

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSCAAL PROVINCIAL DIVISION)

(CIRCUIT LOCAL DIVISION OF THE EASTERN CIRCUIT DIVISION)

HELD AT MIDDELBURG

DELIVERED: 15/4/2008

CASE NO: CC 468/06

In the matter between:

THE STATE

And

PAULOS TABETHE

ACCUSED

JUDGMENT ON SENTENCE

1. The accused was found guilty of the rape of N, the daughter of his life companion.
2. He raped her 18 days before her sixteenth birthday.
3. N was emotionally and psychologically traumatized, but was not physically injured.
4. At the time the accused had been staying for some years with N's mother.
5. He was and still is in steady employment. He has been in the service of the same employer throughout.
6. For some years before the rape the accused had been providing for the family consisting of himself, N's mother, the victim N, the

victim's younger sister S and a boy that was born of the union between the accused and N's mother prior to the offence, J.

7. It took four years to finalize the trial before this court that commenced in the regional court during 2004. Shortly before the proceedings drew to a close, another son was born to the victim's mother, G.
8. The accused is also the father of this child.
9. Immediately after the rape the accused was shown the door by the victim's mother, but continued to support the family as he had done before he committed the offence.
10. The victim stayed for some time with her maternal grandmother before moving back into the family home.
11. This home is a modest RDP house that was apparently bought by the victim's mother. The evidence is not quite clear regarding the exact nature of this transaction. In any event, all rentals or instalments – if these were indeed paid - and other household expenses have been provided for by the accused at all relevant times.
12. The accused was arrested shortly after the offence was committed and duly charged in the regional court.
13. He pleaded guilty.
14. The case was referred to this court for sentencing in terms of section 52 of Act 105 of 1997. It was placed on the Circuit Court roll for 2006.
15. The accused was granted bail by the regional court shortly after his arrest and remained on bail throughout the time his trial took to wend its way to finality in 2008. He attended every court session.
16. The accused repeated his plea of guilty when the sentencing proceedings started in this court. He was clearly remorseful. The conviction was confirmed.
17. The matter had to be postponed on several occasions to finalize the victim impact report and to present the findings thereof in evidence.
18. When the victim's mother testified for the first time, she pleaded strongly that the accused should be sent to jail for a long period. It

was apparent, however, that she was uncomfortable in the witness stand, and became more so when confronted in cross-examination with the fact that she was dependent upon the accused. Eventually it became clear that she felt obliged to plead for the incarceration of the accused because she was under the impression that the authorities expected her to do so, while her true feelings were much more ambivalent.

19. The matter had to be postponed again in order to lead the evidence of the victim herself.
20. She entered the witness stand, by now a young adult, very clearly under considerable stress and torn by conflicting emotions. She stated that she was still deeply hurt by the fact that she been subjected to a violent offence by a man she had trusted. On the other hand she pleaded that the accused should not be sent to jail because the entire family, including herself, depended upon his income. One of her siblings was chronically ill and the accused provided for her medical treatment. She herself was still attending school and needed his support to continue her education.
21. Because of the obvious conflict of emotions she was experiencing, and because the court suspected that she might have been influenced against her will to present a plea on behalf of the accused that her mother had been too wary to raise, I invited her to see me in chambers in the company of my clerk only, who speaks her mother tongue fluently.
22. I impressed upon her that she had an inalienable right to convey her own emotions, feelings and convictions, her own view of a suitable sentence for the accused, that the court was obliged to pay attention to her wishes and that she was free to tell the court whatever troubled her. She was advised that she was under no duty to convey the views of third parties as her own in the witness box.
23. She was also informed that, if necessary, she could testify in the absence of the accused or through an electronic device if necessary. She declined the offer.

24. After a long discussion, the complainant returned to the witness stand and reiterated that she regarded it as being in the best interests of her family and herself and her further schooling that the accused should not be sent to a correctional institution.
25. She quite obviously assumed that the accused and her mother would continue their cohabitation and that the accused would continue to provide for the family.
26. The matter could not be finalized at that juncture and the court requested that a victim/offender program be launched, involving the accused and the victim, under the guidance of the local probation officer and supervised by the Restorative Justice Centre in Pretoria, which kindly agreed to make its good services available to assist in this regard.
27. Neither the defence nor the prosecution objected to the program being implemented at the somewhat unusual stage prior to sentence being imposed.
28. The court was of the view that the program was essential to determine whether the wishes expressed by the complainant regarding the sentence of the accused were indeed genuine and had a realistic prospect of being realized for the benefit of every individual affected by the crime.
29. After a somewhat uncertain start, the program was successfully concluded, as was testified by Ms Nyundu, the probation officer who acted as facilitator thereof..
30. During this program, a meeting was arranged between the offender and the victim, during which the accused formally apologized for his misdeed, which apology was accepted.
31. A formal agreement was drawn up between the accused and the victim in which the parties agreed upon the way they would regulate their interaction in the family in future. The agreement provides i.a. for a referral to this court if the accused should ever again act in an untoward fashion toward the complainant.
32. It was clearly conveyed to all involved that participation in the program would not necessarily result in a non-custodial sentence

for the accused, as was evident from the notes kept of the proceedings by the probation officer.

33. During the program the accused and the complainant discussed the crime that the former had committed. These discussions were recorded by the probation officer. When an appropriate sentence for the accused was discussed, the record reads as follows:

“(The victim) indicated that she was satisfied that the offender used the program effectively to apologise for what he did to her. She further indicated that she will be satisfied with any sentence that the court might impose to the offender, although her wish is not to see the offender being sentenced to imprisonment...”

