

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER:**

A363/2012

**DATE:**

7 SEPTEMBER 2012

5 In the matter between:

**SIPHO SISHUBO**

Appellant

and

**THE STATE**

Respondent

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**J U D G M E N T**

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**MEER, J:**

15 The appellant was convicted in the Wynberg Regional Court on  
13 July 2011 for the contravention of section 3 of the Sexual  
Offences and Related Matters Act 32 of 2007 for the rape of an  
8 year old girl, a charge which attracted the minimum sentence  
of life imprisonment in terms of sections 51 and 52 of Act 105  
of 1997. The appellant was sentenced to 20 years  
20 imprisonment, the court a *quo* finding there to be  
circumstances which militated against the imposition of a life  
sentence. The appellant who was legally represented and  
pleaded not guilty, appeals against both his sentence and  
conviction.

The facts, circumstances and evidence which led to the conviction of the appellant appear hereunder.

Four witnesses testified for the State namely the Complainant  
5 Yonela Sishubo, her aunt Thembeke Mxothwa, a forensic nurse  
Charlene Williams and the Complainant's grandmother Joyce  
Sishubo. The appellant himself testified for the defence.

**Evidence of the Complainant:**

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The Complainant who was 10 years old when she testified did  
so through an intermediary. Her testimony was as follows.  
During December 2008 she and her brother were on holiday at  
the home of their grandmother in West Lake in the Cape. At  
15 the time she was 8 years old. The appellant, who is her  
grandmother's sister's grandson and who was aged 23 at the  
time, was living at the grandmother's house at the time. One  
evening the Complainant, her brother and the appellant had  
been watching television in the lounge. Leaving the other two,  
20 the Complainant retired to the bedroom she occupied and went  
to bed, clad only in her panties because it was a warm  
evening. She lay on her stomach and was alone in the room.  
The light was off. She was awakened, as she explained, by  
someone, laying on top of her and moving. She could not see  
25 the person's face. The person inserted his penis into her

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vagina. She jumped off the bed as did the other person. It was at that stage that she discovered that it was the appellant who had been lying on her. She was crying and in pain.

5 She proceeded towards her Grandparents' room. The appellant, she said had pleaded with her not to go to her grandparents. She denied it was possible that she had dreamt the incident. She was adamant during cross-examination that it was the appellant who had been on top of her and denied  
10 she was saying so simply because he was standing at the door of the room when she got off the bed. When asked whether it was possible that the appellant could have thought she had fallen off the bed her reply was yes: "Ja, maar hy het gelieg op daardie dag". The Complainant said she had then gone to  
15 her grandparent's bedroom where both grandparents were. Her grandfather asked her why she was crying she told him nothing because she was scared. In her own words: "Ek het net gesê dit was Mpo". Mpo is the appellant's name. Mpo, she said had informed her grandfather that she had fallen off  
20 the bed. The Complainant had slept with her grandparents that night.

During cross-examination the Complainant denied the appellant's version as put to her namely that he had heard her  
25 cry, had come to the room saw she had fallen off the bed, and

that he had not raped her. She was adamant that it was the appellant who had raped her. She said he was lying and she asked moreover why he had run away to Queenstown after the event. The Complainant denied the appellant's version as put  
5 to her that he had left her grandparents' home because he had not been treated well there. During the incident her two uncles were also in the house, sleeping in their room.

It was only when the Complainant had returned home to  
10 Queenstown, that she reported the incident. Her step mother's sister Thembeke Thelma had detected an unpleasant odour and discharge from the Complainant's person which had caused her to make enquiries. According to the Complainant Thelma asked her whether she had been raped. The  
15 Complainant informed Thelma that it was the appellant who had raped her. Thembeke Thelma Mxothwa took the Complainant to the police station and the hospital thereafter.

**Testimony of Thembeke Thelma Mxothwa:**

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Thembeke Thelma testified as follows about the report of the rape on her. On 17 March she detected an unpleasant odour emanating from the Complainant, investigated and discovered a yellow discharge on her underclothes. She asked the  
25 Complainant what had happened and eventually the

Complainant had informed her that a person named Mpo had raped her. During cross-examination Thelma said she had not asked the Complainant whether she had been raped, as per the Complainant's testimony. The Complainant told her that  
5 the alleged rape had occurred during December whilst she was at her grandparents' home, that Mpo had lay on top of her and "n stuk hout in haar vagina gedruk het".

**Testimony of Charlene Williams:**

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Charlene Vanessa Williams a forensic nurse employed at the Khomeini Hospital in Queenstown had examined the Complainant on 18 March 2009. A medical report handed into court indicated *inter alia* redness in the vaginal area and a  
15 yellow discharge which was indicative of a sexually transmitted disease. The report also mentioned tears to the hymen which were already healing. This, according to the witness indicated penetration. There is reference to "4 mm scarring of the posterior fourchette".

