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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A271/2018

In the matter between:

THABO JACOB LETSEKA

First Appellant

MOYENI DOCTOR XHUMA

Second Appellant

and

THE STATE

Respondent

CORAM:

MBHELE, J *et* MATHEBULA, J

HEARD ON:

18 MARCH 2019

JUDGMENT BY:

MBHELE, J

DELIVERED ON:

29 MARCH 2019

[1] This is an appeal against conviction and sentence. The appellants who were legally represented were convicted of rape and sentenced

to life imprisonment each on 05 April 2016 by a Regional Court Magistrate in Bloemfontein. The complainant was a 15 years old girl.

- [2] The appellants, aggrieved by both conviction and sentence, approached this court on appeal against both. In the notice of appeal and heads of argument the appellants assail the conviction on the basis that the trial court erred in finding that the state managed to prove its case beyond a reasonable doubt; that it erred by relying on the evidence of the state's single witness that was marred by contradictions and further that it erred by rejecting the appellants' version which was reasonably true or reasonably possible.
- [3] The evidence on record reveals that the complainant, an erstwhile member of 666 gang, was on the fateful day on her way from school walking with her two female friends. She was stopped by the appellants who demanded to know what she did with her 666 tattoo. They took her by force to a shack owned by one Beast. On their arrival at the shack the two appellants inscribed 666 tattoos on her hip extending to her waist. The first appellant had a firearm in his possession while the second appellant had a knife. They thereafter took turns to penetrate her vaginally with their penises without her consent.
- [4] On her arrival at home she did not report the incident to her aunt with whom she was staying owing to her fear of her assailants. Having been a gangster herself she knew that those who expose unlawful activities of gang members expose themselves to severe

harm. The complainant reported the matter to M M, her other aunt, two days after the incident after she had noticed that she was not her usual self.

- [5] M M confirmed that she visited the complainant on 20 July 2013 when she noticed that the complainant was not her usual self. Upon enquiry she learned that the complainant was raped by two members of the 666 gang. She encouraged the complainant to report the matter to the police. She accompanied the complainant to report the matter to the police. They were taken back and forth between two police stations before they received attention from the police about a week later. The complainant was scared of reporting the matter to the police because she feared that her assailants would harm her and her family.
- [6] She went for medical examination a week after the incident. The medical report shows that she had fresh tattoos depicting 666 on both sides of her waist. She had marks of old tattoos on her right wrist and inside her upper arm.
- [7] The appellants simply deny allegations against them. They agree that they met the complainant in the street in company of his friends but deny that they ever asked her about the whereabouts of her 666 tattoos. According to them, it was the complainant who asked them to inscribe a 666 tattoo on her body which request they refused and dismissed as madness. It is their version that the complainant came on her own to requesting that they inscribe a 666 tattoo on her body but they still refused.

- [8] Mr. Tshabalala, on behalf of the appellants, conceded that there are no grounds for appeal against conviction. He submitted that upon perusal of the record he is unable to argue that the trial court erred in its findings.
- [9] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellants as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusion thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See **R v Dhlumayo & another** 1948 (2) SA 677 (A) at 705-706).
- [10] It is so that the powers to evaluate and appraise evidence belong to a trial court which had an opportunity to see and hear witnesses and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion.
- [11] I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellants' versions are inherently improbable and fell to be rejected. The appellants failed to explain how the complainant got

to know that they were at Beast's shack if she did not know him and they were not the ones who dragged her thereto.

- [12] 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. See **(S v Rabie 1975 (4) SA 855 (A) AT 857 D-E also S v De Jager and Another 1965 (2) SA 616 (A)**

- [13] In **S V PILLAY 1977 (4) SA 531(A) at 535 E-F** the court said the following regarding an appeal against sentence:

"as the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh".

- [14] The violation of the innocence of children arouses the community's indignation and prompts it to call for measures to protect its youth. See **S v E 1990 (2) SACR 625 (A)**

- [15] The fact that the Constitution regards a child's best interests as of

paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children. See **De Reuck v DPP WLD 2003 (1) SACR 448 (WLD)**

- [16] The appellants were sentenced to life imprisonment as prescribed by Act 105 of 1997. The regional court found no substantial and compelling circumstances to justify a departure from the prescribed minimum sentence.

- [17] The trial court correctly considered the appellants' personal circumstances and found no weighty justification to depart from the prescribed minimum sentence. There was nothing unique about their personal circumstances. The first appellant was 29 years of age at the time of sentencing. He is single with no dependants. He was employed and earning a monthly income of R3200.00. He was in custody for 2 years 9 months on the date of sentencing. He was on 17 April 2012 convicted of housebreaking with intent to steal and theft and sentenced to 5 years wholly suspended with conditions. He was on 04 July 2012 convicted of assault and sentenced to a fine of R1000.00 or 50 days imprisonment.

- [18] The second appellant was 21 years at the time of sentencing and just over 18 years at the time of the commission of the offence. He went to school up to grade 9. He was staying with his parents and unemployed at the time of his arrest. He is a first offender.

- [19] The appellants were convicted of a very serious offence. It is clear from the first appellant's list of previous convictions that he has no respect for law. As pointed out by the trial court, the appellants stripped the complainant of her dignity completely. The appellants forcefully engraved tattoos with a knife on the complainant's waist before forcefully having sexual intercourse with her. She was violated in the worst possible manner. The appellants had sexual intercourse with her, each in the presence of the other without considering her right to privacy.
- [20] The complainant was a child who was subjected to severe trauma by the appellants. The offence altered the complainant's life significantly. She had to drop out of school for a year for fear of potential harm from the appellants and their fellow gang members. She had to uproot her life completely and move out of Bloemfontein for safety. She endured constant threats from the appellants' friends. Most of all, the appellants showed no remorse for their actions.
- [21] The minimum sentence of life imprisonment is applicable in this matter. In **S v Malgas 2001 (1) SACR 469 SCA** 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 unless they are satisfied that there is weighty justification for doing so.
- [22] Punishment must be proportionate to the offence. When weighing up the mitigating factors against the aggravating circumstances,

this matter as well as the interest of the community, I am not persuaded that the sentence imposed is unjust. The second appellant's youthful age at the time of committing the offence does not justify a departure from the prescribed minimum sentence owing to circumstances surrounding this matter. I am of the view that the trial court exercised its discretion judiciously. There is no justifying cause for us to interfere with the sentence. The appeal must fail in toto.

[23] In view of the above, the following order is made.

ORDER

- Appeal against conviction and sentence is dismissed;
- Conviction and sentence are upheld.

NM MBHELE, J

I concur

MA MATHEBULA, J

On behalf of appellant:
Instructed by:

Mr L Tshabalala
Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. E. Van Rensburg
Office of the Director: Public Prosecutions
Bloemfontein