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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)

CASE NO: A287/2013

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

6 FEBRUARY 2014 **FHD VAN OOSTEN**

In the matter between

SIMPHIWE NDEBELE **APPELLANT**

and

THE STATE **RESPONDENT**

Appeal - against sentence of 18 years' imprisonment effectively on two charges of rape - seriousness of the crime of rape - personal circumstances of appellant - nothing out of the ordinary – 5 previous convictions - no misdirections by trial court – no grounds for interference on appeal - appeal dismissed

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J U D G M E N T

VAN OOSTEN J:

[1] On 10 September 2012 the appellant was convicted in the Randfontein regional court on two charges of rape. The charges were taken together for purpose of sentence and he was sentenced to 18 years' imprisonment. The appellant applied for leave to appeal against sentence only which was refused by the court a quo. On petition to this court by the appellant in person for leave to appeal against the sentence only he was granted leave to appeal against conviction and sentence. Although I doubt the competency to grant leave to appeal against conviction where this was not sought in the petition, I have decided in the interests of justice to also deal with the conviction.

[2] The evidence against the appellant was overwhelming. The appellant admitted having had sexual intercourse with the complainant. His defence was consent. The complainant testified as well as her boyfriend, F[…] M[…], to whom she had made the first report of having been raped. Her evidence briefly was that the appellant, who was unknown to her and armed with a knife, on 11 September 2011, shortly after midnight, forcefully took her to an open veldt behind a filling station, threatened to kill her and proceeded to rape her twice. The medical report (J88) handed in by consent recorded that the complainant sustained gynaecological injuries "suggestive of vaginal penetration beyond the hymen". The injuries she sustained are consistent with her version. The evidence of M[…] corroborated her version in all material aspects. DNA results obtained from swabs taken from the complainant positively implicated the appellant.

[3] The appellant testified that he had met the complainant at Mohlape's tavern. The appellant proposed sexual intercourse to her. They proceeded to another *shebeen* but realising it was already closed, instead went to a 'certain corner house' (shack) in Sandile street to have sexual intercourse there. The complainant agreed to sexual intercourse for money. The appellant did not mention the amount that was agreed on although the amount of R250 was put to the complainant in cross-examination. The appellant however testified that he had no money on him but that did not discourage her from continuing. He handed her an expired post office card as security for payment, which was agreed would be made on 1 October, at Motlani's place. They then had sexual intercourse, but only once. He subsequently, on the agreed date, attended Motlani's place to honour his undertaking to pay but the complainant failed

to turn up. The reason for the complainant laying an alleged false charge of rape, he maintained, was that she had not been paid. The appellant's version was seemingly improbable and palpably false: the complainant clearly did not know him except that he, at her request, after the incident, gave her his first name and informed her that he resided in Rakala. She relayed this information to the police who requested her to draw an identikit of the appellant which she did. The complainant testified that she was, prior to the incident, on her way home which was some 200 meters away from where it had occurred. Had she agreed to sexual intercourse, as the appellant would have it, it is unthinkable, as indeed the complainant explained, that she would have preferred an open veldt at that time of the morning to the comfort of her own home or some unknown shack as the appellant testified. The appellant falsely denied having had sexual intercourse twice. The complainant's version that sexual intercourse occurred twice was not challenged in cross-examination. There was moreover, on the appellant's version, no reason for her to have reported the incident to the police later that morning and moreover to subject herself to a medical examination. Lastly, the appellant's version cannot be reconciled with the medical evidence. It was correctly rejected as false by the court a quo. It follows that the appellant was correctly convicted.

[4] As to sentence the appellant in terms of the minimum sentence legislation faced a sentence of life imprisonment. He was 37 years old at the time and the father of two teenagers, aged 12 and 13 years. His personal circumstances reveal nothing out of the ordinary. No less than 5 previous convictions ranging from theft and robbery to murder, in the period from 1988 to 2001, are recorded in the SAP 69. An aggregate of 22 and a half years' direct imprisonment was imposed. The regional magistrate found substantial and compelling circumstances warranting a lesser sentence than life imprisonment in firstly, the fact that the appellant suffered from epilepsy and, secondly, that the complainant had not suffered serious physical injuries. The last mentioned circumstance being regarded as substantial and compelling within the meaning of the minimum sentence regime has quite rightly been the subject of much controversy. The offence of rape is considered by our courts as one of the most serious crimes that should attract severe punishment. In *State v Chapman* 1997 (3) SA 341 (SCA) 344 the Court remarked:

'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.'

More recently, in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577*g-i* the Court stated:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society.'

The sentence imposed can only be described as lenient. No misdirections were alluded to, none exist and there are accordingly no reasons for this court to interfere with the sentence. It follows that the appeal must fail.

[5] In the result the appeal is dismissed.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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R MONAMA
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV (MS) M BOTHA***
COUNSEL FOR THE RESPONDENT	***ADV G MARKET***
DATE OF HEARING	***6 FEBRUARY 2014***
DATE OF JUDGMENT	***6 FEBRUARY 2014***