



**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: CC 182/05

In the matter between

THE STATE

and

MNCEDI DUNA

Accused

JUDGMENT DELIVERED ON 13 JUNE 2006

ZONDI, AJ

[1] On 17 June 2005 you were convicted on one count of rape by the Regional Court, sitting at Wynberg. According to the charge sheet it is alleged that on or about 9 August 2004 and at or near Gugulethu you unlawfully and intentionally had sexual intercourse

with a complainant while she was below consenting age, namely 10 years old. The provision of section 51 of Act 105 of 1997 applied.

[2] You were referred to this court for sentence in terms of section 51(2) of the Criminal Law and Procedure Act No 105 of 1997 ("the Act"). In terms of section 52(3)(b) of the Act I found that the proceedings in the regional court were in accordance with justice and accordingly confirmed the conviction.

[3] I consider it necessary to set out the provisions of the Act which are relevant to this matter.

Section 52(1) provides:

"Notwithstanding any other law but subject to subsection (3) and (6), a High Court shall:-

- (a) if it has convicted a person of an offence referred to in part 1 of schedule 2; or*
- (b) if the matter has been referred to in under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in part 1 of schedule 2,*

sentence the person to imprisonment for life”.

Subsection (3) provides as follows:

“(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

The offences referred to in Part 1 of schedule 2 of the Act include, inter alia,

“RAPE-

(b) Where the victim-

- (i) is a girl under the age of 16 years;*
- (ii) ...”*

[4] In terms of the Act I have to sentence you to imprisonment for life unless I am satisfied that substantial and compelling circumstances exist which would justify the imposition of a lesser

sentence than the prescribed sentence of life imprisonment. I have to decide whether to impose the prescribed sentence or a lesser sentence. In deciding this question I shall be guided by the decisions and views expressed by various courts in cases such as **S v Malgas 2001 (1) SACR 469 (SCA)**, **S v Gqamana 2001 (2) SACR 28 (CPD)**, **S v Nkosi 2002 (1) SACR 135 (WLD)** and **S v Abrahams 2002 (1) SACR 116 (SCA)**.

[5] In all these cases the courts expressed the view that sentences enacted in terms of the Act are prescribed sentences but not mandatory sentences. A lesser sentence may be imposed if a court finds that substantial and compelling circumstances are present or where the court on an examination of all the facts of the case concludes that a sentence of life imprisonment would be disproportionate to the offence committed and therefore unjust.

[6] However, the prescribed sentences should not be departed from lightly or for flimsy reasons which cannot withstand scrutiny (**S v Malgas supra**).

[7] In sentencing you I have to consider your personal circumstances, the nature of the offence and the interests of the community, including that of a victim (**S v Zinn** 1969 (2) SA 537 (A)).

I should decide on the sentence which will give effect to the objectives of punishment: namely deterrence, prevention, retribution and rehabilitation.

[8] As far as your personal circumstances are concerned, they were indicated by *Mr Ballem*, acting on your behalf, to be as follows: you are 45 years old, unmarried, but have four dependants. Due to financial constraints you were forced to leave school in standard 4. At the time of your arrest, you were employed as a taxi driver earning R350-00 per week. You have previous convictions. However, they are not related to the present offence. According to a SAP69 your last conviction was in September 1990. This may tend to indicate that you learned from your past mistakes.

[9] It was also indicated by *Mr Ballem* that you were drunk when you committed this offence and that you tested HIV positive in December 2004. *Mr Ballem* urged this court not to sentence you to

life imprisonment because of your HIV status and due to the fact that you had had something to drink when you committed this offence.

[10] As far as the nature of the offence is concerned, there is no doubt about its seriousness and this fact should be reflected in the type of a sentence which this court will eventually impose.

[11] In aggravation the State presented the oral evidence of Mr Patrick Simane, the complainant and Constable Zamikhaya Mbali. The probation officer's report was handed in by agreement between the State and the defence.

[12] Mr Patrick Simane is the complainant's biological father. The complainant was born on 29 December 1993. He testified that you were his friend and you would visit him whenever you had an occasion to do so. You were known to his family members. On the day in question at about 10h30 you paid him a visit at his house.

[13] Mr Simane further testified on how you lured the complainant out of her home on 9 August 2004. You sent her twice to a nearby

shop to buy you some drinks. On the third occasion you did not wait for her to return from the shop. You left the complainant's father pretending that you were going to see your friend while you were aware that you were going to persuade the complainant to go with you to your house.

[14] You never returned to his house and neither did the complainant.

[15] Mr Simane further testified that he became concerned when the complainant failed to turn up and he decided to go to the police to report the matter. With the help of the police he managed to track the complainant down at your house at about 22h30. When the police first confronted you about the whereabouts of the complainant you lied to them, telling them that you did not know where she was. But when he and the police entered your house they found the complainant. The police arrested you and took the child to the doctor for medical assistance. Mr Simane observed that his child's face was swollen and she appeared to him to have been emotionally affected.

