

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: A101/2013

In the matter between : -

PULE LIAU

INTEREST IN OTHER JUDGES: YES/NO.
INTEREST TO OTHER JUDGES: YES/NO.
ADVISED.

Appellant

and

2.10.2013

SIGNATURE

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

- [1] The appellant appeals against the sentence of life imprisonment imposed by Shongwe J (as he then was) on 30 March 2004 in respect of one count of rape. The appellant was granted leave to appeal the sentence by the Supreme Court of Appeal on 9 March 2012.

BACKGROUND

[2] The appeal has a long history and emanates from the conviction and sentence of the appellant in the South-Transvaal Regional Court, Klerksdorp on 29 August 2001, some 12 years ago.

[3] The appellant was convicted of the rape of a 14 year old girl, which offence was committed with his co-accused on 23 January 2001 in Khuma. The appellant was sentenced to 15 years imprisonment in the court *a quo*.

[4] The matter came on appeal before the Honourable Justices Du Plessis J and Goodey AJ on 17 October 2003, who made the following order:

"1. *Dat die appèl hierby van die rol geskrap word.*

2. *Dat die vonnis wat die streekhof opgelê het word tersyde gestel en vervang met die volgende bevel: 'Ingevolge Artikel 52(1) van Wet 105 van 1997 word die verrigtinge gestaak en word die beskuldigde verwys na die Hooggeregshof wat regsbevoegdheid het vir vonnis soos beoog in Artikel 5(1) (sic) van die gemelde Wet.'*

[5] The matter, accordingly, came before Shongwe J in the Local Division of the Western Circuit District held at Klerksdorp on 30 March 2004 and the sentence of life imprisonment in terms of the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 ("the Act") was imposed on the appellant, Shongwe J having held that no substantial and compelling circumstances to impose a lesser sentence existed.

[6] The appellant applied for leave to appeal the sentence, which application was dismissed by Hartzenberg J on 8 May 2008.

[7] The appellant was thereafter granted leave to appeal his sentence by the Supreme Court of Appeal as averred to *supra*.

GROUND FOR APPEAL: FAIR TRIAL?

[8] The appellant's appeal is based on the allegation that he did not have a fair trial.

[9] It is common cause between the parties that the appellant was not informed of the fact that the commission of the offence falls within the ambit of the Act and that he, upon conviction, may be sentenced to life imprisonment.

- [10] The court *a quo*, however, did not sentence the appellant in terms of the provisions of section 51(1) of the Act. This much is clear from the following extract from the court *a quo*'s judgment:

"Die wetgewer het ook die wet op minimum vonnisse op die wetboek geplaas en dit is ook aanduidend van die erns waarin die wetgewer hierdie misdryf sien. Ingevolge hierdie wet word daar bepaal dat indien 'n persoon 'n ander persoon verkrag wat onder die ouderdom van 16 jaar oud is, is die hof verplig in sulke gevalle om die saak te verwys na die hooggeregshof vir vonnis aangesien sulke mense kwalifiseer vir lewenslange gevangenisstraf. U kan u dus self gelukkig ag dat u hier in die streekhof tereg staan op hierdie klagte. Die staat het besluit hierdie is die korrekte forum waarin u aangekla behoort te word en dit is dan waarin u ook gevonniss gaan word vandag."

- [11] The court *a quo* proceeded to impose a sentence of 15 years imprisonment. In the circumstances, the appellant did have a fair trial in the court *a quo*.
- [12] The problem arose with the court of appeal's finding that the appellant had to be sentenced in terms of the provisions of section 51(1) of the Act.
- [13] In this sense, the appellant did not have a fair trial.

[14] Mr Wilsenach, counsel for the respondent, conceded that the sentence should in the circumstances be set aside and that this court should consider an appropriate sentence afresh.

APPROPRIATE SENTENCE:

[15] The facts giving rise to the appellant's conviction, may be summarised as follows:

- i) the complainant lived with her mother and uncle in Extention 16, Khuma;
- ii) on the evening of 23 January 2001, the complainant was alone at home. She was in her room when she heard people entering the house;
- iii) upon examination, she found the appellant and his co-accused in the court *a quo*, a certain Mncedisi, playing music on a cassette player in the kitchen;
- iv) the accused knew Mncedisi as he was a friend of her uncle, but the appellant was not known to her;
- v) after Mncedisi established that the complainant's mother and uncle were not at home, he dragged her to her room and threw her on the bed;

- vi) the appellant followed them and after Mncedisi removed the complainant's underwear, he held her feet whilst Mncedisi raped her. The complainant was crying during the rape;
- vii) the complainant was thereafter raped by the appellant. He closed her mouth during the rape and told her to keep quiet;
- viii) after the double rape, Mncedisi and the appellant ran away;
- ix) the complainant was scared to leave the house and remained alone in the house until the next morning.

[16] The personal circumstances of the appellant are as follows:

- i) he was 32 years of age at the time of the incident;
- ii) he is married and has two children;
- iii) he worked at the time;
- iv) he is a first offender.

