IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date : 3 October 2005

Case number :A2898/03

NOT REPORTABLE

In the matter between

SIMON THABISO TAU FIRST APPELLANT

FRANS TELLO MPHEHLO SECOND APPELLANT

and

THE STATE RESPONDENT

Rape – contradictions in evidence of persons to whom appellant reported the rape not of such a substantial nature that they affect the veracity of their evidence that the complainant was panic-stricken when she complained to them that she had been raped. Consent to sex improbable in the circumstances.

Van Rooyen AJ

[1] The two appellants were charged with the double rape of the complainant on the 24-25th October 1998. Both pleaded not guilty, explaining that the complainant had consented to sex. They were convicted and sentenced to 15 years imprisonment by a regional magistrate on each charge. The effective sentence was accordingly 30 years imprisonment. They appealed against both conviction and sentence. *In limine* it was argued that the absence of the guardian of the minor appellant 1 prejudiced appellant 1. Appellant 1 was legally represented. Nevertheless, Mr *Malowa* argued that the assistance of a guardian could have assisted the appellant in the exercise of choices. I do not agree that the absence of his guardian prejudiced appellant 1: I have studied the record and have not come across any unfairness to appellant 1. They pleaded not guilty, but conceded that they had sex with her. That is not a difficult defense to decide upon for an

18 year old who is legally represented. The record shows no unfairness as to his conviction. I do not believe that even if there had been some prejudice, the prejudice was of such a nature that it resulted in an unfair trial.

[2] Since the appellants were convicted of having raped the complainant twice the minimum sentence of 15 years imprisonment was applicable, unless compelling and substantial circumstances were shown to have been present. Since the rape took place in October 1998, the regional magistrate had a discretion whether to refer the matter to the High Court for purposes of sentencing. The amending provision, which became operational on 23 March 2001, was of course not applicable. The regional magistrate, accordingly, did not act *ultra vires* (see *Direkteur van Openbare Vervolgings v Makwetsja* 2004(2) SACR 1 (T)).This Court must, accordingly, decide this appeal (see *S v Makhube* 2004(1) SA 99(T)). It appeared this morning that Mr Malowa was only mandated by appellant 1. We have decided, in the interests of justice, to postpone for this Bench the decision as to the conviction and sentence of appellant 2, once he has mandated counsel, if at all.

[3] The testimony of the complainant was that on that particular late afternoon, she and friends had some beer at her home. As from 18:00 they were at a drinking spot called Seuntjie's Place, where they danced. Since there was no beer available at Seuntjies, they left for another club by 21:00. There she bought some beer, but had not drank any of it when, outside the club when she was looking for her partner, she was grabbed by her collar by accused 2 and hit with a whip by accused 1, who had joined them. They were unknown to her.

[4] They then dragged her to a nearby cemetery, where they both had sex with her twice.

She did not consent to sex. She also told them that they should not have sex with her since she was pregnant. The medical report confirmed that she was four months pregnant. When walking away afterwards, appellant 1 followed her and said that he wanted to have sex with her again. At that stage she saw two men and she reported to them that she had been raped, whereupon appellant 1 ran away. She conceded that she had consumed some beer at her home, but denied that she was under the influence of liquor. There were five bottles of beer which she shared with friends. She could not say what amount she drank. Although there were questions as to her sobriety in cross examination, there was no convincing evidence that she was under the influence of alcohol.

[5] The two men confirmed in their testimony that they had come across the complainant during that night and that she told them that she had been raped in the cemetery. She was panic-stricken according to Dambusa. Mohale confirmed this and testified that she was crying. Mohale also saw a person following her, who ran away when she called for help. She showed Dambusa and Mohale the bruises which had been caused by the whip. Dambusa said that they were not bleeding. Mohale said that he knew the complainant, in spite of her testimony that the two men were unknown to her.

[6] Counsel for appellant 1 argued that contradictions between the two witnesses as well as Dambusa's contradictions with the testimony of the complainant, were substantial in that they affected the circumstances under which the report was made. It is true that there were contradictions. She said that the men were unknown to her and that she wore long pants, while Mohale said that he knew her for some time. Mohale testified that she was wearing long pants, while Dambusa said that she was wearing a long dress. It was argued that Dambusa referred to a long dress so that he could testify more readily that he saw the

bruises. However, Mohale in fact confirmed her evidence that she was wearing long pants. It was significant, it was argued, that the witness who testified directly after the complainant, contradicted her while Mohale, who had the potential to discuss the matter with the complainant, confirmed what she had said.

