

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

Appeal number: A162/2015

In the matter between:

BOKANG BASIA MAKHETHA

Appellant

And

THE STATE

Respondent

CORAM: RAMPAL, J *et* LEKALE, J

HEARD ON: 9 OCTOBER 2015

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 12 NOVEMBER 2015

- [1] The matter came to court by way of an appeal. The appellant was found guilty of rape in the regional court. He was then sentenced to life imprisonment. He was aggrieved by the sentence - hence he appealed. The respondent apposed the appeal.

- [2] An incident occurred at Bronville in Welkom on 21 December 2012. A teenage girl was attacked and sexually molested by two men. The incident was reported to the police. The police investigation led to the arrest of one of the suspects on 14 November 2013. That arrestee was the appellant.
- [3] Subsequent to his arrest, Mr Bokang Basia Makhetha, was criminally charged with rape. The state alleged that he unlawfully and intentionally committed acts of sexual penetration with the complainant, namely: Ms [M.....] [I.....] [R.....], 17 years of age, by penetrating her vagina more than once with his penis without her consent. It was further alleged that by doing so, he contravened the provisions of sec 3 Sexual Offences and Related Matters Act 32/2007 read with other specified statutory provisions thereof, sec 94 Criminal Procedure Act 51/1977 read with other specified statutory provisions thereof as well sec 51 Criminal Law Amendment Act 105/1997 read with part (iii) schedule (2) thereto.
- [4] He was tried in the Welkom Regional Court where his trial commenced on the 3 June 2014. He pleaded not guilty. He chose to give no explanation of his plea. Ms. B.R. Lefenya, regional magistrate, presided. Mr. Mbale appeared for the state and Mr. Setheisho for the defence. He was later replaced by Ms. Mokhele.
- [5] On 20 May 2015 the regional magistrate's verdict was that the accused was guilty of raping the complainant. On the same day

the prescribe minimum sentence of life imprisonment was imposed on him.

- [6] The appellant had an automatic right in terms of sec 309 Criminal Procedure Act 51/1997 to appeal. He elected to exercise his right as regards sentence only. The appellant's notice of appeal was filed on 2 June 2015. Among others, the grounds of appeal were that the sentence of life imprisonment was exceedingly severe, shockingly harsh and thus strikingly inappropriate because, so the appellant contended, the court *a quo* failed to attach due weight to certain mitigating factors or to take some of them into account.

- [7] The question before us was whether the sentence imposed on the appellant was strikingly inappropriate given the peculiar circumstances of this particular case.

- [8] Mr. Van der Merwe counsel for the appellant, submitted that the court *a quo* erred in imposing the prescribed minimum sentence of life imprisonment since substantial and compelling circumstances existed which justified deviation from the prescribe minimum sentence. Accordingly counsel urged us to uphold the appeal.

- [9] However, Mr. Strauss, counsel for the respondent differed. He submitted that there was no material misdirection by the trial court. Counsel argued that the sentence was not excessively harsh and that a severe sentence was justified in *casu* in view of the prevalence of the crime of gang raping. He stressed that

numbers of such gangs have to be deterrantly punished to demonstrate that the courts were determined to protect women.

[10] In sentencing the appellant the following mitigating factors were taken into account:

10.1 He was 27 years of age;

10.2 He educationally progressed up to grade 8;

10.3 He was employed as a scrap metal collector and earned R2000 per month;

10.4 He was a bachelor without any children;

10.5 He maintained his minor brother because his parents were deceased;

10.6 He was arrested on 14 November 2013 and he remained incarcerated ever since then;

10.7 He was a first rape offender.

[11] In sentencing the appellant the following aggravating factors were taken into account:

11.1 The nature and the gravity of the crime he committed;

11.2 The prevalence of the crime of gang raping in the region;

11.3 The complainant was a relatively young, defenceless and vulnerable woman of 17 years of age;

11.4 The appellant and his co-perpetrator were armed with knives with which they threatened to stab her if she yelled or reported the incident to the police;

11.5 He raped the complainant initially inside the first shack from where she was shifted and later raped her outside the second shack;

11.6 He also actively helped his co-perpetrator to do likewise on both scenes of the crime;

11.7 The appellant remained remorseless even after the verdict;

11.8 He attacked and stabbed a young man, [T.....], because he had given his name and that of his accomplice to the complainant.

[12] After considering the mitigating factors and the aggravating factors, the regional court concluded that there were no substantial and compelling circumstances present to justify deviation from the prescribed minimum sentence. In line with that conclusion the court sentenced the appellant to life imprisonment.

[13] I share the view that rape is a repulsive crime. It humiliates and degrades the human dignity of a woman. It is an assault of a particularly vicious nature on the bodily integrity of a woman's femininity. See **S v S** 1995 (1) SACR 50 (ZS) at 61d. It is also an assault of a particularly emotional nature on the soul of a woman.

