

SOUTH AFRICA / JUDGMENT

# Thophi v S (CA&R75/17) [2017] ZAECMHC 41 (17 October 2017)

[2017] ZAECMHC 41

## COURT

Eastern Cape High Court, Mthatha

## BEFORE

S M Mbenenge, N G Z Mjali

## CASE / FILE NUMBER

CA&amp;R75/17

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CA

&amp; R: 75/17

In

the matter between:

ZUKILE

THOPHI

APPELLANT

And

THE

STATE

RESPONDENT

EX-TEMPORE

## JUDGMENT

MBENENGE ADJP:

- [1] The appellant pleaded guilty to and was, pursuant to a statement he made in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, convicted of rape on count 1 and assault with intent to do bodily grievous harm on count 2. He was thereupon sentenced, on

count 1, to undergo life imprisonment, the complainant in that count having been 9 years old at the time of the commission of the offence, and 2 years imprisonment on the assault GBH count. The sentences were ordered to run concurrently.

- [2] According to the statement deposed to by the appellant, who was 20 years old at the time, on the day in question (23 September
- 2014) the appellant had been at Yandla Locality, Mbangweni A/A. Tabankulu. He had partaken of liquor at a tavern and later went home. He was under the influence of liquor, but appreciated what was happening around himself. Upon arrival at his home he craved having sexual intercourse with Inga Songxi (the complainant). The complainant entered the room in which he was, having been in search of a book. He rose, grabbed her and stripped her clothes and panty, bent on having sex with her. He then pressed her down, inserted his penis into her vagina and engaged in thrusting movements. The complainant did not consent to all this. The appellant further admitted in the statement that his actions towards the complainant were unlawful. He continued in his statement "I admit that my actions were unlawful as there was no legal justification therefor. After all these actions (in count 1 and
- 2) I felt down, I wished I had never done them..."
- [3] The relevant medico-legal report recorded the complainant as having borne a "bruised para-urethral fold and fossa navicularis, with reddish hymen, and fresh tears and old scars".
- [4] The court a quo could not accept liquor as constituting a mitigating factor. The fact that the appellant had pleaded guilty, said the court a quo, did not constitute a mitigating factor as the appellant had been caught red-handed. The court a quo also did not accept that the cumulative effect of the appellant's personal circumstances constituted substantial and compelling circumstances justifying the imposition of a lesser sentence.
- [5] The appeal is against the life imprisonment sentence only, and is predicated principally on the contention that the sentence is severe and disproportionate to the offence. It is also contended that first offendership and the youthfulness of the appellant ought to have counted in his favour.
- [6] The immediate difficulty that one has is that the impugned sentence was imposed without a victim impact report to aid the court

understand the impact the rape had on the complainant having been obtained, and a pre-sentence report on the appellant, who is clearly a youthful offender, having been obtained. In so doing the court a quo placed itself in a position where it could not decide on an appropriate sentence (see in this regard *S v Siebert* 1998 (1) SACR 554 (A) at 558i – 559, where the then appellate division cautioned trial courts not be proceed to sentence youthful persons unless it had all the facts relevant to sentencing before it to enable it to decide on an appropriate sentence).

[7] In this matter, the youthfulness of the appellant, reducing as it did his moral blameworthiness, with the chance he has of being

rehabilitated, his offendership and the fact that the he pleaded guilty to the offence, and that the complainant was not shown to have experienced psychological trauma that was out of the ordinary that cannot be treated, in my view, cumulatively taken, amount to substantial and compelling circumstances justifying the imposition of a sentence lesser than life imprisonment (see in this regard *Maliwa & Ano v The State*, unreported judgment of this court by myself concurred in the by Jolwana AJ delivered under Case No. CA & R 04/16 on 10 October 2017; also see *S v Nkawu* by Plasket J 2009 (2) SACR 402 (ECG)).

[8] The court a quo therefore erred in concluding as it did and not finding that the cumulative effect of the appellant's personal circumstances constituted substantial and compelling circumstances. Moreover, life imprisonment in the circumstances of this case is, in my view, disproportionate to the offence.

[9] The seriousness of the offence perpetrated as it was on a young, defenceless and vulnerable girl as also the fact that it has become a scourge that threatens to destroy the moral and social fabric of our society render the appellant deserving of long term imprisonment.

[10] In the result, the life imprisonment imposed by the court a quo on count 1 is set aside and substituted with one of 20 years' imprisonment, which shall run concurrently with the sentence already imposed by the court a quo on count 2.

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S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT,

HIGH COURT, MTHATHA

I agree:

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N G Z MJALI

JUDGE OF THE HIGH COURT

Counsel for the appellants: S Njisane

Instructed by:

Legal Aid South Africa

MTHATHA

Counsel for the respondent: L Pomolo

Office of the DPP

Heard on:

13 October 2017

Ex-tempore judgment delivered on: 13 October 2017

Written judgment delivered on: 17 October 2017

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