



**IN THE NORTH WEST HIGH COURT, MAFIKENG**

**CASE NO: CA 37/10**

In the matter between:

**SEFAKO PARCEL GAKEITUMELE**

**Appellant**

**and**

**THE STATE**

**Respondent**

**CRIMINAL APPEAL**

**HENDRICKS J; KGOELE J**

**DATE OF HEARING : 03 DECEMBER 2010**

**DATE OF JUDGMENT : 09 DECEMBER 2010**

**COUNSEL FOR THE APPELLANT : ADV MBATHA**

**COUNSEL FOR THE RESPONDENT : ADV RASAKANYA**

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**JUDGMENT**

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## **HENDRICKS J**

### **[A] Introduction:-**

- [1] The Appellant was convicted in the Regional Court on a count of rape which falls under Schedule 2 Part I of the Criminal Law Amendment Act, Act 105 of 1997, (“the Act”), in that he raped the complainant more than once on the evening in question. The Appellant was sentenced to life imprisonment because the court *a quo* found that there are no substantial and compelling circumstances which warranted a deviation from imposing the prescribed minimum sentence. The Appellant appeals, with leave of the court *a quo*, the sentence imposed upon him.

### **[B] The Facts:-**

- [2] The facts of this case can be succinctly summarized as follows. On the evening in question, the complainant was in the company of Thabiso and Benolia at a tavern. The Appellant was also present. She asked a lift from Thabiso who was driving a donkey cart. When herself, Thabiso and Benolia left the tavern, the Appellant also boarded the donkey cart of Thabiso. The complainant told Thabiso that the Appellant wanted to force himself onto her.
- [3] Arriving near the Appellant’s place of residence, he alighted from the donkey cart and pulled the complainant towards him.

She resisted. He assaulted her with clenched fists and also broke a bottle and stabbed her with the broken bottle on her arm. Despite the fact that he was reprimanded by Thabiso and Benolia, the Appellant persisted in his endeavour and pulled the complainant by force to his parental home, whilst assaulting her with clenched fists.

- [4] Upon arrival at his place of abode, he took her into the bedroom where he undressed her and himself and he had sexual intercourse with her. The sexual encounters happened on three occasions during that night and he only released her at approximately 14H00 the following day.

**[C] Sentence:-**

- [5] The impositioning of a suitable sentence is a matter which falls pre-eminently within the discretion of the trial court. A court of appeal will not lightly interfere with the exercise of the discretion by the trial court in imposing sentence. A court of appeal will only interfere when the sentence imposed by the trial court is vitiated by an irregularity or misdirection or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence committed.

**See:-**        **S v Coetzee** 2010 (1) SACR 176 (SCA).

**S v Matlala** 2003 (1) SACR 80 (SCA).

**S v Kgosiimore** 1999 (2) SACR 238 (SCA).

[6] The following personal circumstances and mitigating factors were placed before the court ***a quo***:-

- the Appellant was twenty (20) years of age at the time of commission of the offence;
- he is a first offender;
- he was gainfully employed as a farm labourer earning a monthly income of R1 000-00;
- he is the father of two minor children;
- he was the breadwinner and also maintained his father who is pensioner;
- he was incarcerated for eight months awaiting the finalization of his trial before he was committed to bail;
- he had consumed intoxicating liquor and was under the influence when he committed this offence.

[7] Having convicted the Appellant of rape which falls under Schedule 2 Part I of the Act, the court ***a quo*** was enjoined to determine whether there are substantial and compelling circumstances present that would put it at liberty not to impose

the prescribed minimum sentence of life imprisonment. Such substantial and compelling circumstances, if found to be present, should be entered on the record.

**See:-** Section 3 of the Act.

- [8] A test was laid down regarding what the court should take into account in determining whether substantial and compelling circumstances exist. The test is that if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so much so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. However, when it deviates from the minimum sentence laid down, a court has to look at the benchmark set down by the legislature as being appropriate for a particular offence.

**See:-** **S v Malgas** 2001 (1) SACR 469 (SCA).

**S v Fatyi** 2001 (1) SACR 485 (SCA).

**S v Dodo** 2001 (1) SACR 595 (CC).

- [9] It does not follow that because a particular sentence has been laid down for a particular category of rape for example, a uniform sentence of life imprisonment or any other uniform sentence should be imposed. If there are substantial and compelling circumstances in such a case, the mandatory life sentence or any other prescribed sentence should not

automatically be imposed.

**See:-**        **S v Mahomotsa** 2002 (2) SACR 435 (SCA) at 443.

[10] In my view, looking holistically at the personal circumstances of the Appellant, the fact that he is a first offender, his age of twenty (20) years compared to that of the complainant who was seventeen (17) years, and the fact that there was no evidence of any long lasting psychological trauma that the complainant will suffer in future as a result of this ordeal, the court ***a quo*** erred in finding that these factors “*do not amount to substantial and compelling circumstances*”.

[11] This is definitely not one of the worse kinds of rape that this court ever came across. Life imprisonment as the ultimate sentence must be ordained for the most heinous crimes.

**See:-**        **S v Mahomotsa**, *supra*.

**[D] Conclusion:-**

[12] Having found that there are indeed substantial and compelling circumstances present in this case which warrants a deviation from imposing the prescribed minimum sentence of life imprisonment, this court is at liberty to interfere with the sentence imposed and to substitute it with an appropriate sentence. Considering all the mitigating factors and circumstances and all other factors relevant for the impositioning of an appropriate sentence, I am of the view that

a term of imprisonment of fifteen (15) years will be a fit and proper sentence.

**[E] Order:-**

[13] Consequently, the following order is made:-

[i] The appeal against sentence is upheld.

[ii] The sentence imposed by the court ***a quo*** is set aside and it is substituted with the following sentence:-

*“Fifteen (15) years imprisonment.”*

**R D HENDRICKS**  
**JUDGE OF THE HIGH COURT**

I agree.

**A M KGOELE**  
**JUDGE OF THE HIGH COURT**