[14] The appellant and his accomplice were prowling the streets of Hani Park. They were looking for defenceless girls to prey on.

They came across the unsuspecting complainant and her companion Ms. [M.....] [L.....]. Acting on a predatory impulse, they pounced upon the complainant. They threatened to stab her with knives if she resisted. They pulled her away from her companion. She managed to break loose and ran into a certain house. They chased her, audaciously entered the house and pulled her out.

- [15] Girls and woman must be protected from those men who act like predators and audaciously prey on them. Helpless girls like the complainant look up to the courts to provide them with meaningful protection from the rapists. The courts must, therefore, demonstrate, through the sentences they impose, that they are determined to protect the dignity, equality and freedom. Those who invade those rights must get a clear message that the courts will not flinch to deterrantly, and if necessary retributively, punish them – **S v Chapman** 1997 (2) SACR 3 (SCA) at 5e.
- [16] In the absence of a material misdirection, we cannot approach the question of sentence as if we were the court of first instance. To do so would boil down to usurping the sentencing discretion entrusted to the trial court. **S v Malgas** 2001 (1) SACR 496 (SCA) at 478 d-e. We are, therefore, called upon to ascertain whether there was a material misdirection during the adjudicative sentencing process in the current matter.
- [17] The complainant was taken to Bongani Hospital where she was examined by Sr. M.T. Ceba, the forensic nurse. She found that

clinically there were no visible fresh injuries sustained by the complainant. Her genetical examination revealed a white thick slightly bloodstained mucus. The mucus was a vaginal discharge she noted. The forensic nurse further noted that the complainant was emotionally calm at the time of the examination. Although she did not manifest an emotional state of distress, she had earlier tearfully and hurtfully reported to Mrs. [M.....] [L.....], her companion, that the two men had raped her. The complainant testified about 22 months after the incident, on 9 October 2014 to be precise. The trial magistrate asked her about the emotional impact of the rape on her. Her answer was that it did not bother her anymore unless rape featured on television. She said that when that happens then she gets occasional flashbacks of the incident.

[18] About those peculiar circumstances of this particular rape case the trial magistrate assessed those factors as follows:

“There is argument by the defence that complainant did not sustain injuries. In my mind (sic) complainant was only spared injuries not because of accused’s actions, but because she submitted and avoided further injuries. There is no way that a person could have endured that kind of act and not suffer injuries, especially in the hands of people like accused. It is just that (sic) complainant did not suffer visible physical injuries, that are visible to the naked eye. She was however traumatised we heard her testifying and the fact that she testified that her mother is going on trying to console her, means that she was definitely traumatised ...”

- [19] In **S v SMM** 2013 (2) SACR 292 (SCA) the appellant was convicted of rape of a teenage girl 4 years younger than the complainant in the instant case. As in this case he was sentenced to life imprisonment. As in this case the complainant did not suffer any serious or permanent injury. Denied any credit for that mitigating factor, among others, he successfully appealed.
- [20] In **S v Nkawu** 2009 (2) SACR 402 (ECG) para [17] Plasket J was called upon to consider whether the courts were legislatively precluded by sec 51(3)(aA)(ii) Act No 105/1997 from including, in the same collective basket of factors relevant to the enquiry on substantial and compelling circumstances, the previously and traditionally relevant factor where the rape offender had inflicted no serious and permanent physical injuries on the rape victim. Plasket J generously interpreted the penal section in a way favourable to the rape offender.
- [21] In **S v Mabitse** 2012 (2) SACR 380 (FB) this court said, per Rampai J et Molemela J:

At para [17]:

“Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next (Jones J in **S v Booyesen** supra, at para 7), so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next. The physical injury symbolises the measure of violence the perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the

degree of the rapist's moral blameworthiness. I am of the firm view that dictates of justice demand that, in meting out sentence, differentiation be made, based on the degree of violent and brutal force used.”

At para [18]:

“If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors, for inclusion in the melting pot of consideration in order to make a determination in terms of s 51(3) regarding the existence or otherwise of substantial and compelling circumstances — Plasket J in **S v Nkawu** *supra*, at para 17.”

- [22] The decision of **S v Mabitse**, *supra* was applied by this court in **S v Mokoena** (A323/2010) [2012] ZAFSHC 12 (9 February 2012) para [29-0]. Both decisions were informed by the reasoning of Plasket J in **S v Nkawu**, *supra*, para 17 which was authoritatively approved and applied in **S v SMM** 2013 (2) SACR 292(SCA).

To the extent that the regional court excluded the apparent lack of serious and permanent physical injuries, it materially erred, with respect.

