



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No. : A257/2018

In the matter between:-

THAMSANQA FANA

Appellant

and

THE STATE

Respondent

CORAM: NAIDOO, J *et* MOLITSOANE, J

HEARD: 11 MARCH 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 16 MAY 2019

- [1] The appellant was arraigned in the Regional Court sitting in Welkom on charges of housebreaking with intent to commit an offence unknown to the state, assault with intent to do grievous bodily harm as well as rape. He pleaded guilty to all three counts and was accordingly convicted and sentenced. On the first two

charges he was sentenced to 5 years imprisonment on each count while on the last count he was sentenced to 20 years imprisonment. The court *a quo* ordered the sentences to run concurrently and the effective term of imprisonment was 20 years. Leave to appeal was granted for both the conviction and sentence by this court after the appellant successfully petitioned the Judge President. The appellant, however, chose to appeal only against the sentence and consequently this appeal relates to sentence only.

[2] The facts of this case are briefly as follows:

In the early hours of the morning the accused knocked at the door of the house of the complainant, a 69 year old lady. When no one answered the knock he broke the door open and entered the house. While in the house he heard a noise from another room and he hid himself. The complainant appeared and found the appellant in her kitchen. A scuffle then took place as a result of which the appellant assaulted the complainant. The accused indicates that he became furious that the complainant discovered him in her house. He then decided to rape her. He strangled, undressed her underwear and in the process inserted her penis into her vagina without her consent and thus raped her. The appellant was later arrested and linked with the offence by finger prints and DNA.

[3] The charge sheet indicates that the accused was charged with contravention of s3 read with the provisions of s51 (1) of the Criminal Law Amendment Act 51 of 1997(the Act). The charge

sheet makes no reference to the applicable schedules as referred to in s51 (1) of the Act.

- [4] The charge sheet has been formulated as follows:

“

RAPE (involving assault with intent to do grievous bodily harm)

IN THAT on or about 01-02-2015 and at or near Thabong in the district Welkom and within Regional Division of the Free State, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, MMS (69yrs) by: penetrating her vagina with his penis without the consent of the said complainant and thus raped her.”

- [5] The formulation of the heading indicates that the accused is charged with rape involving assault with grievous bodily harm. Section 51(1) of the Act provides as follows:

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

Section (c) of Part 1 of Schedule 2 of the Act on the other contemplates rape ‘involving the infliction of grievous bodily harm.’

- [6] The heading of the charge sheet as it stands is misleading in that it equates the issue of rape where the infliction of grievous bodily harm as contemplated in Part 1 Schedule 2 (c) with rape involving assault with intent to do grievous bodily harm.

- [7] One of the elements of the offence of assault with intent to do grievous bodily harm is proof of ‘*intent*.’ Jonathan Burchell in **Principles of Criminal Law**¹ says the following in the discussion

¹ 3rd ed Juta at 690.

of this element of the offence of assault with intent to do grievous bodily harm:

“It is not necessary that X should actually cause grievous bodily harm: It is enough that he intends to cause it, for the crime is not ‘causing grievous bodily harm’. If X intends a grievous injury, but causes a slight injury or none at all, he may nevertheless be guilty of assault with intent to do grievous bodily harm. Conversely, of course, if X inflicts a serious injury without intending to cause grievous body harm, this crime is not committed (my emphasis).”

- [8] In order to secure a conviction on a charge of assault with intent to cause grievous bodily harm state must, inter alia, prove that the accused intended to cause grievous bodily harm. As indicated above it is enough that such harm is intended even if it was not achieved.

- [9] On the other hand to trigger the operation of the provisions of s51(1) Part 1 of Schedule 2 (c) of the Act , the rape must have been committed in circumstances where such a rape actually involved the infliction of bodily harm. Intent as envisaged in the offence of assault with intent to cause grievous bodily harm may in certain circumstances not be enough.

- [10] Molemela AJA (as she then was) dealing with the interpretation of the provisions of Part 1 Schedule (c) of the Act in **Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi**² said the following:

“[14] It is clear..... that the test for ascertaining whether grievous bodily harm has been inflicted is factual and objective. The correct approach to that

² 2017(2) SACR 384.

enquiry necessitates a holistic consideration of all factors pertaining to the incident, with a view to ascertaining whether bodily injuries were inflicted and whether they are of a serious nature.

[15] In my view the High Court's reliance on cases where the accused was charged with the offence of assault with intent to do grievous bodily harm was clearly wrong.....'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part 1 (c) of the CLLA[the Act]. Rather, the question to be answered is whether, as matter of fact, the victim of such a rape sustained grievous bodily harm."

