IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A787/10

DATE: 6 May 2010

In the matter between:

GERT MacKENZIE Appellant

and

THE STATE Respondent

JUDGMENT

OLIVIER, AJ

The appellant was charged in the Vredendal Regional Court with the contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, namely the rape of an adult complainant, B.

The appellant pleaded guilty, and was convicted as charged and sentenced, in terms of Section 51(2)(b)(1) of Act 105 of 1997, to ten years imprisonment. The appellant now appeals against the sentence imposed.

The appellant testified that he had accompanied the complainant to her home. They were both under the influence

of liquor. He knew the complainant. Along the way he pulled her into the grounds of a school. She refused his advances and he drew a knife and threatened her. He then raped her. He admitted that she was thereafter raped by a second person. The two rapists were not acting in concert.

The learned magistrate in sentencing the appellant had regard to the high prevalence of rape. He pointed out that many rapes are perpetrated in similar circumstances where young men accompany girls who, when they refuse their advances, are in the one or the other manner forced to have sex. The magistrate found that this could not be countenanced, and that the correct message should be sent out that it will not be countenanced.

In S v Swarts and Another 1999(2) SACR 380 (C), Davis, J pointed out that rape is a cancer within our society:

> "This epidemic is reflective of the kind of society which our past has shaped and which must be transformed in order for South Africa to become a truly open and democratic society based on freedom, dignity and equality." (at 38 5 d-e).

The learned magistrate, in my view, had proper regard to the

crime, the personal circumstances of the criminal, and the interests of the community in determining sentence.

It was submitted on behalf of the appellant before the magistrate and also before us that the age of the appellant, the fact that he had pleaded guilty and that he had no previous convictions, cumulatively considered, constituted compelling and substantial circumstances to deviate from the prescribed minimum sentence of ten years imprisonment.

The learned magistrate had regard to the submissions made on behalf of the appellant that there was substantial and compelling circumstances present. He also gave consideration to the circumstances of the complainant and the gross invasion of her privacy, personality and the fact that she was defenceless woman. He had regard to the vacillation on the part of the appellant in pleading guilty, which ultimately led to two correctional services reports being obtained. He also took into account the fact that the appellant had used a knife to threaten and coerce the complainant. That was after they had wrestled. In summary he concluded that there were no substantial or compelling circumstances to deviate from the prescribed minimum sentence.

I agree, even absent the provisions of the Minimum Sentence

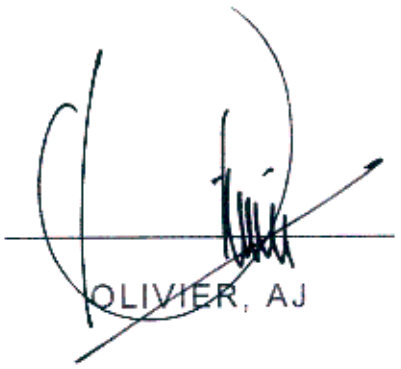
Act I would have considered a sentence of ten years imprisonment appropriate in the circumstances.

Two reports were obtained in terms of section 276A(1)(a) of the Criminal Procedure Act, Act 51 of 1977. The record reflects that the correctional services official had consulted with the appellant telephonically in order to compile his first report. As a result of what the appellant had conveyed to him regarding the commission of the offence a second report was sought. The second report was in all material respects identical to the first report, except for what was conveyed regarding the commission of the offence.

It is often said that sentencing is the more difficult part of a criminal trial and if the presiding officer is to derive any assistance from a correctional services report such a report must be properly prepared. See S v V 1997(2) SACR 133 (T) and the cases there cited.

This is not the first case I have encountered where a palpably superficial report has been tabled. It is in my view wholly inappropriate for a report required in terms of Section 276A(1) to be prepared on the base of a telephonic consultation with the appellant.

In the circumstances I would DISMISS THE APPEAL AND CONFIRM THE SENTENCE OF 10 (TEN) YEARS IMPRISONMENT.



OLIVIER, AJ

I agree, the APPEAL AGAINST SENTENCE IS DISMISSED. I further particularly emphasize my agreement with my learned colleague's remarks regarding the inadequacy of the Correctional Services official's discharge of duty in this matter, and I request counsel for the State to direct the attention of the Directorate of Public Prosecutions to my colleague's judgment with the request that the Directorate of Public Prosecutions does whatever is necessary to convey the sentiments and what was set out in the judgment in S v V referred to by Olivier, AJ to the appropriate Correctional Services authorities.

BINNS-WARD, J