IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A703/2010 & A708/2010

DATE: 3 FEBRUARY 2012

In the matter between:

SIBONGILE NOMFEMELE Appellant

and

THE STATE Respondent

J U D G M E N T

ZONDI, J:

The appellant, who was legally represented, appeared in the Wynberg Regional Court on 18 November 2009, facing one count of rape committed on a nine year old girl complainant. The allegations against the appellant were that during 2009 and at New Crossroads he raped the complainant by penetrating her anally with his penis, in contravention of section 3, read with sections 51, 55, 56(1), 57 to 61 of the Criminal Amendment Act (Sexual Offences & Related Matters) of 32 of 2007. The offence was alleged to have been subject to the provision of section 51 of Act 105 of 1997.

The appellant pleaded not guilty to the charge, but was on 10 June 2010 convicted and sentenced to 18 years imprisonment. The appellant thereafter applied in the court *a quo* for leave to appeal against the conviction and sentence. Leave to appeal against conviction was refused, but was granted against sentence. The appellant successfully petitioned this court for leave to appeal against conviction on 18 October 2011, hence the appeal is before this court against conviction and sentence.

The evidence which forms the basis of the appellant's conviction and sentence is to the following effect. It is common cause that on the day in question, at about eight o'clock in the evening, the complainant's mother, together with the complainant, approached the appellant while he was busy having fun with some of his friends at a friend's house. They were drinking beer. The complainant, who was nine years old at the time, is the appellant's daughter, but stayed with her mother at her mother's place. She would, however, now and then visit the appellant and sometimes sleep over at the appellant's place.

On this occasion, the complainant's mother demanded money for the complainant's food from the appellant. The appellant told her that he had none. It would seem that the discussion

did not go well as the complainant's mother unceremoniously walked away and left the complainant with the appellant. It is not in dispute that the complainant ended up sleeping at the appellant's place. It is also common cause that the appellant bought the complainant a pie and juice which she partook at the appellant's house. There is a dispute on whether the complainant accompanied the appellant when he went to buy her these items, and on the sequence of their arrival at the appellant's house.

It is common cause that the complainant on the night in question slept with the appellant in his flatlet, which is located at the back of the main house. This flatlet has two rooms and there is a wall dividing them. The appellant's brothers use the other room. On her arrival at the appellant's house, the complainant sat in the lounge and watched TV until late, when she decided to retire to bed. According to the appellant, he walked her to the flatlet and put her to bed. He thereafter returned to the main house and continued watching television, together with some of his family members until 12 midnight when he went to bed.

According to the complainant she was already asleep when the appellant joined her in bed. She says she did not see him when he arrived, but heard him when he got in bed. The

appellant then started raping her in her "bum". She could not tell what it was that he used to penetrate her. She felt a cold and big object in her bum. As he sexually molested her, the appellant never uttered a single word. She did not physically see the appellant, but she recognised him by his bodily odour which she said resembled alcohol smell. She does not know what rape means. When the appellant put something into her bum, she told him to stop, which he did. She slept and the appellant raped her again. She told him to stop, which he did, but started again.

Early in the morning the following day, she woke up and went to her mom whilst the appellant was still asleep. At that stage, one of the men who were sleeping in an adjacent room, had gone to work and the other was still in the flatlet. She did not report the incident to the man who was in the flatet when she woke up. In the main house she found the appellant's mother, Tabisa and Tozama and another man. She did not report the incident to any of these people as she was scared. She was shy to inform her grandmother, the appellant's mother.

During the course of the morning, her granny asked her to go fetch her clothes from her home. She did so. When she got home, she found her mother playing cards with some of her friends. She fetched her clothes and when her mother walked

her back to the appellant's place, she reported to her what the appellant had done to her. She told her that she no longer wanted to go back to the appellant's house, because he raped her.

The following day her mother went to the appellant's place, apparently after having reported the matter to the police. The police came to her house and took her to the doctor. That the complainant's mother came to the appellant's house on Sunday morning was also confirmed by the appellant's mother. The complainant was examined by Sister Bartlett on 26 April 2009 at Tutuzela Centre in J F Jooste Hospital. She then compiled a report in respect of the complainant on which she recorded her findings. She found old bumps and clefts, which she said were consistent with previous sexual assault, which she estimated to having taken place on 4 December 2008.

According to her, these bumps and clefts were about more than a week old. In her anus, she found fresh tears and bruising which she estimated to have been about 40 hours old and these, according to her, were consistent with a blunt object having been put into her anus.

The state handed up the J88 report and the complainant's birth certificate, which were admitted by agreement between the

defence and the state.

The appellant testified that the complainant came to his place on 24 April 2009. She slept at his place. Her mother had been to him to ask for money for the complainant. It was about eight or nine o'clock in the evening when the complainant's mother approached him. The mother left the complainant with the appellant and the latter went to buy her a pie and something to drink. Thereafter he went home to watch television in the main house. When the complainant said she wanted to sleep, he took her to the outside building. He went back to the main house to watch TV until 12 midnight when he went to bed.

Contrary to the testimony of the complainant, the appellant testified that when he woke up the following morning, the complainant was still in bed lying next to him. He denied that he sexually assaulted the complainant while she slept with him. After waking up, he and the complainant went to the main house where they joined other members of the family. The complainant stayed in the house after having had breakfast. When the appellant left the house after breakfast, the complainant was still in the house. When he returned to the house at about lunch time, he met the complainant in the street. She was playing with other children.

During cross-examination, the appellant testified that when the complainant and her mother approached him to ask for money for food he was having fun with his friends. They had about six beers. It was about eight to nine o'clock in the evening. When he told her he did not have money, she left the complainant with him and walked away. He walked to a nearby shop with the complainant, where he bought her juice and a pie. He testified that before the rape incident, the relationship between him and the complainant was normal. He suspects that the complainant was primed by her mother to falsely accuse him of rape.

