

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A305/2010

In the matter between:

EPHRAIM LAPI
TSEPO LERATO KOPUTSA
TEBOHO JOSEPH LESHORO

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* DA ROCHA-BOLTNEY, AJ

HEARD ON: 11 FEBRUARY 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 21 FEBRUARY 2013

- [1] On the 6 October 2009 the three appellants, who were legally represented, were each convicted by the Regional Court at Welkom on 1 count of housebreaking with intention to rob and robbery with aggravating circumstances and 1 count of rape as charges 1 and 2 respectively. They were, eventually, each sentenced to 5 years and 10 years imprisonment on each count respectively on the 17th November 2009, which sentences were directed to run concurrently.

- [2] They feel aggrieved by the sentences and now approach this court on appeal against the same with the leave of the trial court.
- [3] On sentencing the appellants the trial court found that the crimes in question and the circumstances in which they were committed were serious and more severe than the cases that usually came before her. The court *a quo* further found that the appellants take responsibility for their actions and appear to show some measure of remorse for what they did. The trial magistrate, furthermore, held that the appellants are still young and obviously capable of rehabilitation.
- [4] In the Heads of Argument Mr Makhene contends on behalf of the appellants that, had the court below considered the mitigating factors it would have found a sentence of 6 years imprisonment, at the very most, to be appropriate in respect of each appellant on the rape charge. In conclusion he submits that the 10 years imprisonment sentence imposed in respect of each appellant is shockingly inappropriate.
- [5] On behalf of the State, Mr de Nysschen gave notice of intention to apply for aggravation of the sentences imposed together with the Heads of Argument. It is, effectively, contended for the State that an effective 18 years imprisonment is appropriate for each appellant regard being

had to, *inter alia*, the circumstances under which the crimes were committed and the aggravating factors such as the fact that the rape victim was pregnant at the time of the offence, the appellants acted as a group and the victim was raped by all three of them in turns and the appellants had knives which they used to threaten the complainants.

[6] The gravity of the offences and the circumstances under which they were committed are apparent from the evidence of the victims. The rape victim was in bed with her boyfriend at the latter's residence when they were rudely awakened by the appellants who forced the door to the dwelling open around 00:35 in the morning. The three appellants had knives in their hands and demanded money and cellphones and, further, threatened them with death. The third appellant, thereafter, ordered the boyfriend to cover his head with a blanket and proceeded to rape the complainant on the bed and next to him. The second appellant followed suit after he had forced the victim to suck his genitals. Thereafter it was the first appellant's turn who also gratified himself sexually by savagely penetrating the helpless victim carnally without her consent. The appellants thereafter, took and left with a large quantity of CD's and other property belonging to the boyfriend and the rape victim.

[7] The first and second appellants, eventually, changed their pleas of not guilty to guilty on both charges after the State had

led the oral evidence of three witnesses inclusive of the victims. The third appellant, on his part, changed his plea on the first charge to guilty but persisted in his plea of not guilty on the rape charge. All appellants were convicted on both charges with the court below, effectively, rejecting the third appellant's version as not being reasonably possibly true with regard to the rape. The appellants did not testify in mitigation of the sentences and their personal circumstances were placed before the trial court from the Bar by their legal representative. The appellants were all born in 1991 and all completed Grade 7 at school. They are all single, unemployed and have no children. The trial magistrate, thereafter, requested pre-sentence reports which were duly submitted before the sentences were imposed. The reports in question recommended direct imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act (CPA) in respect of each appellant.

[8] The parties correctly remind the court that a court of appeal can only interfere with a sentence imposed if the sentencing court did not exercise its discretion properly or reasonably or if the sentence is disturbingly inappropriate or disproportionate. (See **S v Giannoulis** 1975 (4) SA 867 (AD) and **S v Pieters** 1987 (3) SA 717 (AD).)

[9] All the appellants were over 16 years of age but below 18 at the time of the offences in question. The trial court, therefore,

considered herself at liberty to depart, in her discretion, from the prescribed minimum sentences of 15 years and life imprisonment respectively in line with **S v B** 2006 (1) SACR 311 (SCA) at 321.