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The witness' conclusion after she had examined the Complainant was indicated as follows: "consistent with previous forced vaginal penetration with a blunt object and friction". During cross-examination when asked whether it was  
25 possible that another object as opposed to a penis could have



caused the injuries to the Complainant's vaginal opening, the witness said the fact that the Complainant had a sexually transmitted disease, proved conclusively that it was a penis that had penetrated the Complainant. The witness said it was possible that the patient could have contracted the infection 3 months before she examined her.

**Testimony of Joyce Sishubo:**

10 Joyce Sishubo, the Complainant's grandmother testified that the incident had occurred around the 16<sup>th</sup> or 17<sup>th</sup> December 2008 whilst the Complainant and her brother were on holiday with their grandparents in Cape Town. The appellant had been living with the witness for about 4 or 5 months at the time. Her  
15 version of events on the night in question was as follows: The witness and her husband had been sleeping in their room and the Complainant and her brother were asleep in the other room. Whilst the witness was sleeping she heard the Complainant cry and had gone to her room to find out why she  
20 was crying. She encountered the Complainant already coming out of her room and the appellant was behind her. The Complainant rushed to the witness, put her arms around her and held her tight, crying all the time. The witness asked the Complainant why she was crying. The Complainant replied  
25 "dis Mpo."

When the witness asked the Complainant what Mpo had done, before the Complainant could answer, the appellant interjected that the Complainant had fallen off her bed and he had picked  
5 her up and put her on the bed. The appellant called to the Complainant, "Yonela, kom slaap in jou kamer". Mrs Sishuba said: "los nou vir haar jy gaan nou nie vir haar terugneem nie sy gaan saam met ons slaap." The witness had not questioned the Complainant further because the Complainant was a little  
10 confused and upset. The witness had not noticed any injuries to the Complainant. The Complainant had spent the night with her grandparents.

According to Joyce Sishubo the Complainant never fell off the  
15 bed. Mrs Sishubo testified that the appellant had left her home a week after the event, before the Complainant had left. She denied that he had left because he was not treated well. The birth certificate of the Complainant was handed in as an exhibit. This indicated that she was born on 6 February 2000.

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**Testimony of the appellant:**

The appellant testified that on the night in question he was sleeping on the floor in the TV room. He had heard the sound  
25 of something falling in the Complainant's bedroom and he

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heard her crying. He said that as an adult he had gone to investigate, entered the room and saw the Complainant attempting to stand between the two beds. He suspected she had fallen off the bed. She was crying. He asked her what  
5 was going on. The Complainant moved past him and towards her grandmother's room, still crying. He left the room with the Complainant. During cross-examination he said that it was at this stage that he asked the Complainant what was going on. The Complainant did not reply.

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The grandmother came out of her room and in the appellant's presence asked the Complainant why she was crying. The appellant said that he had not heard the Complainant uttering the words, "dis Mpo". He said Mpo was the name his  
15 grandmother had given him.

During cross-examination when it was put to him that both the Complainant and her grandmother testified that before the Complainant could explain what he had done, he, the appellant  
20 had interrupted and told the grandmother that the Complainant had fallen off the bed, he denied this was so. His version was that the grandmother had asked him what had happened and in response he informed her that the Complainant had fallen off the bed. It was pointed out by the prosecutor and the Court  
25 that the appellant's lawyer had not put his version to Joyce



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Sishubo, namely that she had first asked him what had happened. He said the reason Joyce questioned him was because the Complainant was not giving her an answer.

5 The appellant went back to the TV room where he stood next to the TV cabinet and listened to what the Complainant would report to her grandmother had happened. He denied that he had called the Complainant to come back to the room as per the testimony of the Complainant and her grandmother.

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During cross-examination the appellant said he was not aware that anyone else had passed by where he was sleeping towards the Complainant's room on the night in question. He explained that one would have to pass the room in which he  
15 was sleeping to access the room in which the Complainant was. The TV room where he slept was between the room in which the Complainant slept and her uncles' room. He conceded that if someone had come out of the Complainant's room he would have seen that person. He also said that had  
20 there been a person doing something to the Complainant he would have heard the noise. He denied that he had told Joyce Sishubo that he had picked up the Complainant and put her on the bed. According to him Joyce was lying about this because she did not like him.

He had returned to Queenstown in December 2008 and come to the Cape in 2009. He had decided not to stay with the Complainant's grandmother again because he was not treated well there. He was arrested in Queenstown in January 2010.

5 He said he did not know why the Complainant had blamed him.

### On appeal

The uncontroverted evidence of Charlene Williams was that

10 because of the sexually transmitted infection she could say for sure that it must have been a penis which caused the infection and injuries to the Complainant. On this evidence the Court *quo* correctly accepted that the Complainant was raped. In the light of this evidence nothing, I believe turns on the fact that

15 the Grandparents did not sense anything pertaining to the alleged rape or the fact that the Complainant made the first report a few months later. The appellant does not place in dispute that Complainant was raped but denies that he raped her.

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The Complainant, a single child witness to whom the cautionary rule was correctly applied, identified the appellant as the perpetrator. She remained adamant it was him and would not be moved from her version during cross-

25 examination. It is so that the light was off when the

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perpetrator was on top of her and she did not see his face. However, when she jumped off the bed it is common cause that it was the Appellant who was in the room. On the appellant's own version he puts himself there. On appellant's own version  
5 also, there was no other person in the room or who passed by to get to her room. The appellant goes as far as to say that had there been, he would have heard the noise.

