

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A176/2012

In the appeal between:-

MOLEFE NHLAPO

Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA J, *et* DA ROCHA-BOTLNEY, AJ

JUDGMENT BY: DA ROCHA-BOLTNEY, AJ

HEARD ON: 18 FEBRUARY 2013

DELIVERED ON:

[1] The appellant was convicted of Rape (sec 3 of Act 32 of 2007), in the Regional court of Welkom and on the 25th October 2011, he was sentenced to 10 (ten) years imprisonment.

[2] With the leave of the court a quo, the appellant appeals against the above-mentioned sentence. It is trite that the court of appeal may interfere with a sentence of the trial

court when it is considered shockingly inappropriate and induces a sense of shock. See **S v Pieters** 1987 (3) SA 717 (A).

THE FACTS

[3] On the 5th May 2010, the complainant, a 32-year old female was visiting her sister. The appellant was present and consumed alcohol with her family members. Complainant was ill this night and did not partake in the drinking spree. Complainant made a bed for herself on the floor. As the evening progressed, the appellant got into the complaint's blankets and requested her to have sexual intercourse with him. The complainant refused. Whereupon the appellant threatened her family members with a broken bottle neck and subsequently raped her in full view of them. Complainant, who testified approximately five months after the incident, was very emotional when she related her ordeal to the trial court.

[4] Initially the appellant pleaded not guilty, but just before the closure of the state's case, he tendered section 220-admissions and was accordingly convicted.

ARGUMENTS

[5] Adv JS Makhene, who appeared for the appellant was of the opinion that the trial court erred in not finding any substantial and compelling circumstances which would justify the court deviating from the prescribed sentence as per the provisions of The Criminal Law Amendment Act no 105 Of 1997, as amended.

[6] He cited **S v Rabbie** 1975 (4) SA 875 (AD), to substantiate his argument it is trite that, “in every appeal against sentence the court should be guided by the principle that punishment is, pre-eminently a matter for the discretion of the trial court and (b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.

[7] It was submitted on behalf of the appellant that viewed cumulatively the following should have been considered as being substantial and compelling:

1. Appellant was 18 years and 9 months old when he committed the offence;

2. He is a first offender;
3. He had spent 17 months in custody awaiting trial;
4. Although he wielded a broken bottle, he did not inflict any injuries therewith on the complainant;
5. No psychological/psychiatric evidence of the effects of the rape on the complainant was placed before the court.

[8] On behalf of the appellant it was further contended that even though the trial court dismissed drunkenness as a mitigating factor, and considered it to be an aggravating factor, it was submitted that no sober person, in his full senses would rape a woman in full view of the members of her family. Furthermore the fact that the appellant changed his plea to one of guilty and thereby owning up to his wrongs is a sign of his preparedness to be rehabilitated.

[9] Adv MA Mohlala, who represented the respondent, argued that the appeal should be dismissed. He submitted that the trial court did not misdirect itself, on the following grounds:

- The personal circumstances of the appellant was considered;

- The interest of the community were considered;
- The offence is very serious, it is a serious violation of the right to privacy;
- The complainant was humiliated in that she was raped in full view of other people
- The appellant behaved arrogantly towards the complainant and other people;
- The offence is prevalent.

EVALUATION

[10] This offence is listed under Part III of Schedule 2 of the Minimum Sentence Act. According to section 51(2) (b) read with subsection 3(a), it is stated that:

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

[11] In **S v Malgas** 2001 (1) SACR 469 (SCA) the guidelines are laid down as to what constitutes compelling and substantial factors.

[12] With regards to the age of the appellant, I wish to refer to **S v Matyityi** 2011 (1) SACR 40 (SCA) p 47 at par [14] –

“It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity.”

[13] I am of the opinion that as appellant tendered section 220 admissions just before the closure of the state’s case to be of little value as the evidence against him at that stage was so overwhelming that no other option was available to him and it can then be considered a neutral factor, and also that this should not be considered in isolation. See **S v Barnard** 2004 (1) SACR 191 SCA at 197.

[14] An important factor which was overlooked by the trial court was the time that the accused spend in custody awaiting

finalization of his trial. In **S v Brophy and Ano** 2007 (2) SACR 56 (W), this scenario was discussed. Schwartzman J at par 16, cited the following in his judgement, which I have also followed -

In **S v Stephen and Another** 1994 (2) SACR 163 (W), it was said by Schutz J at 168f that

" ' . . . I would agree that there is force in Mr *Du Plessis*' submission, based on the Canadian decision of *Gravino* (70/71) 13 Crim LQ 434 (Quebec Court of Appeal): 'Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length'."

[15] I am therefore of the opinion that the following factors cumulatively consitute substantial and compelling circumstances;

- Appellant was 18 years old when he committed the offence.
- He was a first offender.
- He has spent 17 months in custody awaiting trial.
- He did not inflict serious injuries on the complainant.

- No psychological/psychiatric evidence of the effects of the rape on the complainant was placed before the court.

[16] Since above-mentioned factors were overlooked by the court a quo, I find it to be a misdirection on the part of the learned regional court magistrate and that it therefore entitles me to interfere with the sentence and impose a sentence that I consider to be proper.

[17] I accordingly make the following order:

17.1 The appeal is succeeds and the conviction confirmed:

17.2 The sentence is set aside and replaced with the following:

The Appellant is sentenced: 7 (seven) years imprisonment.

17.3 The sentence is antedated to 25th October 2011.

P. W. DA ROCHA BOLTNEY, AJ

I concur.

M. J. MOLEMELA, J

On behalf of the appellant: Adv. Makhene
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Mr. M A Mohala
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN