IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA 404/2002

In the matter between:

B.N.N. **FIRST APPELLANT**

B.N. **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PLASKET AJ:

[1] The appellants were convicted in the court below on a charge of rape. The first appellant was sentenced to life imprisonment while the second appellant was sentenced to 20 years imprisonment. The second appellant appeals against both the conviction and the sentence while the first appellant appeals only against the sentence.

[A] THE SECOND APPELLANT'S APPEAL AGAINST CONVICTION

[2] The court below found that, on or about 24 August 2001, the appellants had raped the complainant, Ms N.K. at a secluded spot in Indwe. It was found that they had accosted her in the street, had dragged her to this spot, had each raped her while the other held her legs and had then taken her against her will to the second appellant's home where she was held until she was released on the insistence of her mother.

[3] The first appellant's version, which was rejected by the court below, was that he and the complainant had been boyfriend and girlfriend since 1998 and that they had consensual sex that night at the home of the second appellant. The first appellant denied having accosted and abducted the complainant in the street and it was his evidence that they had only had sex in the home of the second appellant and that they had not had sex out of doors. The second appellant's version, which was also rejected by the court below, was that he did not have sex with the complainant at all. He testified that he was in the company of the first appellant when they saw the complainant and a friend of hers, Ms A.T., in the street. He parted company with the first appellant and went to look for a friend of his. When he did not find this friend, he went home and got into bed with his girlfriend, who was already there. Later, the first appellant, accompanied by the complainant arrived and also got into a bed.

[4] It is clear from the above that the second appellant has made common cause with the first appellant on their versions. For all intents and purposes, the version of the appellants is one version. This version rests principally on one foundation stone – that the complainant was the first appellant's girlfriend at the time, an allegation that is denied by the complainant. That the second appellant was party to this allegation is evident from his own evidence: he stated that when he and the first appellant saw the complainant in the street, the first appellant said to him: 'there's my girlfriend'. The second appellant's version proceeds from this starting point.

[5] That the complainant was raped is corroborated by various witnesses called by the State: the doctor who examined her shortly after the incident testified that her injuries were consistent with rape and inconsistent with consensual sex; her friend, A.T., testified that she had seen the first appellant dragging the complainant away; she, the complainant's mother and a policeman, inspector Qotoyi, testified that, after her release from the second

appellant's house, the complainant was upset and was crying, that her clothes were dirty and that she had grass in her hair, allegations that are consistent with her having been raped outside, as she alleged, and inconsistent with her having consensual sex indoors; Ms T. and the complainant's mother testified that, while the complainant was inside the second appellant's house, she was crying, allegations that are inconsistent with her being there voluntarily; and Ms T. testified that the first appellant was not the complainant's boyfriend.

[6] While it is true that, as Mr Sandi, who appeared fro the appellants, argued, there were various contradictions between the accounts of the state witnesses, I am of the view that these contradictions were not of so material a nature as to require the rejection of their evidence. To a large extent, these were no more and no less than the types of contradictions that one would normally expect of people, with imperfect memories like us all, testifying some time after the event. In any event, the contradictions, such as they are, must be viewed in the context of the evidence as a whole and particularly in the light of the overwhelming evidence that the complainant was raped and that the rape occurred out of doors.

[7] The versions of the state witnesses, on the one hand, and the appellants, on the other, cannot exist side by side. Once it is accepted, as it has to be, that the complainant was indeed raped, the appellants' version that she had consensual sex with the first appellant at the home of the second appellant must be rejected. The first appellant's evidence that he was the boyfriend of the complainant is so improbable that it can safely be rejected as being false beyond reasonable doubt. Once this foundational piece of evidence is rejected, it follows that the second appellant's evidence that the first appellant told him that the complainant was his girlfriend, and that she accompanied the first appellant voluntarily to the second appellant's home and there had consensual sex with him, must also be rejected.

