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

DATE: 14/03/2008
CASE NO: A1244/2006

UNREPORTABLE

In the matter between:

ENUEL TSIBISEGANG SEKGOBELA APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

SERITI, J

The appellant together with other co-accused appeared in the regional court, Nelspruit facing one count of rape and one count of assault with intent to do grievous bodily harm.

Accused number 1, Mr Steve Mzimba and the appellant who was accused number 2 were convicted on both counts and the other two

co-accused were convicted on the assault count.

The trial court imposed a fine with an alternative imprisonment term of six months on the other two accused, namely Messrs Gladwell Mogakane and Goodwell Mpholoane and referred accused number 1 and the appellant to the High Court for sentence.

The matter came before DE KLERK J and his judgment on sentence is dated 19 June 2002. In his judgment the learned judge found that the Criminal Law and Procedure Amendment Act 105 of 1997 is applicable as the complainant was raped by both Messrs Mzimba and the appellant. The court confirmed the conviction and the learned judge found that there are no substantial and compelling factors justifying a sentence less than the prescribed sentence as far as the rape charge is concerned and he sentenced each one of them as follows:

> "Count 1 – Rape – life imprisonment.
>
> Count 2 – Assault – R300.00 fine or 3 months imprisonment."

Prior to being sentenced by DE KLERK J as mentioned above they

were in detention for almost one year and eight months as their bail was withdrawn on 26 October 2001.

After the sentence the appellant launched an application for leave to appeal against both conviction and sentence.

The application for leave to appeal was heard by BOSIELO J on 21 August 2003. During the said hearing the appellant pointed out that he is appealing against sentence only.

The learned judge granted the appellant leave to appeal against sentence only.

In her evidence in chief, the complainant testified that on the date mentioned in the charge-sheet at about 07:00 pm she was with her boyfriend when they came across the four accused. The four accused were with two ladies. The appellant came to them, insulted them, and grabbed her and slapped her. In the meantime, Mr Mzimba and the other two accused started to assault her boyfriend. Her boyfriend fell to the ground and Mr Mpholoane, accused number 4 produced a firearm or a toy gun and pointed same at his boyfriend.

The other two accused left with their girlfriends. She remained with the appellant and Mr Steve Mzimba. They dragged her to certain bushes and on their arrival at the said bushes Mr Mzimba slapped her and the appellant grabbed her on her feet and she fell to the ground. Mr Mzimba pulled off her panty, climbed on top of her and the appellant held her hands. They saw lights of a motor vehicle at a distance and Mr Mzimba ran away and he told the appellant that he will find him at a certain tavern.

Appellant, with whom she remained assaulted her and also raped her.

After her rape, she went to the Slapur bar lounge on the same night with a certain Andries and his brother. Mr Mzimba was arrested at the bar lounge and taken to the police station. He informed the police about names of other people he was with.

Police took her to Acornhoek Hospital.

She further testified that all the accused were drunk.

In cross-examination when asked about injuries she sustained, she testified that she felt pain on her stomach and she had minor injuries on her face. The J88 medical report is not in the file. Apparently it cannot be traced.

According to the trial court's judgment, the J88 indicated that the complainant did not sustain any physical injuries, although she had 1.5X1 cm bruise on the lip ("lip vlies").

State proved no previous convictions against Mr Mzimba and the appellant.

Prior to the hearing of this matter, I read the record and after that my *prima facie* view was that the Appeal Court might have to interfere with the sentence imposed on the appellant.

I also noticed that the appellant and Mr Mzimba's participation in the crime is the same, and that their personal circumstances are also not distinguishable, I formed a view that if the court interferes with the sentence imposed on the appellant, there will be a need to interfere with

the sentence imposed on Mr Mzimba, who has not noted an appeal on sentence nor obtained leave to appeal.

In *S v Ralakukwe* 2006 (2) SACR 394 (SCA), the court dealt with the appeal on conviction of one of the six people convicted by the High Court of murder and of robbery with aggravating circumstances.

The appellant was accused 6 at the trial court. His appeal on conviction succeeded.

His co-accused did not note an appeal.

At p 402f-h (paragraph 17) CLOETE JA said:

> "On the above analysis, and to put the position at its lowest, it would seem that accused 4 and 5 may also have been wrongly convicted. Counsel representing the State on appeal could point to no additional facts which would put them in a different position to the appellant. I would accordingly request the Venda and Bloemfontein Justice Centres, which represented the appellant in this appeal, to

> apply for leave to appeal on behalf of accused 4 and 5 as a matter of urgency once the necessary powers of attorney have been obtained. It would be desirable, particularly in view of the length of the record, for any appeal by accused 4 and 5 to be heard by this Court as presently constituted and we have retained our copies of the record to obviate the expense of a new record being prepared."

In keeping with the approach adopted by the Supreme Court of Appeal quoted above, after discussing with my two colleagues involved in this matter, I requested the Legal Aid Board to enquire from Mr Mzimba if he has noted an appeal, and if not, obtain a power of attorney from him, apply for leave to appeal before us and argue his appeal also.

On the day of the hearing, Advocate Serepong, who acted on behalf of the appellant, informed the court that he has consulted with Mr Mzimba and the latter signed a Special Power of Attorney authorising him to prosecute the appeal also on his behalf.

