

IN THE HIGH COURT OF SOUTH AFRICA

(LOCAL CIRCUIT DIVISION FOR THE NORTHERN CIRCUIT)

POLOKWANE

5

CASE NO: CC374/06

DATE:12-09-2006

10

15In the matter between

THE STATE

and

SURPRISE

CHOSHI

ACCUSED

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J U D G M E N T

VAN OOSTEN J: The accused was convicted in the
25Regional Court, held at Mankweng, of the rape of a 15 year
old girl, M K. As the matter fell within the provisions of Act
105 of 1997, sentencing was referred to his Court. Before
sentence can be considered, this Court must be satisfied

that the conviction of the accused in the court *a quo* was in accordance with justice.

Regarding this aspect, Mr *Mokgotho*, who today appeared on behalf of the accused, submitted that the finding should be that it was not in accordance with justice. In essence Mr *Mokgotho* advanced two arguments. The first concerns the complainant's evidence regarding the rape and the medical evidence which was led in support thereof. The complainant testified that the accused penetrated her anus and that in the process, he only touched her vagina. One may infer from what she had said that there was no actual penetration of the vagina, but this aspect is dealt with by the medical evidence. Doctor Rabatseta testified that she examined the complainant and found that she had been sexually assaulted. She said that the complainant was very deeply in pain at the time and she on examination established that the clitoris was swollen and the hymen was torn. This led her to conclude that the complainant, as I have mentioned, had been sexually assaulted. She, however, did not find any anal injuries.

On this aspect doctor Rabatseta was asked the following question by the magistrate:

'Yes I know, that I accept that now. What I am saying is, is it possible that there was no injury to the anus because in the

accused's attempt to penetrate the anus, he actually penetrated her vagina.'

To this question doctor Rabatseta answered, "yes." Her evidence, in my view, is in accordance with the realities of this matter. It is obvious that the accused, who the complainant said was behind her, was trying to penetrate her anus but that she, on the objective medical evidence, sustained injuries to her vagina, which as the doctor testified, showed that she had been sexually assaulted and therefore that actual penetration had occurred.

If the evidence of the complainant is considered in conjunction with that of doctor Rabatseta, I am of the view that penetration has duly been proved by the State.

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Mr *Mokgotho's* second argument concerned the credibility of the complainant. He referred to certain contradictions when her evidence is considered with that of her cousin, Jack Kgoago, who testified that he arrived on the scene apparently at the stage when the complainant was raped by the accused. I do not consider it necessary to refer in detail to those inconsistencies or differences in their evidence. It is trite law that the court should consider the case as a whole on all the evidence that has been led.

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In this regard it is important to have regard to the version of the accused. He admitted that he was in the presence of the complainant and in fact right next to her, when they were inspecting a time table. For the first time he disclosed however, 5that he had his hand around her waist, to which he added that he had had previous sexual intercourse with the complainant when he was in a relationship of sorts with her. These aspects were not put to the complainant in cross-examination and clearly constituted an after-thought by the accused.

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Of further importance is the reason he proffered for the complainant to falsely implicate him. He maintained that she did so because Kgoago arrived unexpectedly on the scene which took her by surprise. For 15that reason she raised the complaint that he had raped her. I am unable to accept this version as reasonably possibly true. Assuming, as the accused would have it, that they had been together for an innocent reason, there was no reason whatsoever for the complainant to tell an outward lie to her 20cousin.

I am satisfied that on all the evidence adduced the Magistrate correctly disbelieved the accused and accepted the evidence of the complainant that she was 25raped by the accused. I am satisfied that the conviction is

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conviction

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JUDGMENT
confirmation of

in accordance with justice and it is accordingly

CONFIRMED.

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(LOCAL CIRCUIT DIVISION FOR THE NORTHERN CIRCUIT)

POLOKWANE

CASE NO: CC374/06

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DATE:12-09-2006

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(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

9 December 2011

.....

20In the matter between

THE STATE

and

SURPSISE CHOSHI

ACCUSED

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SENTENCE

VAN OOSTEN J: The accused has been convicted of an extremely serious crime. He now has to be sentenced. In the consideration of an appropriate sentence I will take into account the personal circumstances of the accused, the nature and seriousness of the crime he has committed and the interests of society.

In favour of the accused I take into account that he is still a young man at the threshold of his life. He was born on 16 November 1985 and therefore only 19 years old when the offence was committed. He was a scholar at the time, as was the complainant. He was in Form 2 and he is now repeating Form 2. The accused is a first offender and he has no dependants.

15 Regarding the complainant, it stands to reason that the violation of her dignity must have caused her serious trauma and emotional harm. In the absence of an impact report I am unable to make any finding as to the nature and extent thereof. I have very properly been
20 informed by Mr *Fourie*, who appeared for the State, that he has interviewed the complainant and that she has come to terms with the occurrence and that she indeed is carrying on with her life. On the face of it, there are accordingly no permanent emotional *sequelae* resulting from the rape.

The offence of which the accused has been convicted is, as I have mentioned, deplorable. The complainant at the time was only 15 years of age. They knew each other and they went to a room to inspect a time stable. The accused took undue advantage of her when they were alone in the room. She was vulnerable and defenceless. The accused assaulted her and proceeded to have sexual intercourse with her from behind. His conduct simply cannot be condoned. The natural outrage and revulsion of society is justified as is the demand for long terms of imprisonment to be imposed.

I do however, find that the youthfulness of the accused, in the circumstances of this case, constitutes a substantial and compelling circumstance justifying a deviation from the minimum statutory prescribed sentence. Having taken all the circumstances into account the accused is sentenced to **FIFTEEN YEARS' IMPRISONMENT.**

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POLOKWANE

CASE NO: CC374/06

12-09-2006

(4) REPORTABLE: NO
(5) OF INTEREST TO OTHER JUDGES: NO
(6) REVISED

9 December 2011

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In the matter between

10 **SURPRISE CHOSHI**

APPLICANT

and

THE

STATE

RESPONDENT

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JUDGMENT
(LEAVE TO APPEAL)

VAN OOSTEN J: This is an application for leave to appeal against both conviction and sentence. Mr *Mokgotho* has again referred to the issue concerning penetration which I have alluded to in the judgment on the merits. He has also again referred to the credibility of the evidence given by the complainant.

I have mentioned in the judgment on the merits that there are certain discrepancies between the evidence of the complainant and Jack Kgoago, but that I preferred to adopted the approach of considering the evidence as a

whole. Having done that, it was my finding that on the evidence as a whole, the guilt of the accused was established beyond reasonable doubt.

The question remains whether another Court may reasonably, on the evidence, come to a different finding. I cannot exclude such a possibility. It follows that the matter should be referred to a Full Court, for re-consideration on appeal. Reasonable prospects of a successful appeal therefore exists both in regard to conviction and sentence.

10 In the result I make the following order:

Leave to appeal to the Full Court of the Transvaal Provincial Division of this Court, against both conviction and sentence, **IS GRANTED.**

15 MR MOKGOTHO APPLIES FOR BAIL PENDING APPEAL

COURT: The application for bail pending appeal is **DISMISSED.**