

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case No: K/S 38/10
Heard: 01-28/02/2011
01-22/03/2011; 03/05/2011
Delivered: 10/05/2011

In the matter between:

THE STATE

v

FRANS OLIPHANT

Accused

JUDGMENT ON SENTENCE

KGOMO JP

[1] The accused, Mr Oliphant, a Galeshewe, Kimberley, man of 38 years, was on 03 May 2011 convicted on eight of the ten charges he faced. These are: Assault common, assault with intent to do grievous bodily harm, rape, theft, arson, attempted murder, kidnapping and attempted assault with intent to do grievous bodily harm.

[2] In aggravation of sentence the state called Ms D, who still testified in camera. Sobbing throughout her testimony, she described how her intolerable treatment at the hand of the accused has edged deep psychological scars in her life. She thought that the accused on more than one occasion threatened to kill her and

take his own life and that she escaped being charred in an inferno in her residence causes her sleepless nights. Her sleeping pattern has therefore been adversely affected. During the trial she testified that the accused reminded her of the tragic occurrence when her father killed her mother. This, in my view, instilled in Ms D an abiding traumatic memory.

- [3] Ms D testified that her love and interactive relationship with men has suffered because she is less trusting of them. The bad experience has even transcended to family and friends. I must observe here that a disconcerting trend has developed whereby the culprits that are near and dear to victims take advantage of them and in a perverse irony afterwards try to invoke their very close relationship as an ameliorating factor; for example lovers or husband and wife. This cannot be.

- [4] Ms D has explained that she has suffered great financial loss as a result of the destruction of her property and the restoration of the burnt flat that she leased. The combined initial damage was quantified at more than R14 000-00 but this does not take account of the much higher replacement cost. Ms D is a low income earner. She says having expended money on taking care of the aforementioned damages she was unable to pay her other debts, which has resulted in sullyng her creditworthiness.

- [5] Rehanna Moshoeshoe's, the 15 year old missing girl's, father made a plaintive plea to the accused. He spoke on behalf of Rehanna's mother (his ex-wife), the extended family, their friends, the various support groups since Rehanna's disappearances and the broader Kimberley/Galeshewe society. Tell us, he says, where Rehanna is. Tell us what you did to her. Give us the sordid details; distasteful as that may be, because if

you have killed her that knowledge is preferable to the unending ignorance of not knowing her whereabouts because we can reconcile ourselves with her death and get closure.

- [6] Mr Moshoeshoe wore an anguished and distressed expression. The courtroom, the biggest, was full to its rafters. Mr Moshoeshoe was not swept up by emotions nor did he play to the gallery. He showed no anger and bitterness. He was polite and addressed the accused as "*my brother, Mr Oliphant.*" He never tried to belittle the accused. Where there may have been a hint of it, I don't believe there was, it would have been entirely unintended. I was as vigilant as I could to ensure the accused's dignity was not impinged upon; mindful also of what the Constitutional Court stated in **Key v Attorney – General, Cape Provincial Division and Another** 1996(4) SA 187 (CC) at 195G (para 13) that:

"[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale."

- [7] Mr Moshoeshoe informed the accused that the punishment, of whatever nature, meted out is scant consolation if contrasted with him revealing Rehanna's whereabouts: dead or alive. He reminded the accused that whereas the law must take its course in exacting punishment the truth will set him (the accused) free spiritually as he will be relieved of carrying the burden of guilt for the rest of his life. I reckon by "the truth will set you free" Mr Moshoeshoe had in mind what was said by Jesus Christ in the Holy Bible, the book of John, Chapter 8: verse 32 that:

"If you hold my teaching, you are really my disciples. Then you will know the truth, and the truth will set you free."

[8] Finally, Mr Moshoeshoe explained what adverse impact Rehanna's disappearance has had on the family, particularly that of Rehanna's mother, Mrs Mpho Moshoeshoe, and Rehanna's paternal grand mother who is 77 years old, whose health has taken a severe knock. He explains that Rehanna's mother is a nervous wreck and has not been able to resume her teaching duties since Rehanna's disappearance. She is still under medical and psychological treatment and her medical aid has been exhausted.

[9] The ordeal suffered by Ms D and Rehanna's family in their respective contexts brings me to what **Ponnan JA**, writing for the Court, stated in **S v Matyityi** 2011(1) SACR 40 (SCA) at 51f – h:

"None of her rapists used condoms. Each ejaculated. Although not properly explored during her evidence, it is obvious that her ordeal must have been a horrific one. She had to submit to the brutal and naked invasion of her person in the knowledge that her boyfriend may have been mortally wounded. What we do know is that the trauma she suffered was so severe that, by the time of the trial, approximately one year after the incident, she was still receiving counseling. According to her, the experience had made her deeply afraid and had even impacted negatively on her relationship with her family. As this court has previously sought to make clear, women in this country 'have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes

*the quality and enjoyment of their lives' (**S v Chapman** 1997 (2) SACR 3 (SCA))."*

- [10] Notwithstanding the evidence in aggravation and his conviction on the eight charges the accused elected not take the stand and explain what happened to Rehanna and why he did the things to Ms D attributed to him. The judgment on the merits show that during the bail proceedings in May/June 2010 the accused suffered from selective amnesia by testifying that he could not recall what he discussed with Rehanna on Saturday 20 February 2010 and Sunday 21 February 2010; the eve and the day of Rehanna's disappearance, respectively. However, during the trial his memory was lucid and proffered that they had a wonderful conversation on the Saturday which they revisited on the Sunday of her disappearance. He has now spurned the opportunity to explain these discrepancies.
- [11] The accused raised the family's hopes when he hinted at revealing where Rehanna was when he spoke to Mr Themba Ngwenya on Monday 22 March 2010. He undertook to revert to Mr Ngwenya but failed to do so. In addition he informed Colonel Perumel on 06 March 2010 that he had resolved to confess to what has happened to Rehanna but wanted first to speak to the Director of Public Prosecutions and to Rehanna's mother. Whilst preparations were being considered and/or made to this end he attempted to commit suicide.
- [12] In his evidence-in-chief the accused testified *ad nauseam* about peripheral and irrelevant matters but merely glossed over Rehanna's disappearance in a matter of a few minutes, hardly occupying more than two pages of the transcribed record. During the trial the accused was in jovial mood and cracking

jokes. His whole demeanour was of a person who did not care and derived a measure of satisfaction from the occasion and even laughed at times. During the sentencing phase he sat expressionless.

[13] In **S v Matyityi** (above) at 51j – 52b the SCA stated:

*"The one person who could have filled those gaps was the respondent [the accused]. He chose not to. That was his right. **S v Dzukuda and Others; S v Tshilo** 2000 (2) SACR 443 (CC) (2000 (4) SA 1078; 2000 (11) BCLR 1252) para 40. But it is not without its consequence, for, as the Constitutional Court has endeavoured to stress (**S v Jaipal** 2005 (1) SACR 215 (CC) (2005 (4) SA 581; 2005 (5) BCLR 423) para 29.):*

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

His silence thus leads irresistibly to the conclusion that there was nothing to be said in his favour."

[14] The personal circumstances of the accused, proffered from the bar, are pretty mundane. He is married to his wife, Xoliswa, whose phone calls he twice ignored whilst evidently accosting Rehanna. They have two children aged 8 and 6. He passed Standard 10 (Grade 12) at school. During his arrest on 26 February 2010 he had been working for Stuttafords Van Lines, a furniture and household goods removal company, for more than a year. I am unsure how much this factor helps the accused because he embarrassed his employer by stealing the laptop,

which features in Count 8, from Stuttafords' custody. He earned R4000-00 per month. The accused has been in custody, having been denied bail, since 07 March 2010 – just over a year and two months. He is deemed to be a first offender since his conviction for theft took place in 1995 – more than 10 years ago.

- [15] Counsel are *ad idem* that unless substantial and compelling circumstances are found to exist the accused is liable to be sentenced to life imprisonment for the rape of Ms D. The accused has been apprised of this enhanced sentencing jurisdictional option in that the indictment specifically states that the charge of rape must be read with the various applicable provisions of the Criminal Procedure Law (Sexual Offences and Related Matters) Amended Act, 32 of 2007. As the Court pointed out in the **Matyityi case** (above) at 53b:

"The sexual assaults covered by this new Act extend beyond phenomena previously covered by the definition of rape, to include male rape and sexual penetration of a whole range of orifices. It also covers human trafficking, pornography and prostitution (including charges against clients of sex workers)."

- [16] The accused committed two distinct acts of rape against Ms D during the same evening. The first took place at the ABC Cemetary where the indecent assault-type rape took place whereafter the accused drove Ms D to her flat and raped her again – the conventional or common law rape. The indecent assault-type rape was accompanied by some assault, not a severe assault. The second rape was accompanied by Ms D being incarcerated in her room from 03h00 to 06h00 and her cellphone being removed from her whilst the accused went to his home.

