REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A452/2011

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

19 April 2012 FHD VAN OOSTEN

In the matter between

NICHOLAS TOBELA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

MUDAU AJ:

[1] The appellant was convicted of rape (count 1) in contravention of the provisions of section 3 read with other relevant provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as well as kidnapping (Count 2), in the Boksburg Regional Court. In terms of s 51 (1) Act 105 of 1997, the appellant was sentenced to 25 years' imprisonment in respect of count 1 and to 4 years' imprisonment in respect to count 2. The sentences were ordered to be served concurrently. The effective sentence is therefore 25 years imprisonment. The appellant was also declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

[2]The appellant now appeals against both convictions and sentence with leave of the court a quo.

POINT IN LIMINE

[3] It was submitted, *in limine,* that the appellant's right to a fair trial was "hampered" in that reference was made in the charge sheet to the provisions of Section 51 and Schedule 2 Part 2 of the Criminal Law Amendment Act 105 of 1997 in terms of which a sentence of 15 years imprisonment could be imposed for a first offender. After all evidence had been led the State applied for an amendment to the charge sheet to provide for a sentence referred to in Part 1 of Schedule 2 of the Act. The application was opposed. The regional Magistrate granted the amendment and afforded both the State and the defence the opportunity to re-open their cases. None of them availed themselves thereof and the trial proceeded on sentence.

[4] In my view the Regional Magistrate correctly allowed the amendment and properly afforded the parties an opportunity for re-opening their cases. No prejudice therefore resulted and there is accordingly no merit in the point raised.

THE MERITS

[5] The evidence adduced by the State consisted of the evidence of the complainant, her mother and the Dr Chauke, who examined the complainant after the alleged rape. A summary of their evidence is the following. It was after school hours on 24 August 2010 when the complainant, on her way home, met the appellant who asked her to join him. She refused. The next day which is the day of the incident, she again met the appellant in the street, whilst on her way to visit her sister at the Ramaphosa squatter camp. The appellant once again called over but she refused. Appellant then approached and grabbed her hand and dragged her to his shack some 30 to 40 meters away. Along the way, she screamed and resisted but none of the people in the street or at the neighbour's house came to her assistance. The appellant told people they met that she was his girlfriend. Inside the shack, the appellant assaulted her. She tried to use her cellular phone to alert her father but the appellant took it away from her after having closed the door. He told her that he loved her but she rejected this. Appellant then threatened to rape her for rejecting his proposal. The appellant took out dagga, and smoked it. She threw a glass at him but it missed. She

picked up a knife which she had found inside, but he disarmed her and placed it on her neck threatening to kill her. He ordered her to undress. She pulled her jeans to her hips. After undressing himself, he took off her clothes and panties. He then raped her. Once he was finished, he told her not to tell anyone including her mother. He forced her to take a bath after and warned her not to report him to the police. He promised to give her money. He gave her R150.00 and pleaded with her not to report him to the police. She refused to accept the money but asked him if she could go to the toilet which was outside. He wanted an assurance that she will be back. She left her cellular phone and hat behind. She left for home and reported the rape incident to her mother. Her mother confirmed the report made to her. The mother also testified that the complainant was only 15 yrs old. The matter was subsequently later the same day, reported to the police. The complainant's cellular phone and her hat were recovered. The appellant was as a result arrested. The complainant was examined by Dr Chauke. He found no injuries but testified that the complainant had had previous sexual relations which would explain why she did not suffer injuries to her private parts.

[6] The appellant admitted sexual intercourse with the complainant. According to the appellant, he first met the complainant on the 23 August 2010 and that he, out of the blue, proposed love to her. The complainant accepted this. They proceeded to his shack where they had sexual intercourse. He, at her request, gave her R100.00. They agreed to meet the next day. The next day (date of this incident), once again, they had sexual intercourse with her approval. He was playing with her cellular phone when she went to the toilet. She left her hat and cell phone with him.

[7] The trial court rejected the version of the appellant on the basis of a number of contradictions and improbabilities. The credibility finding, in my view, cannot be faulted. The appellant's version was highly improbable: the cell phone and hat of the complainant left behind with the appellant as well as the complainant's report to her mother and thereafter to the police are damning aspects militating against any suggestion of a on the spot love relationship or consensual sexual intercourse. Nor can it be accepted, as the appellant would have it, that the complainant was "selling" herself for money. It simply makes no sense and cannot be reconciled with the evidence as a whole. The appellant called a witness, Ray Tobela, to testify on his

behalf. His evidence was rightly rejected by the Regional Magistrate as biased in favour of the appellant and false.

[9] The evidence overwhelmingly proved that the appellant raped the complainant. He was accordingly correctly convicted. The appeal against conviction must accordingly fail.

SENTENCE

[10] The appellant was 22 years old at the time of the offence. Although the Regional Magistrate duly considered all relevant factors in imposing sentence, I am of the view that a sentence of 25 years' imprisonment for a young man of 22 years of age, at the threshold of his life, is shockingly inappropriate and not proportionate to the crimes he has been convicted of Interference with the sentence imposed is accordingly justified. The appellant was 23 years old at the time of sentencing and therefore relatively young. He had been in custody for a little over 11 months. Appellant is a first offender. He is the 6th child in a family of 8 children of which 3 have since died. It is clear from the pre-sentence report that he had a difficult upbringing. Appellant's father passed away whilst he was still young. He dropped out of school whilst doing grade 10. Appellant was not formally employed at the time the crimes were committed. A combination of all these factors in my view, constitute substantial and compelling factors as intended in section 51 (3) and (6) of the Criminal Amendment Act 105 of 1997 However, the seriousness of the offences and in particular the prevalence of rape perpetrated against women and children is a scourge in our country, which warrants a long term of imprisonment. An effective sentence of 18 years' imprisonment, in my view, will be just in the circumstances of this case.

[11] In the result I propose the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld to the extent that the sentence imposed is altered to read:

   "The accused is sentenced to 15 years' imprisonment on count 1 and 3 years' imprisonment on count 2. The effective sentence is 18 years' imprisonment."

   The effective date of the sentence is 10/08/2011.

T P MUDAU
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	*ADV (MS) M BOTHA*
COUNSEL FOR THE RESPONDENT	*ADV RN RAMPYAPEDI*
DATE OF HEARING	*19 APRIL 2012*
DATE OF JUDGMENT	*19 APRIL 2012*