[17] During the sentencing proceedings in front of Shongwe J, the State submitted a report by a social worker in respect of the impact the rape had on the complainant. The report is dated 29 March 2004 and was compiled more than three years after the incident.

[18] The report is, to say the least, heartrending. Ms van Biljon, a senior social worker, reports that the complainant was ridiculed by her peers to such an

extent that she decided to leave school. The complainant's mother reported that the complainant was emotional after the rape and that she cried a lot. For a long period subsequent to the rape, she did not want to sleep alone and had nightmares. She did not want to sleep in the dark and still insists that the lights must be on when she sleeps. According to the complainant's mother, she had undergone a total change of personality.

[19] Under the heading evaluation, Ms van Biljon, states the following:

"Die hof het hier te make met 'n vyftienjarige dogter wat in 'n groot mate getraumatiseerd is deur die gebeure. Haar lewe is in 'n ernstige mate beïnvloed deur die verkragting. Die feit dat sy ten tye van die verkragting slegs twaalf jaar oud was is opsigself baie traumaties omdat sy van haar kinderlewe ontnem is."

[20] Ms Augustyn, counsel for the appellant, submitted that no weapon or violence was used during the rape nor did the complainant suffer any injuries. Accordingly, the matter in *casu* does not fall under the "most serious" cases for which the maximum sentences are reserved. I do not agree.

- [21] Mr Wilsenach referred to the unreported matter of *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013), in which Majiedt JA held as follows at par [17]:

"It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. ..."

- [22] The perception that only physical injuries will suffice to elevate a rape to be "most serious", is misplaced. The report of the social worker deals with the psychological damage the complainant has suffered as a result of the rape. Whilst physical injuries heal, psychological damage may take years to overcome.

- [20] In *casu* the complainant stood on the brink of womanhood with all the possibilities of becoming a self assured woman in own right. She still had the prospect of finding love, getting married and having a family of her own. This was summarily taken away by the appellant's cruel invasion of what is most sacred at her age, her blossoming womanhood.

- [22] I am mindful that the appellant's personal circumstances should be given due weight in considering an appropriate sentence. The appellant, however, elected not to testify in mitigation of sentence and did not place any evidence pertaining to his psychological functioning or background before the court *a quo*. In the premises, it is not clear what motivated the appellant to perpetrate the crime of rape.
- [23] The fact that the appellant is married is, to my mind, an aggravating factor. One would especially expect a married man to treat woman with the respect they deserve. It is not clear whether the appellant has boys or girls, but for the father of two children to rape a 14 year old girl likewise constitutes, in my view, aggravating circumstances.
- [24] The appellant has, furthermore, shown no remorse, whatsoever. In my view, the first step to rehabilitation, is insight in the nature of the crime committed. If a person convicted of rape, does not appreciate the grave injustice visited upon his victim, rehabilitation seems a remote if not impossible outcome. Persons convicted of rape should learn to have respect for women and children. If the physical and emotional integrity of women and children are not respected, the prevalence of rape in our society will not abate.

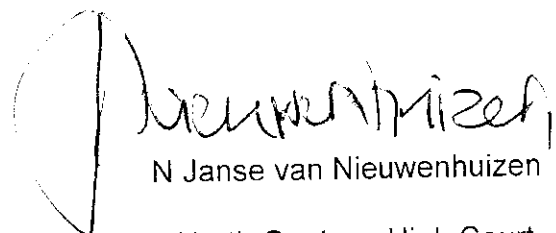
[25] The question remains whether the appellant is a person who should be removed from society. Is the imposition of lifelong imprisonment the only sentencing option in the circumstances? I think not. The appellant was a first offender at the age of 32 and I may not discount the possibility that an appropriate term of imprisonment might result in the appellant gaining some insight in the atrocious nature of the crime committed by him.

[26] Having regard to all the factors mentioned *supra*, I am of the view that a sentence of 25 years imprisonment will be appropriate in the circumstances.

ORDER:

1. The appeal on sentence is upheld.
2. The sentence of life imprisonment imposed in terms of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 is set aside and substituted with the following:

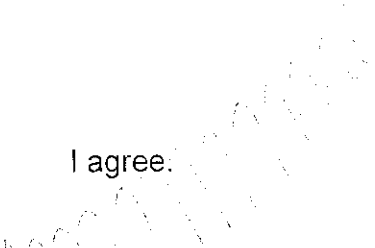
"The accused is sentenced to 25 years imprisonment," which is antedated in terms of Section 282 of the Criminal Act 51 of 1977, to 30 March 2004".



N Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court.

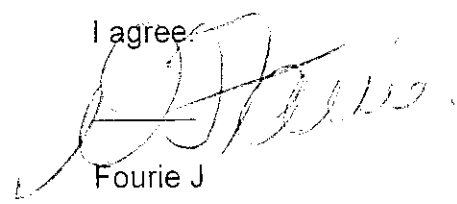
I agree.



Makhafola J

Judge of the North Gauteng High Court.

I agree.



Fourie J

Judge of the North Gauteng High Court.