[16] He testified on how the whole ordeal has affected the complainant's scholastic performance. The standard of her school work deteriorated after this incident and she had to be taken for counselling.

[17] The complainant testified on how you made her to travel with you to your place on 9 August 2004 at about 14h00. You started by sending her twice to buy you some drinks at the nearby shops. On the third occasion you sent her to a distant shop. You had come to visit her father. On the third occasion you did not await her to return with the cold drink you had sent her to buy for you. You met her on her way home whereupon you deceptively asked her to accompany you to your house to collect a pair of trousers which her mother had allegedly agreed to mend for you. She agreed to do so and boarded a taxi to your place.

[18] When you arrived at your place you took her inside your house. You thereupon closed the door and ordered her to lie down. When she refused you started hitting her on the face. She then complied. Thereafter you ordered her to take her clothes off and when she

refused you pulled her pants off and started raping her. She cried. You told her to keep quiet and threatened her with a knife. She bled through the nose and you told her to wash blood off in the bath. You proceeded raping her until 22h30 when you heard a knock on your door. At first you did not respond to the knock. You kept quiet and when the knock persisted you asked the caller who it was. When the caller identified himself as the police it was only then that you opened the door.

[19] You told the complainant to hide at the foot of the bed while you were responding to the knock. Her father and the police entered the house and found her inside. The police took her to the doctor for medical examination. According to the medical report (J88) on examination she was found to have bruising and swelling below the right eye. The doctor concluded that based on his findings there were signs compatible with alleged vaginal penetration.

[20] Under cross-examination by *Mr Ballem* the complainant denied that you were under the influence of liquor when you raped her.

[21] Constable Zamikhaya Mbali testified on how he, together with the complainant's parents found the complainant in your house on 9 August 2004. He testified that after removing the child from your house he arrested you for rape.

[22] A report, compiled by the probation officer, was also presented. It deals with the complainant's condition before and after the incident. At para 11 of her report, the probation officer based on her experience, makes the following remarks:

"Rape has long-term effects on the victim. In some instances reactions towards the effects of this offence manifest later in life, more especially with young children. Despite the fact that she seems stable, she might display behavioral problems such as prostitution, distortion of one's development of normal pleasure with sexual activities, and overprotection of one's children during parenting."

[23] She accordingly recommends that the complainant be referred for therapeutic counselling.

[24] I now turn to consider the interest of the community. Rape is a very serious offence and is on the increase these days. And it is for

this reason that Parliament has seen it fit to enact legislation prescribing minimum sentence for rape. The message is clear. Society must be protected against people who commit serious offences such as rape.

[25] In **S v Chapman** 1997 (2) SACR 3 the SCA has had an occasion to consider the impact and ills which the crime of rape brings to the victim. What was said by the SCA in this case is very instructive. At page 5 A-E the following was said:

“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.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.

Women in this country are entitled to the protection of these rights. They 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...

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to

protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

[26] I am in full agreement with the views and sentiments expressed by the SCA in this case.

[27] Turning to the facts of the present case, it is clear that you were in a position of trust. The complainant's family trusted you. The complainant also trusted you as a friend of her parents. She always thought she was in safe hands while under your care. You breached that trust relationship which existed when you violated her dignity and womanhood. Your conduct displayed a total lack of “*Ubuntu*”. Within the context of the spirit of *Ubuntu* “your child is my child and my child is your child”. Perhaps it is more apposite to refer to the remarks made by *Mokgoro J* in **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at para 308 where the following was said regarding notion of *Ubuntu*:-

“Generally, *ubuntu* translates as ‘humaneness’. In its most fundamental sense it translates as personhood and ‘morality’. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival

of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation."

[28] The question is whether there are substantial and compelling circumstances in this matter which would justify imposition of a lesser sentence than the prescribed life imprisonment.

[29] I was urged by *Mr Ballem* to find that there are substantial and compelling circumstances in this matter. He cited the fact that you were drunk and that you are now HIV positive as constituting substantial and compelling circumstances. *Mr Badenhorst* for the State argued otherwise.

[30] I have fully considered your personal circumstances and weighed them against the nature of the offence and the interest of the community. In my view they do not constitute substantial and compelling circumstances. What makes this case even more worse is the fact that you were the complainant's family friend and because

of this relationship an element of trust had developed between you and the complainant. You violated the dignity of your friend's child. She regarded you as a father and was entitled to feel safe and secure in your presence. You physically and emotionally assaulted her and her cries and pleas for help landed on deaf ears. She went through a traumatic experience from 14h00 until 22h30 when she was rescued from you by her father with the help of the police.

[31] Women and children must be protected against the offences of this nature and it is the duty of the Court to do so. This can only be done by imposing appropriate sentences on perpetrators who are found guilty of these offences.

[32] It is accordingly my view that the prescribed minimum sentence will be an appropriate sentence in this case having regard to the absence of substantial and compelling circumstances.

[33] In the result you are sentenced to life imprisonment.

ZONDI, AJ