- [23] Quite apart from the absence of visible injuries, it also appeared that, over and above the emotional hurt which the complainant inevitably and contemporaneously must have experienced, there was no concrete evidence of the teenage girl suffering any

persistent trauma. The apparent lack of on-going trauma or emotional damage was also misdiagnosed. To find that the complainant was definitely traumatized without any evidence that she was and without the slightest indication of the adverse impact or consequences of her on-going emotional state of distress, was a clear misdirection in my respectful view.

[24] In **S v GK** 2013 (2) SACR 505 (WCC) para 22 Rogers J said:

“I am sure that the court was alive to the fact that rape is always likely to be accompanied by some emotional or psychological trauma, but the absence of clear evidence of significant trauma of that kind was clearly regarded by the court, in conjunction with other factors, as militating against the imposition of the most severe sentence.”

In casu, as in that case, there was no evidence of significantly persistent trauma.

[25] The appellant was a first rape offender. Although he did not have a clean criminal record, he was not shown to be likely to re-offend society. Of course this cannot be confidently predicted by anyone. His status as a first offender coupled with the apparent lack of evidence that he was likely to rape again were material considerations. They should not be lightly treated. He acted aggressively and violently to certain members of the public on the day in question. However, his actions did not suggest that he had the propensity to commit violent crimes. Both Ms. [L.....] and Ms. [S.....] testified that the appellant and his accomplice were very

intoxicated on the day of the incident. As a matter of fact, it was on the strength of their state of intoxication that they were positively identified by Ms. [S.....]. To write the appellant off as an irredeemable recidivist, was unduly harsh given the peculiar circumstances of this particular crime.

[26] There is one further consideration that must be brought to account. The appellant's accomplice pleaded guilty. Because he did, the trial was separated. He was convicted on his plea and sentenced to 10 years imprisonment. The record of his trial was not before us. We were given to understand that those facts were correct and true by counsel for the appellant. The information was confirmed by counsel for the respondent.

[27] The appellant was subsequently convicted of the same rape and sentenced to life imprisonment as we know. What accounted for the enormous disparity between the very severe and ultimate sentence imposed on the appellant and the very lenient sentence imposed on his accomplice no-one could tell. The disparity created the impression, in the eyes of the public at least, that the appellant was harshly punished because he, unlike his accomplice, dared to plead not guilty.

[28] A perception must never be created that in exercising a constitutional right by pleading not guilty an accused risks having a heavier sentence imposed on him than otherwise would have been the case. I hasten to add that the trial court was, in all probabilities, unaware of the sentence imposed on the appellant's

accomplice. Therefore, I must not be misunderstood to mean that the enormous disparity between the two sentences constituted a misdirection by the trial court. What I say is that justice was not seen to have been done.

[29] Viewed as a whole the only features that the evidence disclosed as having materially aggravated what is inherently a serious crime, were the following, the fact that the appellant was not in it alone; the fact that he violated the complainant twice and the fact that his accomplice also violated her twice. But all those were objective features of the crime on the basis of which their actions were categorized in the higher regime of rape.

[30] In **S v Vilakazi** 2009 (1) SACR 552 (SCA) para 16 Nugent JA dismissed, as incorrect, the submission that the prescribed minimum sentence should, as a rule, ordinarily be imposed. The judge was at pains to explain what the Malgas decision really meant.

“What it said is that a court must approach the matter ‘**conscious [of the fact] that the Legislature has ordained** [the prescribed sentence] as the sentence that should *ordinarily* **and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances’ ”.

The question is: Was there or was there no weighty justification?

[31] I am satisfied, after consideration of all the peculiar circumstances of this particular case, that weighty justification exists that renders

the prescribed minimum sentence of life imprisonment unjust. I have earlier alluded to the factors which significantly justified that conclusion. I have weighed up the mitigating factors against the aggravating factors. Given the peculiar circumstances of this particular case, I am of the firm view that the sentence of life imprisonment imposed on the appellant by the regional court was exceedingly disproportionate to the offence. To make him pay for his crime with the remainder of his life would seem to be grossly disproportionate to the crime he committed.

[32] The material misdirections earlier alluded to warrant appellate interference. We are, therefore, at liberty to set aside the disproportionate sentence and to sentence the appellant afresh. A substantial sentence of 18 years imprisonment appeared to me to be sufficient to deterrantly bring the message home to the appellant about the gravity of the offence and to exact sufficient measure of retribution for his crime. I have already factored in the period of his pre-sentencing incarceration.

[33] In the result the following order is made:

33.1 The appeal against the sentence is upheld;

33.2 The sentence of life imprisonment is set aside and it is substituted with the sentence below;

33.3 The appellant is sentenced to 18 years imprisonment;

33.4 The sentence is antedated to 20 May 2015.

M.H. RAMPAL, J

I concur

L.J. LEKALE, J

On behalf of appellant: Attorney P.L. van der Merwe
Instructed by:
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