Mr Mzimba was in court and he confirmed that he wants Advocate Serepong to proceed with his appeal.

The court then agreed to hear the appeal of both appellant and Mr Mzimba on sentence.

In the High Court, during sentencing, the court noted that they are both 20 years of age and that they are both first offenders.

In *S v Abrahams* 2002 (1) SACR 116 (SCA), when dealing with substantial and compelling circumstances as stated in section 51 of Criminal Law and Procedure Act 105 of 1997 the court stated at p 126H that the fact that the complainant did not sustain serious physical injuries is an important fact.

In *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at para 57 at p 349E; CAMERON JA said:

> "Accused 1, though he pulled the trigger, was not yet 20 when he murdered the deceased. His youth is a consideration of substance compelling the imposition of a lesser sentence."

In *S v Meiring* 2004 (2) SACR 201 (CPD) para 19 (p 204H) the court said:

> "Under the circumstances, in my view, the youth of the accused, particularly in the light of the provisions of s 51(3)(b) of the Act, taken together with the fact that he has no previous convictions, constitutes substantial and compelling reasons, which justify the imposition of a lesser sentence than the minimum prescribed sentence."

Appellant, in the case mentioned in the previous paragraphs at time of the commission of the offence was 18 years and 71 days old.

In *S v Sikhipha* 2006 (2) SACR 439 (SCA), the appellant was convicted for raping a 13 years old girl. He was sentenced to life imprisonment by the High Court. LEWIS JA at p 445I (para 18) said the following:

> "Factors in mitigation include the fact that the appellant is a first offender; that he has a wife and children dependent upon him; that he has a trade … and makes a living from his

work, that he was 31 years old at time of the trial and that he is capable of rehabilitation. Moreover, the complainant was not seriously injured."

The Supreme Court of Appeals set aside the life imprisonment and substituted same with twenty years imprisonment.

In *S v Nkomo* 2007 (2) SACR 198 (SCA) the appellant was sentenced to life imprisonment for unlawfully keeping the complainant in his room and raping her four times during the course of the night.

The appellant was 29 years old at the time he raped the complainant. At paragraphs 13 and 14 the court said:

"13. The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect however.

14. Nonetheless these are substantial and compelling

> circumstances which the sentencing court did not take into account. A sentence of life imprisonment is the gravest of sentences that can be passed, even for the crime of murder – is in the circumstances unjust and this Court is entitled to interfere and impose a different sentence, one that it considers appropriate."

The Supreme Court of Appeals in the abovementioned case set aside the life imprisonment and substituted it with sixteen years imprisonment.

My view is that, applying the principles enunciated in the abovementioned cases, the cumulative effect of the following facts compels met to come to the conclusion that life imprisonment will be unjust in this case. The said facts are the following:

1. The comparative youth of the appellant and Mr Mzimba.

2. The fact that the complainant did not sustain any serious physical harm.

3. That alcohol could have played a part.

4. That the appellant and Mr Mzimba were first offenders.

This court is entitled to interfere with the sentences imposed on the appellant and Mr Mzimba as the High Court which sentenced them erred by finding that there are no substantial and compelling circumstances which can justify a sentence lesser than the prescribed sentence.

This court must now consider an appropriate sentence.

In *S v Abrahams supra*, the accused who raped his 16 year old daughter was sentenced to twelve years imprisonment.

In *S v Mahomotsa* 2002 (2) SACR 435 (SCA), a 23 year old accused was convicted on two counts of rape. As far as count 1 is concerned, the accused grabbed the complainant in the street and dragged her to his parental home. He threatened her with a firearm. Accused raped the complainant three times during the night.

As far as count 2 is concerned, the accused met the complainant in

count 2 also in the street. The complainant was from school and on her way home he grabbed her, pulled her to his parental home and raped her twice.

On count 1 he was sentenced to eight years imprisonment and on count 2 he was sentenced to twelve years imprisonment.

In *S v Gqamana* 2001 (2) SACR 28 (C) an accused who was 23 years old was sentenced to eight years imprisonment for raping a 14 year old complainant.

In *Nkomo v State supra*, an accused who was 29 years old, raped the complainant four times during the course of the night, was sentenced to sixteen years imprisonment.

In *S v Sikhipha supra*, the appellant was sentenced to twenty years imprisonment for raping his neighbours' 13 year old daughter.

My opinion is that ten years imprisonment antedated in terms of section 282 of the Criminal Procedure Act will be appropriate in this case.

The court therefore makes the following order:

1. The appeal of the appellant and Mr Mzimba on sentence succeeds.

2. The sentences imposed on the appellant and Mr Mzimba are set aside and substituted by the following:

2.1 Each one of them is sentenced as follows:

Count 1 – Rape – ten years imprisonment

Count 2 – Assault – R300.00 fine or three months imprisonment

In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence imposed on each of them is antedated to 19 June 2002.

W L SERITI
JUDGE OF THE HIGH COURT

I agree

T J RAULINGA
JUDGE OF THE HIGH COURT

A1244/2006

Heard on:	03/03/2008
For the Appellant:	Adv Serepong
Instructed by:	The Legal Aid Board, Pretoria
For the Respondent:	Adv A Roos
Instructed by:	The State
Date of Judgment:	