

Jezile v S and Others [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC) (as an amicus curiae)

This landmark judgment delivered by a full bench of the Western Cape Division of the High Court set precedent that the customary practice of ukuthwala cannot be utilised as a legitimate defence to criminal offences of rape, assault with intent to do grievous bodily harm (GBH) and human trafficking. The appellant, Mvumeleni Jezile (Jezile) after forcefully marrying a 14 year old girl from Eastern Cape and trafficking her to Cape Town, was initially sentenced to twenty two years imprisonment after he was convicted of rape, human trafficking, and one count of assault with intent to do grievous bodily harm. Jezile appealed his conviction on the basis that he had married the fourteen year old girl in a legitimate manner, namely he had practised the custom of ukuthwala. Jezile placed argument in support of his appeal that the court a quo:-

“...had misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of ukuthwala, or customary marriage. It was submitted that “consent” within the practice of ukuthwala is a concept that must be determined in accordance with the rightful place which customary law has in our constitutional dispensation, because it is an integral part of ukuthwala that the “bride” may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected, of her to do so.”¹

The Commission for Gender Equality (CGE) represented by the Legal Resources Centre (LRC) was successfully admitted as amicus curiae (friends of the court). The CGE placed before the Court its extensive work within the customary arena specifically in relation to the customary practice of ukuthwala. It noted that the customary practice of yester year was currently

¹ Para 52

polluted and utilised as a modern day guise for human trafficking. Moreover, it was submitted that the forced underage marriage violated a number international and regional legal instruments which the South African state was party too.

The Appeal Court dismissed the appeal and in turn confirmed the convictions levelled against Jezile. The lauded judgment reaffirmed the CGE's learned and informed viewpoint that ukuthwala in its true form did not involve rape and gross abuse of underage girls. It further emphasised the need for consent by both parties to conclude a legitimate marriage².

² irc.org.za/ircarchive/press-releases/3430-press-release-ukuthwala-defence-dismissed-in-appeal-of-rape-conviction [Accessed on the 19 of February 2018]