

**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 number: A82/2016

In the matter between:

PHILEMON SERATHI

Appellant

and

THE STATE

Respondent

CORAM:

MBHELE, J *et* MATHEBULA, AJ

HEARD ON:

8 AUGUST 2016

JUDGMENT BY:

MBHELE, J

DELIVERED ON:

8 SEPTEMBER 2016

- [1] The Appellant was convicted of rape by a Regional Court sitting at **Heilbron** on the **25th October 2011**, he was sentenced to life

imprisonment on **18th June 2012**. The complainant was a 15 year old girl.

- [2] The Appellant feels aggrieved by both conviction and sentence and now approaches us on appeal of the same.
- [3] The complainant went to Maphedi tavern on 21 September 2007 at about **22h00** to look for her aunt [A M]. [A] asked the complainant to stay inside the tavern and wait for her. A disappeared for a while and the complainant went outside to look for her. She then met with the Appellant who grabbed and pulled her away. She screamed for help but no one came to her rescue.
- [4] The Appellant took her to a shack where at knife point forced her to undress. He subsequently had sexual intercourse with her three times without her consent. The following day the Appellant went with the Complainant to his sister's house where there was a feast. The appellant was asked by his sister to go arrange transport for the people who had to go to the graveyard. The complainant left soon after the appellant's departure. The Appellant's DNA was positively linked with the DNA found on the Complainant's panty.
- [5] The Appellant simply denies ever having had sexual intercourse with the Complainant. In his attempt to try and explain how he was linked to this offence, he stated that he could no longer remember if sexual intercourse indeed took place that night owing to the fact that he was drunk. He testified in his defense that he had intentions to have consensual intercourse with the

Complainant which could not happen because the Complainant was menstruating.

- [6] Mr. Makhene, for the Appellant, and Mr. Botes, for the Respondent, are in agreement that conviction cannot be assailed. The trial court evaluated the evidence carefully. It came to a conclusion that the Complainant's evidence was true and rejected Appellant's evidence as false.
- [7] It is trite that the factual findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. The trial court correctly found that the Appellant penetrated the Complainant vaginally without her consent.
- [8] The trial court allowed the defense to cross examine the complainant on her sexual history without proper basis being laid for such evidence to be led. Mr. Mosese who appeared on behalf of the appellant during trial told the court that he would like to determine whether the complainant's hymen was torn on the night of her encounter with the appellant or during her previous sexual encounter with other parties. This reasoning was misplaced because the appellant denied ever having had sexual intercourse with the complainant. The complainant's sexual history was irrelevant in so far as the appellant's plea explanation was concerned. Section 227 (2) of the Criminal Procedure Act 51 of 1977 provides as follows:

‘No evidence as to any previous experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings before the court unless -

- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions; or
- (b) such evidence has been introduced by prosecution.’

[9] Subsection 4 further provides that such application may only be granted only if the court is satisfied that such evidence or questioning is relevant to the proceedings pending before the court.

[10] In the present matter there is no basis to show that such questioning was relevant to the matter before court.

[11] Sentencing is pre-eminently in the discretion of the trial court. The sentence can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate (see **S v Pieters** 1987 (3) SA 717 at 727).

[12] Life imprisonment is applicable in this matter. The test for existence of substantial and compelling circumstances warranting deviation from the prescribed minimum sentence is whether or

not the cumulative effect of mitigating factors on the gravity of the offence, the general aggravating factors and the interest of community render the relevant prescribed sentence unjust. (see **S v Malgas** 2001 (1) SACR 469 SCA.

[13] The Appellant was 25 years during the commission of the offence. He was married with a thirteen (13) year old child. He was not a first offender. He was convicted of rape and murder on the 10th September 1997 and 14 February 2001 respectively.

[14] It is clear that the Appellant has a propensity to commit violent crimes. His actions show that short prison terms have not done much to alter his world view. He took away a defenseless 15 year old girl against her wish and repeatedly had sexual intercourse with her without her consent.

[15] I am not persuaded that the sentence imposed is unjust. The trial court exercised its discretion judiciously. There is no justifying cause for us to interfere with the sentence.

ORDER.

[16] The appeal fails and conviction and sentence are confirmed.

N.M MBHELE, J

I concur

M.A MATHEBULA, AJ

On behalf of appellant:
Instructed by:

Adv. Makhene
Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. Botes
Director of Public Prosecutions
Bloemfontein