- [10] In determining the actual sentence the trial court was obliged to give recognition to the prescribed minimum sentences. (See generally **S v Malgas** 2001 (1) SACR 469 (SCA) and **S v B** *supra* at 320 g – h.)
- [11] In written argument Mr Makhene effectively submits that the fact that the appellants eventually changed their respective pleas to guilty is a mitigatory factor. As correctly submitted by Mr de Nysschen, for the State, a plea of guilty in the face of an open and shut case is, however, a neutral factor and is not *per se* an indication of remorse. (See **S v Barnard** 2004 (1) SACR 191 (SCA) at 197 and **S v Matyityi** 2011 (1) SACR 40 (SCA) 46 para [13].) In the instant matter the pleas of guilty were entered only after an overwhelming case had been presented by the State against the appellants. The appellants stood no chance against such a formidable case in our view. All the State was about to do when the appellants changed their minds was to close its case.
- [12] It is true that child offenders are invariably treated differently when it comes to sentencing. The provisions of the Criminal Law Amendment Act no 105 of 1997 (Minimum Sentences

Act) regarding prescribed minimum sentences are, further, not applicable to children who were under 18 years of age at the time of the commission of the offence as correctly pointed out by Mr Reyneke who argued the appeals before us in the place and stead of Mr Makhene. (See **Centre for Child Law v Minister of Justice and Constitutional Development** 2009 (2) SACR 477 (SCA))

- [13] The trial court accepted that the appellants seemed to take responsibility for their actions and, further, appeared to show some form of remorse. There is, however, no evidence of genuine remorse on their part. As the Supreme Court of Appeal pointed out in **S v Matyityi** *supra* at 47a – d genuine contrition flows from full appreciation of the consequences of one's actions.

- [14] It is not apparent from the submissions made by their legal representative to the trial court that the appellants appreciate the consequences of their actions. It is, further, not evident *ex facie* the record what motivated their actions in the commission of the crimes and what triggered them to change their hearts. The guilty pleas were only entered after the victims had been put through gruelling and embarrassing cross examination as Mr de Nysschen correctly submits in argument.

- [15] Mr Makhene, further, contends in writing that the fact that no

evidence of any physical or genital injuries was placed before the trial court should count as a mitigating factor. He, further, feels that the same applies to the fact that there existed no evidence of psychological or psychiatric after effects before the court below.

- [16] As correctly pointed out by Mr de Nysschen in the Heads of Argument:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.”

(See **S v Chapman** 1997 (3) SA 341 AD at 344 – 345.)

- [17] It was submitted to the trial court on behalf of the appellants that they were under the influence of intoxicating liquor at the time of the commission of the crimes. There was, however, no evidence tendered whatsoever to show that their faculties were so substantially impaired by their intake of liquor that their moral blameworthiness was diminished as to attribute their moral lapses to alcohol. (See **S v Cele** 1990 (1) SACR 251 (AD) and **S v Raath** 2009 (2) SACR 46 (C) at 55 and 56.)
- [18] As correctly observed by the trial court, even though the appellants were juveniles when they committed the relevant

offences, they acted very much like adults and committed very serious offences. Their moral lapses cannot, as such, reasonably possibly be attributed to immaturity or lack of experience on their part. They are all of the same age group and none can, reasonably possibly, be said to have been susceptible to being influenced by others merely by reason of his age at the time of the offences. (See generally **S v Matyityi** (*supra*) at 47 – 48.)

- [19] It is correct, as effectively submitted by Mr de Nyschen, that in terms of section 322(6) of the Criminal Procedure Act the court of appeal has the power to reduce or aggravate the sentence where there has been a misdirection or the sentence is shockingly inappropriate. (See further **S v Pieters** *supra*.)

- [20] In determining an appropriate sentence for each appellant the trial court was constitutionally obliged to regard a custodial sentence as a measure of last resort and to impose the shortest appropriate custodial sentence in the circumstances of the matter. (See section 28(1)(g) of Constitution of the Republic of South Africa 1996 (Constitution) and **S v B** *supra* at para [20].)

- [21] An appropriate sentence in a matter of the present nature is, in our view, one which reflects a healthy balance between the nature and gravity of the offence concerned, the interests and needs of the child offender involved and the interests of the

society at large. (Compare **S v KWALASE** 2000 (2) SACR 135 (C) at 139e.)

- [22] Prescribed minimum sentences applicable to adult offenders for the offences herein are 15 years and life imprisonment respectively. The provisions of the Child Justice Act, no 75 of 2008 (the “CJA”) are not applicable in the instant matter because it only came into operation after the fact of sentencing. Its provisions are, however, edifying because it was already in existence as an Act of Parliament as at the date of sentencing.
- [23] The pre-sentence reports submitted in respect of the appellants, as individuals, outlined, *inter alia*, their personal circumstances and also indicated that they are physically and psychologically in good condition.
- [24] Mr Reyneke correctly concedes that there exists nothing, other than the appellants’ ages as at the date of the crimes, which justifies the imposition of sentences lesser than prescribed minimum sentences. He, further, concedes that if the appellants were adults the minimum sentences ordained for the relevant offences would be appropriate sentences, at the very least. He, however, beseeches the court to restrain itself and refrain from interfering with the sentences in the event of the appeals failing.

