

**IN THE EASTERN CAPE HIGH COURT
BHISHO**

NOT REPORTABLE

CASE NO. CC24/2009

DATE HEARD: 26 MAY 2010

DATE DELIVERED: 09 JUNE 2010

In the matter between:

THE STATE

and

N[...] M[...]

ACCUSED

SENTENCE

DHLODHLO ADJP:

[1] The accused was convicted on two counts, namely rape in terms of the Sexual Offences and Related Matters Act¹ and kidnapping. On 05 February 2008 he was convicted by a magistrate in Keiskamahoe of assault and also of malicious damage to property. Both counts were treated as one for the purpose of sentence and he was sentenced to imprisonment for six (6) months which was wholly conditionally suspended for two years.

[2] The accused kidnapped the complainant, a girl who was nine (9) years old then and detained her in an unoccupied house where he raped her at

¹ 32 of 2007

knife point. To the complainant it seemed that the accused was under the influence of liquor.

[3] According to the medico-legal examination report the following parts of the complainant's body were bruised: the clitoris, the urethral orifice, the frenulum of clitoris, the para – urethral folds, the labia minora and the fossa navicularis. The hymen was ragged and the vagina was bleeding. The conclusion was that her genitals had been forcefully penetrated.

[4] Personal circumstances of the accused are as follows:

4.1 He is now 27 years old. His biological parents never married. They separated when the father went to look for work in Johannesburg. His mother married another man with whom she now lives.

4.2 At the time of the commission of the offences he was under the care of his maternal grandmother.

4.3 According to a pre-sentence report by a probation officer Mrs S Yobo the accused's biological parents did not play a meaningful role in raising him and they were "both not there for him when he needed them most."

4.4 He dropped out at school in June 2007 when he was doing grade eight. The probation officer was informed by the accused's grandmother that he did not leave school because of financial constraints "but it was the beginning of his behavioural challenges".

[5] The accused was diagnosed on 24 March 2009 while in detention to be HIV – positive. According to Dr Lungelo Dibela his CD4 count was low at 65. He was started on ARV treatment on 28 April 2009. He was also diagnosed to be suffering from deep venous thrombosis. On 23 April 2010 his CD4 count had risen to 98. According to Dr Dibela he is "currently doing well" and no major opportunistic infections have developed.

[6] The complainant was diagnosed on 26 February 2010 to be HIV – positive with a CD4 count of 175. She was started on antiretroviral tablets on 26 April 2010. On 30 April 2010 her CD4 count had risen to 279. It is not known whether the complainant was infected with the virus when the accused raped her and whether or not the accused knew at that stage that he was HIV – positive.

[7] Ill health including being HIV – positive is a factor to be considered in the determination of an appropriate sentence. However the fact that an accused person suffers from some ailment does not mean that he cannot be sentenced to a prison term.²

[8] In the words of Goldstein J³:

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our legislature, and the community at large, correctly expect our courts to punish rapists very severely”⁴.

[9] In **S v Snoti**⁵ the appellant who was 29 years old had been convicted of raping a nine – year – old girl. The appellant penetrated her vagina. As a result thereof she screamed because of what she described as being terrible pain. The appellant had been diagnosed as being HIV – positive during year 2000. The trial Judge had found that the complainant was a helpless little girl

² **S v Cloete 1995(1) SACR 367(W) S v C 1996(2) SACR 503(T) S v Mahachi 1993(2) SACR 36(Z)**

³ **S v Ncheche 2005(2) SACR 386(W)**

⁴ at 395h - i

⁵ 2007(1) SACR 660(E)

of nine years. In that case the appellant knew that he was HIV – positive when he raped the victim. The trial Judge had emphasized that “. . .the rape of a small child such as the complainant is always an extremely serious matter even in the absence of serious injury and despite there being no evidence of permanent psychological after – effects.”⁶ Luckily the victim was not infected. The trial Judge had found that the fact that the appellant was aware of his HIV status at the time that he committed the offence placed that case within the worst category of rape cases.⁷ On appeal life imprisonment was confirmed.

[10] In the present case the fact that the accused did not derive benefit from living with both parents, that his health condition might affect his life expectancy and that he was apparently under the influence of liquor when he committed the rape, do constitute substantial and compelling circumstances.

[11] Rape of young girls is prevalent countrywide. I subscribe to the remarks made by Goldstein J referred to in paragraph eight above. The accused deflowered a defenceless young girl and detained her for hours. He threatened her with a knife. She must have feared that she could be killed. Her rights to privacy, dignity and physical integrity were violated. The accused has thus far shown no remorse. It seems that the suspended prison term of six months in 2008 did not deter him.

[12] Courts should impose sentences which show that violent crimes such as rape will not be tolerated. The message should be loud and clear. In some cases such as the present one the sentence of correctional supervision is inappropriate.

[13] Having considered the nature of the crimes the accused committed, circumstances in which they were committed, personal circumstances of the accused and interests of society, I am of the view that the following sentences

⁶ at 663b - c

⁷ at 663c - d

are appropriate:

COUNT ONE: (RAPE)

Sentenced to undergo imprisonment for eighteen (18) years.

COUNT TWO: (KIDNAPPING)

Sentenced to undergo imprisonment for twelve (12) years.

The two sentences shall run concurrently.

**A E B DHLODHLO
ACTING DEPUTY JUDGE PRESIDENT**

For the State: Ms N Tokota
Director of Prosecutions:
Bhisho

For the Accused: Mr L Silandela
Justice Centre:
King Williamstown