

Snoti v S
[2007] JOL 19383 (E)

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Case No:	CA 197 / 2006
Judgment Date(s):	08 / 02 / 2007
Hearing Date(s):	05 / 02 / 2007
Marked as:	Unmarked
Country:	South Africa
Jurisdiction:	High Court
Division:	Eastern Cape Division
Judge:	Pickering J
Bench:	JD Pickering J, JC Froneman J, C Plasket J
Parties:	Mncedisi Snoti (At); State (R)
Appearance:	Adv Theron, Justice Centre (At); Adv Williams, DPP (R)
Categories:	Appeal – Action – Criminal – Procedural – Public
Function:	Confirms Legal Principle

Key Words

Criminal procedure – Rape – Of nine-year-old girl – Minimum sentence – Aggravating circumstances – Accused HIV positive – Awareness of – Complainant not affected – No bearing on moral blameworthiness – Appeal against sentence dismissed

Mini Summary

The appellant had raped a nine year old girl with whom he shared a bedroom in someone else's house. He was sentenced to life imprisonment because the court *a quo* did not find substantial and compelling circumstances to impose a sentence less than the statutory minimum. Apart from the age of the complainant, another aggravating factor had been that the appellant was HIV positive and knew it. After he had appealed the judge furnished a report in terms of section 320 of the Criminal Procedure Act 51 of 1997. The report stated that the judge had inadvertently not referred to a significant item of information given to him from the bar during the course of argument in mitigation of sentence. The information was that after several medical tests conducted on the complainant after the rape it had been established that the appellant had not transmitted AIDS to the complainant.

Held that the fact that the appellant was aware that he was HIV positive at the time when he committed the offence placed this case within the worst category of rape cases. The court was not persuaded that the fortuitous circumstance of the complainant's HIV negative status had any bearing on the appellant's moral blameworthiness. The appeal against sentence was dismissed.

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PICKERING J: This is an appeal to the Full Bench of this Division against a sentence of life imprisonment imposed by Jones J upon appellant pursuant to a conviction of rape in the South East Cape Local Division. Appellant, a 29 year old man, was charged as accused one with the rape of complainant, a nine-year-old

girl. One Eunice Weziwe Cingi Makana, a woman, appeared as accused two, charged with being an accomplice to the aforesaid rape. She was eventually acquitted on this charge.

It appears from the evidence of complainant that she, appellant and accused two shared a bedroom at the house of one Sis Nomabaca, complainant's paternal aunt. On the night of 3 November 2004 complainant was sent to buy some home made liquor for appellant. On her return with the liquor she was called by accused two who whispered to her that appellant loved her and that she should go and sleep with him on his mattress. I interpose to mention that accused two in her evidence denied having said this to complainant. Although Jones J was satisfied as to the credibility of the complainant he considered that, in the absence of any corroboratory evidence, it would be dangerous to convict accused two on the single evidence of a child witness, hence her acquittal.

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Be that as it may, complainant stated that she obeyed accused two and went to appellant where he was lying on his mattress. Appellant undressed her proceeded to rape her. When he penetrated her vagina she "jumped" and screamed because of what she described as being terrible pain. Appellant then closed her mouth with one hand and slapped her on the thigh with the other hand. When he was finished he gave her R600 which she told him she did not want. Accused two then "borrowed" it. The following morning complainant reported the incident to her grandmother. Complainant was thereafter taken for a medical examination to Dr Mazibuko who recorded her findings on form J88 (exhibit C). Dr Mazibuko also testified at the trial. Her findings and evidence were summarised by Jones J as follows:

"Her findings were that the child's hymen was not intact and that the area around the hymen and the opening of the vagina was swollen, oedematous and red. She has illustrated the oedematous area on the drawing on the form J88. She is of the view that the child's evidence that she did not bleed does not seriously affect her findings because the removal of the hymen in this way, it was completely absent, does not necessarily involve visible bleeding. . . The conclusion from the medical evidence is that there was penetration by an object into the child's sexual organs at least as far as the opening of the vagina."

In his judgment on sentence Jones J described complainant as being a bright and intelligent little girl. It appears that she was given counselling at an early stage by Child Line and that although her grandmother indicated that complainant had subsequently become forgetful there is no evidence of deep seated and permanent psychological trauma. In this regard Jones J stated that whilst in his view there is no case of rape, particularly on a little child, which does not have some kind of psychological after-effects there was, in the present case, no evidence enabling him to measure it and to gauge its effect upon complainant in the future.

As regards the personal circumstances of appellant he is, as I have said, 29 years of age, and was at the time of the incident unemployed. Although he

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had a previous conviction for dishonesty he was treated by Jones J as a first offender. During 2000 he was diagnosed as being HIV positive.

In coming to the conclusion that no substantial and compelling circumstances existed which justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by section 51 of Act 105 of 1977 the learned Judge took into account as aggravating features two factors in particular. Firstly, that complainant was a helpless little girl aged nine years who had been given a place to sleep in appellant's room where she was supposed to be safe. Instead of protecting her appellant raped her in the presence of an adult woman. Secondly, the fact that at the time of the incident appellant was, to his knowledge, HIV positive. In this regard the learned Judge stated as follows:

"What makes the accused's moral blameworthiness greater is that he knew at the time he committed this offence that he was HIV positive and he knew that in imposing himself upon this little girl in the way that he did, he exposed her to the risk of infection. In my view this conduct places this case within the very worst category of rape cases. It is the kind of case for which the ultimate penalty was designed. It is necessary to protect our children from this kind of exposure to HIV, to serious disease and illness such as HIV and Aids and I believe that it is proper that society should be protected permanently from a repetition of this kind of conduct."

After having granted leave to appeal against the sentence imposed upon appellant by him Jones J furnished a report in terms of section 320 of Act 51 of 1977. In such report he stated that he had inadvertently not referred to a significant item of information on sentence given to him from the bar during the course of argument in mitigation namely, that subsequent to the rape the complainant had been medically examined at regular intervals to establish whether or not she had been infected with HIV. The result of the testing was that she had not been so infected and that it can now be accepted that appellant did not transmit the virus to her. The learned Judge stated that this

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objective fact might have a bearing on whether or not a sentence of life imprisonment should have been imposed.

In his judgment on sentence the learned Judge emphasised, correctly with respect, that the rape of a small child such as complainant is always an extremely serious matter, even in the absence of serious injury and despite there being no evidence of permanent psychological after-effects. This is all the more so where the perpetrator is a man in a position of trust *vis a vis* the complainant. I agree further with the learned Judge that the fact that appellant was aware that he was HIV positive at the time that he committed the offence places this case within the worst category of rape cases (compare *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 443f-h).

Ms Theron, who appeared for appellant, emphasised the fact that complainant had not been infected. I am not persuaded that this fortuitous circumstance has any bearing on appellant's moral blameworthiness. His conduct in raping a nine-year-old child entrusted to his care whilst knowing of his HIV status, was reprehensible in the extreme.

In my view the learned trial Judge correctly found that in the light of the aggravating factors present in the case no substantial and compelling circumstances existed justifying a lesser sentence than that of life imprisonment.

Accordingly the appeal against sentence is dismissed.