In the light of this report the court enquired from the probation officer whether a suitable community service program existed in her jurisdiction that the accused could follow if the court were to consider a sentence of correctional supervision rather than imprisonment

34. A suitable program was available in Delmas that included a sexual offender program.
35. After establishing the accused's disposable monthly income and the fact that the victim was still at school in grade 10, the court found that there were a number of substantial and compelling circumstances that, individually and collectively, justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by Act 105 of 1997 in Part 1 of Schedule 2 thereto read with section 51 of the Act. The substantial and compelling circumstances are the following;
 - a) The accused is a first offender;
 - b) The accused exhibited remorse throughout and
 - c) Pleaded guilty at both stages of the trial;
 - d) Genuine remorse should be taken into account, *S v Genever and Others* 2008 (2) SACR 117 (C);
 - e) Although the victim was under sixteen when the offence was committed, she reached that age within a few days after that date;

- f) The rape was not preceded by grooming of the victim but occurred on the spur of the moment;
- g) Although rape is always a heinous crime, particularly if it occurs within the family, *S v Abrahams* 2002 (1) SACR 116 (SCA), and ought to attract a severe sentence, *S v M* 2007 (2) SACR 60 (W), it is not irrelevant that the victim was not injured physically;
- h) The rape was therefore not one of the worst kind of rapes, *S v Nkomo* 2007 (2) SACR 198 (SCA);
- i) The accused had remained involved in the family of which he and the victim were part;
- j) The accused continued to support the family, including the victim, throughout the period from the commission of the offence to the end of the trial;
- k) The accused and the victim's mother resumed their cohabitation during the trial and another child was born from this union before the sentencing process was concluded;
- l) The family was entirely dependent upon the accused;
- m) The victim was fully aware of this fact and came to the conclusion that it would not be in the family's interest that the accused be incarcerated;
- n) This conclusion was reached in spite of the fact that the victim was suffering obvious emotional trauma as a result of the invasion of her physical, emotional and psychological integrity to which she had been subjected;
- o) This conclusion was reached by the victim independently and without obvious outside influence;
- p) The accused and the victim participated in a successful victim/offender program;
- q) The accused maintained his employment and fulfilled his obligations in that regard throughout the trial;
- r) If the accused were to be sentenced to imprisonment, he would lose his employment and income and the family would lose its only source of support;
- s) This might lead to the loss of the family home;

- t) It was clearly not in the family's interest to remove the accused out of their lives;
 - u) It was also not in the interests of society to create secondary victims by the imposition of punishment upon the accused that would leave at least five indigent person dependent upon social grants;
 - v) The accused represents no threat to the community or society at large as it is highly unlikely that he will re-offend;
 - w) The accused is a good candidate for rehabilitative therapy and is able to render community service at a suitable facility that is available;
 - x) He spent four years on bail while the trial was in progress, attended every single court date and observed his bail conditions.
36. In the light of these facts, the court was of the view that this case was the one rape case – certainly the first this court has dealt with - in which restorative justice could be applied in full measure in order to ensure that the offender continued to acknowledge his responsibility and guilt; that he apologised to the victim and co-operated in establishing conditions through which she may find closure; that he recompensed the victim and society by further supporting the former and rendering community service to the latter and that he continued to maintain his family.
37. Although the court is obliged to sentence a convicted rapist fully conscious of the fact that the Legislature has expressed its wish that severe minimum sentences should be imposed on such offenders under virtually all circumstances, *S v Mvamvu* 2005 (1) SACR 54 (SCA), the court is obliged to impose lighter sentences when the circumstances of the particular case exhibit the substantial and compelling circumstances that dictate a lesser sentence, *S v Moijolai* 2005 (1) SACR 580 (BD);
38. Restorative justice is a concept that has received judicial recognition in recent judgments, see the minority judgments of Mokgoro J and Sachs J in *Dikoko v Mokhatla* 2007 (1) BCLR 1

(CC); *S v Shilohane* [2005] JOL 15671 (T) and *S v Maluleke and Others* 2008 (1) SACR 49 (T).

39. If restorative justice is to be recognized in South Africa – and in the light of the serious challenges faced by our country's criminal justice system and the perennial overcrowding of our correctional institutions there can be little doubt that its application and integration into our law is essential – then it must find application not only in respect of minor offences, but also, in appropriate circumstances, in suitable matters of a grave nature.
40. If this statement is correct, the present case is an instance in which restorative justice provides a just and appropriate sentence that punishes the accused, restores the victim, helps to heal the damage done by the commission of the crime and benefits society by ensuring the rehabilitation of the offender and the rendition of community service.
41. In the light of the extraordinary circumstances of this case the court imposed the following sentence:
 - (1) Ten years imprisonment, suspended for five years on condition that:
 - (a) The accused is not convicted, during the period of suspension, of a crime involving violence or a sexual element or both;
 - (b) That he remain in the employment of Mr Roussow unless he is laid off without his own fault;
 - (c) In such event, he must immediately do everything necessary to find alternative employment;
 - (d) From his income, at least 80% must be devoted to the support of the victim and her family. In particular the accused must accept responsibility for the victim's schooling and, if applicable, for her tertiary education;
 - (e) Such support for the family is to continue even if his relationship with the victim's mother is terminated for whatever reason;

- (f) The accused must report on one day each weekend (subject to his work program, which normally entails working one day each weekend) to the probation officer at Delmas and participate in any program that such officer might prescribe;
- (g) Such programs must include a Sexual Offender's Program to be attended at the accused's cost;
- (h) The accused is to perform 800 hours of community service of a nature to be determined by the probation officer during the period of suspension. (This represents the maximum number of hours the accused can serve as he is only available on one day of every weekend.)

Signed at Pretoria on this 23rd day of January 2009

E Bertelsmann
Judge of the High Court

FOR THE STATE: ADV P VAN BASTEN
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA
FOR THE DEFENCE: Ms P JAGNATH