



<i>Reportable:</i>	Yes/No
<i>Circulate to Judges</i>	Yes/No
<i>Circulate to Magistrates</i>	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: CA&R 70116
Matter heard: 06-02-2017
Delivered: 05-05-2017

In the Appeal of:

JOHNNY GOUWS

Appellant

and

THE STATE

Respondent

WILLIAMS J et LEVER AJ

JUDGMENT

WILLIAMS J:

1. The appellant was convicted in the Regional Court held at Douglas on a count of rape and was sentenced to life imprisonment. He now appeals against both the conviction and the sentence imposed.
2. The grounds of appeal relating to the conviction can be summarised as follows:

- 2.1 The court *a quo* erred in not treating the complainant's evidence, as a youthful, single witness with the necessary caution;
 - 2.2 The court *a quo* erred in finding that the state witnesses T. Baartman and P. Tallies were credible and reliable witnesses;
 - 2.3 The complainant's version of events is not corroborated by the medical evidence; and
 - 2.4 The court *a quo* erred by rejecting the appellant's version as not reasonably possible true.
3. The complainant who was 12 years old at the time of the incident, testified that she was in the company of her two friends T. and P. on the night in issue. They had been drinking beer on the soccer field of the local school and were just about to buy more beer from a nearby tavern when the appellant, who is known to all three of them, approached the group, grabbed the complainant and dragged her off into a copse of trees. The appellant then removed her pants and panties and vaginally raped her. The appellant thereafter made the complainant sit with him on a rock until family members of the complainant, who had been alerted by her two friends, approached the scene and the appellant ran away.

4. The complainant testified that she was ashamed to tell her grandmother that she had been raped but when one K. asked her she replied in the affirmative. A report was made to the police that same night and the next morning the complainant was examined by a doctor.
5. T. testified that she, the complainant and P. were sitting on the soccer field when the appellant approached and grabbed the complainant. P. tried to intervene but the appellant kicked him in the stomach. T. ran away while the appellant pelted her with stones. She alerted the complainant's family and on their return to the field they encountered P., who then joined the group in looking for the complainant. They saw the appellant and complainant sitting on a rock. The appellant ran away when he saw them. When asked what the appellant had done to her the complainant replied that the appellant had raped her.
6. P.'s evidence was that he and the two girls were on their way to the soccer field with two beers which they had bought at the tavern when the appellant approached them. He grabbed the complainant and when P. intervened he was kicked in the stomach. T. ran off. P. later met up with T. and the people she had called but did not go back with them to the complainant.
7. The contradictions in the evidence of the complainant, T. and P. relate mainly to where the appellant had

approached them. This contradiction is in my view not material in light of the fact that the appellant placed himself on the scene. The appellant, who was legally represented, did not give a plea explanation but during cross-examination of the three above-mentioned witnesses it was put to them that the appellant had been out looking for P. who had earlier taken a box of wine belonging to the appellant. The appellant had then found the three witnesses on the soccer field with the box of wine. T. and P. ran away with the wine while the complainant walked across the road to a cafe. The appellant then left to spend the rest of the night with his girlfriend Hanna Witbooi.

8. The complainant, T. and P. denied the version of the appellant as put to them. Hanna Witbooi who was called by the state as a witness and later recalled by the defence, also denied that the appellant spent the night with her and that she was his girlfriend.
9. The state witnesses R. P, S. J. (the complainant's grandmother) and K. S. (K.) confirmed that they were awakened that particular night by T. who informed them that the appellant had dragged the complainant away. S. also testified that she saw the appellant sitting with the complainant on the rock before he ran away. Jansen and S. however both testified that the complainant had told Jansen that she had been raped by the appellant, contrary to the complainant's version that she had

told S.. Not much turns on this however since it appears that S. and Jansen were together when the complainant made the report.

10. The complainant, as mentioned, was only seen by a medical practitioner, Dr Morolong the morning after the incident. Dr Morolong who completed a J88 medical form also testified. His evidence was that he could find no injuries on the complainant. According to the doctor this factor could point to either consensual intercourse or the fact that the complainant had been sexually active prior to the incident.
11. The doctor collected samples from the complainant - her panties, an intra-vaginal swab, and swabs of the vulva and vestibule - which together with a reference sample of the appellant's blood, were sent for DNA testing. The DNA result of the samples collected from the complainant matched the DNA result of the appellant's blood sample.
12. In these circumstances, the appellant's version that he had no sexual or even physical contact with the complainant and that he was falsely implicated in the matter for reasons not very clear, was in my view correctly rejected by the court *a quo*. Mr Fourie who appeared for the appellant wisely conceded during argument that the conviction was unassailable.
13. As far as the sentence is concerned, the appellant, who was 37 years at the time of the incident, has numerous previous convictions. Most telling of these is a conviction of rape during

2001 and for which he was sentenced to 10 years imprisonment. The appellant could clearly not be rehabilitated since the offence *in casu* was committed 8% years later, after an apparent early release.

14. The present conviction - that of rape of a person under the age of 16 years - attracts a sentence of life imprisonment in terms of the minimum sentence provisions unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The court *a quo* considered all the relevant factors and found no substantial and compelling circumstances to exist. Here too the court *a quo* cannot be faulted. The appellant shows no remorse for his actions and is clearly a danger to society.

In the circumstances the following order is made.

- a) The appeal against both conviction and sentence is dismissed.**



CC WILLIAMS

JUDGE

I concur

L LEVER

ACTING JUDGE

For Appellant: Mr PJ Fourie
Kimberley Justice Centre

For Respondent: Adv KF Ilanga
Office of the OPP