

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A317/2011

In the matter between:-

MPHO MPINDO

Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE *et* MOLEMELA, JJ

HEARD ON:

29 JULY 2013

DELIVERED ON:

1 AUGUST 2013

MOCUMIE, J

[1] This is an appeal from the regional court sitting at [Viljoenskroon](#). The appellant was convicted of two counts. One count of rape read with the provisions of section 3 of Act 32 of 2007, the Sexual Offences Amendment Act, and one of assault with intent to do grievous bodily harm. He was sentenced to fifteen years' imprisonment on rape and five years' imprisonment on assault with intent to do grievous bodily harm. The appeal is against the sentence only with the leave of the court *a quo*.

[2] The proven facts of this case are that the appellant and a second person not before the trial court met the first and the second complainant who are a couple walking leisurely together in the street just after 00h00. The appellant then stabbed the second complainant (the man) on his head, and hit him with a panga over his shoulders and head which made him to lose consciousness and left him with a fractured skull . The second complainant (the woman) on seeing the vicious attack on her companion fled to a nearby house for help. The appellant followed her to that house and took her forcibly to his home where he raped her repeatedly.

[3] The appellant's attack on the judgment on sentence is that the effective sentence of twenty years' imprisonment is too harsh taking into account the mitigating factors proffered in on his behalf, that:

2.1. At the time of the commission of these offences the appellant was 20 years of age; which is relatively young;

2.2 He was in custody awaiting trial for nine months; and

2.3 He was a first offender.

2.4 He had passed standard 7 at school.

[4] In his defence, the appellant had called his brother who informed the trial court that although the appellant was indeed young, at that young age, he was disrespectful towards his family, in particular his mother and brother. The brother depicted him as a person who did what he wished to do regardless of whether his own mother approved or not. For instance, as he made an example, the appellant came to his parental home at any time of the day including during the night with different girlfriends and slept

with those girlfriends, that's why at his age he had already fathered one child. Thus, correctly so as observed by the trial court, the appellant was not conducting himself as youthful as he wanted to portray himself during the trial and during the hearing of this appeal.

[5] The aggravating factors of this case are the following:- The second complainant was badly injured to the extent that he sustained a fractured skull. The first complainant was raped repeatedly. An older man at the house where the first complainant fled to just after their encounter with the appellant, tried to persuade the appellant from forcing himself on the first complainant as was evident he had all the intention to do. He ignored this man and took the complainant away to his home. This means the appellant had at least two distinct opportunities to withdraw from proceeding with this unlawful conduct but he simply continued. The appellant was not remorseful throughout the trial. The appellant's conduct was so brazen that after raping the complainant the next day he took her to a house she pointed out as her home and threatened to deal with her if she reported the incident to the police.

[6] What the trial court can be faulted on, perhaps, is the fact that it is not clear on record that it took into account the fact that the appellant had spent almost nine months awaiting trial. It is now settled that a sentencing court has to take this factor into account when it imposes sentence.

[7] However, in my view, taking into account all the aggravating factors of this case, particularly the fact that the second complainant was assaulted so badly just so that his girlfriend could be taken from him and be raped repeatedly, justified the imposition of severe sentences in respect of both counts. The circumstances of this case are such that, even if the nine months awaiting trial period was taken into account, the sentence which was imposed was still appropriate not only to send the right message to the appellant but to society at large that in cases such as these, courts will not shirk their responsibility to protect society, particularly women, against rape and any form of violence. In my view, the sentence was not only appropriate but fitted the crime(s) and the appellant's personal circumstances.

[8] There is no justifiable reason to temper with the sentences imposed on any of the grounds relied on. This appeal stands to be dismissed.

[9] It bears to be repeated that the prosecution as the *dominis litis* has a responsibility to ensure that charge sheets/indictments are properly drafted. The failure of the prosecutor in this matter to include the provision of s51 of Act 105 of 1997 left the trial court with no option but to avoid imposing life imprisonment in this case, which was a case that really justified life imprisonment to be imposed. The second complainant was seriously injured after being stabbed on the head with a knife and hit over the shoulders and head with a panga until he lost consciousness. That was clearly an attempt to kill the second complainant, yet, instead the prosecutor concerned, charged the appellant with assault with

intent to do grievous bodily harm. That also restrained the trial court from imposing the appropriate sentence for attempted murder which could range between eight and ten years' imprisonment.

[10] In the event, I make the following order:

ORDER

1. The conviction and sentence of the court *a quo* are confirmed.
2. The appeal against sentence is dismissed.

B. C. MOCUMIE, J

I concur.

M. B. MOLEMELA, J

On behalf of the appellant: K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. L. Zweni
Instructed by:
The Director: Public Prosecutions

BLOEMFONTEIN

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