- [25] In our view lengthy custodial sentences are the only appropriate sentences regard being had to the aggravating circumstances herein, the views of the society as reflected in the minimum sentences prescribed for the relevant offences, where applicable, and the personal circumstances of each appellant. (Compare **Brandt v S** 2005 (2) All SA 1 (SCA) at para [19].)
- [26] In my judgment the sentences imposed on each appellant are out of step with the interests of the community and the gravity of the offences. They, as such, desperately cry out for re-alignment by this court insofar as they clearly lose sight of the fact that the victims were robbed in the comfort and safety of their love nest, the rape victim was raped in the sanctity of her boyfriend's dwelling and on the same bed which she shared with him and next to him where he lay covered with blankets at the instance of one of the appellants. The rape, in the circumstances of the present matter, in my opinion, constituted a serious affront to the boyfriend's manhood in that he had to endure the pain and humiliation of peeping through the blankets and watching, like a spineless coward, as the appellants took turns to rape his pregnant girlfriend. The crimes were, indeed, heinous and vicious.
- [27] In the light of the foregoing we are of the view that the trial court did not exercise its discretion properly and, as such, we are at large to interfere and adjust the scales of justice

accordingly.

- [28] Mr de Nysschen feels that an effective 18 years imprisonment is appropriate for each appellant. In my opinion, it is essential for the proper development of the appellants, as young offenders, for each of them to feel the burden of each sentence imposed by having to serve a part of each such sentence, even if it is only a second thereof, so as to always be reminded that crime does not pay and to associate it with pain. For their erratic conduct they must pay.
- [29] An appropriate shortest custodial sentence in the circumstances of the instant matter is, in my view, one which acknowledges that rehabilitation is possible even after lengthy incarceration, that the crimes involved are very serious, pervasive and degrading and that in the case of adult offenders the public expects nothing less than 15 years imprisonment for aggravated robbery and life imprisonment for group rape in the absence of a legal cause justifying a lesser sentence. One which also recognises the fact that the appellants were so determined to commit the offences that they forced the door open, thus, undermining the security measures in place. At the time of sentencing the appellants had all reached 18 years of age and, in our view, an effective sentence of not less than 17 years will afford each appellant an opportunity to retrace his individual journey, re-discover his true north and steer his boat back into the path of rectitude so

as to eventually re-integrate with the society as a mature, better and responsible individual.

- [30] In our view the fact that the child offender was over 16 and below 18 years of age when he/she committed the heinous crime at issue is not a licence for the court to lose sight of the gravity of the relevant offences and the interests of society. Such a fact requires the court to first explore the appropriateness of non-custodial sentencing options in the circumstances of such a case and only to consider, as an option, imprisonment in the absence of such other appropriate options which allow the child offender to rehabilitate out of custody. Even then to opt for the shortest period over which such a child may appropriately be incarcerated. It is a salutary practice, in my opinion, for sentencing courts to always keep in mind that sometimes the best interests of a child are best served by allowing it to have the full measure of the pain in order to appreciate that, when one plays with fire, one is bound to burn one's fingers at some stage. The shortest appropriate custodial sentence in the instant matter must, further, recognise the period which the appellants spent in custody as awaiting trial inmates in line with the spirit of CJA which, effectively, requires a custodial sentence to be antedated to cover such a period. (See section 77(5) of CJA). They were arrested on the 8 June 2008 and remained in custody in the juvenile section until they were sentenced.

[31] The convictions cannot be faulted regard being had to the evidence before the trial court and the pleas of guilty entered for and by the appellants who admitted all the relevant elements of the crimes.

[32] The cross-appeal, therefore, stands to succeed.

ORDER

[33] In the result the appeals fail and the convictions are confirmed.

[34] The cross-appeal succeeds and the sentences are set aside and in their respective places and steads are substituted the following:

“AD CHARGE NO. 1:

In terms of section 276(1)(b) of the Criminal Procedure Act the accused are each sentenced to 10 years imprisonment.

AD CHARGE NO. 2:

The accused are each sentenced to 15 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act.

The 8 years of the 15 year imprisonment in respect of charge 2 shall run concurrently with the sentence imposed in respect of charge 1 with the result that

each accused shall serve an effective 17 years imprisonment”

[35] The sentences are antedated to the 17 November 2009.

L. J. LEKALE, J

I concur.

P. W. DA ROCHA-BOLTNEY, AJ

On behalf of appellants:

Adv S Makhene
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv JM de Nysschen
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

/EB