

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

Case No.: A165/2015

In the matter between:

MBUSENI PHILEMON TSHABALALA

Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J et MOHALE, AJ

HEARD ON:

09 NOVEMBER 2015

DELIVERED ON:

12 NOVEMBER 2015

MOLOI, J

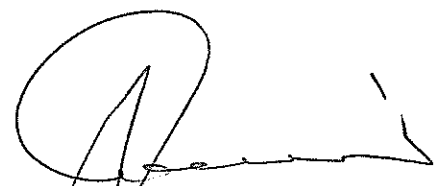
- [1] The appellant was convicted in the Regional court of c/s 3 of Act 32 of 2007 (rape) of the complainant and sentenced to life imprisonment. The appellant has an automatic right of appeal. He came before us challenging the correctness of both his conviction and sentence.
- [2] According to the evidence, the complainant left a tavern where she was with her boyfriend as it was late. She was walking homewards when she met the appellant, whom she knew by sight. The appellant was with another man unknown

to her. The appellant was armed with a knife. The two men ordered her to take off her clothes and took turns to rape her. The appellant threatened to kill her because she knew him but his companion stopped him from doing so. She made a report to one Sibongile who has since left the place and her address is unknown. The following morning she reported the incident to the police and she was also medically examined. She suffered a cut in front of her neck and this was caused by the appellant when he threatened to kill her if she reported the matter to the police.

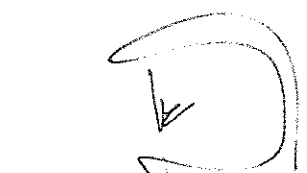
- [3] The appellant claims to have had a relationship with the complainant and that the sexual intercourse took place by consent. According to the appellant they met at a tavern where they had drinks and later agreed to go to his place where they had sexual intercourse. In the morning he walked her to her home and agreed to meet later when he would give her some money. He did not do that and the police came to arrest him.
- [4] Mr Makhene who argued the appeal on behalf of the appellant conceded that the appellant's version cannot hold and that the magistrate was right in convicting him. He could not find fault with how the matter was dealt with by the trial court. The rejection by the trial court of the appellant's version was justified and the court of appeal could not interfere with the value judgment as to the complainant's credibility of the trial court in the absence of an irregularity or misdirection as envisaged in S v Olivier 1998 (2) 267(A). The

injury to the complainant's neck if she consented to sexual intercourse with him.

- [5] The trial court took into account the personal circumstances of the appellant, the nature and gravity of the offence committed and that the community would expect severe punishment to be metered out in such circumstances. Moreover the complainant was raped by two men who were clearly together and set out to invade the complainant's rights and person. The court could find no substantial and compelling circumstances that would justify its departure from the imposition of the prescribed minimum sentence of life imprisonment in this case: S v Malgas 2001 (1) SACR 469 SCA. Mr Makhene correctly submitted the trial court was right in imposing the sentence it did. There was no misdirection on the part of the trial court to impose such a sentence.
- [6] In view of the above the appeal against the conviction and the sentence imposed is dismissed.


K. J. MOLOI, J

I concur.


MOHALE, AJ

On behalf of the Appellant: **Adv. MAKHENE**
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

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