THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 262/05

Reportable

In the matter between

NTSHENGEDZENI SIKHIPHA **Appellant**

and

THE STATE **Respondent**

Coram**:** **SCOTT, LEWIS, VAN HEERDEN JJA**

Heard: 12 May 2006
Delivered: 30 May 2006

Summary: Trial of an unrepresented accused not vitiated by irregularity: sentence of life imprisonment for the rape of a child of 13 set aside and replaced with sentence of 20 years' imprisonment.

Neutral citation: This case may be cited as Sikhipha v State [2006] SCA 71 (RSA)

JUDGMENT

LEWIS JA

[1] The appellant was convicted in the regional court, Venda, of the rape of a thirteen-year old girl. He was sentenced in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the Act') to life imprisonment by the High Court, Venda (Hetisani J). The appeal against both conviction and sentence lies with the leave of this court.

[2] In so far as conviction is concerned, the appellant argues that it should be set aside on the basis of a number of trial irregularities: first, that the appellant was unrepresented, and his legal rights were not properly explained to him; second, that a medical report (Form J 88) was handed in and accepted as evidence when the appellant did not fully appreciate its significance; third, that the presiding magistrate did not establish that the complainant and her brother, both minors at the time of the trial, and who testified for the State, understood the nature of the oath before giving evidence; and fourth, that the regional magistrate failed to assist the appellant in the conduct of his trial and cross-examined the appellant himself.

[3] Before dealing with these I shall deal first with the evidence leading to conviction. The complainant, who was 14 at the time of the trial, testified that she lives in a house in the Divhani Location, Venda. On 10 January 2002, when she was 13 years old, she was called by her neighbour, the appellant, who asked her to bring him some water. When she did so, he grabbed her and dragged her onto the grass outside his house. She screamed and he

covered her mouth. He undressed her, lay on top of her and had sexual intercourse with her. He raped her, she said.

[4] Her brother, Patrick, testified that he had passed by the house and seen the appellant lying on top of the complainant outside the appellant's house. He had run off to report the matter to the deputy headman of the village. The latter told him to report the incident to the police. Patrick had gone home before going to the police and had encountered his and the complainant's mother. He informed his mother of what he had seen. The mother testified that she had gone to speak to the deputy headman too. She returned home, and asked the complainant what had happened. The complainant refused to tell her.

[5] Patrick telephoned the police, as apparently did the deputy headman, and the police, after examining the complainant, took her to hospital. A doctor confirmed that she had had sexual intercourse: her vulva was swollen, bruised and covered with a 'whitish' 'foul-smelling' discharge, her labia minora were bruised with slight bleeding and her hymen was absent. I shall revert to the J 88 form signed by him.

[6] The appellant, who had pleaded not guilty and had proffered no plea explanation, denied that he had sexual intercourse with her. His cross-examination consisted in the main of questions about how she had brought water to him, and the colour of the receptacle she claimed to have taken into his yard.

[7] The magistrate found the appellant guilty of rape, and referred him, in terms of s 52 of the Act, for sentencing to the high court: a regional court does not have jurisdiction to impose a sentence of life imprisonment, required by s 51(1) of the Act, read with Part I of Schedule 2 (rape committed where the victim is under 16 years of age). Hetisani J, after hearing evidence in mitigation, imposed a sentence of life imprisonment on the appellant.

[8] I turn now to the procedural irregularities which the appellant argues vitiate the trial in the regional court. At the outset it should be recalled that whether an irregularity results in an unfair trial depends on whether the accused has been prejudiced, a principle restated recently in *Hlantlalala v Dyantyi NO*[1] and *S v May*.[2]

[9] The appellant was unrepresented and elected to conduct his own defence. His right to legal representation and his right to legal aid were not explained to him properly, the appellant argues. The record of the regional magistrate's notes shows, however, that 'Accused is explained of his rights to legal representation and legal aid, and he elects to conduct his own defence'. The prosecutor repeated at the start of the trial that 'the accused elected to conduct his own defence' and the court confirmed this with the appellant. There is no evidence to suggest that the appellant was not apprised of his rights (although the argument is made that this was the case), nor any part of the record that shows that he was prejudiced by the absence of a legal

[1] 1999 (2) SACR 541 (SCA) paras 8 and 9.
[2] 2005 (2) SACR 331 (SCA) paras 7 and 8.

representative. I consider therefore that there was no irregularity in this respect.

[10] It should be said, however, that where an accused is faced with a charge as serious as that of rape, and especially where he faces a sentence of life imprisonment, he should not only be advised of his right to a legal representative but should also be encouraged to employ one and to seek legal aid where necessary. It is not desirable for the trial court in such cases merely to apprise an accused of his rights and to record this in notes: the court should, at the outset of the trial, ensure that the accused is fully informed of his rights and that he understands them, and should encourage the accused to appoint a legal representative, explaining that legal aid is available to an indigent accused.[3]

[11] The second irregularity alleged is that the J 88 form was handed in with the appellant's consent although he did not appreciate its import. Although he was advised as to what it said, the appellant argued, he did not understand its implications. The basis of this submission is that at the commencement of the trial, after the charge had been put to him, the appellant asked whether there was a document stating that he had had sexual intercourse with the complainant. The regional magistrate replied that he did not know. The appellant stated that he denied that he had intercourse with the complainant. The court continued to explain the charge, and competent verdicts. The State then asked for leave to hand in the J 88, stating that the contents had been

[3] See *S v Mbambo* 1999 (2) SACR 421 (W) at 428h-i.

explained to the appellant and that he had no objection to its being handed in. The appellant argues that this supports the claim that he did not understand its implications. I do not see how the proceedings show that the appellant did not understand the legal implications of the form. He denied having intercourse and of course the J 88 does not refer to any suspect.

