

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

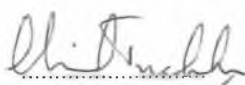
04/11/2011.
CASE NO: A874/09

In the matter between:

JOHANNES MABENA

Appellant

and

(1)	REPORTABLE:	YES / NO
(2)	OF INTEREST TO OTHER JUDGES:	YES / NO
03/11/11		
DATE		SIGNATURE

THE STATE

Respondent

JUDGMENT

Tuchten J:

- 1 The appellant was convicted by a regional magistrate on a charge of raping a thirteen year old child. As the law then stood, the matter was referred to this court (Eksteen AJ) for sentence. The learned judge received a psycho-social report in respect of the appellant and heard the evidence of the complainant, who was by that stage 17 years old, in relation to sentence.

- 2 Although the learned judge appreciated that the minimum sentencing regime was applicable, he sentenced the appellant to imprisonment for five years of which three years were suspended.
- 3 The appellant was granted leave to appeal against both the conviction and the sentence and his appeal in this regard is presently before this court.
- 4 By notice dated 11 October 2011, the State gave notice of its intention to apply for the increase of the sentence imposed upon the appellant on the grounds that the sentence imposed by the learned judge was inappropriately low and that the sentence imposed over-emphasised the personal circumstances of the appellant and failed to give adequate weight to the seriousness of the offence and the interests of the community.
- 5 From enquiries made from the bench at the commencement of argument before us, it is clear that the appellant was made aware of the application for an increase in the sentence and gave his counsel specific instructions to proceed with the appeal despite the risk he ran of having the sentence increased on appeal.

- 6 The complainant testified that on 13 October 2003, she went to the appellant for help with her mathematics lessons. The appellant was 18 at the time. According to the complainant, the appellant told her that they must go into his room in the house in which he was staying because it was cool there. The complainant then described how the appellant asked her to kiss him and said that he would not force her to do so; he then left the room but came back and closed the door and said again that she must kiss him. The complainant then said she wanted to leave but the appellant pushed her onto the bed and raped her, while covering her mouth with his hand to prevent her screaming.
- 7 It is important in view of the conclusions of the learned judge to mention that the complainant was wearing a very short pair of shorts at the time. According to the complainant, the appellant succeeded in penetrating her without removing her shorts, which he succeeded in thrusting to one side.
- 8 On the same day, the complainant told first her friend, then her sister and then her mother of what she said had happened to her. The police were called and a charge was laid. That evening, at about 23h30, the complainant was examined by a medical doctor, Dr Itsweng, at the Mamelodi hospital. Dr Itsweng found that there was a discharge from and reddening around the outside of the vagina as

well as posterior fourchette bleeding inside the vagina. The doctor concluded that forceful penetration had taken place. He could not see the hymen on examination so could not come to a conclusion on whether or not the hymen had been torn.

- 9 The appellant gave evidence. He admitted that the complainant had come to see him but said that she had neglected to bring her school books with her. He said he told her to go and get her books, which she agreed to do but then left and did not come back. The appellant denied having had intercourse with the complainant.
- 10 The regional magistrate evaluated the evidence and came to the conclusion that Dr Itsweng had indeed made the observations in relation to the complainant's body to which he had testified. In the light of this corroborative evidence, the regional magistrate accepted the complainant's evidence that she had been raped and rejected that of the appellant.
- 11 On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably possibly true. It was however not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court to interfere on fact with the findings of the court below is limited.

Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case. I think that the regional magistrate was correct in her finding that intercourse had in fact taken place and, in the light of that finding, rightly rejected the appellant's evidence. The appeal against conviction must therefore fail.

12 The following appeared from the psycho-social report, compiled on 25 April 2008 by a probation officer:

12.1 The appellant was born on 24 August 1985 and was thus a little more than 18 years and one month old at the time of the rape.

12.2 The appellant matriculated in 2002 and had a post-school qualification in the form of a certificate in "PC Engineering".

12.3 The appellant showed no remorse and persisted in his denial (which in my view was untruthful) that he had raped the complainant.

12.4 The appellant had no previous convictions.

- 12.5 The appellant grew up in an extended family environment comprising his maternal grandmother, five cousins, his mother and two siblings. His father died in 2006. The appellant regarded his family as economically poor but functioning well. There was nothing in the appellant's background that could have pre-disposed the appellant to criminal conduct. His relationship with his mother was good and his mother was supportive.
- 12.6 The appellant had a girlfriend at the time of the offence but she terminated the relationship because of the rape allegation.
- 12.7 The appellant attained his certificate in engineering with the assistance of a substantial bursary but failed in 2004 and decided to drop out.
- 13 The complainant gave evidence in relation to the sentence to be imposed on the appellant. She said that although the incident had affected her in that she lost concentration and her school marks dropped, she had learnt to forgive the appellant. She said in regard to the emotional effect the rape had had on her:

For some reasons I was angry, not to her (sic) but to myself because of the clothes I was wearing, the relationship that I had with him - I felt I was the one pushing myself to him, so I felt angry.

