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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: A1322/03

DATE: 2005-12-01

In the matter between

10 SLYABULELA NGEDANA

Appellant

and

THE STATE

J U D G M E N T

BLIEDEN, J: The appellant was convicted on one count of rape, [count 1] and one count of indecent assault, [count 2] by the regional magistrate sitting in Protea, Soweto.

20 The complainants in each case were 11 years old at the time of the offences. The magistrate sentenced the appellant to 14 years imprisonment on count 1, and one year imprisonment on count 2 making a total of 15 years' imprisonment effectively. The present appeal is directed at both the convictions and the sentence.

At the outset attention must be given to the fundamental irregularity committed by the magistrate in failing to have regard to the

provisions of section 52(1) of Act 105 of 1997 (The Act) read together with Part I of Schedule 2 thereto. These in summary require that on a conviction for the rape of a person under the age of 16 the regional magistrate must halt the proceedings and refer the accused to a High Court judge for sentence on all charges. If the judge confirms the conviction he/she will determine the sentence to be imposed on the accused. After the inquiry into whether there are substantial and compelling circumstances the judge will decide whether to impose life imprisonment or a lesser sentence. Appropriate sentences will then be
10 imposed on any other counts.

This is not the first occasion on which such an irregularity has occurred. In *S v Liau* 2005 (1) SACR 498 (T) a two bench court of the Transvaal Provincial Division found in identical circumstances that the sentence imposed by the regional magistrate was a nullity. The Court went on to find that [and I quote from the English translation of the headnote]:

“Where the accused thereafter appeals she or he must be regarded as not having been sentenced. Such appeals must be dealt with as follows: in the first place the Court
20 must decide whether it is in the interests of justice to hear the appeal. At that stage the Court hears argument on the appeal against the conviction and considers whether the appeal should succeed. If the appeal against conviction must succeed the appeal is heard and the conviction and sentence are set aside. If at that stage the Court is of the

opinion that the appeal has no prospect of success it is struck from the roll. In terms of the Court's review competency in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 the regional court sentence is set aside and an order is made which the regional court should have made."

In this division Schwartzman J in *S v Oupa William Shabangu* [unreported case in the Witwatersrand Local Division case number A952/02] referring to the formulation of the judgment in *Liau's* case said:

10 "The only difficulty I have with the formulation of how an appeal court should respond to the irregularity is that I consider it inadvisable for a court of appeal at that stage of the proceedings to express an "opinion" that the appeal has no prospect of success. I say this because in terms of section 52(1) of the Act it is for the single judge to whom the regional magistrate refers the matter to decide whether the accused's conviction should or should not be confirmed. In reaching a decision on this issue such judge has the right in terms of section 52(1) of the Act to call for
20 further evidence. The judge's discretion on these issues should not be affected or influenced by any judgment or opinion of a Court of Appeal on the issue. I also do not see the need to strike the matter from the roll because making an order in terms of section 304(4) of the Criminal Procedure Act of 1977 would be appropriate."

I am in respectful agreement with the learned judge save for his comment in the last sentence of the above quoted paragraph. The appeal is before this Court. It is not being upheld as the proceedings have not yet been finalised. All that can be done at this stage is for the appeal to be struck from the roll of this Court so that the proceedings can be brought to finality in terms of the Act.

In my view it would be incorrect at this stage for this Court to comment on the conviction. As has already been mentioned in terms of section 52 of the Act, the proceedings against the appellant have not been
10 finalised both as regards conviction and sentence. The appeal must therefore be struck off the roll. I would make the following order in this case:

1. The appeal is struck off the roll.
2. In terms of section 304(4) of the Criminal Procedure Act 51 of 1977 the sentences are set aside and referred to the High Court in terms of the provisions of section 52(1) of Act 105 of 1997.

MASIPA, J: I agree.

BLIEDEN, J: It is so ordered.