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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 No: A67/2016

In the matter between:-

THIBELLO DAVID RAPITSO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: RAMPAL, J et MATHEBULA, J et MHLAMBI, J

HEARD ON: 24 APRIL 2017

DELIVERED ON: 08 JUNE 2017

MHLAMBI, J

- [1] On 08 May 2015, the appellant was convicted in the circuit court at Virginia by Mia AJ on charges of rape and assault with intent to commit grievous bodily harm. He was sentenced on 02 July 2015 to life imprisonment on a charge of rape and 5 (five) years imprisonment on a charge of assault with the intention to inflict grievous bodily harm.
- [2] He applied for leave to appeal against both conviction and sentence. The application for leave to appeal against the conviction was refused but granted against the sentence only. The appellant appeals to this court against the sentence.
- [3] The issues to be considered are couched as follows in the application for leave to appeal:
- “2.1 Whether the court a quo was correct in sentencing the Appellant to life imprisonment on the basis that grievous bodily harm were inflicted during the course of rape. Despite the fact that the Appellant was not charged for the rape involving the infliction of grievous bodily harm.*
- 2.2 The Appellant submitted inter alia in his notice of appeal that learned Acting Judge erred:*
- 2.2.1 By imposing a sentence of life imprisonment in respect of count 1,*
- 2.2.2 By not taking into account that the minimum sentence that was applicable in respect of count 1 was 10 years imprisonment,*
- 2.2.3 By over-emphasizing the interest of community and in doing so, the court a quo ignored the personal circumstances of the Appellant.”*

- [4] The evidence in this matter is that on the evening of 11 March 2012 at about 20h00 the complainant and her friends were at the N. tavern where they drank liquor when she was approached by the appellant who proposed love to her. She was not interested. She spent the whole evening at the tavern and left at approximately two in the morning.
- [5] As she and her friend were on their way to her boyfriend's home, she noticed two males coming out of the tavern. The men caught up with them, grabbed the complainant, demanded that she accompany them and pulled her along with them. Her friend fled. When she resisted, she was assaulted with fists, trampled upon and her mouth gagged as she screamed. The appellant took out a knife and threatened to kill her if she continued to resist or to scream.
- [6] The assault continued until they reached a house where she was taken inside and raped by both men. Whenever she refused their advances she was assaulted by both the appellant and the other man, known as Moeketsi who died after the incident.
- [7] In paragraph 8 and 9 of the appellant's heads of arguments reference was made to page 247, line 1-13 of the case record and it was submitted that the court *a quo* "found that, the prescribed minimum sentence of life imprisonment was applicable on this basis that grievous bodily harm was inflicted on the complainant during the course of the rape. The court *a quo* after it was referred to *State vs*

Mahlase, it decided to use second count in order to make count one to fall within the purview of section 51(1) of the Criminal Law Amendment Act 105 of 1977. 9.2 It is our submission that the court a quo misdirected itself material in sentencing the appellant in terms of section 51(1) of the Act to life imprisonment in respect of the rape charge. It is our submission that the conduct of the court a quo of using count 2 in order to make count 1 to fall within the purview of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 is tantamount to duplication of conviction.”

- [8] Line 1-13 of the court record reads which reads as follows:
“In view of the factors referred to above, I am not persuaded that there are weighting (sic) factors or any substantial and compelling factors, which justify a deviation from the prescribed sentence.
In the circumstances noted above, namely the rape, accompanied by assault, causing grievous bodily harm, the sentence of life imprisonment would not be disproportionate to the crime, the offender and the needs of society, as to amount to injustice being done. The prescribed sentence is applicable” (my own emphasis).
- [9] The argument is misplaced. The passages quoted above do not in any way suggest that the court a quo used the second count, in order to bring count one within the purview of section 51(1) of Act 105 of 1977. On page 242 of the record the following was stated during sentence:
“The facts furnished, in the State’s summary of substantial facts referred to an assault en route to the house, where the complainant was raped, as well as an assault, during the rape, in paragraphs 3 and 4. The clinical findings on the J88 indicate that the complainant presented with fresh injuries namely, swollen face, both eyes were swollen and blue eye, bruises, plus a small laceration on the right cheek, bruises on the left cheek and bruises on the chin”

- [10] Relying on **S v Mahlase (255/1211) (2011) ZASCA 191**, it was, submitted furthermore in the heads of argument that the court *a quo* erred in finding that the appellant was charged with the rape involving the infliction of grievous bodily harm. According to the counsel the appellant could only be convicted of rape as provided for in Part 3 of Schedule 2 of Act 105 of 1997. Furthermore, the counsel contended that the charge against the appellant did not refer to Part 1 of Schedule 2. The former has as a prescribed minimum sentence imprisonment for a period of ten (10) years. It was further argued that as charges were withdrawn against the co-accused who has since died, the appellant should have been sentenced to a lesser term of imprisonment.
- [11] Mr Mthethwa, on behalf of the respondent, correctly submitted that a sentencing court was not precluded from imposing a life sentence solely on the basis that the indictment did not refer to specific jurisdictional factors listed in section 51(1) of Act 105 of 1998 and, coincidental thereto, that a sentence of life imprisonment might be imposed upon him in the event that he is convicted of rape where there was infliction of grievous bodily harm in accordance with the provisions of Part 1(c) of schedule.

