

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A358/2004

In the matter between:

TUMELO DANIEL RADEBE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MATHEBULA, AJ

JUDGMENT:

MATHEBULA, AJ

HEARD ON:

13 MARCH 2006

DELIVERED ON:

1 JUNE 2006

[1] The appeal lies against sentence. The appellant pleaded not guilty before the regional magistrate, Phuthaditjhaba on a charge of rape. During the course of the trial in the court *a quo* the appellant changed his initial plea of not guilty to one of guilty. He was convicted and sentenced to 15 years imprisonment. The appellant was sentenced in terms of

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section 51(2)(a)(ii) of the Criminal Law Amendment Act no. 105 of 1997 which prescribes sentences of not less than 15 years imprisonment for a second offender on a charge of rape. The sentence can only be lesser if there exists substantial and compelling circumstances. The court *a quo* found that there were no substantial and compelling circumstances and imposed the sentence as per the provisions of the Act.

[2] The facts are broadly that on or about the 31st March 2002 at Mandela Park, Phuthaditjhaba, the appellant raped M, who was 16 years at the time. The appellant assaulted the complainant before having sexual intercourse with her.

[3] At the time of the commission of this offence the appellant was an awaiting trialist in the care of his guardian on a similar charge. The other offence was committed on the 9th December 2001. He was sentenced to 10 years imprisonment on that charge. At the time of his conviction

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and sentence by the court *a quo* on this matter he was serving the second month of the 10 years sentence.

[4] It was submitted by Mr. Nkhahle, on behalf of the appellant, that the sentence imposed was harsh and inappropriate. Furthermore that the appellant pleaded guilty. He emphasised that the appellant was 17 years at the time of the commission of the offence thus the element of youth played a pivotal role. He further submitted that due to the time elapse between the two offences the court *a quo* should have ordered that the sentences run concurrently.

[5] On behalf of the State, Mr. S. Chalale, submitted that the objective gravity of the crime played an important role. The appellant was in a trust position *vis-a-vis* the complainant who was his family member. In addition the victim was a virgin at the time. The appellant used force against the victim. He submitted that the sentence imposed was appropriate in the circumstances.

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[6] Evaluating the matter I am not convinced that the court *a quo* erred in not finding substantial and compelling circumstances. The sentence of 15 years is inappropriate.

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.”

See **S v CHAPMAN** 1997 (2) SACR 3 at 5 A – B.

[7] However, punishment is not the only purpose of a sentence. In dealing with young people, the court must as far as possible punish with a point of view of care and rehabilitation. See **S v NKOSI AND ANOTHER** 2000 (2) SACR 94 T. The appellant committed these offences within three months of each other in the same municipal district. I fail to understand why the charges were not consolidated in to one matter with a number of counts. The appellant will only serve the 15 years imprisonment after he had served the first 10 years of the earlier sentence. This will result in

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the appellant serving a severe and unjustifiably long sentence. See **S v BREYTENBACH** 1988 (4) SA 286 (T) at 292 G – J.

[8] The court *a quo* did not even give a cursory look at section 280 of the Criminal Procedure Act no. 51 of 1977 (as amended). I am of the view that the sentence is harsh and inappropriate. The court *a quo* erred in treating the appellant as a second offender. He ought to have sentenced him in terms of section 52(1)(a)(i) and not section 52(1)(a)(ii) as he did. On account of his misdirection I am at liberty to interfere with the sentence imposed by the court *a quo*.

[9] I make the following order:

1. Conviction is confirmed.
2. The sentence of 15 (fifteen) years imprisonment is set aside. It is substituted with one of 10 (ten) years imprisonment.
3. In terms of section 280 of the Criminal Procedure Act the sentence of 10 (ten) years will run concurrently

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with the 10 (ten) years' sentence imposed on the
11th March 2003 so that the effective sentence is 15
(fifteen) years imprisonment.

M.A. MATHEBULA, AJ

I concur.

M.H. RAMPAL, J

On behalf of the appellant:

Adv. R. J. Nkhahle
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Chalale
Instructed by:

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The Director:
Public Prosecutions
BLOEMFONTEIN

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