- 14 She agreed that the manner in which she had been dressed constituted a temptation and went on:

I learnt to forgive myself and to look at the situation and to forgive him as well and yes, I made peace with everything. So that is why I was saying to your (sic) earlier that I do not see the point of him being sentenced, because as a Christian I believe if we forgive we should all like forget, all what ... about what happened. So, yes, I forgave him and I believe he should maybe have a second chance.
... I believe if we ... if I say that I have forgiven him I do not have to live with that thing that he is in jail because of me and at the same time saying that I have forgiven him.

- 15 In passing sentence, the learned judge said, inter alia, the following:

- 15.1 "Sy het ook 'n baie belangrike aspek aangeraak wat die hof opgemerk het tydens die deurlees van die verrigtinge, *dat sy in 'n groot mate te blameer is vir die gebeure wat die aand plaasgevind het. Om na 'n jong man se kamer te gaan terwyl sy so 'n kortbroekie aan het dat sy nie eens nodig gehad het*

om die broek uit te trek tydens geslagtelike verkeer nie, dan soek sy wat sy gekry het." [own emphasis]

- 15.2 The learned judge also noted in mitigation of sentence "die verleidelike kleredrag" of the complainant.
- 16 In addition to the reference to the complainant's clothing, the learned judge identified the following factors as justifying the imposition of a lesser sentence than the prescribed minimum:
- 16.1 the plea of the complainant and the fact that she had forgiven the appellant;
- 16.2 the youth of the appellant and of the complainant;
- 16.3 the circumstances in which the crime was committed and especially the seductive clothing;
- 16.4 the fact that the appellant was a first offender and that the commission of the offence had severely affected his career and his education;
- 16.5 the fact that there were no serious injuries.

17 In my view, the reasoning of the learned judge in regard to sentence is vitiated by two serious misdirections.

18 Firstly, the minimum sentencing regime operative in this case arises from the provisions of ss 51 of the Criminal Law Amendment Act 105 of 1997 which, to the extent relevant, provide:

51. Minimum sentences for certain serious offences.

(1) Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(3)(a) If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.¹

19 Under s 53 of the same Act, the minimum sentencing regime was to have expired two years after its commencement unless extended by the President with the concurrence of Parliament. The measure was intended to combat the rising tide of violent crime in our country. It has from time to time since it came into force in 1998 duly been extended as contemplated and is still in force at today.

¹

The full text of ss 51 and 53 and Schedule 2 forms an appendix to this judgment.

- 20 Rape of a girl under the age of 16 years is one of the crimes identified in Part 1 of Schedule 2. Section 51(5) of the same statute provides:

The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in s 297(4) of the Criminal Procedure Act 51 of 1977.

- 21 The learned judge was thus precluded by law from suspending any part of the sentence imposed pursuant to the minimum sentencing regime and his doing so constituted a material misdirection.²
- 22 The second such misdirection arises from the references by the learned judge to the complainant's so-called seductive clothing and the imputation of responsibility for the crime to the complainant. There is no possible justification for the attribution of blame to the complainant under the circumstances I have described. Women and girls are entitled, as is everybody else, to wear what clothes they please, free from any suggestion that they invite by their dress preferences the criminal attentions of those with whom they interact or encounter. At the subjective level, moreover, there was no indication in the evidence that the shorts worn by this 13 year old

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See *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011) para 23 in relation to a sentence which was suspended in its entirety.

child, who had apparently not yet reached the age of puberty, played any part in the decision of the appellant to violate her.

- 23 It was tragic that the complainant herself should have thought that she was to blame for what happened and that her clothing choice had precipitated the outrage perpetrated upon her but it is even more unfortunate that this understandable but false perception on the part of the complainant should have been supported by a court of law, one of whose functions was to administer retributive justice for the crime committed against her.
- 24 It follows that this court is at large to impose an appropriate sentence, unfettered by the discretion vested in the learned judge. Much has been written on the subject of appropriate sentences in rape cases subject to the minimum sentencing regime. It would be idle to regurgitate the learning that has been produced. I shall confine myself to a recital of what I regard to be the principles relevant to the case before us:

24.1 This case carries a minimum sentence of life imprisonment, unless substantial and compelling circumstances are found to be present. The fact that Parliament enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer has a clean slate upon which to inscribe whatever sentence it thinks fit for the specified crime. It has to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances are found to be present.³

24.2 No all-embracing definition of substantial and compelling circumstances is possible. A court must impose the prescribed minimum sentence unless it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances, the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.⁴

