

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

Appeal No.: A139/2015

In the appeal between:-

JOSEPH OUPA LEBOHANG SEPHULA

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, JP *et* NAIDOO, J

HEARD ON:

5 OCTOBER 2015

DELIVERED ON:

11 FEBRUARY 2016

MOLEMELA, JP

- [1] This is an appeal against conviction and sentence. The appellant appeared before the Regional Court in Bethlehem (court *a quo*) and was charged with rape. He was convicted and sentenced to life imprisonment. The appellant has an automatic right of appeal on account of his sentence.
- [2] The facts that gave rise to the appellant's prosecution were presented to the court *a quo* through the evidence of three state witnesses. The complainant was a single witness in respect of the

rape. In a nutshell, the complainant's evidence was that she and the appellant lived on neighbouring houses at a farm. On the day of the incident, the appellant came to her house in the morning and told her that he had problems. He requested her to let him into the house so that they could discuss his problems in private. The two of them then proceeded to the complainant's parental home, which was situated in the same premises. Once they were inside the house, the appellant, closed the door, locked it and then grabbed a pair of scissors from the table. He immediately stabbed the complainant on the forehead with the scissors and then ordered her to take off her clothes. The complainant obliged. The appellant took off his clothes and ordered the complainant to climb on the bed. He then ordered the complainant to perform oral sex on him. The complainant obliged. The complainant tried to scream but the appellant threatened to kill her. He thereafter penetrated her vaginally and proceeded to rape her. After ejaculating, he lay next to her. He raped her three times. He then put his clothes on and told the complainant that he was going to check on some people. As soon as he opened the door, the complainant pushed him out. In her haste to rush out of the house, the complainant fell, injuring her shoulder in the process. She stood up and ran to her neighbour's house. As she was running away, she saw the appellant walking towards his house. The neighbour phoned the owner of the farm, who was the appellant's employer. The latter arrived soon thereafter, followed by the police.

- [3] The complainant's neighbour testified and confirmed that when the complainant arrived at her house, she was bleeding and in

shock and reported that the appellant had raped her. She confirmed that she phoned the appellant's employer to notify her about the incident. The appellant's employer testified and confirmed that she was called to the scene by the complainant's neighbour. She in turn called the police. Before the arrival of the police, she saw the appellant walking towards his house and asked him what was going on. The appellant did not respond. After the arrival of the police, the appellant refused to open the door and threatened to shoot the police. The police entered the house forcibly, only to find the appellant lying on the floor, unconscious. He was bleeding from his wrists. It seemed as if the appellant had slashed his own wrists. The appellant was taken to the hospital, where he received treatment.

- [4] At the commencement of the trial, the prosecutor requested that the appellant be referred for mental observation to determine whether he had criminal capacity. The matter was postponed and the appellant was duly referred to a mental institution for observation as contemplated in the Criminal Procedure Act 51 of 1977. On resumption of the trial, a psychiatrist's report was handed up by the prosecution without any objection from the defence. In the report, the psychiatrist confirmed that the appellant was able to distinguish between right and wrong at the time of the incident and that he was able to understand the nature of the proceedings. He was therefore certified to have criminal capacity and the trial resumed. The appellant pleaded not guilty and gave a plea explanation. The basis of his defence was consent. During the complainant's cross examination, it was put to her that she and the appellant had a love affair and that the

sexual intercourse that had taken place between them was consensual. She vehemently denied this. Once the complainant's witnesses had concluded their testimony, the state prosecutor handed up a section 212 affidavit embodying the DNA test results. There was no objection from the defence. The defence counsel then proceeded to make certain formal admissions, after which the state closed its case. The defence counsel then indicated that the appellant was changing his plea to a plea of guilty and thereafter closed the defence case. The state prosecutor then gave a closing address. The defence counsel indicated that he would not give a closing address. The court *a quo* convicted the appellant and sentenced him to life imprisonment.

- [5] In the appellant's heads of argument, it was submitted that the appellant's counsel had not been mandated to change the appellant's plea and that the court *a quo* had, after failing to confirm the change of plea with the appellant, wrongly convicted him. It was argued that the court *a quo*'s failure to confirm whether the appellant had indeed instructed his counsel to change his not guilty plea to that of guilty, constituted a serious misdirection warranting the setting aside of the conviction. It is evident from the record that after the appellant's counsel had indicated that the appellant was changing his plea, the trial magistrate, prosecutor and the defence counsel all proceeded as if there was no change of plea. The prosecutor gave the closing address and the defence indicated that he would not give a closing address. Insofar as the trial magistrate failed to record the change of the plea as contemplated in the Criminal Procedure

Act, he misdirected himself. It is trite that not every misdirection committed by the trial court warrants the setting aside of its decision. I am thus satisfied that the circumstances of this case are such that the misdirection committed by the court *a quo* is not of such a serious nature as to vitiate its guilty verdict.

