IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO.: CA 27/15

In the matter between:

JOHANNES SONO **APPELLANT**

and

THE STATE **RESPONDENT**

LANDMAN J & CHWARO AJ

JUDGMENT

Landman J:

Introduction

[1] Johannes Sono, the appellant, who was accused no 2 at his trial and one Tshepiso Philemon Letsebe (accused no 3), were charged in the Regional Magistrate Court sitting at Ga-rankuwa on a charge of raping a 15 years old minor on 7 November 2010 at or near Waterval. (Tobias Frans Ramakoka (accused no 1) and accused no 3 faced other charges relating to the same complainant during the trial. They were also convicted and sentenced). The appellant pleaded not guilty but was convicted and sentenced to life imprisonment.

[2] The appellant unnecessarily sought leave from the Regional Magistrate Court to appeal. As the appellant was sentenced to life imprisonment by a Regional Magistrate under section 51 (1) of the Criminal Law Amendment Act 105 of 1977, he has an automatic right of appeal. The appellant appeals against conviction and sentence.

Appeal against conviction

[3] The complainant testified that she went to a certain Tavern together with her sister. Her sister met her boyfriend and they left her at the tavern. The complainant, who knew all three accused requested accused no 3 to take her home. They set off but were joined by accused no 1. Near a cemetery, accused no

3 and then accused no 1 raped her. She later went to urinate and then made her way barefoot back to the tavern. She did not lodge a complaint nor did she inform anyone of her plight.

[4] When the patrons began leaving the Tavern to head to a party elsewhere, the complainant asked the appellant to take her home and give her food. They left together with accused no 3.

[5] On arriving at his home the appellant provided her with food afterwards she and the appellant went to sleep on his bed. Accused no 3 slept on the other bed. The appellant did not have intercourse with her that night.

[6] On the next morning before 05:00 when she woke up accused no 3 insisted. that the appellant have sexual intercourse with her. The appellant had intercourse with her after he threatened her with a knife. She says she did not consent to intercourse with the appellant.

[7] The complainant left and made her way to her grandmother and confided in her sister. She and her sister acquired a phone and called the police.

[8] The complainant went to the Brits Hospital two days later and a J88 form was completed. The medical doctor who examined her testified to the effect that he found no injuries on her.

[9] The appellant testified. His evidence was largely consistent with that of the complainant but he said that he was too drunk to remember whether he had intercourse with her or not.

Submissions

[10] Counsel for the appellant submitted, correctly, that the onus rests on the state to prove all the elements of the offence beyond reasonable doubt. He also referred to **S v Jackson** 1998 (1) SACR 470 (SCA) at 476e-f where it is said:

"*Burden is on the state to prove the guilt of the accused's beyond reasonable doubt, no more and no less. The evidence in particular case may call for cautionary approach, but that is far cry from the application of a general cautionary rule."*

[11] The complaint was a good witness. She had ample opportunity to embellish her evidence but she did not do so. She also answered some difficult questions openly. The learned Regional Magistrate believed that she was a credible witness.

[12] Counsel also submitted that the learned Magistrate did not consider adequately the fact that he did not voluntarily have sexual intercourse with the complainant without her consent, he was instructed by accused no 3 to do so. But, as his counsel appreciated, on the complainant's version the appellant took out a knife when the complainant refused to have sexual intercourse with him and thus overcame her reluctance. Accused no 3 testified that he was not present on this occasion. The learned Magistrate correctly disbelieved him.

[13] The appellant testified that he had previously had consensual sexual intercourse with the complainant as she was his girlfriend. But he was not in a condition to remember whether he did so on this occasion. However, his defence was not that he was forced by accused 3 to have sexual intercourse with the complainant.

Appeal against sentence

[14] Counsel for the appellant submitted that the Regional Magistrate erred in not regarding the following factors, taken cumulatively, as substantial and compelling circumstances that would have allowed him to imposing a lesser sentence than the prescribed minimum sentence:

a) the appellant was the first offender at the time of sentencing.

b) he was [.....] years of age at the time of the commission of the offence and therefore relatively young.

c) he could still be a candidate for rehabilitation.

d) he was under the influence of intoxicating liquor when he committed the offence.

e) the fact that he spend the night with the complainant without doing anything to her is the indication that he did not initiate sexual intercourse with the complainant; he complied with accused no 3's demand.

f) there was no evidence that the complainant suffered any severe physical injuries.

g) there was no evidence of any permanent effect on the complainant as the result of this offence.

[15] There is no merit in the submission that he was under the influence of intoxicating liquor when he committed the offence. It may be accepted that this may have been the case that night but it is doubtful whether it was the case the next morning.

[16] Nevertheless there is some merit in the submission that taken together these facts and circumstances constitute substantial and compelling circumstances for the trial court to have imposed a lesser sentence than the minimum sentence. I say this notwithstanding the absence of remorse and the fact that the appellant exposed the complainant to, the risks associated with having unsafe sexual intercourse.

[17] The result is that this court is entitled to impose sentence afresh. Taking the personal circumstances of the appellant, the crime, the interests of society and the goals of sentencing into account I am satisfied that a sentence of 20 years imprisonment would be adequate.

Order

[18] In the premises I make the following order:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is upheld.

3. The sentence of life imprisonment imposed by the Regional Magistrate's Court is set aside and replaced by a sentence of 20 years imprisonment antedated to 13 November 2012.

AA Landman
Judge of the High Court

I Agree

O K Chwaro
Acting Judge of the High Court

Appearances

Date of hearing:	31 July 2015
Date of Judgment:	6 August 2015
For the Appellant:	Adv Segone instructed by Legal aid South Africa, Mafikeng Justice Centre
For the Respondent:	Adv Jika instructed by State Attorneys, Mafikeng