[12] Even if the appellant had not fully appreciated that the form was evidence that the complainant had had intercourse, and that she had been bruised in the process, there was no basis for any objection to the handing in of the form, as counsel for the appellant was constrained to concede. Whether he understood its legal implications or not is thus irrelevant. The appellant argues also, however, that the J 88 was defective in that it was not dated and does not state when the complainant was examined. However, the form is stamped with a date and accompanied by a certificate from the doctor stating that he had examined the complainant and that the facts set out there were determined by him after the examination. The certificate is dated 11 January 2002. The complainant testified that she was examined on the same day as she had been raped, 10 January. I do not consider that there is anything wrong with the completion of the paperwork the day after the examination. The appellant is not in any way prejudiced by the acceptance into evidence of the J 88 form. Moreover, the doctor's certificate and J 88 form would in any event have been admissible, and prima facie proof of its contents, in terms of s 212(4) of the Criminal Procedure Act 51 of 1977. Again, there is no irregularity in this respect.

[13] The third irregularity alleged is that the regional magistrate did not enquire whether either the complainant or her brother, understood the oath that was administered to them, and that therefore their evidence should have been inadmissible. There is no substance in this complaint. Section 164 of the Criminal Procedure Act permits a presiding officer to dispense with the taking of an oath where it appears that a child does not understand the nature and import of the oath. In such circumstances an enquiry should be held as to the level of understanding of the witness, and the presiding officer must admonish the child to tell the truth. But a formal enquiry is not necessary, as long as the presiding officer has formed an opinion that the witness does not understand the meaning of the oath.[4] In this case, however, the oath was administered to both the complainant, who was 14 at the time of the trial, and her brother, whose age does not appear from the record. The situation is different. There is no requirement that the trial court must formally enquire whether a witness understands the oath, nor that the presiding officer must record that fact.[5] Of course a presiding officer must be satisfied that a witness does understand the oath, but he or she may form a view in this regard without formally making an enquiry or recording his or her view. There is nothing at all in the evidence to suggest that either the complainant or her brother were ignorant of the import of the oath.

[14] The fourth irregularity complained of is that the regional magistrate did not assist the appellant, but rather descended into the arena and in effect cross-examined him. The instances cited by the appellant do not bear out the

[4] See for example *S v B* 2003 (1) SACR 52 (SCA) and *Director of Public Prosecutions, KwaZulu Natal v Mekka* 2003 (2) SACR 1 (SCA).
[5] *S v Chalale* 2004 (2) SACR 264 (W) para 3.

complaint. It is true that the court asked the appellant questions when he was cross-examining the complainant, including whether he had inserted his penis into the complainant's vagina. Such questioning was not merely a clarification of a question or of an answer. But the appellant did not give an answer that in any way prejudiced him. Moreover, he was appropriately assisted by the regional magistrate when he gave evidence and was cross-examined. Accordingly there is no substance in this complaint. There is thus no foundation for any of the complaints about irregularities, and the appeal against the conviction fails.

[15] Hetisani J imposed a sentence of life imprisonment on the appellant in terms of s 51(1) of the Act after concluding that there were no 'substantial and compelling circumstances' that justified the imposition of a lesser sentence.[6] Circumstances were substantial and compelling, he concluded, only when exceptional: they would be 'very rare to find' in a case like this.

[16] The judge misunderstood what is meant by substantial and compelling circumstances. This court, in *S v Malgas*,[7] held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. It is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those factors traditionally taken into

[6] Section 51(3) of the Act.
[7] 2001 (1) SACR 469 (SCA).

account in sentencing – mitigating factors. Of course these must be weighed together with aggravating factors. But none of these need be ‘exceptional’.

[17] In my view the judge below committed a serious misdirection in looking only for exceptional circumstances, and in failing to have regard to mitigating factors. The sentence of life imprisonment must therefore be set aside, and this court must consider an appropriate sentence mindful of the sentence that the legislature has considered appropriate for the rape of a child under 16 – life imprisonment.

[18] Factors in mitigation include the fact that the appellant is a first offender; that he has a wife and children dependent upon him; that he has a trade (he is a bricklayer) and makes a living from his work; that he was 31 years old at the time of the trial, and that he is capable of rehabilitation. Moreover the complainant was not seriously injured. However, no evidence was led as to the psychological consequences for her of the rape. But there can be no doubt that the rape was traumatic for her. She was only 13 when a neighbour, a married man, more than twice her age, dragged her across his yard and had sexual intercourse with her against her will. Her injuries may have been minor, but she must have been severely affected.

[19] The sentence of life imprisonment required by the legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover, the mitigating factors are not speculative or flimsy. In my view, life imprisonment is not a just sentence for

the appellant. However, a lengthy sentence of imprisonment is warranted. I consider that a period of 20 years' imprisonment will send a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message.

[20] In conclusion I wish to refer to what I regard as unacceptable conduct on the part of the judge below. In passing sentence he remarked that he did not know what had driven the appellant to rape a young girl. He continued: 'I must say if you had raped a woman above or around 20, the court would say oh, well, she might have tempted him and so on and so forth.' This statement suggests a belief held by the judge that women entice men to rape them simply by virtue of being women. Perhaps that is not what the judge meant to imply. But courts should be more cautious in their expression. It is never appropriate to suggest that men are entitled to have sex with women against their will simply because they are women, or because they have dressed or behaved seductively. A court should not condone such a view let alone express it.

[21] The appeal against sentence is upheld. The sentence of the court below is set aside and replaced with the following:

'The accused is sentenced to 20 years' imprisonment.'

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C H Lewis
Judge of Appeal

Concur:
Scott JA and Van Heerden JA