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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO: A 741/2006

DATE: 04/03/2009

IN THE MATTER BETWEEN:

VUSI NICLAAS MTSOTSO METHULA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

HARTZENBERG J

[L] THE APPELLANT WAS CONVICTED OF RAPE OF THE COMPLAINANT. M M, A SIXTEEN YEAR OLD LADY, IN THE REGIONAL COURT AT PIET RETIEF. HE WAS SENTENCED TO 10 YEARS IMPRISONMENT. LEAVE TO APPEAL AGAINST CONVICTION AND SENTENCE WAS GRANTED BY THE REGIONAL MAGISTRATE. THE TWO JUDGES HEARING THE APPEAL DID NOT AGREE AS TO THE OUTCOME OF THE APPEAL. AS A RESULT OF THEIR DISAGREEMENT THE MATTER CAME BEFORE THIS COURT.

[2] THE APPELLANT WAS REPRESENTED THROUGHOUT THE TRIAL. THE STATE CALLED THREE WITNESSES, THE COMPLAINANT. F T. A BLOOD RELATION OF THE COMPLAINANT AND Z M, THE MOTHER OF THE COMPLAINANT. BY AGREEMENT BETWEEN THE PARTIES A FORM J88 PREPARED BY A DR. MOROA WAS ACCEPTED IN EVIDENCE AND THE CONTENTS WERE ADMITTED TO BE TRUE AND CORRECT.

[3] THE COMPLAINANT'S EVIDENCE WAS FULLY CORROBORATED BY THE WITNESSES. IT WAS TO THE EFFECT THAT SHE AND F SAW THE COMPLAINANT, ON 10 OCTOBER 2004, ON THEIR WAY TO THE HOUSE OF A MRS. MTHETHWA, WHERE TO THEY HAD BEEN SENT BY HER MOTHER. SHE DID NOT KNOW HIM WELL BUT KNEW HIM FROM SIGHT AS HE REGULARLY VISITED TWO BOYS, BRISCO AND MTONDO, WHO LIVE IN THE SAME STREET AS THE COMPLAINANT. THE COMPLAINANT AND F INFORMED THE APPELLANT THAT THEY WOULD COME BACK THE SAME WAY AFTER COMPLETING THEIR ERRAND.

[4] ON THEIR RETURN TO THAT PLACE HE SENT F TO GO AND BUY HIM A BEER AND IN HER ABSENCE HE CLAIMED THAT THE TWO OF THEM HAD A

RELATIONSHIP. THE COMPLAINANT DENIED IT. WHEN F BROUGHT THE BEER HE STARTED DRINKING IT AND DID NOT WANT TO ALLOW THEM TO LEAVE. WHEN THE COMPLAINANT TRIED TO LEAVE HE HURLED THE BEER BOTTLE AT HER AND HE THEN TOOK A KNIFE OUT OF HIS POCKET AND PRESSED IT AGAINST THE NECK OF THE COMPLAINANT, INDICATING THAT HE WAS TAKING HER TOWARDS HIS PARENTAL HOME. THE THREE OF THEM WENT TO HIS HOME AND WHEN THEY REACHED IT HE ASKED A NEIGHBOUR TO TAKE F WITH HER TO WATCH TELEVISION. HE TOOK THE COMPLAINANT INTO THE KITCHEN OF HIS PARENTAL HOME. WHEN HIS MOTHER REPRIMANDED HIM FOR BRINGING A GIRL TO HIS ROOM HE TOLD HER TO "VOERTSEK" AND THAT HE IS THE BOSS IN THE HOUSE. IN HIS ROOM HE FORCED HER TO UNDRESS AND HE THEN HAD FULL INTERCOURSE WITH HER. AFTERWARDS SHE ASKED THE APPELLANT IF SHE COULD GO TO THE TOILET AND AFTER HAVING ONLY PUT ON HER SKIRT AND PANTY SHE RAN AWAY BARE FOOTED. F HAD BEEN WAITING FOR HER AND THEY WENT STRAIT TO

THEIR HOME WHERE THEY WAITED FOR HER MOTHER. ON HER ARRIVAL SHE MADE A REPORT TO HER MOTHER WHO IMMEDIATELY TELEPHONED THE POLICE. BEFORE THE ARRIVAL OF THE POLICE THE APPELLANT APPROACHED THE COMPLAINANT'S MOTHER AND HE TOLD HER THAT HE AND THE COMPLAINANT HAD PLAYED A DOLL'S HOUSE GAME. THE MOTHER CHASED HIM AWAY. THE COMPLAINANT WAS TAKEN TO A DOCTOR. THE MEDICAL REPORT WAS COMPLETED AT 18 30 ON 10 OCTOBER 2004. IT REPORTS A TEAR IN THE VAGINA CORRESPONDING WITH THE COMPLAINANT'S EVIDENCE OF A BLOODY DISCHARGE.

