

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



Case Number: A173/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 12.4.2017

SIGNATURE: [Signature]

12/4/2017

In the matter between:

MOLEFI DAVID MOFOKENG

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted in the Vereeniging Magistrates' court on a charge of contravening section 55(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 and sentenced to ten years' imprisonment.
- [2] This appeal is only against sentence.
- [3] The appellant, a 45 year old male and friend of the complainant's mother, found the complainant alone at home on the afternoon of 4 May 2015. The complainant was 16 years of age at the time.
- [4] Shortly after his arrival and upon ascertaining that the complainant's mother was not at home, the appellant professed his love to the complainant. The complainant did not respond favourably to his declarations of love, whereupon the appellant forced himself on the complainant and proceeded to undo the zip of her pants.
- [5] Whilst struggling to get away from the appellant, the appellant took out his penis and penned the complainant to the floor. The appellant's penis touched the complainant's vagina. Fortunately, and before any penetration occurred, a friend of the complainant arrived at her house and the appellant immediately moved away from the complainant.

- [6] In view of the aforesaid facts and as alluded to *supra*, the appellant was found guilty of attempted rape.
- [7] In sentencing the appellant to ten years' imprisonment, the court *a quo* relied heavily on section 55 of the Act that provides that any person who has been found guilty of attempted rape, may be liable to the same punishment as that which a person convicted of actually committing rape will be liable.
- [8] The court *a quo*, relied on Part III of the Second Schedule to the Criminal Law Amendment Act, 105 of 1997 read with section 51(2), which prescribes a minimum sentence of ten years' imprisonment in respect of a first offender of rape.
- [9] To his credit, Mr Nethononda, counsel for the State, readily conceded that the court *a quo* erred in this regard. An attempt to rape carries less blameworthiness than an actual rape. In *A Guide to Sentencing in South Africa*, SS Terblanche, 3rd edition at page 219, the learned author stated the following in respect of attempted rape:

"It is submitted, however, that the mere fact that the offender did not actually rape the complainant must be mitigating. At least she did not suffer the pain, humiliation and terror of actually being subjected to

forced intercourse, meaning that the harm caused by the crime is less than a completed offence."

[10] Whilst agreeing with the view of the learned author, I am mindful that there may be instances where the circumstances in which the crime of attempted rape was committed would justify a term of ten years' imprisonment. This is not one of those instances.

[11] The crime, however, remains extremely serious. More so in view of the complainant's tender age and the fact that she was accosted in the sanctity of her own home by a friend of her mother, a person she obviously trusted. The trauma of the incident has lasting effects on the complainant and her performance at school has deteriorated.

[12] Mr Nethononda submitted that a period of seven years' imprisonment will be proportional to the blameworthiness of the appellant in the present circumstances. I agree.

[13] In the premises, I propose the following order:

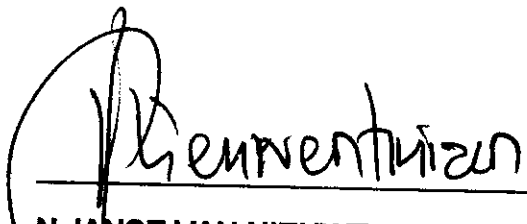
Order

1. The appeal against sentence is upheld.

2. The sentence of ten years' imprisonment is set aside and replaced by the following sentence:

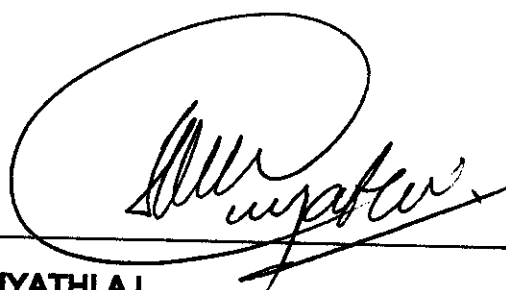
"The accused is sentenced to seven years' imprisonment."

3. The sentence is antedated to the 21st of October 2015.



N JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree



MANYATHI AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES*Counsel for the Appellant:*

Advocate L. Augustyn

Instructed by:

Pretoria Justice Centre

Counsel for the Respondent:

Advocate M.J. Nethononda

Instructed by:

State Attorney's Office

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