IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER A508/2008

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

21 SEPTEMBER 2009
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SIGNATURE

In the matter between

PAPIKI JOHANNES TLADI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] The appellant was convicted of the rape read with the provisions of s 51 (1)(b) of the Criminal Law Amendment Act 105 of 1997 (the Act) in the

regional court sitting in Randfontein and sentenced to life imprisonment. It was further ordered that the appellant not be considered for parole prior to him having served at least 25 years imprisonment. The appellant has exercised his automatic right of appeal against conviction and sentence which is the appeal before us.

[2] I shall first deal with the conviction. It is not in dispute that the appellant and the complainant, M T, who at the time of the incident was 18 years of age, had known each other at the time of the incident and that sexual intercourse had occurred during the night of 5 April 2008. The complainant's consent to sexual intercourse or the absence thereof was the principal issue both in the court *a quo* and on appeal.

[3] A brief summary of the complainant's evidence is the following. During the evening of the incident the complainant and her friends attended a tavern. On their way home the appellant who was at the back of the group called the complainant and accused her of spreading the rumour that he was HIV positive. She denied having done that. He held her by her jacket and her friend, Zama by the hand and took them both to an open veldt. There he assaulted Zama and then chased her away. Zama left and the appellant ordered the complainant to walk on. She refused. She screamed and he tripped her which caused her to fall down. He put his hand on her mouth and dragged her to a tree. He ordered her to undress. She decided to oblige. He again tripped her and she fell down on her jacket which the appellant had spread open on the ground. He undressed and raped her. He then took her to his own house where he again raped her thrice: twice while she was lying on his bed and once on the floor. In between she urinated on his bed and he slapped her through the face. He told her not to say anything about the rape and unlocked the door to allow her to go. She ran to her house and reported the rape to her mother. Her mother as well as her uncle and brother who were also there knew the appellant and they went searching for him. Having found

him he was confronted with the allegations of rape but denied having raped the complainant and told her mother that they had had a love relationship for the past six months and that this had not been the first time for them to have sexual intercourse.

[4] Two further witnesses were called by the State to testify: firstly, Zama Nxumalo, the friend of the complainant I have earlier referred to, and, secondly, her mother S T. I do not consider it necessary to traverse their evidence. Suffice to say that their evidence, on all material aspects fully corroborates the version of the complainant.

[5] This brings me to the version of the appellant. He admitted having had sexual intercourse with the complainant twice on the day of the incident. Not only did she consent thereto he said, she in fact seduced him to have sexual intercourse. The starting point is to consider the medical evidence set out in a so-called J88 from, the contents of which was admitted, and which was handed in by consent. It effectively draws a line through the version of the appellant. Firstly, the report confirms the complainant's evidence that she was a virgin. The appellant's version that they had been involved in a sexually active relationship for six months prior to the rape therefore is clearly an untruth. Secondly, serious injuries to the complainant's private parts were detected upon examination, which led to the conclusion by the medical practitioner that 'clinically there is evidence of forced genital penetration'. Neither the injuries nor the conclusion I have referred to can be reconciled with the appellant's version of consensual intercourse. Nor can the complainant's conduct of reporting the rape after the incident in any way be reconciled with consensual intercourse. The evidence overwhelmingly established that she was raped. The contentions raised on behalf of the appellant before us all endeavoured to advance speculative alternatives the complainant could have followed to escape being raped or to raise alarm. The arguments are without merit and certainly overlook the intimidation of a much older male dominant person over a defenceless young woman subdued to the

relentless aims of sexual self gratification. The appellant's evidence of consensual intercourse was rightly rejected by the court *a quo* as false. For these reasons the conviction must stand.

[6] I turn now to the sentence of life imprisonment. Section 51 of the Act provides:

> **51. Discretionary minimum sentences for certain serious offences.—**
> (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

Part 1 of Schedule 2 reads

> Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007[1]-
> (a) when committed-
> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice.

In the present matter the complainant was raped on four separate occasions. The minimum sentence provisions I have referred to accordingly are of application. The principles laid down in *S v Malgas* 2001 (1) SACR 469 (SCA) in the approach to sentencing under the Act are well-entrenched. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) para [15] Nugent JA in dealing with the requirement of substantial and compelling circumstances, held:

> It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.