[7] I do not agree. The contradictions were slight and peripheral. It is understandable that a witness could easily, at that time of the night, mistakenly believe that a woman is wearing a long dress, while she in fact had long pants on. It was dark, in any case. The fact that she described them both as unknown to her, is not really important and does not justify an inference of collusion between Mohale and the complainant. The differences as to where they met her, are also immaterial. Contradictions must always be judged within context. See S v *Mafaladiso en Andere 2003(1) SACR 583(SCA)* where Olivier JA said the following at p 593-4 in an incisive analysis of the approach to contradictions:

"Die juridiese benaderingswyse tot weersprekings tussen twee getuies en weersprekings tussen die weergawes van een en dieselfde getuie (soos o a tussen sy of haar *viva voce* getuienis en vorige verklaring) is, in beginsel (indien nie in graad nie) identies. Die doel is immers in geen geval om te bewys welke van die weergawes die korrekte een is nie, maar om oortuiging te bring dat die getuie kan fouteer, hetsy weens 'n defektiewe rekolleksie of weens oneerlikheid (sien *Wigmore* a w paragraaf 1017). In die geval van self-weerspreking, in die besonder, word tereg deur Wigmore (t a p paragraaf 1018) gesê:

> '(a) Since, in the words of Chief Baron Gilbert (§ 1017 *supra*), it is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used *assertively*; i.e., we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other - but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one.'

Wigmore se benadering t a p is onderskryf in *S v Oosthuizen* 1982 (3) SA 571 (T) deur Nicholas R op 576 A - 577 B, wat op sy beurt deur hierdie Hof in *S v Mkohle* 1990 (1) SA SV 95 (A) op 98 f - g goedgekeur is.

Die blote feit dat daar self-weersprekings voor hande is, moet deur 'n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê, ten einde te bepaal of daar 'n weerspreking voor hande is en wat die presiese omvang daarvan is. In hierdie verband moet die feite-beoordeelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal- en kultuurverskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is in die weg staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Tweedens moet dit steeds voor

oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking of afwyking die getuie se geloofwaardigheid aantas nie (sien S v Mkohle1990 (1) SASV 95 (A) op 98 f - g). Nie-wesenlike afwykings is nie noodwendig relevant nie. (Sien S v Bruiners en 'n Ander 1998 (2) SASV 432 (SOKPA) op 437 g e v.) SOKPA) op 437 g e v.)
Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheid of geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik - en die kwaliteit van dié verduidelikings - en die samehang van die weersprekings met die res van die getuie se getuienis moet o a in ag geneem en opgeweeg word. (Sien S v Mkohle, supra, op 98 f - g; sien ook R v Gumede, supra, op 756 - 758 in medio; S v Jochems 1991 (1) SASV 208 (A) op 211 f - j; S v Bruiners en 'n Ander, supra, op 437 i - 438 a.)" (emphasis added).

[8] I am satisfied that the State has proved its case beyond a reasonable doubt and that the version of appellant 1 is false beyond a reasonable doubt. I agree with the conclusions reached by the learned regional magistrate. The two witnesses to whom she reported the rape said that she was crying and panick-stricken. I accept the evidence of complainant that she was not under the influence of alcohol in so far that could have created the impression that she was willing to have sex; she conceded that she had some beer before she went to the first beer-hall, but she had nothing after that. She conceded that she had purchased beer at the second hall, but she was attacked outside the hall when she went looking for her friend and did not go back to have the beer. People were dancing and it is unlikely that they would have heard her if she had called out. The version of accused 1 that she did not wish to have sex in a house since she did not wish to spend the night there, is highly unlikely. Why would she choose to have sex in a cemetery? Although it is prudent to approach the fact that the appellant's version was not always put to the complainant with circumspection, I believe that the learned regional magistrate, in the present matter, was justified to reject his version. Appellants pleaded consent. It is extremely unlikely, in my view, to suggest that a woman, who is four months pregnant, would consciously consent to sex with a male person, unknown to her for that matter. Furthermore the conduct of the complainant soon after the rape, is corroborative of

absence of consent. In my view appellant 1 was properly and correctly convicted. The conviction is, accordingly, justified. The State has proved its case beyond a reasonable doubt.

Sentence

[9] The justifiability of the sentence of 15 years' imprisonment for each rape must be examined next. The following guidelines should, *inter alia,* be considered when sentencing a person:

(1)A balance must be struck between the interests of the community, the nature and seriousness of the crime and the personal circumstances of the accused.[1]

(2)Punishment should not be approached with anger,[2] but from a perspective of justice and may never be cruel, inhuman or degrading[3]. The term of imprisonment may also never be excessive.

