



IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG  
JUDGMENT

NOT REPORTABLE  
CASE NO: AR460/2015

In the matter between:

JABU VUNDLA

APPELLANT

and

THE STATE

RESPONDENT

**Coram : Koen et Seegobin JJ**

**Heard : 18 February 2016**

**Delivered : 23 February 2016**

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ORDER

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On appeal from the Regional Court, Madadeni, sitting as a court of first instance):

The appeal against conviction and sentence is dismissed.

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JUDGMENT

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**SEGOBIN J (Koen J concurring):**

[1] This is an appeal against conviction and sentence. The appellant was arraigned in the Regional Court, Madadeni, on a charge of rape. The charge sheet alleged that the incident occurred on 20 December 2008 at Madadeni. The offence in question had to be read subject to the relevant provisions of the (Criminal Law Sexual Offences and Related Matters) Amendment Act 32 of 2007 as well as with the provisions of s51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The complainant was ten years old at the time of the incident. By the time the matter was finally heard in August 2014, she was 16 years old.

[2] The appellant, who was legally represented, pleaded not guilty to the charge. His defence was a bare denial. The State case rested on the evidence of the complainant, her guardian Mrs *Cynthia Khubeka* with whom she resided at the time as well as the doctor who examined her on the day in question and who completed the medical report. The appellant testified in his defence but called no witnesses. At the conclusion of all the evidence in September 2014, the appellant was duly convicted. He was sentenced to 16 years imprisonment. The present appeal is with leave of the court *a quo*.

[3] As far as the conviction is concerned the essential issue is whether the State had proved the guilt of the appellant beyond a reasonable doubt. An issue which confronted the trial court was whether the medical evidence went so far as to establish that the young complainant was in fact sexually assaulted on the occasion in question. This evidence was given by Dr *Mbhele*. There was no dispute that he examined the complainant at about 19h30 on the day in question

at the Madadeni Hospital. While he found that there was redness on the para-urethral folds of the complainant's vagina, he nevertheless recorded in the J88 medical form that his findings could not confirm a sexual assault. When Dr Mbhele testified, however, he was at pains to explain that due to his inexperience at the time he did not think that the redness he found could be associated with any sexual assault. However, with the benefit of hindsight and the experience he gained over the years in Obstetrics and Gynecology, it was clear to him that the symptoms he found on the complainant at the time were caused as a result of a sexual assault. He readily conceded that his prior finding was a mistake on his part. He explained that the redness found on her para-urethral folds had progressed onto her *labia majora* and *labia minora*. This could only have been caused by some friction which was consistent with a sexual assault. He depicted his findings in this regard on the sketch which accompanied the J88 medical report, Exhibit "C". It is clear from the judgment that Dr Mbhele made a favourable impression on the court which accepted his explanation regarding the mistake he made, without reservation.

[4] As far as the incident itself is concerned, the complainant's evidence was clear and straightforward. It is common cause that she and the appellant are well known to each other as Mrs *Khubeka's* sister is married in the accused's family. The complainant visited the accused's home on occasions when she went to see her aunt. Throughout her evidence the complainant referred to the appellant as 'Uncle *Jabu*'.

[5] The complainant testified that sometime during the morning of 20 December 2008, she and two of her friends went out delivering invitations for a wedding that was due to take place. On their way back the appellant, who was standing in his yard, called her to fetch a jersey and scarf which he said

belonged to her mother. Since her friends did not wish to accompany her into the yard, she went in by herself.

[6] She entered the dining room and stood at the door. The appellant picked up a jersey and scarf which were lying on a sofa. He walked towards the toilet but ended up sitting on a trunk in the passage. He then asked the complainant to come and sit on his lap. The complainant could not recall whether or not she sat on his lap at that stage. She remembered, however, that the appellant paid her a compliment about her hairstyle. The appellant thereafter took the jersey and scarf and proceeded into the bedroom. In the bedroom he again requested the complainant to sit on his lap. He then started kissing her on her neck. He thereafter requested her to remove her panty but she refused. The appellant pulled her closer to him and removed her panty and skirt. It was at that stage that he heard someone referred to as Uncle *George* whistling outside.

[7] The appellant then left the room closing the door behind him. She could hear him asking George where he was going to. She heard George saying that he was on his way to Canaan and he left. The appellant returned to the room. He placed the complainant on the bed and started inserting his finger into her vagina. The complainant started crying telling him that she wanted to go home. It was then that the appellant told her to face the wall and bend down. He then proceeded to insert his penis into her vagina from behind. When he finished he got dressed. He gave her fifty cents and told her not to tell anyone. She testified that when he inserted his penis into her it was painful. She further testified that when she put on her panty she felt that she was wet. In all this time she was crying.

[8] When the complainant got home, her aunt, Mrs Khubeka, asked her why she was crying. The complainant told her immediately that Uncle Jabu had

raped her. Shortly thereafter Mrs Khubeka took her to the police station where a report was made. That very day she was examined by Dr Mbhele at the Madadeni Hospital. She vehemently denied a suggestion put to her on behalf of the appellant that he had sent her to the shop to buy him some cigarettes and that she had lost his money. It was suggested to her that she was implicating the appellant because he had scolded her.

[9] Mrs Khubeka confirmed that the complainant was out on the day in question delivering wedding invitations with some of her friends. At some stage the other children returned without the complainant. When Mrs Khubeka asked them about the complainant's whereabouts, she was informed that Uncle Jabu had called the complainant. At that stage Mrs Khubeka did not seem to be too concerned because the appellant was a relative. However, things changed when the complainant returned. She noticed that the complainant had been crying. When Mrs Khubeka asked her why she was crying, the complainant informed her that she had been raped by Uncle Jabu.

[10] On hearing this Mrs Khubeka immediately took the complainant and proceeded to the appellant's home but when she got there they found the house locked. Mrs Khubeka thereafter met Constable *Mabaso* who resided in the area. She made a report to him concerning the complainant's allegations. Constable Mabaso suggested that the matter be reported at the police station. On the way to the police station they met the appellant and when they confronted him with the allegation, he simply denied it. Strangely, however, the appellant boarded the same taxi in which they were and proceeded to the police station with them. Once the complaint was made at the police station the appellant was arrested. Mrs Khubeka confirmed that the complainant was examined later that day at the hospital.

[11] In his defence the appellant denied that he raped the complainant. He denied ever calling her into his house. However, he admitted that he complimented her on her hairstyle. He averred that he requested the complainant to go and buy him some cigarettes at the shop. He gave her about R4,50 for this. The complainant took her time returning and when she finally did, she reported that she had lost his money. She returned with 50 cents only. He then scolded her and she started crying. He maintained that he told her to keep the 50 cents as it served no purpose to him. He further maintained that the reason why she was implicating him in this offence is because he had scolded her.

[12] In a carefully considered and well-reasoned judgment the learned magistrate concluded that the appellant's version could not be believed and that he was making up a version as he went along. The learned magistrate was mindful of the fact that he was dealing with a young complainant who was a single witness to the offence in question. He was also mindful of the fact that her evidence had to be approached with the requisite degree of caution.

[13] On the evidence the learned magistrate found, correctly in my view, that the guilt of the appellant was proved beyond a reasonable doubt. The appellant's version that he had sent the young complainant to buy cigarettes for him and that she had lost his money, was correctly rejected as being false. The appellant had to explain why the complainant had the sum of 50 cents in her possession when she reported the rape incident to her aunt. He sought to explain this by saying that he told her to keep the 50 cents which she brought back after losing the rest of his money. On the complainant's version which was accepted by the trial court, the 50 cents given by the appellant to the complainant was to buy her silence. As far as the complainant's version regarding the jersey and scarf is concerned, it is clear that the appellant used this

as a ruse to get the complainant into his house. As Mrs Khubeka confirmed, no such items had been left at the appellant's house by her sister and this was all just a ploy on the part of the appellant. All in all, the appellant's version was highly improbable and was correctly rejected as being false. It follows, in my view, that the appeal against conviction cannot succeed.

[14] On the issue of sentence, there is nothing in the reasoning of the learned magistrate to suggest that he misdirected himself in any way or that he exercised his discretion incorrectly. The sentence imposed is neither unduly harsh nor shockingly inappropriate. In my view, the appellant can consider himself fortunate that he did not get a higher sentence. On this aspect as well, the appeal must fail.

## ORDER

[15] The order I make is the following:

The appeal against conviction and sentence is dismissed.

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\_\_\_\_\_ I agree

KOEN J

Date of Hearing	:	18 February 2016
Date of Judgment	:	23 February 2016
Counsel for Appellant	:	EX Sindane
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	Z Dyazi
Instructed by	:	The Director of Public Prosecutions, Pietermaritzburg