[17] The case involving the kidnapping of Rehanna excited a lot of interest as shown in paras 5 and 6 (above). When Rehanna's father made his plea there was a lot of weeping. A sentencing court must be astute not to be influenced by such an event and be tempted to impose an unreasonably harsh sentence. I caution myself that the accused must not be punished as if he murdered Rehanna. Ms Jansen, for the state, submitted that the fact that Rehanna has not shown up and the circumstances of her disappearance are aggravating factors. I agree.

[18] In **S v Thonga** 1993(1) SACR 365(V) at 370b-i the court remarked:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

During the sentencing phase the trial court is then called upon to exercise its penal discretion judicially and only after a careful and objectively balanced consideration of all relevant material.

Certain guidelines may be laid down in this regard. In my view the punishment must firstly be reasonable, ie it should reflect

the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly possible, with previous sentences imposed on similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account.

To all this I would add that the trial Court does not impose sentence in vacuo. It, to the contrary, certainly does so within a certain time frame and at a certain stage in the development of the people(s) of a district, or a province, or a country, or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its values and its moral indignation at unlawful conduct, as well as the negative or harmful effect thereof on third parties or society itself. But in a civilised society punishment reflects also the interests of the offender himself. The trial court, in a criminal matter then, functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interests of society and all of its law-abiding members.”

I align myself with these remarks.

- [19] The accused has shown no contrition or remorse. On the contrary he seems to have derived some satisfaction from the

whole sad saga. Catch me if you can, he seems to say. I know I have "*done a clean job.*"

[20] Kidnapping is a very serious offence. Indeed it ranks amongst the most serious offences in this country. In fact in several schedules to the Criminal Procedure Act it is listed with crimes such as murder, rape, treason etc. It involves the gratuitous deprivation of a person's liberty and freedoms guaranteed in the Constitution of the Republic of South Africa, 108 of 1996. If the arbitrary restriction of freedom is prolonged it surely amounts to modern day slavery. It is immaterial whether the accused acted alone or was in cahoots with a collaborator. He bears full responsibility for Rehanna's prolonged disappearance and plight. This is a serious aggravating factor. Even though the state did not call for life imprisonment in this regard either, and I have not come across a precedent that life imprisonment has been imposed for kidnapping *simpliciter* i.e. unaccompanied by murder or rape or serious assault, it does not mean that life imprisonment in appropriate cases is not competent.

[21] If ever one has to look for an ideal candidate for rehabilitation the accused is not one of them. He exploits and abuses young women and girls. It is startling that after effecting the disappearance of Rehanna in the morning of Sunday 21 February 2010, on the very afternoon he promised Ms Mampe "*a better life*" in a bit to soften her up to agree to sex. She rebuffed his advances. She is, as they say, "*the lucky one that got away.*"

[22] As shown hereinbefore the aggravating factors by far outweigh the mitigating features. This notwithstanding I am of the considered view that both the rape and kidnapping cases do not call for the imposition of life imprisonment. The state has not

called for such sentences as I have said. In **S v Malgas** 2001(1) SACR 469 (SCA) the SCA per **Marais JA** stated at 482e-f:

"I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[23] The accused deserves a long prison sentence lest society take the law into their own hands if the courts trivialize serious offences.

[24] I accordingly impose the following sentences:

1. **COUNT 1: ASSAULT COMMON:**

The accused is sentenced to six (6) months imprisonment.

2. **COUNT 3: RAPE:**

The accused is sentenced to 15 (fifteen) years imprisonment.

3. **COUNT 5: ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM:**

The accused is sentenced to 18 (eighteen) months (1½ years) imprisonment.

4. **COUNT 6: ARSON:**

The accused is sentenced to 5 (five) years imprisonment.

5. **COUNT 7: ATTEMPTED MURDER:**

The accused is sentenced to 6 (six) years imprisonment.

6. **COUNT 8: THEFT:**

The accused is sentenced to 2 (two) years imprisonment.

7. **COUNT 9: KIDNAPPING:**

The accused is sentenced to 15 (fifteen) years imprisonment.

8. **COUNT 10: ATTEMPTED ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM:**

The accused is sentenced to 6 (six) months imprisonment.

9. **It is ordered that the sentences in respect of Counts 1, 5, 6, 8 and 10 run concurrently with the sentence of 15 (fifteen) years imprisonment in Count 3. The accused will therefore serve an effective sentence of 36 years.**

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the State:
 Instructed by:

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On behalf of the Accused:
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