

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: AI 56/2013

DPP REF. NUMBER: 1 0/2/5/1 - (2013/148) / JAP 2013/148

DATE OF APPEAL: 10 February 2022

REPORTABLE: : NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. NO
8 APRIL 2022

In the matter of:

SEKETE, LUCKY BUBU
SIMELANE, FLOYD NKOSANA
And

APPELLANT 1
APPELLANT 2

THE STATE

RESPONDENT

JUDGMENT

MEERSING AJ

This is an appeal by appellant 1 against his sentence as imposed by the Regional Court.

[1] Appellant 1, Lucky Bubu Sekete and appellant 2, Floyd Nkosana Simelane were charged in the Regional Court with rape read with Sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (CLAA) on 6 October 2008.

[2] Both the appellants were legally represented and pleaded not guilty to the charge. They did not tender any plea explanation. Towards the end of his defence appellant 2, Floyd Nkosana Simelane conducted his own defence.

[3] On 8 December 2009, the appellants were convicted of rape and on 26 March 2010 they were both sentenced to life imprisonment.

[4] On 12 November 2012, appellant 1, (Lucky Bubu Sekete) brought an application for leave to appeal and filed a notice of appeal setting out his grounds of appeal. The said application was granted.

[5] Appellant 1 has noted an appeal against his sentence only. However, in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013 read with section 309 of the Criminal Procedure Act 51 of 1977(CPA), an appellant who has been sentenced to life imprisonment in a regional court has an automatic right of appeal against both his conviction and sentence, once noted.

[6] Appellant 2 did not exercise his automatic right for leave to appeal in terms of the framework provided for in Section 309 of the CPA 51 of 1977. He has not noted an appeal as is required of him. Accordingly this appeal will be considered in respect of appellant 1 only.

[7] The record of the proceeding is as a result of same having been reconstructed. The appellants were present when such reconstruction was undertaken.

[8] The appellant was required to file heads of argument on 10 December 2021. No heads of argument were forthcoming and the respondent subsequently, on 3 January 2022, filed a Notice of Intention to strike the matter off the roll.

[9] An application for condonation was made for the late filing of the heads of argument.

[10] This court expresses its extreme dissatisfaction with the paucity of the said application. No proper reason was tendered for why the matter was not attended to

from June 2015. The affidavit of the legal representative, one advocate Enrico Agostino Guarneri the Legal Aid High Court Unit Manager confirms that the heads of argument were to be filed on the 10th December 2021. The matter was only allocated to one Ms Brits on the 15th December 2021 which is some 5 days after the heads of argument were due. He baldly states that the delay in filing of the heads of arguments was not due to the appellant and is presumptuous in his submissions that nonetheless the matter can be finalized given that the issues before this court are not very complex.

[11] This court notes the history of the matter which is as follows: -

- (i) The matter was initially set down for argument on 19 September 2013 however was removed from the roll, as the record had to be reconstructed.
- (ii) The matter was once again enrolled for argument on 11 June 2015.
- (iii) On 11 June 2015 the matter was struck of the roll, because Ms Botha from the Legal Aid offices could not obtain instructions from the appellants.

[12] There is no good reason before this court why this matter was not proceeded with from June 2015 until January 2022. There is no explanation for the clear dereliction of duty which is imposed upon the legal aid officers. An application for condonation is not determined by the complexity or otherwise of the matter but rather whether the requirements for condonation have been satisfied. Given that the matter is long outstanding and that the appellant's Constitutional rights will be breached by a further delay this court granted condonation of the late filing of the heads of argument and proceeded with the Appeal before it.

[13] This court will now deal with the conviction of appellant 1.

[14] The State called three witnesses,

- (i) The first state witness, H[....] M[....] (the complainant), testified that she bought two speakers and a subwoofer from appellant 1 on 21 November 2006 for R 100.00. He gave her the two speakers but not the "subwoofer" and told her to collect it from 7th Avenue.

(ii) She went with appellant 1 to 7th Avenue to fetch the subwoofer where they met with by appellant 2.

[15] Appellant 2 told them that he wanted to collect some things at his place of residence. They accompanied him to his place of residence. They found the uncle of appellant 2 sitting outside the residence. The complainant and appellant 1 were then invited into the room of appellant 2. He, appellant 2, locked the door and switched off the lights. He informed them that his reason for doing so was that the police was looking for him. At the same time there were 3 guys knocking on the window.

[16] Appellant 2 ordered the complainant to get on to the bed. She did not want to do so but he pushed and slapped her. She screamed and he warned her to stop making a noise.

[17] Both appellants had sexual intercourse with the complainant. Her evidence is that she did not consent to such intercourse. Appellant 1 thereafter took the complainant home. The complainant further testified that she had known appellant 1 for many years and that she treated him as she would a brother.

[18] The second state witness Zama Ngcobo the complainant's aunt testified that she heard appellant's 1 voice when she opened the door for the complainant upon her return home.

[19] The complainant sat on her bed and was crying. She asked the complainant why she was crying and the complainant then informed her that she was raped by both appellant 1 and 2. Ms Ngcobo confirmed that this report was made to her on the evening when the incident had occurred namely 21 November 2006.

[20] The state called the evidence of an Expert one, Dr Yvonne Ryster:

(i) Dr Yvonne Ryster testified that she examined the complainant on the 22 November 2006 at 10h00 at Alexandra Kids' Clinic. Her examination revealed that there were abrasions and redness of the posterior fourchette.

Dr Ryster also found the entrance of the vagina to be red and tender and that there were small superficial scratches or abrasions.

(ii) Her findings were that that if a woman is not wet during intercourse you could easily get this redness or these abrasions. She further testified that her medical findings could also be in keeping with consensual sexual intercourse.

[21] The state then closed its case.

[22] Both the appellants testified in their own defence.

[23] Appellant 2 Floyd Nkosana Simelane (who was accused no 1 in the court a quo) gave his evidence first.

(i) He testified that he was advised by appellant 1 that there was an agreement between appellant 1 and the complainant that she would have sex with appellant 1 in exchange for the sub-woofer. He was advised by appellant 1 that the complainant was a prostitute whilst she had been living in Johannesburg. After buying drinks, he remembered that he did not have any condoms and asked a person that he knows for the condoms, He thereafter went to the house and fetched the condoms. His initial evidence was that he did not have sexual intercourse with complainant. He later contradicted himself by testifying that he did have sexual intercourse with the complainant because there was an agreement with the complainant and appellant 1 that she would have sexual intercourse with both of them in exchange for the subwoofer.

[24] Appellant 1 Lucky Bubu Sekete (who was accused no 2 in the court a quo) gave his evidence thereafter.

(i) He testified that he was scared that appellant 2 would shoot him if he didn't have sexual intercourse with the complainant. He later retracted this and changed his version. He testified that he was not forced to have sexual intercourse with the complainant. He confirmed that he accompanied the

complainant to the residence of appellant 2 in order to get the sub-woofer. The Sub-woofer was never given to the complainant. His evidence is that appellant 2 had locked the door and ordered the complainant to lie on the bed. The complainant refused to do so. Appellant 2 then slapped her and ordered her not to make a noise. Both he and appellant 2 thereafter had sexual intercourse with the complainant.

(ii) His evidence was in direct contradiction to the evidence of appellant 2 in that he denied that there was any agreement with the complainant for her to have sex with them in exchange for the subwoofer. Further he denied that he had told appellant 2 that the complainant was a prostitute. He confirmed that appellant 2 had not brought any condoms.

[25] It is common cause that both appellants had sexual intercourse with the complainant, H[....] M[....].

[26] The only issue in dispute is whether the complainant consented to the sexual intercourse.

[27] The evidence of appellant 1 confirms the version of the complainant in all material respects. He confirmed that the complainant was scared and that she was slapped with an open hand because she was making a noise. She was pulled and pushed down onto the sheet before sexual intercourse had occurred. The evidence of appellant 1 is that he had sexual intercourse with complainant without her consent. Appellant 2 also had sexual intercourse with the complainant without her consent.

[28] This court has regard as did the court a quo to the cautionary rules applicable to the evidence of a single state witness. In the instant matter, the evidence of the complainant is corroborated by her aunt to whom she reported the rape, the findings of the expert witness Dr Ryster (whom this court accepts as a competent expert) and most importantly by appellant 1 himself.

[29] Very simply the evidence of the appellant 1 himself in that he had sexual intercourse with the complainant without her consent and accordingly admitted that he raped the complainant.

[30] This court finds that the state had proved its case beyond a reasonable doubt and accordingly both appellant 1 and 2 were correctly convicted of rape.

[31] In regard to sentence the issue before this court is whether there are substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[32] In *S v Malgas*¹ what constitutes substantial and compelling circumstances is clearly set out as a guideline in particular.

[33] Courts are required to approach the imposition of the sentence conscious that Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

[34] Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

[35] The specified sentences are not to be departed from lightly and for flimsy reasons.

[36] Section 51 (1) of the CLAA 105 of 1997 makes provision for the following:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.

Part I of Schedule 2 refers to "Rape..."

