

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

Appeal number: A137/2014

In the appeal of:

BOITUMELO ISHMAEL KHUMALO

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, AJP et MURRAY, AJ

HEARD ON:

13 OCTOBER 2014

JUDGMENT BY:

MURRAY, AJ

DELIVERED ON:

30 OCTOBER 2014

- [1] This is an appeal against the Appellant's conviction of the multiple rape of the same victim and the sentence of life imprisonment imposed on him by the Regional Court, Viljoenskroon, on 21 April 2011.
- [2] The Appellant pleaded not guilty to the charge of rape in terms of section 3 the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, read with sections 51(1) and (2) of the Criminal Law Amendment

Act 105 of 1997. He was accused of raping his victim by penetrating her vaginally and anally and forcing her to suck his private part with her mouth.

[3] The complainant testified *in camera*. She described the rapes in detail, informing the court that the Appellant grabbed her from behind while she was standing in front of her friend's house and choked her with his arm around her throat so that she could not scream. He threatened to stab her with a bottle if she did scream. He forced her to a dark spot under the bell-tower of a nearby church where he undressed her and told her to lie on her back. He forced her to suck on his private part until he got an erection, then penetrated her vaginally and then anally. At that stage some other men approached and her assailant told her that he was the leader of that gang and that they were waiting to rape her as well. She pleaded with him to send them away, and while he was talking to them, she tried to escape. He, however, caught her before she got to the gate and raped her again. The complainant was crying throughout the ordeal. She told him he was hurting her, but that did not stop him and merely elicited derogatory remarks about her private parts and performance.

[4] The complainant testified that she could see the Appellant's face clearly in the light of a high overhead mast lamp. She recognised him from having seen him at a house where she had looked for accommodation some time before. Her version was corroborated by the friend whom she told of the rape and who also saw the Appellant with her directly after the rape.

[5] The Appellant chose not to testify or to call any witnesses. The State's version therefore remained uncontroverted. On appeal it was correctly conceded that *"the Court correctly convicted the Appellant and there is no argument to the contrary"*.

[6] The Appellant did not testify in mitigation before sentencing either. His legal representative put his personal circumstances before the court. In considering a suitable sentence, the court *a quo* then took into consideration the following mitigating factors:

- 1) that the Appellant was 20 years old at the time of the rapes;
- 2) that the Appellant was unmarried with no dependants;
- 3) that the Appellant passed standard 8 at school;
- 4) that the Appellant was unemployed;
- 5) that the Appellant was a first offender; and
- 6) that the Appellant had been incarcerated while awaiting trial for 5 months.

[7] The court *a quo* also considered as aggravating the following factors:

- 1) the nature and seriousness of the crime;
- 2) the fact that the Appellant raped the complainant more than once, vaginally as well as anally;
- 3) the fact that the Appellant forced her into submission by threatening to stab her with a beer bottle;

- 4) the fact that the lack of serious injuries could not be attributed to the Appellant but was the result of the complainant having had to submit to his demands out of fear;
- 5) the fact that the Appellant humiliated and degraded the complainant by raping her in the presence of the other gang members, by forcing her to suck his private part, by raping her anally and by making derogatory comments on her private parts and performance;
- 6) the alarming prevalence of this type of crime in the community; and
- 7) that the Appellant had had a previous run-in with the law.

[8] The court *a quo* concluded that there were no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence. Because of the multiple penetrations, section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997, read with section 51(3) and Part 1 of Schedule 2 of the Act was applicable.

[9] The court *a quo* therefore found that in the absence of substantial and compelling circumstances the mandatory life sentence had to be imposed. The State supported the sentence.

[10] The Appellant's legal representative in the appeal argued that the court *a quo* erred in considering the mitigating circumstances individually instead of cumulatively. He maintained that, after the court's weighing up of the mitigating circumstances against the aggravating ones, its imposition of the statutorily prescribed minimum sentence was 'grossly disproportionate' to the

offence and amounted to a 'serious misdirection' and 'improper exercise of its discretion'. I do not agree with these submissions.

[11] First of all, in my view the fact that the court *a quo* selected certain of the Appellant's personal circumstances for a separate more detailed consideration, does not *per se* indicate a failure to consider the cumulative effect of the mitigating circumstances as alleged. The court, in fact, analysed and discarded every other non-personal factor which might conceivably have counted in the Applicant's favour as well.

[12] Regarding the Appellant's age (20) the court remarked that he was not 18. In **S v Matyityi** Ponnon JA ¹ stated that while someone under the age of 18 is to be regarded as naturally immature, the same does not apply to adults and a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating circumstance. There was no such evidence in the present case.

