

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: A70/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the Appeal of:

T[....] E[....] Z[....]

FIRST APPELLANT

NTHIBANE JOHN MAKHETHA

SECOND APPELLANT

And

THE STATE

RESPONDENT

CORAM: MBHELE, DJP et REINDERS, J

HEARD ON: 10 OCTOBER 2022

DELIVERED ON: 21 OCTOBER 2022

JUDGMENT BY: MBHELE, DJP

[1] The appellants were convicted by the Regional Magistrate, Botshabelo, of raping a 16-year-old complainant more than once. They were each sentenced to life imprisonment on 12 November 2015. Aggrieved by the sentence, the appellants exercised their right to automatic appeal, due to the sentence of life imprisonment imposed, and approached this court on appeal.

[2] The offence took place on 28 December 2013. The two appellants gained entry, through the window, into the room where the complainant was sleeping at night and interchangeably had sexual intercourse with her without her consent. After they each had sex with her in the house the first appellant dragged her outside to some rocky place in the veld and continued to penetrate her vaginally with his penis without her consent. The second appellant threatened other occupants of the house with a knife resulting in them running out of the house to seek help from the neighbours. Amongst those that fled the house was a mother and her little baby who had to escape the house through her bedroom window while the appellants were in the complainant's bedroom.

[3] In their notice of appeal, the appellants contended that the sentence imposed by the trial court is shockingly harsh and inappropriate. They submitted, further, that the trial court over emphasized the seriousness of the offence and the interests of society at the expense of their personal circumstances and further that it erred in finding that there were no substantial and compelling circumstances warranting deviation from the prescribed minimum sentences.

[4] The personal circumstances of the appellants were set out as follows: The first appellant was 23 years of age at the time of sentencing, single with one minor child, he went to school up to grade 9 and does odd jobs from time to time. He has one previous conviction of assault common wherein he paid an admission of guilt fine in 05 July 2010. The second appellant was 25 years of age at the time of sentencing, single with a minor child who was less than 2 years old. He passed grade 10 and was employed earning a monthly salary of R5 500.00.

[5] The issue in this appeal is whether the trial court erred in imposing a prison term of life for each of the appellants after concluding that there were no substantial and compelling circumstances present that justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment for the rape of the complainant more than once.

[6] Before us Mr. Van der Merwe submitted that he is unable to convincingly argue that the court a quo erred in imposing a sentence of life imprisonment for each of the appellants.

[7] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate.

1

[8] The offence committed by the appellants is a serious one. They violated a 16-year-old complainant 16 in the most despicable manner. In **S v Chapman**² Mahomed CJ said the following on the brutality of rape.

‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.’

[9] Sexual violence is endemic in this country. We live in a society where there are angry men lurking at every corner who are in constant search for victims on whom they can vent their anger. Nothing explains why the two appellants who had women in their lives would go out of their way to break into the complainant’s house and violate her in the manner that they did. This is an indication that women are not safe anywhere they find themselves. Women are told to be extra cautious at all

¹ S v Rabie 1975 (4) SA 855 (A) AT 857 D-E see also S v De Jager and Another 1965 (2) SA 616 (A)

² S v Chapman 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A)

times. They are told to scan people's faces when in lifts, to stay away from dark places, not to be in the streets at night, to always look over their shoulders but all these are not enough to make them feel safe. It doesn't matter whether women keep their doors and windows locked in sweltering summer, if rapists want to find them nothing can stop them. In the current matter the complainant had ticked all the boxes to feel safe but the appellants pursued and violated her in the comfort of her home sleeping.

[10] Rapists are audacious and stop at nothing to get their way. The appellants broke into the complainant's home armed with a knife and attacked her while sleeping knowing very well that she was at her most vulnerable and would not manage to retaliate or raise a finger at them. What is even more difficult is that rapists do not have a particular profile through which they can be easily identified, they are lurking everywhere and can pounce anytime. There is absolutely nothing that women can do to thwart being the next victim of sexual assault.