¹ *S v Malgas*¹ 2001 (1) SACR 469 (SCA)

(b) When committed —

In circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice,²

[37] The complainant was raped by both appellants and therefore this matter falls within the ambit of Section 51 (1) of Act 105 of 1997.

[38] It is trite that the Court, when considering an appropriate sentence, retain a balance between the relevant considerations at the imposition of punishment, and that the interest of society should not be over- emphasised at the costs of the personal factors of the accused.

[39] In *S v Banda 1991*², It was held that when imposing a sentence, a court should try to balance evenly the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community, its welfare and concern.

[40] The court a quo in considering the imposition of sentence took into consideration: -

1. The personal circumstances of the appellant 1;
2. The psycho social report of the appellant 1;
3. The victim impact report and;
4. The period of incarceration prior to sentence.

[41] The personal circumstances of the appellant 1 is that he was 27 years old and unmarried. He does however have a previous conviction. The learned magistrate found in favour of appellant 1 in that his previous conviction is not relevant to this matter.

[42] The Psycho-social Report indicates that the appellant 1 keeps on lying about the offence. The learned magistrate found that although appellant 1 indicated that he

² S v Banda 1991 (2) SA 352 (BG) at 355 A

is sorry for what he had done when addressing the court before sentence; this cannot be regarded as real remorse. The Psycho-social report indicates that the appellant had consumed alcohol on the day of the incident. According to the probation officer this was not the first time that the appellant had consumed alcohol. The appellant being under the influence of alcohol cannot be used as an excuse.

[43] The victim impact report indicates that the complainant at the time of the commission of the crime was 21 years old. She regarded appellant 1 as a brother. He used to visit them and his family was close to her aunt prior to the incident. The complainant experienced pains in her private parts for three days. She tested for HIV and after waiting for a period of three months she was confirmed negative. She had lost weight after the incident. She had nightmares every day and was scared when someone she does not know followed her. She had to move from her aunt's house and seek other accommodation. The incident affected her sex life. She lost her boyfriend because she was thinking of the incident.

[44] The appellant 1 had been in custody for 30 months prior to sentence.

[45] The imposition of sentence is at the discretion of the trial court. An appeal court's power to interfere with a sentence is circumscribed. The sentence may only be interfered with if there is an irregularity, misdirection or is one which no reasonable court could have come to.

[46] This court, in weighing the interest of the appellant 1, justice and the interest of society finds that the sentence imposed of life imprisonment is suitable and not shockingly inappropriate to the crime committed especially in view of the prevailing circumstance surrounding the commission of this crime. A lesser sentence would be woefully inappropriate.

[47] The complainant was lured by the appellant 1, who she trusted as she would a brother, to the residence of appellant 2. Not only did appellant 2 rape her but appellant 1, who she relied on to protect her, also raped her. The fact that the appellant was under the influence of alcohol cannot be found to be a substantial and compelling ground to deviate from the sentence. It ought to be found to be an

aggravating factor. This is clearly set out in *Director of Public Prosecution, Grahamstown v TM* 2020 JDR 0652 (SCA).

[48] The period, which an accused has spent in custody, should be taken into account when determining the imposition of a sentence. This court is alive to the fact that the appellant 1 had spent 30 months in custody prior to the imposition of the sentence.

[49] In *S v Radebe*³ it was stated by Lewis J.A, A better approach, in my view, is that the period of detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified whether it is proportionate to the crime committed.

[50] In the instant matter this court finds that the pre-sentence incarceration does not affect the imposition of a life sentence in light of the aggravating circumstances surrounding the commission of the crime.

[51] The court *a quo* properly considered the aims of punishment which include retribution and deterrence. In the particular instant the aggravating factors in the crime committed by the appellant 1 together with the interest of society, the impact on the victim, far outweigh the appellant's personal circumstances. In these circumstances, retribution and deterrence come to the fore and the appellant 1 personal circumstances reduce to the background.

[52] Accordingly, this court is satisfied that the trial court properly exercised its discretion in imposing a life sentence.

[53] I accordingly make the following order:

- (i) The appeal is dismissed in its entirety both on conviction and sentence.

MEERSINGH S.D

³ S v Radebe 2013 (2) SACR 165 at 170 (B)

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

FRANCIS E.J.

JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT : Y.J. BRITZ

APPELLANT'S ATTORNEYS : LEGAL AID SA

COUNSEL FOR THE RESPONDENT : M VAN HEERDEN

**RESPONDENTS ATTORNEYS : THE OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS**

DATE OF HEARING : 10TH FEBRUARY 2022

DATE OF DELIVERY OF JUDGMENT: 8 APRIL 2022