IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: AR 457/10

In the matter between:

Mfanini Bhekumuzi Cebekhulu **Appellant**

And

The State **Respondent**

JUDGMENT

Delivered on:

NKOSI AJ

[1] The Appellant was charged and convicted on one count of Rape, in contravention of section 3, read with sections 1, 56(1), 57, 58, 59,60 and 61 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act No. 32 of 2007, and one count of Sexual Assault, in contravention of section 5(1), read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the same Act, before the Regional Court sitting at Empangeni. The conviction on the count of Rape attracted the minimum sentence provision of section 51(1)(a) and Part 1 of Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997, in that the victim was below the age of 16 years. The Court *a quo* found no substantial and compelling circumstances to exist which justify the imposition of a lesser sentence than the prescribed imprisonment for life

and, consequently sentenced the Appellant to the aforesaid sentence. On the count of Sexual Assault, the Appellant was sentenced to 10 years imprisonment.

[2] The Appellant now appeals, as of right, against the conviction and sentence imposed on the count of Rape. No leave to appeal was sought in the count of Sexual Assault and, therefore, nothing turns on that count on this appeal.

[3] The facts of the case, according to the State's version, which gave rise to the conviction were briefly the following:

The Appellant was once employed by the complainant's parents to erect a perimeter fence around their home. At some later stage, estimated to be a month, and before he could finish the job, he was stopped from entering the premises at the instance of the complainant's mother who had felt uneasy by his continued presence on the premises. According to the complainant's mother, she had taken that decision because she had noticed the Appellant making sexual overtures torwards the complainant. Thereafter, on 28 July 2008, the Appellant went to the complainant's home and he had sexual intercourse with the complainant during the absence of her parents. According to the complainant, the aforesaid sexual intercourse had taken place without her consent. It was common cause that she was 12 years old at the time. The complainant, however, did not report the incident to her parents, because, as she said, the Appellant had threatened to kill her, if she did.

[4] According to the complainant's testimony, the Appellant again came to her home on the following day, and, while they were both fully clad, masturbated on top of her, touching her vagina with his penis. This, too, was without her consent, she said. After the latter incident, the complainant reported both incidents to her mother

who had found her crying and she had demanded to know why she was crying. The complainant was subsequently examined by Dr Becker who found that the complainant's hymen was recently perforated.

[5] In his defence, the Appellant admitted that he had sexual intercourse with the complainant, on the day in question, but said it was with her consent. The Appellant proposed, in his testimony, that the complainant had either been deceived by her mother into laying false charges, with a promise to be paid money, because her mother wanted him to be arrested after failing to pay him his outstanding wages, or the complainant had reported the incident because she was scared of being assaulted by her mother.

[6] The Court *a quo* accepted the version adduced by the State and rejected the Appellant's proposition that the charges were falsely laid against him, as false.

[7] It is a trite principle of our law that the appeal court can only interfere with a conviction when there is a serious misdirection on fact which vitiates the conviction.

[8] On the facts, as adumbrated above, Mr Zaca, who is the counsel for the Appellant, was unable to submit any point of misdirection by the Court *a quo* on the conviction. He conceded that on the strength of the Appellant's admission, namely, that he did have sexual intercourse with the complainant, the conviction can hardly be assailed, and instead, he directed his focus on the sentence imposed. The concession was not misplaced. On a conspectus of the evidence led, the Appellant's version that he and the complainant were lovers and that they had consensual sexual intercourse does not dovetail with reasonable possibilities. This is so, in view of the

complainant's insurmountable emotional state after the incident, and the manner in which the aforesaid incident, previously unknown to the complainant's parents, came to the fore. It is highly unlikely that the complainant had made a *volte-face* about the alleged love relationship and equally unlikely that her mother had hit her in order to extract a confession of sorts about the incident. Therefore, the Appellant's proposition that the complainant had either lied in order to save her skin or because her mother had colluded with her to cause him to be arrested, so as to avoid paying his wages, does not find support in the evidence and it was correctly rejected in the Court *a quo*. The conviction must therefore stand.

[9] Coming to the sentence imposed, Mr Zaca submitted that the sentence of life imprisonment was too severe compared to lighter sentences imposed by higher courts for similar crimes. In his view, and because of the seriousness of the crime, an imprisonment for 25 years would be more appropriate, bearing in mind the fact that the Appellant was 37 years of age, a first offender and a good candidate for rehabilitation. The submission was strongly opposed by Ms Greeff, who was counsel for the State. The proposition is legally flawed, in my view. The conviction attracted the minimum sentence provisions alluded to above. The appropriateness of the sentence, therefore, depends on whether substantial and compelling circumstances exist which justify a lesser sentence or not. Even where a discretion arise, there is no catalogue for appropriate sentences. Each case must be dealt with on its merits.

[10] *In casu*, the court *a quo* found no substantial and compelling circumstances despite the mitigating factors alluded to above, and correctly so, in my view. The Appellant was a 37 year old man, who should have acted with utmost maturity towards the 12 year old, innocent child. Instead, he responded to his sexual urges by

taking advantage of the defenceless child, in the sanctuary of her home, in order to satisfy his wicked desire. This was after he had been warned and barred from entering her premises for fear he might eventually force himself on her in that sexual manner. His actions were evidently fully and carefully calculated. At his trial, he showed no remorse for this dastardly act, but instead blamed the victim and her mother for his woes. The aforegoing is aggravating against him. The gravity of the crime and its repulsiveness outweigh his personal circumstances which must, therefore, recede. These crimes, perpetrated against the most vulnerable members of society, are a cancer that eats away into our social fabric of decency and should, therefore, be treated with contempt which is deserved. The finding of the Court *a quo* can, therefore, not be faulted.

[11] In the result, the order is proposed that the appeal against both conviction and sentence on the Rape count be and is herby dismissed.

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I agree. It is so ordered.

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GORVEN J

Date of Hearing:	23 June 2011
Date of Judgment:	30 June 2011
For the Appellant:	Mr Zaca
Instructed by:	Legal Aid, Pietermaritzburg
For the Respondent:	Ms Greeff
Instructed by:	Director of Public Prosecution (Durban)