

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

CASE NUMBER:

A602/2009

5 **DATE:**

30 JULY 2009

In the matter between:

WAZIER JUMAT

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

15 **HLOPHE, JP:**

This is an appeal against the judgment of Mr Justice Motala, now retired. An appeal was noted against both conviction and sentence. The facts giving rise to this may be briefly stated.

20 The appellant, who was an accused in the court *a quo* was charged with, and convicted of rape and the matter came to the High Court before Justice Motala for purposes of sentence.

25 The defence advanced by the appellant was one of consent,
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namely he did not deny that there was sexual intercourse between himself and the complainant. He said the complainant consented to sexual intercourse. Before us today, in the full Bench Appeal, Mr Burgers appeared for the
5 appellant. The State was represented by Ms Cecil. He argued, among other things, that the evidence was consistent with the view that there was consent at all material times, namely that the complainant had given consent and, therefore, there was no rape whatsoever in the circumstances.

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The difficulty with that submission is the following. If one looks at the totality of the evidence, to the extent that Mr Burgers may argue that there were some contradictions, it is clear that there were no material contradictions. To the extent
15 that there is argument advanced that the medical evidence is not conclusive inasmuch as there could well have been injuries sustained by the complainant to her private parts, if she was having consensual sexual intercourse for the first time, this agreement is not convincing.

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One must look at the totality of the evidence. In my judgment, the totality of the evidence and the circumstances of this case militates against any finding or conclusion that sex was consensual. Indeed no suggestion was made whatsoever why
25 the complainant, who allegedly had consensual intercourse

with the appellant, would immediately report that to Mr Francis, immediately after the so-called consensual intercourse. If anything, that is indicative of the fact that she did not consent to sexual intercourse.

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Ms Cecil, who appeared for the State, also argued, and correctly in my view, that if one looks at the totality of the evidence, it militates against any conclusion or finding that sexual intercourse was indeed consensual. It is a well known principle of our law that if there are contradictions in the evidence of a complainant, if anything, that is an indication that the evidence was not rehearsed. And in my view, these contradictions are not material. For example, Mr Burgers made an issue of the fact that she said she was taken by her father, whereas the evidence was that she was taken by William and somebody else. If anything, that is an indication that her evidence was not rehearsed at all and she was indeed telling the truth.

20 One must not lose sight of the fact that the complainant was 15 years, seven months old at the time of the alleged incident. Furthermore no doubt rape would have traumatised her. There is no question in my mind that if one looks at the totality of the evidence, it is militating against the submission that sex was indeed consensual. Insofar as the conviction is concerned, I

would certainly uphold the conclusion and confirm the judgment of the court *a quo* relating to conviction.

We turn now to sentence. The appellant was sentenced to 12
5 years direct imprisonment by the learned judge. The learned
judge found that there were substantial and compelling
circumstances warranting a deviation from the prescribed
minimum sentence of 15 years imprisonment. To be quite
frank, I was, and I remain, firmly of the view that if anything,
10 the sentence borders on leniency. I would, therefore, dismiss
the appeal against both conviction and sentence as being
altogether without merit.

MOOSA, J: I agree.

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MOOSA, J

LE GRANGE, J: I agree.

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LE GRANGE, J

HLOPHE, JP: I agree and that is the order of court. The
25 judgment of the court *a quo* is confirmed insofar as it relates to

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both conviction and sentence and the appeal is dismissed.

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HLOPHE, JP