Appellant took off her panty. Ms T. inspected the panty, which she noticed was wet. The complainant told her also that Appellant made her stand on her knees and penetrated her vagina. The police was called and the complainant was taken to the hospital to be examined. It would seem that despite the fact that S. referred to this

witness as the complainant's grandmother and not mother, that Ms T. is the person S. referred to in her evidence.

- [9] The J88 indicates that the complainant is mentally retarded. It also states that there were positive signs of penetration with laceration on the vaginal vault. The anal examination states that tears were present.
- [10] Constable Totetsi testified that on 27 June 2014 he was instructed to trace the Appellant regarding a rape matter. He visited the house of the father of Appellant who told him that Appellant had fled to Volksrust. He then requested the police officers at Volksrust to trace and arrest the Appellant.
- [11] Constable Maseko, from the SAPS in Volksrust, testified that he was contacted by Constable Totetsi to trace and arrest Appellant which he did.
- [12] The Appellant testified that he had a long standing affair with the complainant. He met her on that day at the shop and they went to his house where he prepared food and they watched a romantic video. Afterwards they had consensual intercourse. When they were done he walked her home. He said her mother did not approve of their affair. The complainant's mother denied any knowledge of a relationship between Appellant and the complainant in her evidence. Appellant denied that complainant is mentally retarded. According to him she

appeared normal and the only disability that she had was the physical one. He said complainant requested money from him and he went to a so called “loan shark” to get the money. On his way there his other girlfriend called him and told him that their child was ill and needed medication. He then left for Volksrust, where he was arrested.

[13] Counsel for Appellant argued that the state did not succeed in proving rape of a mentally retarded person. Life imprisonment is the minimum prescribed sentence for such an offence in terms of s 51 of Act 105 of 1997. We know however that the accused was not sentenced to life imprisonment, despite the conviction of a rape of a mentally disabled person.

[14] The definition of a person who is mentally disabled in s 1 of the Act 32 of 2007 reads as follows —

'a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was —

(a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;

(c) unable to resist the commission of any such act; or

(d) unable to communicate his or her unwillingness to participate in any such act;'

[15] In **S v Mnguni** 2014 (2) SACR (GP) P598 par [4] the following was said:

“The onus was therefore on the state to prove that the victim was mentally disabled as contemplated in one of the four categories mentioned in the definition. The nature of the mental disability required to be proved is therefore specific. It is not sufficient for the state to merely prove that the victim is mentally disabled or retarded or challenged. The evidence presented by the state in this regard in my view fell short of what was required.”

[16] No expert evidence was led by the State in order to prove that the complainant was indeed mentally disabled. Her mother testified that she was a “slow learner” and acted like a child. The evidence of Mrs T. does not prove beyond reasonable doubt that complainant’s mental state met the requirements of section 1 of Act 32 of 2007 or the requirement set out in *S v Mnguni, supra*. However, there was sufficient evidence to indicate that the complainant was mentally challenged and as such I find the version of the Appellant that they had a long standing relationship and that she was “normal” not reasonably possibly true. Although the complainant’s evidence appeared to be immature she was consistent about the fact that she did not agree to

have intercourse with the Appellant or that they had a relationship. To a certain extent she is corroborated by S. who testified that she was pushed by Appellant to his house. S. also testified that the complainant covered her face with her hands when she came out of Appellant's house which is indicative of the fact that something traumatic happened to her while she was in the house. Her mother also said she appeared "shy" when she arrived home and her panty was wet. The J88 indicates certain injuries which seem rather improbable if she had a long standing sexual relationship with the Appellant.

[17] I am satisfied that the state proved that the Appellant raped the complainant. I am however not satisfied that it was proven that she met the legal definition of mental disability. Consequently the conviction should be amended accordingly.

[18] Leave to appeal was granted against the conviction only, but as far as it may be relevant I am of the view that the amendment of the conviction should not impact on the sentence. There is no indication that the accused did not have a fair trial or that its rights were prejudiced in any way. The Court *a quo* did consider all the relevant extenuating and mitigating circumstances and exercised its discretion accordingly. I am of the view that there is no indication that the presiding officer in the Court *a quo* misdirected himself nor is the sentence shockingly inappropriate.

THE HOUSEBREAKING AND THEFT CHARGES

[19] Ms S. X. testified that on 24 June 2012 she left her residence at approximately 18:30 at night. The doors were locked and the windows closed. When she returned at 19:00 she found that the house has been broken into. She phoned a neighbour as she was too scared to enter the house. When they entered they found that the house was burgled. In front of the door they found a plastic bag with a kettle and iron inside it. These items did not belong to her. The neighbours' son, M. Dh. said he would make enquiries. He later told her that two boys saw Appellant with these items which he was trying to sell. Ms X. and the police went to Appellant's house where his father pointed out his room. In this room they found some of Ms X.'s belongings. The Appellant was not home when they found the items. Mr M. D. confirmed Ms X.'s evidence. A police officer Mr Tsotetsi attended to the housebreaking complaint. He confirmed Ms X.'s evidence that her property was found in Appellant's room.

[20] Mr M. R. testified that he was approached by Mr M. D. who was looking for information regarding a break in. He identified the items that he saw in possession of the Appellant. Mr R. directed the police to the house of the Appellant. The Appellant denied any involvement in the break in.

[21] The evidence although circumstantial, is overwhelming. The stolen items were found in the Appellant's room and items that he tried to sell earlier in the day were found on the premises where the break in and

theft occurred. There is no doubt that his guilt was proven beyond a reasonable doubt.

[22] I make the following order:

22.1 The convictions on the rape charges are confirmed but the order is amended by deleting the words “a mentally disabled person” and consequently the conviction is amended to read as follows:

22.1.2 The accused is found guilty of two charges of rape of Z. T.; and

22.1.3 The conviction of breaking in and theft is confirmed.

R G TOLMAY
JUDGE OF THE HIGH COURT

I AGREE:

N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE:

D MAKHOB
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 10 JUNE 2016

DATE OF JUDGMENT: 18 AUGUST 2016

FOR APPELLANT: ADV L AUGUSTYN
LEGAL AID

FOR RESPONDENT: ADV T MOETAESI
DPP