

IAFRICA TRANSCRIPTIONS (PTY) LTD/ASS
IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A407/10

3/9/2010

2010-09-03

10 The Magistrate
NIGEL
Case no SH193/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
DATE 2011/11/04	SIGNATURE

In the matter between

THULANI VINCENT NGOMANE

Appellant

versus

THE STATE

Respondent

20

J U D G M E N T

MAVUNDLA J:

1. This is an appeal against the sentence of 15 years imprisonment imposed upon the appellant consequent to his plea of guilty on one count of rape and conviction in the Regional Court of Nigel on

1 December 2009.

2. The appellant was duly represented during the trial in the Regional Court. He pleaded guilty to the charge and handed in his statement in terms of section 112 of Act 51 of 1977. This statement was accepted as Exhibit A and read into the record. The statement is reflected at page 5 of the record. He admitted having had sexual intercourse without the consent of the complainant.

I am of the view that the conviction of the appellant was in accordance with justice and he was correctly so convicted.

10 In regard to sentence it was put on record that the appellant is 42 years old, not married and has no children. The appellant admitted his previous record. On 19 June 1996 he was found guilty of rape and sentenced at KwaThema to eight years imprisonment. He was further declared not fit to possess a firearm in terms of the Old Fire Arms Act, 75 of 1969. The magistrate took into consideration all these factors and sentenced the appellant to 15 years imprisonment.

It has been submitted on behalf of the applicant that the magistrate misdirected himself in finding that there were no compelling circumstances warranting a departure from the minimum sentence of 15 years. It is not
20 submitted that rape is not a serious offence. It is, however, submitted that on the record there is nothing that shows the extent of the injuries suffered. It is submitted that this is not one of those cases it could be said it is a very serious offence or a serious rape case.

On behalf of the state it is submitted that rape is a very serious case. The victim of the nature of this offence is scarred and is stigmatised and

would be emotionally scarred. It is further submitted that the magistrate did not misdirect himself in imposing the minimum sentence of 15 years.

In casu there is nothing on record that shows whether the complainant was injured and if so what the extent of her injuries were. All that is apparent is that the complainant was from Mozambique. We have not been furnished with, for instance, the J88-form which in many instances of this nature it would be on record. It may well be that because the appellant had indicated that he is going to plead guilty that this was not placed on record. I am of the view that even if the appellant or put differently even if an
10 accused person gives an indication that he intends to plead guilty it is the task of the prosecuting authorities to ensure that the J88-form nonetheless handed in. This is necessary so that when at a later stage the convicted person decides to approach this Court on appeal either against conviction or against sentence that the Appeal Court would then be in a position to assess for itself what the extent of the injuries to the victim were even if the accused person intends to plead guilty.

In my view it is the responsibility of the presiding officer to bring to the attention of the accused person that he stands to be sentenced in accordance with the Minimum Sentence Act. This is necessary because in
20 many instances the people who have been convicted of offences of this nature will then at a later stage, when they decide to execute or prosecute an appeal, will then raise a point that because they have not been appraised that they are exposed to be sentenced through the Minimum Sentence Act and that, therefore, their trial was not fair.

In my view the state irrespective whether that person intends to

plead guilty or not guilty it must, where the Minimum Sentence Act is applicable, right from the onset and this must appear on record, bring to the attention of the accused person to the fact that the Minimum Sentence Act is applicable. Equally so it is the task and responsibility of the presiding officer, not only to explain the rights of an accused person but also the fact that he is exposed to the Minimum Sentence Act.

I am remarking as I did notwithstanding the fact that that point is not raised in this case. The point that is being raised is that the sentence of 15 years, in the circumstances of this case, is shockingly excessive and that
10 the magistrate in imposing this sentence, having regard to the fact that the appellant or rather the victim did not suffer serious injuries.

The magistrate took into consideration the personal circumstances of the appellant, his age and *inter alia* the fact that he pleaded guilty and that he is not a first offender.

The magistrate also had regard to the fact that rape is a serious and dreadful offence especially in the wave of AIDS and HIV. He further found that there are no exceptional and compelling circumstances warranting a departure from the imposition of the minimum sentence.

The fact that the magistrate imposed 15 years imprisonment shows
20 that he did not attach much value to the fact that the appellant has a previous conviction of a similar offence which dates back 13 years earlier because had he done so then he would have sentenced accepting that his finding was right, was correct, that there are no exceptional and compelling circumstances then he would have sentenced the appellant to the minimum sentence of 20 years which is the applicable sentence where the person has

got a previous conviction of a similar offence.

Sentencing is a matter of judicial discretion of the Court imposing sentence. The Appeal Court has limited judicial discretion to interfere with the sentence. The Appeal Court can only interfere with a sentence if the discretion of the Court imposing sentence was not judicially exercised and was vitiated by an irregularity or misdirection or the sentence is so severe that no reasonable Court could have imposed such sentence. The Appeal Court will interfere if the sentence induces a sense of shock and is grossly excessive to what sentence the Appeal Court would have imposed. *Vide S v*
10 *De Jager and another* 1965 (2) SA 616 (A) at 628 (FIN) 2629B. *Vide also S v Blignaut* 2008 (1) SACR 78 (SCA) at 81(f) to 83(f).

Where a Court is dealing with the Minimum Sentence Act, in particular in respect of several offences, in my view, it is expected of and necessary that the magistrate must canvass what the nature and extent of the injuries, if any, sustained by the victim of rape are. This is a factor that needs to be placed on the balancing scale to determine whether there exist compelling and exceptional circumstances. It would seem that this was not done in this case. This failure on the part of the magistrate in canvassing what the extent of the injuries suffered by the complainant is, is in my view a
20 serious misdirection. Where this is not done the right of the appellant when he executes an appeal is adversely affected because the Court of Appeal is unable to assess the gravity of the offence. It is not that rape *per se* is not serious but there are various degrees of brutality meted to rape victims

I am of the view that because of the misdirection which I have referred to herein above on the part of the magistrate, his failure to place on

record the extent of the injuries suffered by the complainant, this Court is at liberty to consider whether there exist compelling and exceptional circumstances warranting a departure from the minimum sentence.

The appellant pleaded guilty and his plea cannot be looked at in isolation. It must be looked at in the context of the totality of the facts before the Court. The cumulative effect of these facts, namely, that the appellant pleaded guilty, is 42 years old, the absence of the nature and the extent of the injuries suffered by the complainant amounts to exceptional and compelling circumstances. I am of the view that having regard to the
10 abovementioned factors the sentence of 15 years is disproportionately excessive and induces a sense of shock.

In the result I am of the view that this Court must interfere with the sentence imposed by the magistrate and set it aside and impose an appropriate sentence.

In the result I make the following order:

1. That the conviction of the appellant is confirmed.
2. That the appeal against the sentence is upheld and the sentence of 15 years imprisonment is set aside and substituted with ten years imprisonment which is antedated to 1 December 2009.
- 20 3. That the period of the incarceration of the appellant from 18 June 2009 as an awaiting trialist be taken into consideration in determining when the appellant would qualify to be considered for parole.

KOLLAPEN AJ: I agree.