[8] The appellants' version is unable to explain the injuries to the complainant's private parts and is unable to account for the grass in the complainant's hair. The attempts by the appellants to explain the dirt on the complainant's clothes – that she wrestled with a person by the name of Badanile on the cow dung floor of the house – is, in my view, an unconvincing fabrication on their part.

[9] Once the version of the appellants is rejected as false beyond reasonable doubt, as it must be, all that remains is the complainant's version that she was raped by both appellants in the manner described by her. For these reasons I am of the view that the trial judge correctly rejected the versions of the appellants and accepted the evidence of the complainant and the State witnesses that supported and corroborated her in material respects. It follows then that the second appellant's appeal against his conviction must fail.

[B] THE APPEALS AGAINST SENTENCE

[10] As stated above, the first appellant was sentenced to life imprisonment and the second appellant was sentenced to 20 years imprisonment.

(a) The First Appellant

[11] The first appellant was sentenced to life imprisonment because s51(1)(a) of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2 thereof, prescribes this as the sentence to be imposed in the absence of substantial and compelling circumstances in cases in which a rape was committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice' or 'by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy'.

[12] The trial judge found that there were no substantial and compelling circumstances that would have entitled him to have departed from the prescribed sentence. In arriving at this conclusion, he held as follows:[1]

> 'With regard to accused no. 1 if the Court finds that there are exceptional circumstances, it must also not impose life imprisonment. If the Court for instance in this case finds that the age of accused no. 1, the fact that he was a scholar and the fact that he was still dependent on his parents, that those factors cumulatively amount to exceptional circumstances then the Court will be entitled to impose a lesser sentence. However, that is not the position in this case. The Court can find no exceptional circumstances or compelling circumstances to depart from the minimum sentence which is prescribed by legislation.'

[13] It is clear that, in equating substantial and compelling circumstances with exceptional circumstances, the trial judge misdirected himself and applied the incorrect test. In *S v Malgas*,[2] Marais JA held specifically that this was an incorrect approach:

> 'To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial or compelling.'

[14] There is a further misdirection in the trial judge's approach to whether substantial and compelling circumstances were present: he decided that no

1 Record, 269-270.
2 2001 (1) SACR 469 (SCA), para 10.

such circumstances were present in the absence of proper consideration of, and evidence on, the objective gravity of the offence. In *S v Abrahams*,[3] Cameron JA held that 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'.

[15] No attempt was made by the trial judge to grade the seriousness of the particular rape that he was concerned with. He was also not able to do this properly because, while he could have made findings on the degree of violence used, the fact that no weapons were used to force the complainant's submission, the physical injuries caused by the rape, and so on, he had little evidence of relevance in respect of the psychological effects of the rape on the complainant and the nature and duration of such effects. It has been held by Mpati JA, in *Rammoko v Director of Public Prosecutions*,[4] that such evidence is relevant to the question of sentence and ordinarily should be led:

> 'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time, the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present. In the present matter, evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.'

[16] In this matter some evidence was given by the complainant's mother

3 2002 (1) SACR 116 (SCA), para 29.
4 2003 (1) SACR 200 (SCA), para 13.

about the effect of the rape on the complainant but it was so vague and so sparse as to be of little help to the trial judge. It was no substitute for properly led expert evidence presented by a psychologist who had interviewed the complainant. Such evidence was, in my view, necessary in this case: as Mpati JA held in *Rammoko*,[5] when the State failed to lead such evidence, the trial judge, who, after all had to 'satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances [were] present', could have and, in my view, should have, directed that the complainant be interviewed by a psychologist or other appropriately qualified or trained person on the effects of the rape on her.

[17] For the above reasons, it will be necessary to interfere with the sentence imposed upon the first appellant. The order will be formulated below.