[11] In the case before us after the charges were put to the accused the following transpired:

"COURT: Count 3 its rape involving assault or assault with intention to do grievous bodily harm, as per count 2?

PROSECUTOR: Grievous bodily harm.

COURT: Just add that there. Then it brings it in the provisions of s51 (1). Yes Mr Fana, do you understand the charges against you?"

Clearly the court was of the mistaken view that rape involving assault with intent to cause grievous bodily harm brought the offence within the provisions of s51(1) of the Act. It is so that in some cases it may be so that where an accused is charged with rape and he actually as a matter of fact caused grievous bodily injury to the complainant the provisions of s51(1) may be triggered. It is ,however, not correct to assume that where the accused is charged with rape involving assault with intent to cause grievous bodily harm would as a matter of cause bring the rape within the meaning of s51(1)(c) of the Act.

[12] The evidence before us reveal that the appellant strangled the complainant with his bare hands. There is no indication from the record as to the force exerted by the accused to strangle the

complainant. There is also no evidence as to how long this strangulation endured. The clinical findings in the medico legal report indicate that the complainant sustained scratch marks on the right side of the neck and cheek. She also sustained a swollen right upper lip. These injuries could hardly be described as serious.

[13] In view of the injuries sustained, I am of the considered view that this rape does not involve the infliction of grievous bodily harm. I consequently find that the court *a quo* erred in finding that this rape fell to be dealt with in terms of s51 (1) of the Act.

[14] It is now settled that a court sitting in appeal will not interfere with the sentence imposed by the trial court unless the trial court misdirected itself in the imposition of the sentence and thus imposed a sentence which is so inappropriate and induces a sense of shock or outrage, or the court failed to exercise its judicial discretion properly. [See *Sv Rabie*³]

[15] The trial court approached the sentence in the matter on the basis that the rape fell within the provisions of s51 (1) of the court. We now know that such a premise was wrong as the rape fell to be dealt with in terms of s51(2) of the Act which prescribes a minimum sentence of 10 years imprisonment for a first offender on a charge of rape. The trial court found that compelling and substantial circumstances were present which warranted that court to impose a lesser sentence. I do not agree.

³ 1975(4) SA 855(A).

- [16] In this case the trial court took into account the personal circumstances of the accused. That at the time of the commission of the offences the accused was 25 years of age. That although not a first offender, the trial court took the view that his previous convictions were irrelevant to the matters at hand and the court decided to treat him as a first offender. That he pleaded guilty to the charges and thus shown remorse for his actions. I have doubt that the appellant was remorseful. The accused was linked with these offences by fingerprints and DNA. It appears that the case was strong against the accused.
- [17] Against this background it must be noted that the accused was convicted of very serious offences. Housebreaking with intent to commit any kind of an offence remains serious in that it also infringes upon the complainant's right to privacy. The complainant expected to feel safe in her home and not to be attacked in the way that the appellant attacked her. She was an elderly woman, 69 years of age at the time. She was so old to be the grandmother of the appellant. Rape has been described as humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim⁴.
- [18] Taking into account the mitigating factors and weighing them against the aggravating factors I am of the view that no substantial and compelling circumstances exist that warrants the imposition of a lesser sentence in respect of the charge of rape.

⁴ S v Chapman 1997(2) SACR 3(SCA).

- [19] With regard to the offence of housebreaking and assault with intent to steal and theft I am of the view that 5 years imprisonment is not appropriate. The appellant was found in the house of the complainant. At that stage it is unknown what his intention was. Save for breaking in it cannot be said with certainty what he intended to do. In my view 5 years imprisonment is excessive.
- [20] With regard to the offence of assault with intent to cause grievous bodily harm I already alluded above that the injuries were not serious and 5 years imprisonment is in my view disproportionate to the crime and the personal circumstances of the appellant.
- [21] Taking into account the triad of the seriousness of the case, the personal circumstances of the accused and the interest of the community I am of the view that there are no substantial and compelling circumstances warranting the imposition of a lesser sentence. I accordingly make the following order:
- [22] **ORDER:**
1. The appeal against the sentence is upheld and the sentence imposed by the trial court is set aside and it is substituted with the following:
 - i. Count 1: 2 years imprisonment;
 - ii. Count 2: 2 years imprisonment;
 - iii. Count 3: 10 years imprisonment;
 - iv. It is ordered that the sentence in count 1 is to run concurrently with the sentence in count 2.

- v. The order in terms of s103 (1) of the Firearms Control Act 60 of 2000 is confirmed.

P.E. MOLITSOANE, J

I agree.

S. NAIDOO, J

On behalf of the appellant: Ms S. Kruger
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent: Adv. XXX
Director of Public Prosecutions
BLOEMFONTEIN