

**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

CC 20/05

In the matter between:

THE STATE

AND

DAVID MOTSWEISANE

MMABATHO

MONAMA AJ

JUDGMENT

MONAMA AJ:

- [1] Mr David Motsweisane to whom I shall refer to herein as the accused was convicted by the Regional Court in Mmabatho on a charge of rape. He pleaded not guilty to the charge which allegedly occurred on two occasions during February and March 2004. The charge sheet does not itemise the rape but evidence shows that the complainant was raped on two different occasions, one during the life time of the complainant's mother and the other after the death of the complainant's mother. The accused was legally

represented.

[2] The Learned Magistrate committed the accused for sentence by this Court. Notwithstanding the plea of not guilty, I am satisfied, having read the record that he was correctly convicted. The counsel for the defence and the State have, shared my opinion. Counsel agreed that two counts of rape are involved. The proceedings were in accordance with justice and the accused is accordingly and formally found guilty on two counts of rape by this Court.

[3] The accused is the lover of the complainant's mother. When the report was made to the complainant's mother the latter was assaulted and the second rape took place one day after the death of the complainant's mother. The accused is 57 years old and currently receiving medical attention for tuberculosis. The accused is a widower and having four minor dependants between the ages 1 to 10 years. The accused has no record of previous convictions.

[4] The State submitted that there are no compelling and substantial circumstances and invited me to impose the maximum sentence in terms of the Criminal Law Amendment Act 105 of 1997. On the contrary the defence submitted without elaboration that the personal circumstances of the accused referred to above should be construed as constituting substantial and compelling circumstances.

[5] The duty to establish the factors constituting substantial and compelling circumstances rests on the Court, the State and the

defence. However, it is inappropriate to equate substantial and compelling circumstances with the traditional mitigating factors. The correct approach to determine the said circumstances is to be found in the cases of *S v Blaauw* 1999 (2) SACR 295 at page 311 G-I; *S v Dithotze* 1999 (2) SACR 314 (W) at 317 H-I and *S v Malan en n ander* 2004 SACR 264 (T).

[6] In casu and on the facts, I hold an opinion that life sentence would be grossly excessive and inappropriate. I find the following factors to fall within the ambit of substantial and compelling circumstances, namely:

- The age of the accused;
- The fact that the accused suffers from tuberculosis;
- The absence of extreme violence; and
- The fact that the accused has a clean record.

[7] On the contrary the accused abused the complainant. The accused was occupying a position of trust. The complainant had a sick mother who was also assaulted when she confronted him with the allegation of the first rape. The second rape occurred immediately after the death of the complainant's mother. During the trial in the Regional Court the accused has failed to demonstrate remorse.

[8] The medical report does not reflect serious injuries. The medical report is the only evidence which was produced. This is understandable. The parties are poor and coming from a deprived background. The complainant cannot afford proper expert examination to evaluate the impact of the rape. However, it is safe to assume, that the incident would leave her affected for life. The complainant has narrated her ordeal in detail which demonstrated the effect on her life. She has lost her virginity.

[9] Taking all these factors, for and against, life sentence will be inappropriate. The sentence I impose is 30 years on each count of rape. The sentence imposed shall run concurrently.

R E MONAMA
ACTING JUDGE OF THE HIGH COURT