

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

Case No.: A200/2015

In the matter between:

TEBOGO BARRY TINTE

Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J et CHESIWE, AJ

HEARD ON:

15 FEBRUARY 2016

DELIVERED ON:

18 FEBRUARY 2016

MOLOI, J

- [1] This is an appeal against the conviction on a charge of rape and the sentence of ten (10) years imprisonment imposed by the Regional Court. Leave to appeal was granted by the trial court.
- [2] The appellant was charged with rape of the complainant, one Rose Thabethe, on 17 July 2009. The complainant was walking to a tuck shop at approximately 18h50. She saw the appellant standing near a container. She knew the appellant well and they had attended the same school. After passing the appellant, he came from behind and grabbed her by her

neck holding a knife in one hand. He pulled her towards the playground and demanded that she undress herself. She tried to resist and he stabbed her on the head with the knife. The appellant forcefully undressed her and fondled with her breasts and kissed her. He raped her whereafter he ordered her to run away naked threatening to cut her tongue and kill her if she refused. She grabbed her jeans and ran away leaving her cellular telephone on the ground where it fell. She immediately reported the incident to Matuna and told her Barry (the appellant) raped her. Matuna confirmed in her evidence that the complainant was bleeding, crying and in a state of shock. She (Matuna) also knew the appellant very well. The J88 form confirmed the injuries to her head and also those caused by forced penetration of her vagina.

- [3] The only defence raised by the appellant was mistaken identity of the complainant's attacker. He denied he was at the scene and stated that he had been with his wife at home. The magistrate found the evidence of the complainant truthful and reliable as she testified logically and had no reason to falsely incriminate the appellant. The trial court correctly applied the cautionary rules regarding the evidence of a single witness and the requirements of proper identification citing the relevant decisions. I must add that even the legal representative of the appellant on appeal, Mr Van der Merwe conceded that the evidence of the complainant and her witness cannot be criticised and would not pursue the appeal against the conviction. Even the purported *alibi* of the appellant was not pursued.

- [4] As regards sentence imposed it was also conceded that the approach of the trial court was balanced and all the factors to be taken into account, namely the personal circumstances of the appellant, the nature and the gravity of the offence committed as well as its high rate in that community and as the interests of the community were approached in the correct manner: **S v Banda & Others** 1991(2) SA (BGW) 355 A. It was also conceded that the court of appeal may not lightly interfere with the sentencing discretion of the trial unless the sentence imposed was shockingly inappropriate: **S v Makhandu** 2002(1) SA at 431 E-F (SCA). I was, however, contended that the appellant's incarceration for a period of two years awaiting trial; **S v Stephen and Another** 1994 (2) SACR 163 (W); that he was the first offender, that he was a productive member of the community as he was working and earning R1200-00 per month and that he was maintaining his family should have moved the court to a finding of the existence of substantial and compelling circumstances that would empower the court to deviate from the imposition of the prescribed minimum sentence of ten years imprisonment. As against that argument the respondent contended that the inhumane and degrading conduct to which the complainant was subjected and that the appellant was not a first offender as he had two previous convictions having violence as an element viz robbery. It was also required that the finding of substantial and compelling circumstance must be able to stand scrutiny and not be based on the whim of the presiding officer: **S v Matyityi**

2011 (1) SACR 40 (SCA). The respondent further argued that the period spent in custody awaiting trial alone cannot constitute substantial and compelling circumstances and quoted from **Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and Others**, 2012 (1) SACR 423 (SCA) where it was stated:

"...even having regard to the time spent in custody by the respondents pending finalisation of the trial, the prescribed minimum sentences were, in the totality of the circumstances encountered here, the only fair and just sentences."

[5] I am of the view that the brutal manner in which the complainant was attacked simply because her father and sister were working at the police station by a person well-known to her; and serious injuries caused to her, cannot justify the deviation from the imposition of the prescribed minimum sentence.

[6] In the result the following order is made

The appeal against both the conviction and the sentence is dismissed.

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K. J. MOLOI, J

I concur.



S. CHESIWE, AJ

On behalf of the Appellant: **Adv. PL VAN DER MERWE**
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of Respondent: **Adv MMM MOROKA**
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN