

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No.: A179/2005

In the appeal between:

**THE STATE**

and

**T.W.T.**

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**CORAM:** H. M. MUSI, J *et* MOLEMELA, AJ

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**JUDGMENT:** MOLEMELA, AJ

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**HEARD ON:** 20 NOVEMBER 2006

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**DELIVERED ON:** 30 NOVEMBER 2006

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[1] This is an appeal against sentence only. On the 11<sup>th</sup> October 2004 the appellant was convicted of rape and theft by the Harrismith Regional Court and sentenced to 10 years and 6 months' imprisonment, respectively.

[2] It will be noted that rape is one of the offences that have been specifically designated for severe punishment as set

out in section 51 of the Criminal Law Amendment Act, no. 105 of 1997 (“the Act”). The particular provision that is applicable to the facts of this case is section 51(2) read with Part III of Schedule 2, in terms of which the appellant would be liable to a minimum sentence of 10 years imprisonment unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. However, this section is to be read with subsection 3(b) of section 51, seeing that the appellant was 17 years of age at the time of commission of the offence.

- [3] In oral argument counsel for the appellant contended that the effect of subsection 3(b) is that offenders older than 16 years but under 18 years are exempt from the imposition of the prescribed minimum sentence and do not therefore have to establish the existence of substantial and compelling circumstances warranting a departure from the prescribed sentence. As authority for this counsel cited **S v BRANDT** 2005 (2) ALL SA 1 (SCA).

[4] Counsel for the state agreed that the appellant did not have to establish the existence of substantial and compelling circumstances but submitted that the sentence imposed on the appellant was appropriate and supported it. She submitted that the sentence imposed adequately reflects the seriousness of the crime.

[5] Regarding the interpretation of subsection 3(b) it is apposite to refer to the following passage from **S v BRANDT** *supra* at page 5:

“The national starting point of the enquiry for the two categories of offenders to whom the Act does apply thus differs. For adult offenders the starting point is the minimum sentence prescribed by the legislature. That sentence, which is intended to be a severe and standardised one, may only be departed from if there is weighty justification therefor. It is for the adult offender to establish that substantial and compelling circumstances justifying a departure are present. For child offenders between the age of 16 and 18, the sentencing court starts with a clean slate.

Subject to the weighting effect of the statutorily prescribed minimum sentence, the sentencing court is free to impose such sentence as it would ordinarily have imposed. It may decide in the exercise of its sentencing discretion to impose the minimum sentence prescribed by section 51(2) for an offence of the kind specified in Schedule 2. That a discretion to impose the minimum sentence does indeed exist is clear from the use of the words “decides” and “decision” in section 51(3)(b). The sentencing court is called upon in the exercise of its discretion to make a decision as to whether or not to impose the minimum sentence prescribed by the Act. But it is not obliged to impose the statutorily prescribed minimum sentence and, if it does do so, it is required to enter its reasons for its decision on the record of the proceedings.”

[6] It is clear from the above passage that in relation to offenders who are older than 16 years but under 18 years of age, a sentencing court has a discretion whether to impose the prescribed minimum sentence or not, but if it decides to impose the prescribed minimum sentence, it must record its reasons for doing so. In *casu*, the court *a quo* imposed the prescribed minimum sentence but did not record its reasons for doing so. This constitutes a misdirection which entitles this court to interfere and to consider sentence afresh. In doing so, the triad of sentence will be taken into account, namely, the nature of the offence, the interests of the community and the personal circumstances of the offender.

[7] It is indeed so that the appellant was only 17 years old when he committed the offence and that his age must count in his favour when considering a sentence that is appropriate for him. However, the aggravating circumstances of this case do have a bearing on the sentence that must be imposed. The aggravating circumstances are the following:

- (i) the seriousness of the offence;
- (ii) prevalence of the offence;
- (iii) that the appellant was aware that someone else had already raped the complainant but decided to subject her to a further ordeal.

[8] These above-mentioned factors leave me with no doubt that this is a situation that warrants incarceration of the appellant despite the fact he was only 17 years old and as such practically a child at the time of the commission of the offence. I do, however, subscribe to the view that given his age, he should be incarcerated for the “shortest appropriate period of time”. See **S v BRANDT** *supra* at page 8. Having considered all these factors, I am of the view that

ten years' imprisonment is too harsh under the circumstances and ought to be set aside. However, rape remains a serious offence warranting severe punishment. I am therefore of the view that an appropriate sentence is 8 years' imprisonment.

[9] In the result, the appeal against sentence succeeds to the extent that:

- (a) the sentence of 10 years' imprisonment on count 1 is set aside;
- (b) there is substituted for it a sentence of imprisonment for a term of 8 years.
- (c) the sentence of six months' imprisonment on count 2 will run concurrently with the sentence of count 1.
- (d) the sentences are antedated to 11 October 2004.

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**M. B. MOLEMELA, AJ**

I concur.

**H. M. MUSI, J**

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