³ *S v Matyityi* 2011 1 SACR 40 SCA paras 9 and 11

⁴ *S v Malgas* 2001 1 SACR paras 20 and 22

- 24.3 That the accused feels remorse for what he has done can constitute such a circumstance. But there is a very great difference between regret and remorse.⁵ By parity of reasoning, in my view, the absence of remorse can count in a proper case against the accused.
- 24.4 The offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness.⁶ It hardly needs to be added that the full spectrum of the personal circumstances of the accused are relevant in this context.
- 24.5 Sound penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before the court and needs to be victim-centred.⁷
- 24.6 Rape of women and young children is a serious and prevalent crime. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent,

⁵ *Matyityi* para 13

⁶ *Matyityi* para 14

⁷ *Matyityi* para 16

defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society.⁶

25 In my view, the sentence imposed by the learned judge is impermissibly lenient. The judge was clearly profoundly impressed by the courage of the complainant and the compassion shown by the complainant for the appellant. But in doing so, in my view, the learned judge lost sight of the serious nature of the charge of which the appellant had been found guilty and had inadequate regard for the minimum sentencing regime and the just sense of outrage which the circumstances of the appellant's crime must engender in the minds of all right thinking people. And finally, to my mind of exceptional importance, the appellant shows, to this day, no appreciation of or remorse for what he has done.

26 I do not think that this is a case where the imposition of the prescribed minimum of life imprisonment would be justified. The following in my view constitute substantial and compelling circumstances in the present context:

26.1 the youth of the appellant;

Thabethe para 22

26.2 that the crime was committed without much prior planning and premeditation;

26.3 that the appellant was a first offender and the commission of the offence had adversely affected his career and his education;

26.4 that there were no serious physical injuries to the complainant;

26.5 that the complainant has forgiven the appellant.

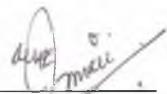
27 Counsel for the State asked for a sentence of eight to ten years imprisonment. In my judgment a sentence of ten years would be appropriate in this case. I would therefore make the following order:

- 1 The appeal by the appellant against his conviction is dismissed and the conviction is confirmed.
- 2 The appeal by the appellant against the severity of the sentence imposed upon him is dismissed.
- 3 The appeal by the State against the leniency of the sentence is upheld. The sentence of five years imprisonment, three of which are suspended, is set aside and replaced with the following:

The accused is sentenced to a period of
imprisonment for ten years.


NB Tuchten
Judge of the High Court
3 November 2011

I agree


M Ismail
Judge of the High Court
3 November 2011

I agree. It is so ordered.


G Webster
Judge of the High Court
3 November 2011

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APPENDIX

Sections 51 and 53 of the Criminal Law Amendment Act 105 of 1997 provide in full as follows:

51. Minimum sentences for certain serious offences.

(1) Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to ss (3) and (6), a regional court or a High Court shall -

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of -

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of -

(i) a first offender, to imprisonment for a period not less than 10 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of -
 - (i) a first offender, to imprisonment for a period not less than five years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than seven years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3)(a) If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in ss (1) or (2) decides to H impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in s 297(4) of the Criminal Procedure Act 51 of 1977.

(6) The provisions of this section shall not be applicable in respect A of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) . . .

53. Saving.

(1) Sections 51 and 52 shall, subject to ss (2) and (3), cease to have effect after the expiry of two years from the commencement of this Act.

(2) The period referred to in ss (1) may be extended by the President, with the concurrence of Parliament, by proclamation in the Gazette for one year at a time.

(3) Any appeal against -

(a) a conviction of an offence referred to in Schedule 2 of this Act and a resultant sentence imposed in terms of section 51; or

(b) a sentence imposed in terms of s 51 shall be continued and concluded as if s 51 had at all relevant times been in operation.

Schedule 2 provides as follows:

PART I

Murder, when -

- (a) it was planned or premeditated;
- (b) the victim was -
 - (i) a law enforcement officer performing his or her functions as such, whether on duty or not; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) Rape; or
 - (ii) robbery with aggravating circumstances; or
 - (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape -

- (a) when committed -
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution of furtherance or a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim -
 - (i) is a girl under the age of 16 years;
 - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
 - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973; or
- (c) involving the infliction of grievous bodily harm

PART II

Murder in circumstances other than those referred to in Part I.

Robbery -

- (a) when there are aggravating circumstances; or
- (b) involving the taking of a motor vehicle.

Any offence referred to in s 13(f) of the Drugs and Drug Trafficking Act 140 of 1992.

If it is proved that -

(a) the value of the dependence producing substance in question is more than R50 000;

(b) the value of the dependence-producing substance in question is more than R10 000 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) the offence was committed by any law enforcement officer.

Any offence relating to -

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft -

(a) involving amounts of more than R500 000

(b) involving amounts of more than R100 000, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) if it is proved that the offence was committed by any law enforcement officer -

(i) involving amounts of more than R10 000; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. PART III

Rape in circumstances other than those referred to in Part I.

Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence in contravention of s 36 of the Arms and Ammunition Act 75 of 1969, on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in s 39(2)(a)(i) of that Act.

PART IV

Any offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977, other than an offence referred to in Part I, II or III of H this Schedule, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.