[11] It has been generally accepted that rape is not about sexual pleasure but it is used as a tool to exert power over the victim with the ob. In **Masiya v Director of Public Prosecutions Pretoria and Another**³ the following was said:

'Today rape is recognized as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.'

[12] Section 51 (1) and (3) of the Criminal Law Amendment Act 105 of 1997 (CLAA) prescribes that the court can depart from the prescribed minimum sentence of life imprisonment only if the court is satisfied that substantial and compelling circumstances exist warranting imposition of a sentence lesser than life

³ Masiya v Director of Public Prosecutions Pretoria and Another CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) 13

imprisonment. In **S v Malgas**⁴ it was held that courts are required to regard the prescribed sentences as “being *generally appropriate*’ for crimes of the kind specified and enjoined not to depart from them for flimsy reasons. Malgas tells us that courts have to provide sound reasons for departing from prescribed sentences.

[13] As stated above the harm suffered by victims of rape cannot be understated. When the legislature enacted Section 51 of the CLAA and prescribed life imprisonment for gang rape on any victim and rape of a minor child it was sending a message that rape, especially of the category I mentioned above, must be viewed in a serious light by all. It placed a duty on our courts to send a clear and unambiguous message to the community and would be offenders that failure to treat women and children with respect has dire consequences. The one way through which the violence of this nature can be curbed is by imposing harsh sentences on the offenders.

[14] It is widely accepted that the statistics of rape in this country are escalating at an alarming proportion. The Minister of Police reported on 19 August 2022 that 9516 people were raped in a period of 3 months spanning between 1 April 2022 and 30 June 2022⁵. Although this shows a reduction of 500 cases for the same period in 2021 it is still a shocking figure. Courts are called upon to ensure that women and children enjoy the human rights guaranteed in the constitution and are given some sense of security that the perpetrators of violent crimes against them shall be brought to book.

[15] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society. The court should also take into consideration the provisions of Section 51 of CLAA where applicable. The sentence imposed must be proportionate to the offence.

⁴ S v Malgas 2001 (1) SACR 469 SCA

⁵ <https://www.gov.za/speeches/minister-bheki-cele-quarter-one-crime-statistics-20222023-19-aug2022000#:~:text=9%20516%20rape%20cases%20were,increases%20in%20this%20crime%20category>.

[16] In **Masuku v S** the court said the following when dealing with departure from prescribed minimum sentences:

“In my judgment, the fundamental approach in a case such as this has to be one that accepts that the mandatory sentence of life imprisonment should only be departed from where there is a weighty justification for doing so. And the extent of the departure must be proportionate. It cannot be so lenient that it loses altogether the importance of giving effect to the Legislature’s concern about the severity of the crime, and the interests of society to put an end to it by at the very least making it clear to all perpetrators and would be perpetrators that "it is no longer business as usual".

[17] The victim impact report and the evidence presented by the complainant indicate that the complainant’s life has been altered to the worst. She suffered depression, anxiety and mistrust towards men including her own male family members. She suffers from nightmares and insomnia which contribute to her lack of focus in class because she is always tired and drowsy during the day. She is unable to cope academically, she repeated grade 9 and 10 after the incident. She has become forgetful and struggles to reproduce information passed to her.

[18] When weighing mitigating factors, the offence and interest of society, I am unable to find that the sentence imposed by the trial court is out of proportion with the offence committed. There is nothing exceptional about the appellants’ personal circumstances and as such do not call for a departure from the prescribed minimum sentence of life imprisonment. The offence justifies a lengthy period of imprisonment. The appeal ought to fail.

[19] In the circumstances I make the following order:

[20] The appeal against the sentence is dismissed
The sentence is confirmed.

N.M. MBHELE, DJP

I concur

C. REINDERS , J

On behalf of the applicants:

Instructed by:

Mr. Van der Merwe

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent:

Instructed by:

Adv Straus

NDPP

BLOEMFONTEIN