

SOUTH AFRICA / JUDGMENT

S v Tshabangu (A952/02) [2005] ZAGPHC 73 (28 July 2005)

[2005] ZAGPHC 73

COURT

High Courts - Gauteng

BEFORE

Schwartzman

CASE / FILE NUMBER

A952/02

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

BEGIN DEUR 'N "HEADER" TE MAAKSneller Verbatim/lrIN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)

BEGIN DEUR 'N "HEADER" TE MAAK

Sneller Verbatim/lr

IN THE HIGH COURT OF SOUTH AFRICA

(

WITWATERSRAND LOCAL DIVISION

)

JOHANNESBURGCASE NO: A952/02

JOHANNESBURG

CASE NO: A952/02

2005-07-28

In the matter between

TSHABANGU, OUPA WILLIAM Appellant

and

THE STATE Respondent

J U D G M E N T

_____SCHWARTZMAN, J: On 14 April 2002 the appellant an adult male, was convicted by a regional magistrate of raping a girl who was under the age of 16. The charge sheet alleges that when the offence was committed on 8 April 2001 the complainant was a 15 year old. The appellant was also convicted on a second charge of kidnapping the complainant as well as a third charge of assault with the intent to do grievous bodily harm by burning her with a cigarette. Having convicted the appellant on these three charges the regional magistrate who was aware of the minimum sentence for rape, went on to take the rape and kidnapping convictions as one for the purpose of sentence. On these charges the appellant was sentenced to 15 years in prison. On the assault with intent to do grievous bodily harm charge he was sentenced to two years, a total of 17 years imprisonment. The appellant then appealed against his convictions and sentences. The fundamental irregularity committed by the magistrate was his failure to have regard to the provisions of section 52(1) of Act 105 of 1997 read with part 1 of schedule 2 thereto which in summary requires that on conviction for the rape of a person under 16 a regional magistrate must halt the proceedings and refer the accused to a High Court judge for sentence on all charges. If a judge confirms the conviction he or she will determine the sentence to be imposed on the accused. After an inquiry into whether there are substantial and compelling circumstances the judge will decide whether to impose life imprisonment or a lesser sentence. Appropriate sentences will then be imposed on any other count. This is not the first occasion on which such an irregularity has occurred. In *S v Liau* 2005 (1) SACR 498(T) a two bench court of the Transvaal Provincial Division found in identical circumstances that the sentence imposed by the regional magistrate was a nullity. The court went on to find and I quote from the English translation of the headnote:

SCHWARTZMAN, J

: On 14 April 2002 the appellant an adult male, was convicted by a regional magistrate of raping a girl who was under the age of 16. The charge sheet alleges that when the offence was committed on 8 April 2001 the complainant was a 15 year old. The appellant was also convicted on a second charge of kidnapping the complainant as well as a third charge of assault with the intent to do grievous bodily harm by burning her with a cigarette. Having convicted the appellant on these three charges the regional magistrate who was aware of the minimum sentence for rape, went on to take the rape and kidnapping convictions as one for the purpose of sentence. On these charges the appellant was sentenced to 15 years in prison. On the assault with intent to do grievous bodily harm charge he was sentenced to two years, a total of 17 years imprisonment. The appellant then appealed against his convictions and sentences. The fundamental irregularity committed by the magistrate was his failure to have regard to the provisions of section 52(1) of Act 105 of 1997 read with part 1 of schedule 2 thereto which in summary requires that on conviction for the rape of a person under 16 a regional magistrate must halt the proceedings and refer the accused to a High Court judge for sentence on all charges. If a judge confirms the conviction he or she will determine the sentence to be imposed on the accused. After an inquiry into whether there are substantial and compelling circumstances the judge will decide whether to impose life imprisonment or a lesser sentence. Appropriate sentences will then be imposed on any other count. This is not the first occasion on which such an irregularity has occurred. In

S v Liao

2005 (1) SACR 498(T) a two bench court of the Transvaal Provincial Division found in identical circumstances that the sentence imposed by the regional magistrate was a nullity. The court went on to find and I quote from the English translation of the headnote:

2005 (1) SACR 498

"Where the accused thereafter appeals she or he must be regarded as not having been sentenced such appeals must be dealt with as follows: in the first place the Court must decide whether it is in the interests of justice to hear the appeal. At that stage the court hears argument on the appeal against the conviction and considers whether the appeal should succeed. If the appeal against conviction must succeed the appeal is heard and the conviction and sentence is set aside. If at that stage the Court is of the opinion that the appeal has no prospect of success it is struck from the roll. In terms of the Court's review competency in terms of section 304(4) of the Criminal Procedure Act the regional court's sentence is set aside and an order is made which the regional court should have made."

The only difficulty I have with this formulation of how an appeal court should respond to the irregularity is that I consider it inadvisable for a court of appeal at that stage of the proceedings to express an "opinion that the appeal has no prospect of success". I say this because in terms of section 52(1) of the Act it is for the single judge to whom the regional magistrate refers the matter to decide whether the accused's conviction should or should not be confirmed. In reaching a decision on this issue such judge has the right in terms of section 52(1) of the Act to call for further evidence. The judge's discretion on these issues should not be affected or influenced by any judgment or opinion of a court of appeal on the issue. After a conviction has been confirmed and following sentence by that judge, the accused has rights of appeal with which I need not deal. I also do not see the need to strike the appeal from the roll before making an order in terms of section 304(4) of the Criminal Procedure Act.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2005/73.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-tshabangu-unknown-topic-agphc-2005>

Prepared on 11 October 2026 · Esheria