The Complainant's testimony that, when asked why she was  
10 crying, she said "dis Mpo", was corroborated by the testimony of the grandmother. Corroborated also was her evidence that the appellant interjected when the grandmother asked the Complainant what Mpo had done. There is also corroboration between the Complainant and her grandmother that the  
15 appellant pleaded with the Complainant to return to her room, suggesting he did not want her to go to the grandmother. The Complainant consistently named the appellant as the man that raped her, both to Thelma Mxothwa, albeit a few months after the event, and in her testimony, and would not be swayed  
20 from the stance during cross-examination.

The contradictions in the testimony of the state witnesses, alluded to by the appellant are not in my view material. Here I refer to the evidence of the Complainant that Thembeke, her  
25 aunt, had asked her if she had been raped while the testimony

of Thembeke was that the Complainant had first told her that she had been raped. Then there is the difference between the evidence of the Complainant and her Grandmother none of which is material. On an assessment of all the evidence the  
5 Complainant undoubtedly passes muster as a credible and competent witness, as, I believe, do the other state witnesses.

Can the evidence of the appellant be reasonably possibly true in the light of the evidence of the state witnesses? The fact  
10 that the appellant does not dispute the Complainant was raped, that on his own version there is no evidence of another perpetrator, and the fact also that he puts himself in the room, suggests not. This, together with the corroborative evidence of the Complainant and her grandmother that immediately after  
15 the Complainant emerged from the room, she named the appellant and he tried to prevent her going to her grandparents' room and his evidence that thereafter he was interested to hear what she would report, leads one to conclude that the appellant's version, that all that happened  
20 was a child falling off the bed, is not reasonably possibly true.

There simply was no evidence that any other person could have raped the Complainant. Even if one were to accept the appellant's testimony that he came into the room because the  
25 Complainant had fallen off the bed, this does not in the totality

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of the evidence make his version, that he did not rape the Complainant, reasonably possibly true. In the circumstances the guilt of the appellant and the charge against him was correctly found to have been proved beyond reasonable doubt.

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**Sentence:**

For the purpose of sentencing the Court had the advantage of two comprehensive reports. The first was a professional report by a probation officer setting out the personal circumstances of the appellant. The second was a pro-victim impact report pertaining to the Complainant. The former detailed the difficulties the appellant had experienced in his relatively young life. The latter report indicated the trauma experienced by the Complainant and her family as a consequence of the incident.

Notwithstanding the devastating impact on the Complainant the Court found there to be the following substantial and compelling circumstances which militated against the life sentence:- The appellant was a first offender he was relatively young, being 23 years of age at the time of the incident. He had experienced difficulties in his life *inter alia* in that he had lost both his parents at a young age; and that he had spent 23 months in prison awaiting trial. The Court also took



cognisance of the fact that the Complainant was not seriously injured or assaulted and imposed a sentence of 20 years.

It is contended on behalf of the appellant that the sentence  
5 was shocking and that the Court over-emphasised the interests  
of society to the detriment of those of the appellant. I am of  
the view that in the light of the profile of the appellant and all  
of the circumstances, in particular that he was a first offender  
and this was not one of the worst cases of rape, the sentence  
10 of 20 years imprisonment was excessive.

There is merit also in the argument that the Court  
overemphasised the interests of society to the detriment of  
those of the appellant. For, as was said by Harmse JA in S v  
15 Mhlakaza 1997(1) SACR 515 (SCA) at 518(e-g):

20 "The object of sentencing is not to satisfy public opinion  
but to serve the public interest...A sentencing policy that  
caters predominantly or exclusively for public opinion is  
inherently flawed. It remains the Courts duty to impose  
fearlessly an appropriate and fair sentence even if the  
sentence does not satisfy the public."

Regard being had to all of the circumstances I am of the view  
25 that the sentence of 20 years imprisonment was neither an

appropriate nor fair sentence and warrants interference with on appeal.

The following order is accordingly granted:

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1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld. The sentence of 20 years direct imprisonment is set aside and substituted with the following sentence:

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The accused/appellant is sentenced to 15 years direct imprisonment of which 3 years are suspended for 5 year on condition that he is not convicted of rape or attempted rape committed during the period of suspension or sentence to direct imprisonment without the option of a fine.

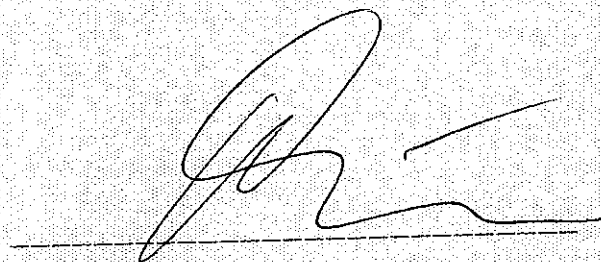
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MEER, J

I agree and it is so ordered.



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STELZNER, AJ