- [6] I am of the view that even if we were to accept, in the appellant's favour, that the defence counsel had no mandate to change the plea, it is clear from the facts of this case that this could not have caused the appellant any prejudice, as the change of plea occurred after the state had already closed its case. It is evident from the record that by the time the state closed its case, a solid case had already been presented by three witnesses whose evidence had not been seriously attacked by the defence in cross-examination. It must also be borne in mind that the appellant admitted that sexual intercourse occurred. This was in any event confirmed by the DNA results. Although the appellant was a single witness in respect of the rape itself, her evidence was satisfactory in all material respects. The evidence of the neighbour of both the complainant and the appellant, to the effect that the bleeding complainant ran into her house in a state of shock and reported that the appellant had raped her, lends credence to the complainant's version. The employer's version corroborated the complainant's emotional state and the injuries that she had sustained. It is highly improbable that a lover who had just made love to his girlfriend would suddenly stab her with a pair of scissors.

[7] Furthermore, since the appellant only queried the change of plea and did not take issue with the closure of his case without him taking the witness stand, I accept that this stance was within the mandate he gave to his counsel. Evidently, he chose not to testify despite a formidable case that had been made against him. In **S v Boesak 2001 (1) SA 912 (CC) para 24** the court aptly stated as follows: The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused.” Considering that the appellant’s defence was that of consent, he ought to have taken the witness stand to explain the circumstances under which the alleged consent was granted. The fact that he failed to do so in the face of the state’s formidable evidence renders his conviction beyond reproach. The concession in respect of the conviction, made by his counsel at the hearing of the appeal, was therefore properly made and the appeal against the conviction falls to be dismissed.

[8] With regards to the sentence imposed, it is trite that sentencing is pre-eminently a matter that falls within the discretion of the trial court. In **S v Malgas 2001(1) SACR 469 (SCA)**, the following was stated in relation to the approach to be adopted in an appeal against sentence: “ A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and

then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.

- [9] It is a trite principle of sentencing that the well-known triad of sentence, namely the nature of the offence, the personal circumstances of the accused and the interests of society, must be taken into account in a balanced fashion. See **S v Zinn 1969 (2) SA 537 (A)**. The objectives of punishment must also be taken into account. The court *a quo* concluded that the rape committed by the appellant fell in the category of most severe rapes. This conclusion was arrived at after considering a number of factors and was justified, in my view. The court *a quo* correctly took into account that the appellant inflicted serious injuries on the complainant and then raped her three times after forcing her to perform oral sex on him. It also took the seriousness of the offence and its prevalence into account. What adds to the afore-

mentioned aggravating factors is the fact that the appellant, as the complainant's neighbour, breached the trust relationship, and that he violated her in the sanctity of her own home, where she thought she was safe.

[10] The record shows that the court *a quo* considered the fact that the appellant was 34 years old, that he was a first offender and that he was responsible for the maintenance of his two children as mitigating factors. The court *a quo* stated that it was in agreement with the state prosecutor's submission that the appellant's change of plea, having taken place at such a late stage of the proceedings and against the backdrop of a solid state case, was not a genuine sign of contrition. I agree with this finding. I disagree with the submission that the appellant's alleged attempt to commit suicide after the incident cannot be considered as a sign of remorse, because during the proceedings he pleaded not guilty and in any event disavows his change of plea on the basis that it was not in accordance with his instructions. This disavowal makes it clear that the court *a quo* correctly considered him not to have shown any remorse for his actions. It is evident from the record that in its consideration of the facts of the case for purposes of assessing the appropriate sentence, the court *a quo* was alive to the triad of sentence and considered it in a balanced fashion.

[11] Having considered all the circumstances of the case, I am of the view that the court *a quo* correctly concluded that there were no substantial and compelling circumstances that warranted deviation from the prescribed minimum sentence. I do not deem

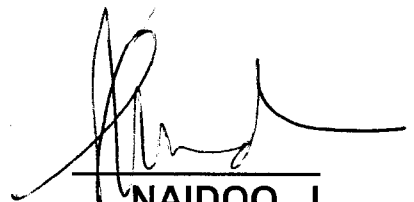
the sentence of life imprisonment to be disproportionate to the gravity of the offence committed by the appellant. There is therefore no justification for tampering with this sentence. The appeal against sentence also has to fail.

[12] Wherefore the following order is made:-

1. The appeal against the conviction and sentence fails.
2. The conviction and the sentence of life imprisonment imposed by the court *a quo* are confirmed.


 pp MOLEMELA, JP

I concur.


 NAIDOO, J

On behalf of the applicant:

P L van der Merwe
 Instructed by:
 Justice Centre
 BLOEMFONTEIN

On behalf of the respondent:

Adv. F Pienaar
 Instructed by:
 The Director: Public Prosecutions
 BLOEMFONTEIN