[5] THE APPELLANT'S EVIDENCE WAS IN ACCORDANCE WITH HIS PLEA TO THE EFFECT THAT HE WAS IN A RELATIONSHIP WITH THE COMPLAINANT AND THAT THEY HAD CONSENSUAL INTERCOURSE. THE MAGISTRATE REJECTED HIS EVIDENCE AND ACCEPTED THE EVIDENCE OF THE STATE WITNESSES AND CONVICTED HIM. THE MAGISTRATE IN MY VIEW QUITE CORRECTLY FOUND THAT THE APPELLANT'S EVIDENCE CANNOT BE TRUE AND THAT THE EVIDENCE OF THE STATE WITNESSES MUST BE TRUE. IT IS CLEAR THAT THE APPELLANT FORCED THE COMPLAINANT TO HIS HOUSE BY PRODUCING A KNIFE. THAT IN ITSELF IS IRRECONCILABLE WITH HIS VERSION OF A GIRLFRIEND HAPPILY ACCOMPANYING HER BEAU TO HIS HOUSE. SHE RAN AWAY FROM HIS HOUSE WITHOUT SOME OF HER CLOTHES AND HER SHOES. THAT TOGETHER WITH THE FACT THAT THEY IMMEDIATELY LAID A RAPE CHARGE AGAINST THE APPELLANT IS LIKEWISE IRRECONCILABLE WITH THE CONDUCT OF A LOVER WHO VOLUNTARILY HAD INTERCOURSE WITH HER BOYFRIEND. MOREOVER THE COMPLAINANT HAD INJURIES AND A BLOODY DISCHARGE OF HER PRIVATE PARTS.

[6] IT WAS ARGUED ON BEHALF OF THE APPELLANT THAT HE DID NOT HAVE A FAIR TRIAL, FIRSTLY AS THE ATTORNEY WHO REPRESENTED HIM DID NOT PRESENT HIS CASE PROPERLY AND SECONDLY BECAUSE THE MAGISTRATE DID NOT *mero motu* CALL THE DOCTOR TO GIVE EVIDENCE. THE ARGUMENT IS BASED ON A THEORY, THAT AS THE J88 INDICATES THAT THE COMPLAINANT DID NOT HAVE A HYMEN, THE ATTORNEY DID NOT EXPLORE A POSSIBLE BASIS OF A DEFENCE AND THAT THE MAGISTRATE WAS ALSO REMISS BY NOT CALLING THE DOCTOR. THE EVIDENCE WAS OVERWHELMING THAT THE APPELLANT HAD INTERCOURSE WITH THE COMPLAINANT AGAINST HER WILL AND IT WAS TOTALLY IRRELEVANT WHAT THE STATE OF HER HYMEN WAS BEFORE THAT. THE ARGUMENT IS WITHOUT SUBSTANCE.

[7] AS FAR AS SENTENCE IS CONCERNED IT IS SO THAT THE APPELLANT WAS 20 YEARS OLD AT THE TIME OF THE COMMISSION OF THE OFFENCE. ALTHOUGH THE STATE DID NOT PROVE ANY PREVIOUS CONVICTIONS THE APPELLANT HAD INFORMED HIS ATTORNEY THAT HE HAD BEEN CONVICTED OF HOUSEBREAKING AND THEFT AND HAD BEEN SENTENCED TO 5 YEARS IMPRISONMENT DURING 2002. IN ADDITION THERETO IT IS CLEAR THAT HE SHOWED NO REMORSE AND TRIED TO LIE HIS WAY OUT OF THE SITUATION. IT IS SO THAT YOUTH IN ITSELF CAN BE A SUBSTANTIAL AND COMPELLING CIRCUMSTANCE FOR NOT IMPOSING A MINIMUM SENTENCE. WHEN IMPOSING A SENTENCE, HOWEVER, THE COURT HAS TO TAKE A BALANCED VIEW AND IS NOT TO OVEREMPHASIZE ONE OF THE RELEVANT FACTORS. IN THIS CASE THE COMPLAINANT WAS BARELY OLDER THAN 16 YEARS. SHE WAS INJURED. SHE WAS HUMILIATED. THE APPELLANT DID NOT HEED THE WARNING OF HIS OWN MOTHER NOT TO CARRY ON WITH HIS HEINOUS PROJECT. TO FIND THAT THE APPELLANT'S YOUTH IN ITSELF IS A COMPELLING CIRCUMSTANCE NOT TO IMPOSE THE MINIMUM SENTENCE OF 10 YEARS WOULD BE TO NEGATE THE DESPICABLE CONDUCT TOWARDS THE COMPLAINANT.

[8] IT IS TRITE LAW THAT A COURT OF APPEAL IS ONLY ENTITLED TO INTERFERE WITH A SENTENCE BY A COURT A QUO IN VERY LIMITED CIRCUMSTANCES. IN MY VIEW THERE ARE NO CIRCUMSTANCES WHICH POINT THERETO THAT THE SENTENCED IMPOSED WAS NOT PROPERLY CONSIDERED OR INAPPROPRIATE. THIS COURT IS NOT AT LIBERTY TO INTERFERE WITH SENTENCE.

THE APPEAL IS DISMISSED, BOTH AGAINST CONVICTION AND SENTENCE.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

I AGREE

M F LEGODI
JUDGE OF THE HIGH COURT

I AGREE

TJ RAULINGA
JUDGE OF THE HIGH COURT

HEARD ON: 25 FEBRUARY 2009

ON BEHALF OF THE APPELLANT

COUNSEL: M. BOSIKI
Instructed by Legal Aid

ON BEHALF OF THE RESPONDENT

COUNSEL: VAN DER MERWE
Instructed by: State Attorney