[12] At the outset of the trial, the state indicated that the charge in count one should be read with the provisions of section 51(1) of schedule 2 of the Criminal Law Amendment Act. The appellant's legal representative confirmed having discussed and explained to the appellant that in the event of conviction, the appellant would face a minimum sentence of life imprisonment. The accused confirmed and understood the explanation.

[13] The charge sheet on the count of rape reads as follows:

"1. Contravening the provisions of Section 3 read with Sections 1; 55; 56(1); 57; 58; 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007- and read with Sections 256; 257; and 281 of the Criminal Procedure Act 51 of 1977- Rape (read with the provisions of Section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended).

In that upon or about 11 March 2012 and at or near Phomolong, in the district of Hennenman, the accused did unlawfully and intentionally commit an act of sexual penetration with T S, an adult female person, by penetrating her vagina without her consent and therefore raped her."

[14] Section 51(1) of Act 105 of 1997 provides as follows:

"[n]otwithstanding any other law but subject to subsection (3) and "6", a High Court shall-

a) if it has convicted a person of an offence referred to in Part 1 schedule 2;
or

b)

sentence the person to imprisonment for life"

On page 241 line 25 and 242 line 1 to 5 of the record on sentence the following was said:

“The charge against Mr Rapiso was formulated, so that it referred to schedule 2, without referring to the specific Part 1 to 4. There was no objection, at the outset, to this formulation or that it failed to give sufficient particularity, to enable Mr Rapiso to respond thereto”.

See also **Senne v The State** (A15/2016) ZAHSA, 18 August 2016 (FB) paragraphs 25-26.

- [15] Returning to the merits it is quite obvious that the appellant was sexually attracted to the complainant as from the time that he approached and unsuccessfully proposed love to her in the tavern. The assault on the complainant by the appellant and Moeketsi was not the beginning and the end in itself, but was launched with the intention to subdue her so that she should go with both of them to the house where the rape took place. The continued assault at the house was to eliminate any further resistance on her part to their sexual advances. This much was conceded by the state when Mr Mthethwa submitted that the assault, that took place before they reached the house was to render the complainant to succumb to the wishes of the accused. He conceded furthermore that the second charge of assault with the intention of inflicting grievous bodily harm, was a duplication and should be set aside. There could therefore be no talk or suggestion of separate “pockets of *dolus*”; one formulated inside the house and the other outside in the street. The intention to subdue the complainant in order to

rape her, was continuous throughout, from the minute the assault took place until the rape was completed. Both the accused had one purpose in mind, viz, to have carnal relations with the complainant, with or without her consent. To achieve this aim, they were prepared to resort to violence. The application of the violence on the complainant was not to hurt her per se, but to subdue her so that they could have their way with her.

[16] In the premises it is therefore evident that the second count cannot stand as it is a duplication and should therefore be set aside

[17] The court *a quo* found that the appellant's age, employment, impoverished circumstances and consumption of alcohol did not individually or accumulatively justify a deviation from the minimum sentence. Women are entitled to the protection of their rights and to enjoy them without fear. **S v Matyityi 2011 (2) All SA 424 SCA; S v Chapman 1997 (3) SACR 341 (SCA)**. In my view this approach was correct. I could find no material misdirection which would necessitate the interference with the sentence.

[18] A court hearing a criminal appeal against sentence should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and it should be careful not to erode such discretion. The sentence should

only be altered if the discretion has not been judicially and properly excised. **S v Rabie 1975 (1) SA 855 (A) 857 D-F.** I am of the view that the sentence is neither vitiated by a misdirection nor is disturbingly inappropriate. Bearing in mind the guidance in **S v Malgas 2001 (2) SA 1222 (SCA)** that the Legislature has ordained the prescribed sentence as the sentence that should ordinarily and in the absence of weighty justification be imposed in the specified circumstances. I am of the view that the court *a quo* exercised its discretion properly and reasonably; **S v Pillay 1977 (4) SA 531 (A) 535 F-G.**

[19] I would therefore dismiss the appeal as regards the sentence imposed in respect of the rape. Consequently, by virtue of the reasons set out above, I find that the second charge represents a duplication and should be set aside.

[21] I therefore make the following order:

ORDER:

- (i) The appeal against sentence in respect of charge 1 is dismissed;

(ii) The Conviction and sentence on the second charge are set aside and substituted with the following order: the accused is found not guilty.

M.H RAMPAL, J

I concur

M.A MATHEBULA, J

I concur

J.J. MHLAMBI, J

On behalf of appellant: Mr L. Pretorius
Instructed by:
Bloemfontein Justice Centre
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On behalf of appellant: Mr S Mthethwa
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