

08/3/13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER A108/13

BEFORE THE HONOURABLE JUDGES: RABIE J, THULARE AJ

In the matter between

OUPA ZITHA

AND

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

APPELLANT

RESPONDENT

DATE

SIGNATURE

JUDGMENT

THULARE AJ

[1] Appellant was convicted on a charge of rape of a then ten (10) year old minor child and sentenced to 25 years imprisonment on 08 September 2011 in the Regional Division of Limpopo held in Ritavi.

At the time of the commission of the offence, appellant was 18 years of age.

[2] Appellant's application for leave to appeal against his conviction and sentence was dismissed by the Magistrate. Appellant's petition was considered by the honourable Judges Louw and Teffo and after perusal the honourable Judges' ordered refusal of the petition on appeal against the conviction, and leave was granted to appeal against the sentence.

[3] The complaint is a child as defined in Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) and further, at the age of 10, she is a female incapable of consenting to a sexual act.

[4] The Regional Court did not pass the sentence prescribed, which is imprisonment for life, but imposed a lesser sentence of 25 years imprisonment.

[5] The approach to be adopted in the sentencing of the appellant, in my view, is ably set out by Boshielo J, as he then was, in *S v Phulwane and Others* 2003 (1) SACR 631 (T.P.D.) at 634 paragraph 8 to paragraph 9 ending at 635 when he said:

"[8] As the Director of Public Prosecutions correctly pointed out, the learned magistrate failed to acknowledge the important fact that the accused herein are relatively young, with clean criminal records, who deserved a sentence based more on rehabilitation than deterrence. As the learned Cachalia J correctly remarked in S v Nkosi 2002(1) SACR 135 (W) at 143b:

'The fine balance that needs to be struck between society's needs to punish crime while not overlooking the interests of a juvenile offender was emphasized by Botha JA in S v Jansen and Another 1975 (1) SA 425 (A) at 427 in fine – 428 in the following terms:

'The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society''

In S v Z en Vier Andere Sake 1999(1) SACR 427 € at 430f the learned Erasmus J correctly observed as follows:

'Besondere omstandighede geld by die bestrewing van jeugdige oortreders, juis vanwee die feit van hul jonkheid. Die jeug is kenlik van kosbare waarde vir die gemeenskap soos weerspiel word in art. 28 van die Grondwet. Hulle is ons toekoms. Verbanhoudend hiermee is die feit dat jeugdige se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard weer vatbaar vir beïnvloeding, ten goede sowel as ten kwade Dit is derhalwe die dure plig van elke persoon en instansie gemoeid met jeugdige, ook dan die howe, om te poog om jeugdige oortreders vir geledere van wetgehoorsame te win'

Although accused 1 and 3 are, strictly speaking, not juveniles, I am of the view that the salutary approach set out above should apply to them as well.

[9] It is clear from the record that the magistrate adopted an incorrect approach in sentencing the accused. Undoubtedly the youth is our hope for the future. When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualized. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that

whatsoever sentence he or she decides to impose will promote the rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community."

[6] Currently in my view, the best way to obtain relevant information pertaining to a youth to enable a magistrate to structure a sentence that will best suit the needs and interests of a youth, is to obtain a report of a probation officer appointed in terms of the Probation Services Act, 1991 (Act No. 116 of 1991). We do not know whether the childhood of appellant was characterized by neglect, ill-discipline or ineffective parenting. It is unknown whether the youth has challenges inherent in his faculties, challenges from his family set-up or challenges from the community from which he emerges. By not obtaining a probation officer's report, and any further evidence relevant to assist the magistrate to structure a sentence best suited for appellant, it was a misdirection.

The misdirection resulted in the magistrate denying himself an opportunity to impose a sentence that will promote the rehabilitation of the appellant. The sentence imposed, in my view, is disproportionately harsh. It is not individualized to the appellant. In my view, the youthfulness of the appellant, on its own in the absence of any countervailing evidence, leaves an impression that the appellant is capable of being rehabilitated, moulded and placed on the right path of life.

[7] Even if the court were to arrive at a conclusion that imprisonment was appropriate, in the light of the referral for probation services informed by the youth of appellant, no doubt the probation officer would have called for the Department of Correctional Services to compile a correctional officer's report on appellant, and over and above a probation officer's report, the magistrate would have been favoured with a correctional officer's report. In that way, it would have been clear that the magistrate's priority was the reintegration of a youthful offender back into his family and his community. This priority, no doubt, would have found expression in the term considered.

[8] In *S v WV* 2013 SACR 204 GNP at 210, paragraphs 30 to 32, Legodi J said:

"[30] It is when offences of this nature are committed against an innocent and defenceless society, that the society looks to the courts for protection.

[31] It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system.

The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders.

[32] However, whilst society expects offenders of the serious offences to be appropriately punished when convicted, it is expected that the personal circumstances of each offender should be accorded an appropriate consideration in assessing a balanced sentence to be imposed."

[8] The appellant was 18 years at the time of the commission of the offence, he is a first offender, has no children, is single, there was no gratuitous violence in addition to the rape and there were no other injuries sustained in addition to the thin fresh tear of the fossa navicularis on the vagina of the complainant.

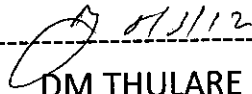
[9] Appellant's mother and complainant's mother are sisters. The relationship is so close that although the English term is cousins, in Africa they are brother and sister and this explains why complainant referred to appellant as brother in her testimony. It is a very close blood relation, which explains why the complainant's mother first took appellant to her own mother, who is also appellant's maternal grandmother. Appellant was, as the magistrate correctly remarked, in a position of trust and was looked upon to offer protection to complainant, as opposed to abuse her. Complainant must have been shocked, terrified and distressed at the invasion of her body, her humiliation and the stripping of her dignity.

[10] After weighing these factors, I am convinced that they warrant a severe sentence, but I am also convinced that the relevant information pertaining to appellant will enable the magistrate to structure a sentence that will best suit him. I am satisfied that the absence of the relevant information led to the magistrate's imposition of a sentence which is disproportionately harsh.

I would make the following order:

1. The appeal against sentence is upheld.
2. The order of the court *a quo* on sentence is set aside.
3. The case is referred back to the magistrate to pass sentence afresh after obtaining the material evidence, including calling for and considering a report from a Probation Officer appointed in terms of the Probation

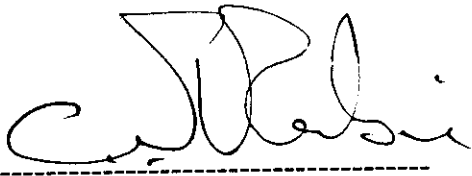
Services Act, 1991 (Act No. 116 of 1991), as well as such other evidence as the appellant and the State may wish to lead.



DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.



CP RABIE
JUDGE OF THE HIGH COURT