THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 651/12

NOT REPORTABLE

In the matter between:

AZWIFANELI RASIRUBU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Azwifaneli Rasirubu v The State* (656/12) [2013] ZASCA 140 (30 September 2013)

Coram: Ponnan, Leach and Tshiqi JJA and Van der Merwe and Zondi AJJA

Heard: **03 September 2013**

Delivered: **30 September 2013**

Summary: Appeal against sentence - evidence led at trial insufficient - unable ex facie the record to conclude that the discretion was exercised judicially - appellant already served a lengthy period of imprisonment - remittal not in the interests of justice - sentence substituted.

ORDER

On appeal from: Venda High Court, Thohoyandou (Hetisani J sitting as a court of first instance):

1. The appeal is upheld.
2. The sentence imposed by the high court is set aside and in its stead is substituted:

'(i) The accused is sentenced to 8 years and 10 months imprisonment.

(ii) The substituted sentence set out in 2(i) is antedated to 29 November 2009.'

JUDGMENT

TSHIQI JA (PONNAN, LEACH JJA AND VAN DER MERWE AND ZONDI AJJA CONCURRING):

[1] The appellant, Azwifaneli Rasirubu, a 19 year old male, was charged in the Venda High Court, Thohoyandou with rape, read with s 51(1)(*a*) of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act), it being alleged that he raped a 13 year old girl. He pleaded guilty to the charge and in amplification of his plea tendered a statement in terms of s 112 of the Criminal Procedure 51 of 1977 (the CPA). The statement reads:

'I, the undersigned, Azwifaneli Rasirubu, hereby make a statement freely and voluntarily and states as follows: That on 25 June 2004, and at Karaba Village, I had sexual intercourse with [KM][1], a female who resides at Karaba Village, without her consent. I know and understand it is unlawful to have sexual intercourse with a person without her consent and acted with that knowledge. Therefore, I plead guilty to the charge proffered against me.'

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[1] The initials in lieu of the complainant's full name have been used to protect her identity.

[2] In order to prove the complainant's age the State submitted a copy of her birth certificate. The only other evidence adduced by the State was a medical report (J88) completed by a medical practitioner in respect of his examination of the complainant. The J88 reflected that the complainant was anxious, her vagina was swollen, the space between the labia minora had superficial cracks, the hymen was torn at two, five, seven and eleven o' clock and the vaginal opening was swollen. The anal examination showed multiple superficial cracks at the anal opening at six o'clock. Apart from the injuries to her genitalia, no other injuries appear to have been sustained by the complainant.

[3] The appellant testified in mitigation of sentence. He stated that he was remorseful, had no previous convictions, was still a school pupil in grade 11 and that he lived with his unemployed mother and younger siblings whom he maintained financially by doing odd jobs.

[4] The court imposed a sentence of life imprisonment. He now appeals to this court against sentence only, leave having been granted by that court (per Hetisani J).

[5] Given the paucity of information before the court when it imposed the sentence, it is not clear what considerations were taken into account by the court in deciding that life imprisonment was an appropriate sentence. As is evident from s 112 statement, it merely recited the elements of the offence. There was no evidence as to the circumstances surrounding the commission of the offence, nor for that matter the nature of the relationship, if any, between the appellant and the complainant prior to the rape. Despite his age, no pre-sentencing report was submitted. Regarding the complainant, there was no victim impact assessment report or evidence on the impact the rape had on her life. The court made no reference to the Criminal Law Amendment Act nor did it conduct an enquiry, as required in terms of the Act, whether there were any substantial and compelling circumstances present that justified a deviation from the prescribed minimum sentence. In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200

(SCA) para 13, Mpati JA stated: 'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent.' That is precisely what occurred here. It follows that the high court misdirected itself. For, even in cases falling within the categories of rape delineated in the Criminal Law Amendment Act as attracting a life sentence, there are bound to be differences in the degree of their seriousness as well as the facts and circumstances of each case. It is thus the duty of the court to apply its mind to all those considerations before it imposes sentence.

[6] The judge was not excused from his duty to ensure that all relevant information was placed before the court, regardless of the failure by counsel to do so. As stated in *S v Siebert:*[2]

'… In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.

An accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance. If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, it is the duty of that court to call for such evidence … An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combination of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of punishment.'

[7] Given the failure of the court a quo to ensure that all relevant information was before it, it failed to properly exercise its sentencing discretion. In those circumstances, one would ordinarily remit the matter to the trial court in order for that court to properly exercise its discretion afresh once the relevant evidential material was placed before it. Here however, the appellant was sentenced in November 2004 and has been in custody since then. He has effectively served a period of approximately nine years. The

[2] *S v Siebert* 1998 (1) SACR 554 (SCA) at 558 j – 559 c.

appellant's continued incarceration pending the finalisation of the matter if it were to be remitted to the high court would thus not be in the public interest. The interests of justice demand therefore that, in view of the passage of time this court should, impose what it considers to be an appropriate sentence based on the information at its disposal.

[8] The appellant was a young man aged 19, he pleaded guilty, had no previous convictions and there was no evidence that he inflicted any other injury other than those observed to the complainant's genital area. The trial court remarked, that the appellant wished to finish schooling and be a responsible member of our community. Counsel for the State conceded that taking all of the factors into consideration the time already spent by the appellant in custody would be sufficient punishment. In my view therefore a sentence of imprisonment equal to the time spent in prison subsequent to the date on which the appellant had been sentenced by the high court is an appropriate one. The effect of this conclusion is that the appellant is not to undergo any further period of imprisonment.

[9] In the result I make the following order:

1 The appeal is upheld.
2 The sentence imposed by the high court is set aside and in its stead is substituted:
'(i) The accused is sentenced to 8 years and 10 months imprisonment.
(ii) The substituted sentence set out in 2(i) is antedated to 29 November 2009.'

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Z L L TSHIQI
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	Mr MJ Manwadu
	Instructed by:
	Justice Centre, Thohoyandou
	Justice Centre Bloemfontein
For Respondent:	Adv. NR Nekhambele
	Instructed by:
	The Director of Public Prosecutions, Thohoyandou
	The Director of Public Prosecutions, Bloemfontein