Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CA15/2016

In the matter between:

DIBATE JEFFREY LESELE **APPELLANT**

AND

THE STATE **RESPONDENT**

LEEUW JP & KGOELE J

DATE OF HEARING : 09 DECEMBER 2016

DATE OF JUDGMENT : 09 FEBRUARY 2017

COUNSEL FOR THE APPELLANT : MR. MOREMI

COUNSEL FOR RESPONDENT : ADV. MUNERI

JUDGMENT

LEEUW JP

Introduction

[1] This is an appeal against sentence only. The appellant was convicted of Rape at the Lehurutse Regional Division of the North West. He pleaded guilty to the charge and was sentenced to life imprisonment on the **9 November 2015**. The charge of rape was read with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 (Criminal Law Amendment Act).

Factual Backround

[2] The facts of the how the offence was committed are stated in the appellant's statement made in terms of Section 112 (2) of the Criminal Procedure Act No. 51 1977 (The Act), since the complainant did not testify.

[3] The appellant stated that he went to a tavern where he consumed liquor. Thereafter, he went home and was drunk, but could appreciate his actions. He had sexual intercourse with the complainant without her consent. The following morning he left for work, and was later phoned by the police who requested him to come to the police station. On his arrival, he was charged with the offence of rape on the complainant. The DNA test results taken from the complainant connected him to the commission of the offence.

[4] In a pre-sentencing report compiled by a probation officer of the Department of Social Development of the North West Provincial Government, Mr Godfrey Mphuma, it is stated that he interviewed both the appellant and the complainant separately. The appellant informed him that he could not remember what happened on the night the complainant was raped.

[5] An interview with the complainant revealed that the complainant was watching television with her male cousin when the appellant arrived. He ordered the cousin to go and sleep with the other boys in a shack. When the cousin left, the appellant undressed the complainant and had sexual intercourse with her without her consent. He had sexual intercourse with her again in the morning before he left for work. She was afraid of the appellant because he threatened to kill her.

[6] The probation officer also interviewed complainant's mother who informed him that she had gone to Rustenburg and had requested the male cousin to put up at the house with the complainant, because she was alone at night. The appellant was supposed to be on night duty. She only learnt after the rape that the appellant had not reported for duty that night.

Submissions

[7] The appellant submits that the sentence of life imprisonment imposed is excessive and induces a sense of shock; and that the court did not take into account the following:

- the appellant is a first offender;
- he pleaded guilty to the charge, and thus was remorseful;
- that there are prospects of rehabilitation; and that
- the court overlooked the mitigating factors in favour of the appellant and overemphasised the aggravating circumstances.

[8] The state argued that the circumstances of the case and the age of the complainant as well as the relationship between the appellant and the child, serve as aggravating factors which warrant a life imprisonment sentence.

Analysis

[9] This court can interfere with the sentence imposed by a trial court only if it is vitiated by an irregularity or if the sentence imposed induces a sense of shock. *See* ***S v Coetzee*** *2010 (1) SACR 176 (SCA)*.

[10] In considering sentence, the court did take the personal circumstances of the appellant into account. The court found that the appellant was not truthful about his employment. He told the court that he was a sole breadwinner responsible for the

maintenance of his sister's minor children, which was not true as was revealed by the investigation conducted by the probation officer. The court also took the prevalence of the offence of rape into account and found it to be aggravating that the complainant was a minor and a step-daughter of the appellant.

[11] Also, aggravating, is the fact that he the appellant did not disclose the true circumstances relating to how the complainant was raped; the pre-sentencing report revealed that the complainant was raped twice in the evening and in the morning. However, the court only considered the facts that were indicated in the plea explanation.

[12] I must here pause and remark that it is the duty of the prosecutor to ensure that all facts of a complainant are fully presented to the court, and that an accused is appropriately arraigned to avoid a miscarriage of justice. It was the duty of the prosecutor to obtain the facts from the complainant on how the rape was committed, through an in-depth consultation with her. Fairness of a trial is in respect of both an accused person and the complainant. ***See S v Kolea*** *2013* SACR 409 (SCA) at para. [20].

[13] Nevertheless, the offence committed by the appellant is very serious. The complainant was relocated to stay with relatives in another village; the mother was seriously aggrieved by the appellant's conduct which has caused a serious rift in the family.

[14] The appellant pleaded guilty to the charge and he submits that it shows that he is remorseful. However, the appellant in his guilty plea, did not disclose the whole truth to the court. The truth, which came out in the pre-sentencing report, is that the appellant consciously raped the complainant by chasing the male cousin away and thereafter raped the complainant. He was aware of the fact that the mother of child was out of town. He threatened to kill the complainant. The overwhelming evidence against him, which was confirmed by the DNA results, suggests that the appellant had no choice but to plead guilty. This is not a sign of remorse. The remark by Mhlantla JA in ***S v Mashinini*** 2012 (1) SACR 604 (SCA) para 24, are opposite:

> *"[24] The appellants did not verbalise any remorse. It was submitted on their behalf that their plea of guilty may be an indication of remorse. This submission cannot prevail. It must be borne in mind that the complainant knew the first appellant, therefore the issue of identification of him as one of the rapists was not in dispute. The second appellant was linked to the commission of the offence by DNA evidence. It is therefore clear that there was overwhelming evidence against the appellants. They had no choice, but to plead guilty. Their plea under such circumstances can never be interpreted as remorse. In S v Matyityi Ponnan JA stated in regard to remorse:*
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> > *"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come*

from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be valid consideration, the penitence must sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to cannot be determined."

[15] I agree with the learned Magistrate a *quo* that the fact that the appellant pleaded guilty by itself does not justify a sentence lesser than life imprisonment. I am of the view that the sentence imposed is appropriate.

[16] Order:

Consequently, the appeal against sentence is dismissed.

M M LEEUW
JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

I AGREE

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A M KGOELE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG