

SOUTH AFRICA / JUDGMENT

## Mathiba v S (A187/2017) [2017] ZAFSHC 227 (14 December 2017) [2017] ZAFSHC 227

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Phalatsi

CASE / FILE NUMBER

A187/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A187/2017

In

the matter between:

JACOB  
GOPOLANG  
MATHIBA Appellant  
and  
THE  
STATE Respondent

CORAM:

MATHEBULA, J et PHALATSI, AJ  
HEARD

ON:

13 NOVEMBER 2017

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JUDGMENT

BY: PHALATSI, AJ

DELIVERED ON: 14 DECEMBER 2017

[1] The appellant, a 29 year old male person, was convicted on 9 June 2014 on a charge of contravention of Section 3 read with Sections 1, 55, 56(1), 56A as amended, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual offences and related matters) Amended Act 32 of 2007, as well as the provisions of Sections 92(2), 94 and 256 and 261 of the Criminal Procedure Act, 51 of 1977, read with the provisions of Section 51(1) and 51(2)(6) of the Criminal Law Amendment Act 105 of 1997, as amended, in that on 29 September 2013 and at or near Bloemfontein, within the Regional Division of the Free State, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, N. A. S. by penetrating her vaginally with his penis, without her consent and thus raped her. He was sentenced to life imprisonment on 12 June 2014. He appeals against the imposed sentence pursuant to his automatic right of appeal in terms of Section 10 of Act 42 of 2013.

[2] The facts of the case are briefly as follows:

The complainant, A. S., who was eight (8) years of age at the time of the incident, was with the appellant in a shack at her parental home. When the complainant's mother went out of the shack to the main RDP house, the appellant told the complainant to go outside. He then joined the complainant outside, held her by hand to the toilet, where he kissed and undressed her. The appellant made her to sit on the toilet seat and inserted his penis into her vagina. The state handed in the complainant's birth certificate and the J88, which documents were accepted as Exhibits "A" and "B". The complainant's mother corroborated the complainant's evidence and the appellant was then convicted.

[3] In mitigation of sentence, the appellant's personal circumstances were set out as follows by his then legal representative: that he is twenty nine (29) years old, he is a first offender, passed grade 10 at school. He is unemployed and he was raised by his maternal aunt because his mother passed away whilst he was still young. In aggravation of sentence, it was the evidence of the complainant's mother that the complainant was adversely affected by this incident in that her performance at school dropped; she became absent-minded and anxious at times. The complainant's mother was also adversely affected by this incident to the extent that she contemplated committing suicide, because of the gravity of what happened to her daughter, in her own house. The J88 depicted abrasions at 5, 6, and 7 o'clock positions and its conclusion stated that no visual anal injuries were seen. The court a quo found that no substantial and compelling circumstances exist and, as stated above, sentenced the appellant to life imprisonment.

- [4] It was contended on behalf of the appellant on appeal that the court a quo erred in finding that no compelling and substantial circumstances exist. It was submitted that, over and above the personal circumstances of the appellant as set out above, the age of 29 shows that the appellant can be rehabilitated. That there was no evidence of lasting emotional trauma suffered by the complainant, no victim impact report was obtained and the lack of physical injuries, constitute substantial and compelling circumstances.
- [5] It is indeed true that where a crime committed is the one that includes violence, like rape in casu, the degree of violence used in the commission of the offence must always be taken into account in aggravation or mitigation of sentence.

Section 51(3)(aA)(ii) of the Criminal Law Amended Act states as follows:

"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances

justifying the imposition of lesser sentence":

(ii) an apparent lack of physical injury to the complainant.

This provision clearly states that, that fact alone cannot constitute substantial and compelling circumstances. However, in conjunction

with other considerations and factors, it does not preclude the court to also consider it as a factor. It is, however, also true on the other hand that the younger the rape victim, the less violence will be needed because a young child cannot physically resist the action of the assailant. The vulnerability of the victim cannot be considered in favour of the assailant.

- [6] It is further true that rape is inherently traumatic and will always cause emotional trauma and have an adverse psychological impact on the victim. The presence of the psychological injuries do not need to be proved by any medical evidence. However, I must agree with the appellant's submission that the duration of the said physiological impact and emotional trauma must be proved by medical evidence. The duration thereof cannot be inferred without factual basis that can only be proved by medical evidence. The duration of emotional trauma has nothing to do with the actions of the appellant. Even if it can be accepted that there is no permanent and lasting trauma, it cannot be said that it is because of the benevolence of the appellant. This can only be attributable to the courage and emotional strength of the complainant. It cannot be said that because a person has raped an emotionally strong victim, or that the victim received the best medical treatment that helped her to recover speedily from the emotional trauma, then the accused who raped her must get the benefit, because the emotional trauma was not of a lasting or permanent nature.
- [7] I therefore find that the absence of physical injuries, the absence of evidence that the complainant suffered lasting emotional trauma, as well as the absence of the Victim Impact Report, can be regarded as compelling and substantial circumstances in favour of the appellant justifying a deviation from the minimum sentence.

## ORDER

[8] Accordingly I make the following order: The appeal against sentence is dismissed.

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PHALATSI, AJ

I concur

MATHEBULA, AJ

On behalf of applicant: Adv. S. Kruger

Instructed by:

Bloemfontein Justice Centre

On behalf of respondents: Adv. K.E. Leslie-Shale

Instructed by:

The Director of Public Prosecutions

/dbloem

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Prepared on 11 October 2026 · Esheria