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

CASE NO: A501/2015

DATE DELIVERED: 28/10/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

IN THE MATTER BETWEEN

ESAU NICHOLAS MPHUTHI

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN NIEKERK, AJ

[1] Appellant was charged in the Regional Court, Bethal in Mpumalanga on one count of rape and one count of assault. The Appellant pleaded guilty to the charge of assault, and pleaded not guilty to the charge of rape. On the 1st of August 2014 the Appellant was found not guilty on the charge of rape, and was found guilty on the charge of assault and in terms of Section 51(2) of Act 105 of 1997 the Appellant was sentenced to 10 years imprisonment. The charges supra related to an incident that took place on the 19th of April 2009 near Bethal in eNzinoni when the complainant was 15 years old at the time. During the proceedings in the Court a quo on the 29th of July 2014, the defence prepared a statement in terms of Section 112 of the Criminal Procedure

Act which was read into the Record in the Court a quo and reads as follows:

In the Regional Division of Mpumalanga held at Bethal. Case number 15/13. In the matter between the state versus Esau Nicolas Mphuthi, the accused person. This is a statement in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977, as amended. I the undersigned, do hereby make oath and state. I am the accused in this matter and I understand fully the nature of the charge against me.

I plead guilty to the charge of assault with intent to do grievous bodily harm. I have been advised of my rights by my legal representative, however I waive such right and elect to plead guilty freely and voluntarily without any undue influence.

I would like to make the following submissions. On 19 April 2009, I was at N. Tavern when I met with S. M., a black female person to whom I proposed love. We were drinking alcohol and she accepted my proposal.

Later on that evening, she left the tavern without informing me and my friends were laughing at me. I got angry and embarrassed. I then went after her. When I found her, I assaulted her with fists and I hit her with a brick.

I admit that my conduct on the day in question, was unlawful and cannot be justified. I admit that I was in the district of Bethal when committing this offence. I admit that I had no right to assault the complainant as such. I have no defence in law.”

[2] On appeal it was submitted on behalf of the Appellant that the Court a quo erred in underemphasized the seriousness of the defence which the Appellant has committed whilst the personal circumstances of the Appellant were underemphasized. It was submitted that in imposing such a lengthy period of imprisonment the Court a quo erred as the sentence is shockingly harsh and induces a sense of shock.

[3] I do not agree. The Appellant’s motive for assaulting the complainant by inter alia hitting her with a brick on the head and causing serious injuries was, according to his evidence, as revenge for his embarrassment in front of his friends who drank with him in a tavern due to the fact that the complainant, to whom he so-called “offered love” during the evening departed from the tavern without him. Considering the fact that the complainant was a 15 year old girl, whereas the accused was 35 years old at the time of the incident, it is rather the conduct of the Appellant that induces a sense of shock than the sentence which was imposed and which is in terms of applicable legislation the minimum sentence to be imposed in the circumstances. It is patently

clear from the Record that the Court a quo considered the Appellant's personal circumstances, and on no basis can it be found that the Court a quo misdirected itself in applying the minimum prescribed sentence in terms of the applicable legislation.

[4] I propose the following order: the appeal is dismissed.

P A VAN NIEKERK
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

P.A. Van Niekerk
Acting Judge of the High Court,
Gauteng Division, Pretoria.

Hearing: 24 October 2016

Judgment: 8 October 2016

N JANSEN VAN NIEUWEHUIZEN
Judge of the High Court,
Gauteng Division, Pretoria.

Hearing: 24 October 2016

Judgment: 28 October 2016

APPEARANCE ON BEHALF OF THE APPELLANT:

Advocate M.B. Kgarare

APPEARANCE ON BEHALF OF THE STATE:

Advocate M.B. Moloi