MOH12/132

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS29/2003

DATE: 7-3-2003

In the matter of:

THE STATE

versus

LWANDILE NTHONYWENI

S E N T EN C E

MOTALA, J: Earlier today I confirmed the conviction of the accused in the court below and indicated that I would furnish my reasons later. These are the reasons.

The accused was charged in the Regional Court with one count of rape. The State alleged that on 30 August 1998 he raped the complainant who was then under the age of 12 years. The accused pleaded not guilty. In his plea explanation he admitted having sexual intercourse with the complainant, but despite the averment in the charge sheet that the complainant was under the age of 12 years, he alleged that he did so with her consent. The accused was found guilty of rape on 19 July 2001. He was then referred to this Court for sentence in terms of section 51 of Act 105 of 1997. The matter was placed before me on 14 February 2003. As the complainant was not available the matter was postponed to 21 February 2003. Her testimony was essential as the record of the proceedings in the Regional Court indicated that before she gave evidence, she was warned to tell the truth in terms

of section 164 of the Criminal Procedure Act, i.e. without her being examined under oath in terms of section 162 of the Act or without her making an affirmation in terms of section 163 of the Act.

In terms of section 164 of the Act, a witness may be warned to tell the truth without taking the oath or making an affirmation only if the presiding officer is of the view that the witness is unable to understand the nature and import of the oath or affirmation. Before warning the complainant in terms of section 164 of the Act, the magistrate did not enquire as to whether or not she understood the nature and import of the oath or of an affirmation. The proceedings in the court *a quo* were, in that respect, irregular. In S v B 2003(1) SACR 52 (SCA) it was held that in such a case the court to which a matter has been referred for sentence in terms of Act 105 1997 may itself call the complainant, and after the provisions of sections 162-164 have been complied with, to ask her, *inter alia*, to confirm whether she had given truthful evidence at the trial.

On 21 February 2003 I called the complainant to give evidence. I questioned her as to whether she understood the nature and import of the oath. I was satisfied that she did and she was duly sworn in. She confirmed that what she said in the court *a quo* was the truth. In the circumstances I was satisfied that the accused was correctly found guilty and that the accused's version that the complainant consented to have intercourse with him was correctly rejected by the trial magistrate. Even ignoring for the moment, for reasons which will appear later, that being under the age of 12 years, according to the charge sheet and the undisputed evidence of her mother, she was in law unable to give such

consent.

The magistrate's finding that the complainant did not consent to having sexual intercourse with the accused makes it unnecessary to consider the statement in the report of the social worker Mr Ntuli, that the complainant was born a year earlier than the year deposed to by her mother. Even if the complainant was over the age of 12 years, the accused was correctly convicted.

I turn now to the question of sentence. Evidence in that regard was given by the complainant, the accused and by the social worker, Mr Ntuli. There is some uncertainty as to whether Act 105 of 1997 applies in this matter in that the accused was not advised, either in the charge sheet or otherwise, that the State intended to rely on that Act. However, he was legally represented. In S v B, *supra*, the Supreme Court of Appeal held that the Act did not apply in that case because neither the accused nor his legal representative had been advised that the Act was to be relied on by the State. That case is distinguishable in that the charge sheet in that case lacked the factual averment which would have made the Act applicable so that even a legal representative would not have known that the State was going to rely on that Act.

Here it is clear from the averment that the complainant was under the age of 12 years that the Act was applicable as the Act prescribes a minimum sentence for the rape of any girl under the age of 16 years. It may be going too far to hold that in every case an accused must be informed of the Act, even when he is legally represented. Each case has to be decided on its own facts. The question ultimately is whether the

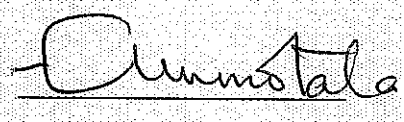
accused had a fair trial. In this matter I will assume in favour of the State that the Act does apply to this matter.

It is now established law that in order to determine whether there are substantial and compelling circumstances justifying the imposition of a sentence other than the prescribed sentence, which in this case is life imprisonment, the court may take into account all the factors it has always taken into account. The accused's personal circumstances are on record and I do not intend to set them out, except to emphasise that he has no previous convictions. That is an important factor and must be given due weight. Furthermore, he has been in custody for more than four and a half years. The Act provides that a sentence of life imprisonment may not be backdated. In my view, the fact that the accused has no previous convictions and the fact that he has been in custody for so long, whatever the reason for that delay, taken together constitute substantial and compelling circumstances that justify the imposition of a lesser sentence than one of life imprisonment. The accused has expressed deep remorse for what he has done, a factor must also be given due weight.

On the other hand there are certain aggravating circumstances in this matter. The complainant was slapped by the accused. He threatened her with a knife. Her evidence in that regard was accepted by the trial magistrate and there is no adequate basis on which I can interfere with that finding. Indeed, the complainant gave evidence before me and confirmed that she feared for her life as the accused had threatened to kill her. During her testimony she was clearly distressed

at having to recall what happened to her and began to cry. Although after that incident she formed a relationship with a male person and her relationship with men may not have been severely affected, and although she has not suffered serious physical injury, there can be no doubt that she was traumatised and will be affected to some degree or other by her experience. A long period of imprisonment is, therefore, the only appropriate sentence. The community demands, quite rightly, that the courts impose heavy sentences on those committing crimes of violence, especially against women and children.

Taking all the circumstances into account, and especially in the light of the fact that the accused is a first offender who has been in detention for more than four and a half years, he is sentenced to 14 years' imprisonment.



MOTALA, J