(3)When the interests of the community are considered it is not what the community demands that should determine the sentence but what the informed, reasonable member of that community believes to be a sentence that would be just.[4]

(4) A sentence would, accordingly, not necessarily represent what the majority in the community demands,[5] but what serves the public interest and not the wrath of

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[1] *S v Zinn* 1969(2) SA 537(A).
[2] An approach which is based on the philosophy of Roman lawyer, Marcus Tullius Cicero and which has often been supported by our courts: *S v Smith en Andere* 2002(1) SACR 188(T); *S v Opperman* 1997(1) SACT 285(W); *S v De Kock* 1997(2) SACR 171(T); *S v Noemdoe* 1993(SACR 365(W); *S v Thonga* 1993(1) SACR 365(W); *S v Rabie*1975(4) SA 855(A) at 866D; *S v Zinn* 1969(2) SA 537(A).Compare Van Zyl *Justice and Equity in Cicero (1991).*
[3] S 12(1)(e) of the Constitution Act 108 of 1996.
[4] *S v Mhlakaza and Another* 1997(1) SACR 515(SCA) at 518.
[5] *S v Makwanyane* 1995(2) SACR 1(CC) at par[87]-[89].

primitive society. [6]

(5)A term of imprisonment often reaches a peak, after which the meaning thereof declines. Excessively long terms of imprisonment accordingly do not necessarily solve the problem of criminality and the ever-increasing wave of crime. A term should never be so long that it destroys the accused emotionally.[7]

(6)Personal suffering[8] and sincere remorse as to what he or she caused, is relevant.[9]

(7) Punishment also serves the purpose of deterrence of the accused and other would-be wrongdoers. The specific wrongdoer must, however, not be punished more severely than he or she deserves, merely because the lengthy sentence acts as a lightning conductor for the wrath of the community.[10] Such an approach could mean that a specific wrongdoer is subjected to a sentence which is heavier than the sentence that he or she legitimately deserves, and that would be unacceptable.[11]

[10] The minimum prescribed sentence for rape under these circumstances is 15 years, which could properly be imposed by a regional magistrate. When there are compelling and substantial circumstances present, then imprisonment of less than 15 years is justified. In *S v Malgas*[12] it was held that the traditional mitigating circumstances still apply in establishing compelling and substantial circumstances. Marais JA states as follows:

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[6] *S v Du Toit* 1979(3) SA 846(A) at 858.
[7] Wrongdoers "must not be visited with punishments to the point of being broken." - per Holmes JA in *S v Sparks and Another* 1972(3) SA 396(A) at 410G; also compare *S v Skenjana* 1985(3) SA 51(A).

[8] See the authorities quoted in *S v Malan 2004(1) SACR 264(T).*
[9] *S v De Vries* 1995(1) SACR 662(T).

[10] E.g. *S v Chapman* 1997(3) SASV 1(SCA).
[11] See Skeen " Effective judicial thundering from up on high or a mere brutum fulmen? Deterrent sentences in criminal cases." 1998 *SAJCJ* 242.
[12] 2001(1) SASV 469(HHA)

"[22] … The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

[23] While speaking of injustice, it is necessary to add that the imposition of the prescribed sentence need not amount to a shocking injustice ("'n skokkende onreg" as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking.

[24] It has been suggested that the kind of circumstances which might qualify as substantial and compelling are those which reduce the moral guilt of the offender (analogously to the circumstances considered in earlier times to be capable of constituting "extenuating circumstances" in crimes which attracted the sentence of death). That will no doubt often be so but it would not be right to suppose that it is only factors diminishing moral guilt which may rank as substantial and compelling circumstances."

[11] In *S v Ndlovu*[13] it was held that the omission to warn an accused that a minimum sentence was applicable, constitutes a compelling and substantial circumstance. It should be borne in mind that the minimum sentences were introduced on the 1st May 1998, the deeds were committed in October 1998, that the accused were arrested on the 29th October 1998, and that the trial commenced in March 1999. Also see *S v Legoa*[14]. It is nevertheless clear that each case must be judged on its own facts. Secondly appellant 1 was only 18 when the deeds were committed. This must, most certainly, be taken into consideration in mitigation. On the other hand, the appellant was callous in his conduct. He abducted a woman to have sex with her in a cemetery. She was crying, was pregnant and told him so. However he remained deliberately deaf to her pleas.

In so far as appellant 1 is concerned I believe that, given his age, fifteen years' imprisonment would do justice to the case : fifteen years each is imposed for each count of rape. However the two terms are to run concurrently in an attempt to ameliorate the accumulative effect of the sentences.

[13] 2003(1) SACR 331(SCA).
[14] 2003(1) SACR13(SCA).

In the result the appeal against the convictions is not upheld. The appeal as to sentence is upheld in so far as appellant 1 is to serve 15 years' effective imprisonment. The sentence is dated back to 25 March 1999.

The appeal of appellant 2 is postponed *sine die* for this Bench.

JCW van Rooyen……. 3 October 2005
Acting Judge of the High Court

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Judge of the High Court