(b) The Second Appellant

[18] The second appellant was 17 years old at the time that the offence was committed, having been born on 25 September 1983. As he was thus between the ages of 16 and 18 he was not automatically liable to life imprisonment as the first appellant was: s51(3)(b) of the Criminal Law Amendment Act provides that if a court decides to impose a sentence prescribed by the Act 'upon a child who was 16 years of age or older, but under the age of 18 years , at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings'. The effect of this provision is that although 'the Legislature has entitled the presiding officer to impose the prescribed sentence upon a child' who falls within the specified category 'it clearly intended that such sentence should only be imposed on youths under special

5 Supra, para 14.

circumstances'.[6]

[19] The trial judge found that there were no factors present that could justify the imposition of a life sentence upon the second appellant but he sentenced him to 20 years imprisonment. While this sentence appears to me to be rather severe, it is not necessary to make any finding in that regard because I am of the view that an irregularity is present that necessitates the setting aside of the sentence irrespective of its severity.

[20] In *S v Z en vier ander sake*[7] Erasmus J set out guidelines for presiding officers called upon to sentence youthful offenders. For present purposes, one of the guidelines is of application. It reads as follows:[8]

> 'Die hof sal dinamies handel ten einde volledige besonderhede van die beskuldigde se persoonlikheid en sy persoonlike omstandighede te bekom. Die hof sal waar nodig 'n voorvonnisverslag van 'n proefbeampte en/of 'n korrektiewe beampte aanvra. So 'n verslag is aangewese waar die beskuldigde 'n ernstige misdryf verpleeg het, óf vorige veroordelinge het. Dit is onvanpas om 'n beskuldigde gevangenisstraf, ook opgeskorte gevangenisstraf, op te lê sonder die voordeel van 'n voorvonnisverslag.'

[21] The above-cited guideline is now generally applied, at least in respect of youthful offenders who are younger than 18 years of age,[9] and it has been approved by the Supreme Court of Appeal: in *S v Peterson en 'n ander*[10] Olivier JA held that even when imprisonment is appropriate, such a sentence

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6 Du Toit, De Jager, Paizes, Skeen and Van Der Merwe *Commentary on the Criminal Procedure Act* Cape Town, Juta and Co: 1987, 28-16I to 28-16J (revision service 28, 2002). See generally on the sentencing of youthful offenders for offences contemplated by s51, *S v Nkosi* 2002 (1) SACR 135 (T).

7 1999 (1) SACR 427 (E).

8 At 441c-d.

9 See for example *S v Kwalase* 2000 (2) SACR 135 (C); *S v J* 2000 (2) SACR 310 (C); *S v Van Rooyen* 2002 (1) SACR 608 (C). See too *S v Luwani and another* ECD 13 March 2003 (CA and R 693/02) unreported.

10 2001 (1) SACR 16 (SCA), para 20.

should not be imposed on a youthful offender 'sonder behoorlike voorvonnis-verslae en getuienis aangaande die persoonlikheid, persoonlike omstandighede en agtergrond, en 'n ernstige oorweging van al die toepaslike alternatiewe vonnisopsies nie'.

[22] The failure on the part of the trial judge to sentence the second appellant without having regard to a pre-sentence report and the oral evidence of its author is an irregularity that requires the sentence imposed upon the second appellant to be set aside. I would add that even though the first appellant is older than the second appellant, he was nonetheless young when the offence was committed. In the circumstances, it is necessary for the trial court to have a pre-sentence report in respect of the first appellant as well and to hear the evidence of the person who drafted it.[11]

[C] THE ORDER

[23] In the result, the following order is made:

a) the second appellant's appeal against conviction is dismissed and his conviction is confirmed;
b) the first appellant's appeal against sentence is upheld and the sentence of life imprisonment imposed on him is set aside;
c) the second appellant's appeal against sentence is upheld and the sentence of 20 years imprisonment imposed on him is set aside;
d) the matter is remitted to the trial court for it to reconsider the sentencing of the appellants and to –

i) direct that the complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, both presently and in the future, to consider any report written by such person and to call such person to give evidence;

11 See *S v Luwani and another*, supra.

ii) direct that a pre-sentencing report be obtained in respect of the first appellant and the second appellant, to consider such reports and to call the author or authors of such reports to give evidence.

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C Plasket

Acting Judge

I agree

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A Erasmus

Judge

I agree

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D Chetty

Judge