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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

Case number: A72/2019

In the matter between:

THABISO DANIEL SEMPE

Appellant

and

THE STATE

Respondent

CORAM: MHLAMBI J, et MURRAY, AJ

HEARD ON: 07 OCTOBER 2019

DELIVERED ON: 28 November 2019

MHLAMBI, J

- [1] The appellant was convicted of rape in the regional court on 8 August 2018 for having contravened the provisions of section 3 of Act 32 of 2007 read with section 51(1) of Act 105 of 1997 and sentenced to life imprisonment. The appeal is against both conviction and sentence.
- [2] The appellant's grounds of appeal against both conviction and sentence were stated as follows:
1. The state failed to prove its case beyond a reasonable doubt; and that the appellant's version was reasonably possibly true;
 2. The complainant was not a reliable witness. There were contradictions between her evidence, that of her witness and the J88 medical report;
 3. The trial court erred in not finding that substantial and compelling circumstances were present to deviate from the prescribed sentence of life imprisonment.
- [3] It was submitted on behalf of the appellant that the trial court erred, despite the contradictions in the state case, that the complainant was a reliable witness whose evidence, as a single witness, should have been approached with caution. The contradictions presented and highlighted by the applicant were, in my view, cosmetic in nature as they referred to the differences of how the parties travelled to D[...]'s place (where the rape took place) and how the complainant ended up with the police. There were no contradictions as to the act of the rape itself. The obvious

contradiction was between the complainant and her witness, L[...]. The complainant testified that the appellant did not stab her with the broken bottles whereas her witness, L[...], suggested that the injuries to her body were caused by broken bottles.

- [4] The appellant's version is that he had consensual sex with the complainant at the house on the morning of 14 February 2015. It is common cause that she was penetrated twice. Her version is that she was penetrated both vaginally and through the anus by the appellant. The appellant, on the other hand, did not mention anal penetration, but that they had sexual intercourse in two sessions, ten minutes apart. What is in issue, is whether the complainant gave consent to the appellant to have sexual relations with her.
- [5] The complainant's evidence is, in a nutshell, that she and the appellant were neither friends nor acquaintances on the day in question. She, her witness, L[...], M[...], D[...], who was the accused's sister, and two unknown male persons, were at D[...]'s house on the morning of the incident. The appellant was asleep on their arrival. A short while after their arrival, the others drove to town to buy food. She sat in the dining room when the appellant emerged from the bedroom, invited her to join and sleep with him. She declined. He instructed her to undress but she refused. He then broke two beer bottles on the floor, threatening to stab her if she refused to undress. She undressed.
- [6] He refused her invitation to wear a condom and penetrated her vaginally without her consent. She testified that she knew that he

was sick, hence her request that he should wear a condom. During the intercourse he was still holding the broken bottle necks. He then instructed her to sweep the dining room floor and pick up the broken bottles. She did that while naked as the appellant said he wanted to see her body.

- [7] She was taken to another room where she was penetrated through the anus as she was made to bend on her knees on the floor. On hearing the sound of an approaching vehicle, she was instructed to put her clothes on and told not to tell anybody of what took place, otherwise the appellant would kill her. L[....]hang found her in the bedroom where she was crying and she, the accused, suggested to L[....]gang that they should go back home. The same people drove her back home where she told L[....] what had happened. The matter was then reported to the police. Save for the contradiction in the nature of the injuries sustained by the complainant, L[....] corroborated the complainant's evidence in all material respects.
- [8] The appellant's version corroborated the complainant's in relation to the presence of the bottles in the house which he alleged to have brought from the visitor's car and put them on top of the wardrobe in the bedroom. His version is not supported by L[....] that the previous night they were together at the tavern, where after he slept with the complainant in his bedroom. During cross-examination he started adding to his evidence when he alleged that the complainant was a prostitute and that his girlfriend had confronted her because of her loose behaviour.

- [9] He was a single witness. He failed to call witnesses who were present either at the tavern or the house to corroborate his version. I am satisfied that his unsubstantiated version can safely be rejected as false in as far as it contradicted that of the state. I am furthermore satisfied that on that day, the appellant threatened the complainant, intimidated her with the broken bottles and had carnal relations with her against her will. It is interesting to note that the evidence surrounding the wearing of the condom and that the complainant knew that the appellant was sick, remained unchallenged. It is equally striking that in mitigation of sentence, it was submitted on behalf of the appellant that he had a chronic disease which he did not want to disclose. I am satisfied that the state succeeded to prove its case beyond reasonable doubt and that this appeal must fail.
- [10] The accused's personal circumstances are that he was 37 years old at the time of sentencing. His scholastic qualification is grade 11. He was employed at the time of sentencing as a general worker and earned an income of R 3 390.00 per month. He has two children, aged 18 and 16 years old who resided with their mothers. He maintained them. He was unmarried and had a chronic illness, the nature of which he declined to disclose. He has previous convictions, two of which were assault with the intent to do grievous bodily harm during 2003 and 2005. He was sentenced to a fine of R500.00 or three months' imprisonment for the first conviction and three years' imprisonment wholly suspended for a period of four years on the second.

- [11] The trial court took into account that the appellant was not a first offender and that the rape of another person was a very serious offence. In mitigation it accepted that he had health problems, was employed and had dependants. The court found that the appellant raped the complainant more than once. The offence was perpetrated in circumstances described in Part 1 of Schedule 2, item (a) (i), as the victim was penetrated by the appellant twice, with a short intervening interval of time. The conviction attracts the imposition of life imprisonment¹. In **S v Maxabaniso**² the following was said:

“[25] In my view, the legislature envisaged an accused being charged with one charge of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item a(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): even when the prescribed minimum sentence for a rape is ten years imprisonment, courts have common law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances.”³

- [12] The trial court found, and correctly so in my view, that there were no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence of life imprisonment. Minimum sentences cannot be departed from

¹ S v MM 2010(2) SACR 543 (GNP)

² 2015 (2) SACR 553 (ECP)

³ See S v Cock; S v Manuel ECG 3 February 2015 (case no. CA108/2013) unreported, para 36.

lightly or for flimsy reasons as they are ordained by the Act⁴. I am satisfied that the trial court had a balanced regard to the nature and seriousness of the crime, the appellant's personal circumstances and the legitimate interests of society. Consequently, the appeal against both conviction and sentence must fail.

[13] I therefore make the following order:

Order

The appeal against both conviction and sentence is dismissed.

MHLAMBI, J

I concur,

MURRAY, J

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⁴ S v PB 2013 (2) SACR 533 SCA para 20

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