[13] The Appellant's status as a first offender regarding this crime, was also discarded as a possible mitigating circumstance. In **S v M**² Satchwell, J, dealt extensively with the fact that the Legislature did not make allowance for a more lenient sentence for first offenders when it comes to rapes which fall under Part 1 and section 51(1) and that the imposition of the maximum sentence in such circumstances therefore does not lead to injustice. In and of itself the Appellant's first offender status is not a 'substantial and compelling

¹ 2011(1) SACR 40 (SCA) at para [14]

² 2007 (2) SACR 60 (W) at para

circumstance' and could only, in conjunction with other factors, persuade a court that such circumstances do exist.

[14] The other mitigating circumstance that the court *a quo* singled out for special consideration, was the length of time that the Appellant had been incarcerated. The court referred to a recent decision in the Supreme Court of Appeal that held that the mere fact that an accused had been incarcerated for a long time, is not in itself a substantial and compelling circumstance.

[15] In **S v Malgas**³ the court indicated that the only matter that needed to be considered regarding the length of incarceration was whether the delay in finishing their appeal "*in and of itself*" justified a lighter sentence. Although incarceration without a very good reason, is not acceptable, the five months period which the Appellant spent in incarceration *in casu* is not so inordinate that it in and of itself justifies a lighter sentence.

[16] The court *a quo* also analysed and discarded each of the other, non-personal, factors which had the potential to be in the Applicant's favour. It indicated, first of all, that the only aspect of the Appellant's conduct which it could regard as mitigating, was his purported intervention to prevent the other gang members from also raping the Appellant. But as the court then stated, it was not even clear that he did intervene.

³ 2013 (2) SACR 343 (SCA)

- [17] The absence of serious injuries the court ascribed to the complainant's fear of being stabbed with the beer bottle and her consequent acquiescence in the Appellant's demands. The court also found that the complainant's visit to the tavern could not be held against her. She was not there alone, but with three friends.
- [18] The court also examined and discussed, in detail, each of the numerous aggravating circumstances pertaining to this particular case and found that, even with knowledge of the Appellant's personal circumstances, it could find nothing that constituted substantial and compelling circumstances.
- [19] In that context, in my view it is clear that the court did apply its mind to all the mitigating circumstances and decided that there were none weighty enough to warrant a finding of substantial and compelling circumstances which would outweigh the aggravating circumstances to the extent that a deviation from the mandatory life sentence prescribed for multiple rapes could be justified.
- [20] I agree with the court *a quo* that nothing in the Appellant's personal circumstances or conduct carried enough weight, even cumulatively, to tip the scale towards the presence of substantial and compelling circumstances, either individually or cumulatively. Had the Appellant exhibited any sign of remorse, for instance, that could have been a weighty mitigating factor. But there is a total absence of any remorse. There is no sign that the Appellant has taken any responsibility for his actions. That does not bode well for any

prospects of rehabilitation (See: **S v Keyser**⁴). He pleaded not guilty and so forced the complainant to relive the horror of the rapes in court. He failed to testify either during the trial or before sentencing and had his legal representative put a false version to the complainant in cross-examination. The latter, of course, a court cannot condone.⁵

[21] It is trite that rape is ‘a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of privacy, dignity and the person of the victim⁶. It has been described as ‘*an appalling and utterly outrageous crime ‘which violates a ‘woman’s body [which] is sacrosanct.*’⁷ In view, especially, of the Applicant’s repeated rape of the complainant and the degradation to which he subjected her to in the present matter, I respectfully agree with Satchwell, J, quoting from **S v Mahomatsa**⁸ that:

“... one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentence that such hypothetical cases would merit. .”

[22] A Court in sentencing needs to take into consideration all relevant factors in such a way that the interests of the community, the seriousness of the offence and the personal circumstances of the Appellant are all properly balanced.

⁴ 2012 (2) SACR 437 (SCA) at para [29]).

⁵ S v GK, *supra*, at para [23]

⁶ S v Chapman 1997 (2) SACT 3 (SCA)

⁷ S v Ncheche 2005(2) SACR 386 (W) at 395h

⁸ 2002 (2) SACR 435 (SCA) at para [19] at 444d – e.

(See: **S v Banda and Another**⁹). In my view, the court *a quo* did not overemphasise any of the abovementioned factors to the detriment of any of the others in imposing, in the absence of substantial and compelling circumstances, the prescribed minimum sentence. In the circumstances of this case, the sentence does not appear to be totally disproportionate to the crime. Neither does it appear to be shockingly inappropriate. And I cannot find that the court *a quo* committed such a material misdirection that interference in the sentence is warranted.

[23] Therefore, since a court of appeal will only interfere with a sentence if the sentence is shockingly inappropriate and/or if the Court *a quo* materially misdirected itself or committed some serious irregularity during sentencing, which in my view is not the case in the present matter, I find no reason for this court to interfere in the sentence imposed on the Appellant.

WHEREFORE the following order is made:

1. The appeal against the sentence is dismissed.
2. The life sentence is confirmed.

H. MURRAY, AJ

⁹ 1991 (2) SA (BGD) 355 (A).

I concur.

M.H. RAMPAL, AJP

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