

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A173/15

In the matter between:-

PALEHO EDWIN TSETSE

First Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J et MOHALE, AJ

HEARD ON:

09 NOVEMBER 2015

DELIVERED ON:

05 MAY 2016

MOLOI, J

- [1] The trial court granted the appellant leave to appeal to this court. The appellant appeals both his convictions and sentences imposed in respect of the following counts: (1) Rape in terms of section 3 read with other sections of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 and further read with section 51 and Schedule 2 of the Criminal Law (Sentencing)

Amendment Act 105 of 1997 and section 261 of the Criminal Procedure Act 51 of 1977 for which he was sentenced to fifteen (15) years imprisonment; (2) unlawfully impersonating police in contravention of section 68(1)(a) of Act 68 of 1995 for which he was sentenced to three (3) years imprisonment and (3) Robbery read with section 51(2) of the Criminal Law (Sentencing) Act 105 of 1997 for which he was sentenced to ten (10) years imprisonment. The appellant was unrepresented during the trial having chosen to represent himself despite the virtual plea of the presiding officer to opt for legal representation, rather.

- [2] The evidence on which the convictions are based was that on 4 February 2007 the complainant, N. W., was collecting fire-wood in a grassy veld where there was a bush and a stream running through. She carried the bundle of wood on her head and proceeded to cross the bridge between Aliwal North and Rouxville. The appellant, who was unknown to the complainant, dressed in a police uniform, ordered her back to the Free State side of the bridge into the veld. The complainant tried to run away and the appellant gave chase and at a point tripped her from behind and she fell on the

ground. The appellant took out her panties and had sexual intercourse with her. She was frightened as she saw a fire-arm in his possession and he threatened to kill her. After raping her, the complainant took and hid under her clothes, the handcuffs that fell from the appellant. The appellant took out a pocketbook with a police stamp on it and wrote her particulars in it. He searched her looking for the handcuffs and found her cellular telephone instead which he took. The cellular telephone was a Motorola valued at R425-00.

- [3] As the appellant was busy looking for the handcuffs, the complainant ran away. She saw someone working on a garden and called for help. The gardener came to her rescue and accompanied her to the police station. She called the appellant a police sergeant to the gardener as she did in her evidence in court during the trial. On the way a police vehicle approached. They stopped the vehicle and reported the incident. The complainant then saw the appellant and confronted the appellant. The police asked for the complainant's cellular telephone which the appellant gave but without a SIM card and a battery. The SIM card and the

battery were found in his pockets. The appellant was still wearing a police uniform. Upon searching the appellant's home, the police found a sergeant lapel, a police gun holster, a police belt, a pair of police socks, four police shirts, a police jacket, a police pair of trousers and a further police jacket, and a further pair of police handcuffs. During cross-examination the appellant suggested he had a relationship with the complainant and had arranged to meet at the scene on the 4th February 2007 to engage in sexual activity but did not do so.

- [4] A policeman William Tumane corroborated the complainant's evidence as to the report she made after stopping the police vehicle up to the arrest of the appellant. The appellant said that he took the complainant's cellular telephone as the complainant was stealing mielies in the fields. He confirmed the complainant was crying. The appellant was handed over to inspector Tandukuhle Adoons who was at the police station and was interested in the appellant as he was wearing police uniform. She asked the appellant to unbutton the shirt he was wearing and notice the name '*Whitting*' on the shirt. Whitting was, in fact, a police officer and confirmed

the appellant was in his employment and had access to the storeroom where he kept his old police uniforms and other things. This led to the search of the appellant's home where the other pieces of police items were found. The finding of these items was made by Constable Gloria Naudea who also confirmed that the complainant, when she got to the police station, was crying. Inspector Whitting confirmed further that he is not permitted to give away police uniforms even if they were old.

[5] Despite repeated warnings and explanation of the importance to give evidence on oath, the appellant refused to do so and insisted of being shown the DNA test results and photographs of the scene. There were no DNA samples taken. He stated however that he had a relationship with the complainant and that their meeting was arranged to have sex though it did not take place.

[6] The evidence above is sufficient to found a conviction on a charge of rape. The appellant was, however, charged with contravention of section 3 of Act 32 of 2007. This Act came into operation on 16 December 2007 whereas the offence

was committed on 4 February 2007 before the Act came into operation. It was argued on appeal that the appeal ought to succeed as a result, at least on this count. The respondent argued that the common law offence of rape had the same elements as the statutory rape and that no prejudice would be suffered by the appellant if convicted on common law rape and relied on S v Mahlangu 1997 (1) SACR 338 (T) wherein the following was stated a p.343 f-g:

“Al wat die verhoor landdros wil bewerkstellig is dat die benaming van die misdaad waaraan die beskuldigde skuldig bevind is verander word. Die bewerings teen die beskuldigde is in wese dieselfde en sy verweer (’n ontkenning) sal nie daardeur geraak word nie. Sy verdediging sou ook nie op ’n ander wyse gevoer word nie. Ek is derhalwe van mening dat daar nie benadeling van enige aard kan wees indien so ’n wysiging gelas word nie.”

Although in the above case the issue was brought in the Special review proceedings, I am of the view that the same can be done in appeal proceedings. The main consideration remain that justice must be done and should not be compromised by simple technicalities.

[7] In as far as the robbery with aggravating circumstances is concerned, the evidence is that when the appellant searched the complainant looking for his handcuffs he found a cellular telephone which he took. According to the appellant he wanted to take it to the police station. No evidence is found that force was used in the process nor threat to harm the complainant. Actually the prosecution at the trial pointed out to the presiding officer that if anything the appellant could be found guilty of theft being a competent verdict on a charge of robbery. I agree with the prosecutor as there was no reason given why the telephone would be taken to the police and why the appellant did not give it to the police on own volition when he was arrested but waited till it was demanded. Moreover, why he took the SIM card and battery out is not explained. These were, however, found in the appellant's pockets when he was searched.

[8] The court of appeal is entitled to intervene where the trial court imposed a sentence that is inappropriate. The sentence will be inappropriate if it induces a sense of shock-

S v De Jager + Another 1965 (2) SA616 (A) or if the trial court misdirected itself in imposing a sentence: S v Kibido, 1998(2) SACR213 (SCA). It is correct that no substantial and compelling circumstances exist in this matter. The appellant was forty (40) years old, married with a child and had passed grade 6 at school. He made a living by doing piece jobs. The offences of which the appellant was convicted are serious. The manner in which the offence of rape was committed exacerbates its seriousness as he acted as a police officer. The appellant had two relevant previous convictions for rape committed in 1984 and 1987 and sixteen (16) other previous convictions.

[9] In the result, the appeal succeeds in part and the findings of the trial court are set aside and substituted with the following:

9.1 In respect of count 1 the appellant is found guilty of common law rape.

9.2 The conviction on count 2 is confirmed.

9.3 The conviction on a charge of Robbery with aggravating circumstances in count 3 is set aside and substituted with a conviction on a charge of theft.

- 9.4 The sentence of fifteen (15) years imprisonment imposed in respect of count 1 is confirmed.
- 9.5 The sentence of three (3) years imprisonment in count 2 is confirmed.
- 9.6 The sentence of three (3) years imprisonment on count 3 is imposed.
- 9.7 The sentences in counts 2 and 3 are ordered to run concurrently with the sentence in count 1.
- 9.8 The above sentences shall be deemed to have been imposed on 10 February 2009.

K.J. MOLOI, ADJP

I concur

I.B MOHALE, A.J

On behalf of the appellant: Adv.S.S Kambi
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. A. Bester
Instructed by:
The DPP
BLOEMFONTEIN