The facts of this matter reveal a rape of extreme seriousness. Not only was the complainant's privacy and personal integrity violated, she suffered serious psychological as well as physical harm in the process. The professional pre-sentence report indicates the extent to which the complainant has been psychologically injured. The significance of the emotional impact of the rime

[1] **3. Rape.**—Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.

on her is apparent from sleepless nights she experienced for several weeks after the incident and the help and assistance she sought and received in counselling from her teacher. Her school performance deteriorated as did her interaction with friends resulting in her having become withdrawn. More positively she tested negative for HIV Aids and has since become interactive with other victims of rape. She sustained physical injuries to her hip and face consistent with her evidence that she was dragged for a considerable distance and hit in the face by the appellant. She lost her virginity. The rape caused much pain to her private parts. The medical examination conducted some 14 hours after the rape confirmed loss of virginity and further revealed serious internal gynaecological bruising and injuries from which she was still bleeding.

[7] The appellant's personal circumstances can be gleaned from the pre-sentence report. At the time of the commission of the offence the appellant was 31 years of age. He is a first offender. He did not have the benefit of a sophisticated background. He left school after finishing grade 7 and thereafter earned an income as a farmer's assistant and hiring out his services as a painter and plumber. Although the appellant is not married he maintained two dependant children from different mothers. The probation officer who compiled the pre-sentence report set out that pursuant to an investigation into the personal circumstances of the appellant, he showed no remorse and expressed anger at the complainant who he maintained had betrayed him.

[8] It is hardly necessary to emphasise the seriousness of the crime of rape. The facts of this matter show an appalling and perverse abuse of male power. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. It strikes a blow at the very core of our claim to be a civilised society. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. In the much quoted judgment of Mahomed CJ in *S v Chapman* 1997 (3) SA 341 (SCA) 345D-E the learned Judge held that:

> The courts are under a duty to send a clear message to the accused in rape cases, to other potential rapists and to the community that the courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those right.

The appellant indicated scant regard for the dignity of his victim. He deprived her of her freedom of movement for a considerable time. He used violence towards her in a most derogatory manner. The absence of more serious physical harm the appellant could have inflicted in my view is not worthy of consideration. The appellant must be sentenced for the crime he has committed, after due consideration of all the relevant circumstances, in respect of which speculative consequences of what the appellant could have done are of little relevance. Having again considered the well-known triad in the sentencing process I remain unpersuaded that anything has been shown to permit the appellant to escape the extreme penalty of the law. No misdirections were committed by the court *a quo* nor is the sentence disproportionate to the crime. Any lesser form of punishment in the circumstances of this case in my view, would render the justice system of our country suspect.

[9] The magistrate as part of the sentence imposed a non-parole period of 25 years. Section 276B of the Criminal Procedure Act 51 of 1977 empowers the court as part of the sentence, in the event of imposition of a sentence in excess of two years, to fix a non-parole period not exceeding two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter. In *S v Williams; S v Papier* 2006 (2) SACR 101 (C) para [15] it was held that the provisions of s 276B should be applied in exceptional circumstances only. The question arising is whether the fixing by the court of a non-parole period where life imprisonment is imposed, is proper. The Correctional Services Act 111 of 1998 provides for the length and form of sentences. Section 73(1)(b) provides that a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life. Section 73(6)(b)(iv) further provides that a person sentenced to life imprisonment may not be placed on parole until he or she has served at least 25 years of the sentence. The minimum length of life

imprisonment (except where the prisoner reaches the age of 65 years) accordingly is 25 years. The non-parole period applicable in regard to the sentence imposed on the appellant in terms of this section of the Act, therefore is 25 years. In view of the statutory provisions it was neither necessary nor did the court *a quo* have the power to fix the non-parole period of the sentence. It follows that the ordering of the non-parole period must be set aside.

[10] In the result the following order is made:

1. The appeal against conviction and sentence is dismissed.
2. The order of the court *a quo* fixing the non-parole period of the sentence at 25 years is set aside.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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WH TRENGOVE
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***Ms F JOSLIN***
APPELLANT'S ATTORNEYS	***JHB JUSTICE CENTRE***
COUNSEL FOR THE RESPONDENT	***ADVG MARKET***
DATE OF HEARING	***21 SEPTEMBER 2009***
DATE OF JUDGMENT	***21 SEPTEMBER 2009***