The appellant's mother also testified. She confirmed that the complainant visited her family on 24 April 2009. As usual, when she visited the family, she slept with the appellant in his backroom. She was with the complainant until she went to bed. She saw the complainant again the following morning when she was watching TV in the lounge. The complainant never said anything to her. She asked her why she got up so early in the morning, she said she was used to it.

During the course of the day the complainant left the house and informed her that she was going to sleep at her maternal granny's house that evening, but she returned at about five

o'clock in the afternoon. When she returned, she asked her to go fetch her clothes as she had arranged to go with her to buy her a school uniform. The complainant left, but did not return at all.

During cross-examination she testified that the complainant came to the house before the appellant. The latter came shortly after her arrival. He bought her a pie and juice. She denied that the appellant took the complainant to the flat. She stated that the appellant was not in the house by the time the complainant went to sleep.

The court *a quo* rejected the appellant's version as false. The basis for this conclusion was that there were contradictions in the appellant's evidence. The appellant's mother's evidence contradicted that of the appellant insofar as it related to when the complainant arrived at the appellant's home, as well as where the appellant was when the complainant went to bed. The court *a quo* also found contradictions in the evidence of the appellant and that of his girlfriend regarding whether the complainant's sleepover at the appellant's house had been arranged between the complainant's mother and the appellant. It accepted the complainant's version which it found to have been clear and satisfactory in all material respects. It accordingly concluded that the state had proved its case

beyond reasonable doubt and convicted the appellant of rape.

In analysing the complainant's evidence, the court *a quo* pointed out that the complainant was a young child of 10 years of age. It observed that when she testified, it appeared as if she contradicted herself and did not answer the questions. It blames this impression on the prosecutor who led her when she gave evidence. It noted that the complainant was poorly led and as a result thereof, her answers were ambiguous. However, despite these deficiencies in her evidence, the court *a quo* found that the complainant was consistent in her story that the complainant had raped her in the bum. It noted that the complainant made a favourable impression on it and its impression was that she was honest and truthful.

Another feature of the complainant's evidence which troubled the court *a quo* was the lack of evidence of the first report, that is her mother to whom she first reported the sexual assault. It pointed out that the evidence of the complainant's mother was necessary, as she would have come and corroborated the complainant's evidence as to why she did not want to go back to sleep at the appellant's house.

In S v Hammond 2004 (2) SACR 303 (SCA), Cloete, JA had an occasion to deal with the importance of a first report in sexual

assault complaints. At paragraph 12 he summarised the position as follows:

> "It is often said that the fact that a complainant in a sexual misconduct case made a complaint soon after the alleged offence, and the terms of that complaint are admissible for two purposes, namely to show the consistency of the complainant's evidence and to negative consent."

So the court *a quo* found corroboration of the complainant's evidence in Sister Bartlett's evidence, who testified regarding the fresh tears she found in the complainant's anus when she examined her.

The basis upon which the conviction is attacked, it would seem is that the court *a quo* erred in finding that the state had proved its case beyond reasonable doubt. It was submitted by Ms Kloppers on behalf of the appellant that the identification evidence of the complainant was not sufficient. However, when one looks at the evidence on record, it is clear that on the day in question the complainant slept with the appellant in the appellant's bed. The room in which she slept has a door and according to the appellant, he kept a key to that room.

It is clear that the issue of identity of the appellant is out of the question, if one has regard to the fact that the complainant slept with the appellant at his flatlet on the day in question. The question is then who raped or sexually assaulted the complainant. Again it is clear from the evidence that on the objective facts, the person who was with the complainant on the day in question, is the appellant. There is no suggestion that during the course of the night, somebody else who might have been sleeping in the room located adjacent to the room in which they slept, crept in and sexually molested the complainant. So it is clear from the totality of evidence that the inference is irresistible that the person who sexually assaulted the complainant, is the appellant. In the circumstances, the appeal against conviction should be dismissed.

The second question is whether the sentence that was imposed by the court *a quo* was appropriate. It is common cause that the offence with which the appellant was charged and convicted of, was subject to the minimum sentence legislation, which meant that absent a finding of substantial and compelling circumstances, the appellant, upon conviction, would be sentenced to life imprisonment. The court *a quo* investigated the existence of substantial and compelling circumstances; it analysed the evidence relating to the

personal circumstances of the appellant, as well as the evidence in aggravation, it concluded that there were substantial and compelling circumstances justifying the deviation from imposing a prescribed minimum sentence and for that reason it deviated from imposing the prescribed sentence of life imprisonment, and sentenced the appellant to 18 years imprisonment.

In my view, having regard to the nature and the seriousness of this offence, it cannot be said that the sentence of 18 years imprisonment is startlingly inappropriate to justify this court's interference. In my view, the court *a quo* exercised its discretion properly in sentencing the appellant to 18 years imprisonment and that being the case, there is, therefore, no basis for this court to interfere with the sentence. In the circumstances the appeal against the sentence is also dismissed.

To sum up, **THE APPEAL AGAINST CONVICTION AND SENTENCE IS DISMISSED**.

ZONDI, J

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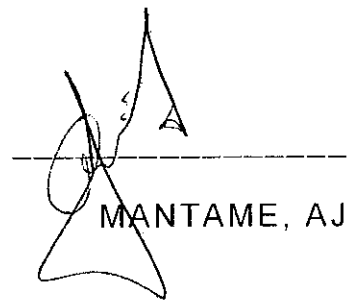
I agree:



MANTAME, AJ