

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A297/11

In the appeal between:-

BUSANI JOHANNES LOUW

Appellant

and

THE STATE

Respondent

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

HEARD ON: 11 FEBRUARY 2013

JUDGMENT BY: DA ROCHA-BOLTNEY, AJ

DELIVERED: 28 FEBRUARY 2013

JUDGMENT

[1] The appellant was convicted of rape in the Regional Court, Bloemfontein and sentenced to 30 (thirty) years imprisonment, on the 21st June 2010. An application for leave to appeal against the conviction and sentence was dismissed. Leave to appeal against the sentence was obtained by petitioning the Judge President.

FACTS

- [2] During September 2008, at Trompsburg, the appellant had sexual intercourse with the complainant, a 9-year old girl, without her consent. This happened more than once. The appellant is well-known to the complainant's mother as they used to consume alcohol together. Complainant had been sexually penetrated per genitalia, i.e. vaginally and per anum.
- [3] Appellant used to send the complainant to do some chores and thereupon he would rape her. Complainant reported to her mother who confronted appellant, but he denied it. Later complainant made a report to an elderly neighbour, Mrs Lydia Mphuti. According to this witness complainant's mother is mentally unstable. Complainant ran to this neighbour's house after she heard that appellant was calling her again. After some questioning by the neighbour it came to light that appellant usually calls complainant and then rapes her. The authorities were notified. Appellant was arrested and subsequently convicted.

ARGUMENTS

- [4] Mr Reyneke, who appeared for the appellant, argued that the court *a quo* correctly found that there were substantial and compelling factors entitling the court to deviate from the prescribed minimum sentence.

- [5] He, however, argued on behalf of the appellant that the sentence of 30 (thirty) years imprisonment is shockingly inappropriate and harsh.
- [6] On behalf of appellant it was argued that there were no aggravating factors that would justify that term of imprisonment, especially if regard is had to the following, *inter alia*:
- 6.1 No evidence was led in aggravation of sentence;
 - 6.2 No evidence was led regarding the psychological and psychiatric effect that the rape had on the complainant or she is likely to experience in the future;
 - 6.3 The doctor's evidence shows that there were no physical injuries except the hymen which was half-moon like, but not oestrogenated.
- [7] As mitigating factors, counsel for appellant argued that the following should have been taken into account:
- Appellant was 26 years old at the time of the commission of the offence.
 - He had spent two years and three months in custody awaiting trial.
 - He is a first offender.
 - He was prepared to apologise to the complainant and her parents.
 - The court failed to take into account the effect of overly long sentences. See **S v Mahomotsa** 2002 (2) SACR 435

SCA at [17]; **S Abrahams** 2002 (1) SACR 116 (SCA); **S v Pute** 1990 (1) SACR 339 at 340 d-f and **S v Nkomo** 2007 (2) SACR 198 (SCA).

- [8] It was further the submission of the appellant's counsel that the period of imprisonment is in excess of his age for an offence which cannot be described as "a much worse case of rape" and in imposing same, the court has deprived him of any opportunity of rehabilitation.
- [9] Mr de Nysschen, who appeared for the respondent, submitted that the trial court incorrectly found that there were substantial and compelling factors present and requested this court to increase the term of imprisonment, to bring it in line with the one prescribed by the Criminal Law Amendment Act no 105 of 1997 (Act on Minimum Sentences). He argued that the trial court committed misdirection in this regard.
- [10] The observation made by the trial magistrate "That only, for the fact that you are still in your twenties, I feel I should not impose life imprisonment", was regarded, by counsel for respondent, to be wrong and as not in accordance with the Act on Minimum Sentences. He referred the court to **S v Matyityi** 2011 (1) SACR 4 (SCA) at 48a – b:

"In my view 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 factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness.”

[11] Counsel for respondent referred to **S v MALGAS** 2001 (1) SACR 469 (SCA). Counsel for respondent argued that because the complainant is so young she suffered enormously and that she will have serious psychological scars as a consequence.

[12] Appellant was found guilty of an offence listed under Part I of Schedule 2 of the Act on Minimum Sentences, as amended. According to section 51(2) (b) read with subsection (3):

“If any court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence...”

[13] It seems that the court *a quo* considered the fact that the appellant was in his twenties and spent some time in custody awaiting trial, sufficient to deviate from the term of imprisonment, prescribed by the Act on Minimum Sentences. It is trite that the court may, in appropriate circumstances, have regard to the time the accused spent in custody awaiting the finalization of his trial. See in this regard **S v Vilikazi and**

Others 2000 (1) SACR 140 (W) and **S v Brophy and Another** 2007 (2) SACR 56 (W).

- [14] In respect of the argument put forward by appellant's counsel that there is no evidence with regard to psychological harm suffered by complainant, I would like to refer to **S v Mahomotsa** 2002 (2) SACR 435 (SCA) at 441:

"Where as here, the complainants were young girls; it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity, of course, is not possible in the absence of appropriate evidence, but that does not mean that one should approach the question of sentence on the footing that there was no psychological harm."

And in **S v E** 1990 (2) SACR 625 (A), it was held that-

"Sexual molestation of children – the violation of the innocence of children arouses the community's indignation and prompts it to call for measures to protect its youth."

It would seem that the crime of rape has become too prevalent in our society. One can hardly open a newspaper or any other form of media without being confronted with its ugliness which is permeating our society. In this instance the complainant was a 9-year old girl. Our courts will have to take firm stance in this regard. In **Bailey v The State** (454/11) [2012] ZASCA 154 (01 October 2012), an appeal against the sentence of life

imprisonment was dismissed. This case dealt with the rape by a father of his daughter. What was uttered by the Court with regard to rape, I feel compelled to repeat-

“It has emerged insidiously in recent times as a malignant cancer seriously threatening the well-being and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric.”

[15] When regard is had to the above, as well as the fact that complainant was struggling at school, was taken away from her mother to live with foster parents and the memory of the rape at that vulnerable age, I can safely say that complainant must have suffered psychological harm.

[16] Appellant was 27 years old (as per charge sheet) at the time of the commission of the offence. To quote Theron AJA in a dissenting judgment in **S v NKOMO** 2007 (2) SACR 198 (SCA):

“The appellant was 29 years old at the time and would ordinarily not be regarded as a youthful or immature offender.”

I fail to see why the appellant cannot fall into this category, as well.

[17] I feel that the trial court misdirected itself when it found that the reasons or factors listed below are substantial and compelling to justify a lesser sentence in the instant matter, to wit

- that the accused was in his twenties;
- that he spent some time in custody awaiting trial.

[18] I accordingly make the following order:

18.1 The appeal is dismissed and the conviction confirmed.

18.2 The sentence is set aside and replaced by the following sentence:

“The accused is sentenced to life imprisonment in terms of section 276(1) (b) of Act 51 of 1977.”

18.3 The sentence is antedated to 21 June 2010.

P.W. DA ROCHA-BOLTNEY

I agree.

L.J. LEKALE, J

On behalf of appellant:

Adv J.D. Reyneke
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv J.M. de Nysschen

Instructed by:

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