Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CA48/2016

In the matter between:

MTHOMBENI LUCAS APPELLANT

AND

THE STATE RESPONDENT

LEEUW JP & KGOELE J

DATE OF HEARING : 9 DECEMBER 2016

DATE OF JUDGMENT : 9 FEBRUARY 2017

COUNSEL FOR THE APPELLANT : MR. MADIBA

COUNSEL FOR RESPONDENT : ADV. MUNYAI

JUDGMENT

LEEUW JP

Introduction

[1] This is an appeal against sentence only. The appellant pleaded guilty and was convicted of four (4) counts of Rape in the Regional Court at Themba and sentenced to four (4) life imprisonment sentences on the **28 July 2010.** Condonation for the late filing of the appeal was granted. The four counts of rape were read with Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997 (the Criminal Law Amendment Act).

The Facts

[3] K. P. C. (the complainant) was Eleven (11) years old when she was raped by the appellant on two different occasions during **January** and **February 2006**. He again had sexual intercourse with the complainant without consent in **April 2007** and on **1st June 2007** when she was twelve (12) years old.

[3] In his plea in terms of Section 112 (1) (b) of the Criminal Procedure Act No. 51 of 1977 (The Act), the appellant admits that he had

sexual intercourse with the complainant on different occasions when she went to his house to buy sweets. He closed the door, undressed her and forcefully had sexual intercourse with her. He threatened her and gave her sweets to prevent her from reporting the crimes.

[4] Before the appellant could be sentenced, the court *a quo* ordered that a pre-sentencing report be compiled in terms of section 276 (1) of the Act. It was then revealed from the report, which was compiled by Ms C.M. Motsepe, a social worker employed by the Department of Correctional Service that, the complainant became pregnant as a result of the rape.

[5] Because of her age and the circumstances under which she conceived the baby, the pregnancy was terminated at the hospital. According to the complainant's mother, she spent a lot of money on medical fees for the complainant who was not enjoying good health after the abortion. Furthermore, the complainant is suffering from depression and is not coping with her studies at school.

Submissions

[6] The appellant's counsel submitted, in the court a quo, in mitigation of sentence that: a) the appellant was fifty (50) years old at the time of sentence; that the appellant is a first offender who grew up in abject poverty and is an illiterate; that he has two (2) children one of whom is a minor; their mother has a mental defect; that he pleaded guilty to the charges and thus remorseful; and further that he

intended to apologise to the complainant and her family. Appellant further submits in his grounds of appeal, that the court erred in

> *"ignoring the fact that this (sic) offences flow from the same facts which was continuous as the complainant is the same person."*

[7] The state argued that the fact that the appellant is a first offender is overshadowed by the repeated rapes on the complainant and that the complainant was of a tender age; that by repeatedly taping the complainant is indicative of one not remorseful for his deeds. The state submitted that should court find that there are no substantial and compelling circumstances present.

[8] In sentencing the appellant the court took the following factors into account:

a) That the appellant was forty-seven (47) years old at the time of the incident;

b) That the appellant was a first offender;

c) That the complainant was eleven (11) and twelve (12) years respectively when she was raped;

d) the effect of the rape on the complainant; and

e) the interests of the society.

The court concluded that there were no *"extraordinary circumstances"* which would warrant a lesser sentence than the minimum sentence prescribed by the Criminal Law Amendment Act.

Analysis

[9] I have considered sentence imposed by the *court a quo* and find that the aggravating factors outweigh the personal circumstances of the appellant. The complainant was very young when she was forcefully subjected to sexual intercourse with the appellant who is far much older than her; he threatened to cause her bodily harm if she reported the rape. She kept the rape incidents a secret out of fear, which unfortunately resulted in her becoming pregnant at a very young age, and had to undergo a termination of pregnancy procedure. I must further remark that the grounds of appeal that the rapes "flow from the same facts which were continuous because the complainant is the same person" should be viewed in a very serious light as aggravating in this case.

[10] A court of appeal will interfere with a sentence imposed by a trial court, only if the trial court exercised its discretion improperly or unreasonably. See **S v Sandler** 2000 (1) SACR 331 (SCA) or if it vitiated by misdirection, irregularly or is excessive See **S v Coetzee** 2010 (1) SACR 176(SCA) and; **S v Matlala** 2003 (1) SACR 80 (SCA).

[11] The appellant submits that he pleaded guilty to all four counts of rape, which is indicative of remorse on his part. This statement has not been tested because he did not testify under oath. He failed to disclose the full facts to the court that the complainant conceived as

a result of rape. The circumstances under which the rapes were discovered are not known. This information was crucial for the court to establish whether or not his plea of guilty could be interpreted as remorse. Compare **S v Matyityi** 2011 (1) SACR 40 (SCA) paragraph [13] where Ponnan JA remarked as follows with relation to remorse:

> *"[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication*

that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case. "

See also **S v Vilakazi** 2009 (1) SACR 552 (SCA) where Nugent JA remarked that:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the backround."

[12] I am of the view that the sentence of life imprisonment imposed for all four counts of rape neither induces a sense of shock nor is it excessive in the circumstances

[13] **Order**

Consequently, the appeal against sentence is dismissed.

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M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I AGREE

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A M KGOELE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG