IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 10 09 2012 SIGNATURE

10/9/2012

CASE NO: A1007/2011

In the matter between

JOHANNES RASENCHERI Appellant

And

THE STATE Respondent

JUDGMENT

MATOJANE J

[1] The appellant was convicted of two counts of rape and of assault with intend to do grievious bodily harm by a regional court on 30 January 2007. The proceedings were stopped and the matter was transferred to the High Court in terms of section 52(1)(b) of the Criminal Law Amendment Act, Act 105 of 1997 for the imposition of sentence. That Court (per Snyders J) sentenced the appellant to life imprisonment in terms of section s 51(1) of the Act.

[2] The regional court found that the appellant had raped the complainant twice during the course of the night. Rape when committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice', attracts a minimum sentence of life imprisonment unless the court is satisfied that substantial and compelling circumstances exists which justify the imposition of a lesser sentence.

[3] The appellant applied for leave to appeal in respect of both conviction and sentence. Leave to appeal was granted in respect of sentence only.

[4] The evidence which was accepted by the regional court was that the complainant, a 56 year old woman knew the appellant well and they worked on the same farm. On 25 November 2005, complainant arrived at her home at about midnight. Appellant approached her from behind, grabbed her and suggested that they have sexual intercouse, when she refused, appellant brutally assaulted her, and dragged her to his house, where he held her captive and raped her twice during the night.

[5] From the photos that were admitted into evidence and the J88 medical report, it appears that the complainant had abrasions and lacerations on the head, face and chest and bled through the vagina as a result of internal bruises.

[6] The appellant's version, rejected by the court, was that he had an affair with the complainant. On the 25 November 2005 he and complainant consumed liquor at the home of one Piet Tabie. Complainant left before appellant. The appellant went to his home and later to complainant's house where he found her lying on the stoep. According to him, the complainant was already assaulted. They went to appellant's house where they had consensual intercourse twice.

[7] It was submitted on behalf of the appellant that failure by the trial court to warn appellant of the applicability of the provisions of section 51(1) constitutes a substantial and compelling circumstance justifying the imposition of a sentence less than life imprisonment. Counsel argued that appellant was only warned of the provisions of of section 51(2) of the act in the charge sheet, as well as during the pleading phase.

[8] This submission is, in my view, about the form of the scheduled offence of no substance. The records reads:

> "COURT: Madam you have explainec to him the implications of the Criminal Law Amendments Act 105 of 1997? Ms Kruger you have explained the implications?
>
> MS KRUGER: Yes your worship that a person that is intoxicated cannot give consent but he would say that she was not so intoxicated that she did not know what was going on he had a conversation with her, he spoke with her, he even asked her before they had consent that can he have intercourse with him and she accepted it your worship so according him she was under the influence but she was not so that she did not understand what she was doing so that he considers that to be with consent your worship.
>
> COURT: I am also referring to the provisions of section 105 of 1997 seeing that the state alleges that she was rape [sic] more than once the minimum sentence will be applicable.
>
> MS KRUGER: Your worship I have discussed it with the accused and he does understand your worship."

[9] There can be no doubt that appellant was made aware during pleading phase long before sentencing phase that the minimun-sentencing provision that the state sought to invoke was that which

prescribed life imprisonment. This fact, in my view, distinguishes this case from **S v Mashinini** 2012 (1) SACR 604 that appellant relied upon. I therefore disagree with counsel's submission that the applicable sentence is 10 years imprisonment per rape count.

[10] The following aggravating factors must be taken into account in determining an appropriate sentence. Appellant raped the complainant twice after brutally assaulting and injuring her. He kept her captive for the night and would not let her out to attend to her wounds. Appellant did not show any remorse.

[11] The following factors taken cumulatively weigh in appellant's favour, appellant was 30 years old and was in custody for a period of 1 year and 11 months before sentence was imposed. He was a first offender for rape and was gainfully employed as a farm labourer and was under the influence of liquor at the time of the commission of the offence, it is therefor possible that appellant can be rehabilitated.

[12] In my view, the sentencing court did not accord suffient weight to the mitigatory factors that I have mentioned above, which constitute substantial and compelling circumstances rendering the sentence of life imprisonment disproportionate. In the

circumstances, this court is entitled to interfere with the sentence on appeal and to replace it with a sentence it considers appropriate.

[13] In all the circumstances, I consider a sentence of 20 years imprisonment just and appropriate under the circumstances

[14] The appeal against sentence is upheld. The sentence imposed by the court below is set aside and replaced with the following:

1. The accused is sentenced to 20 years imprisonment.

2. The sentence is ante-dated in terms of section 282 of the Criminal Procedure Act, Act 51 of 1977 to the 21 August 2007.

K E MATOJANE
JUDGE OF THE HIGH COURT

I agree

P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

I agree

J HIEMSTRA
ACTING JUDGE OF THE HIGH COURT