

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 126/2004

In the matter between:

THABO NYARELI

Applicant

and

THE STATE

Respondent

JUDGMENT:

DAFFUE, J

DELIVERED ON:

3 October 2013

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- [1] Applicant firstly applies for condonation for the late filing of his application for leave to appeal and secondly that leave be granted to appeal against the sentence imposed by the honourable court (per Van Coppenhagen J) on 11 October 2004. The notice of motion contains a prayer 3 wherein the applicant seeks such further and/or alternative relief as the court deems fit.
- [2] Although leave is sought to appeal against the sentence only, it is apparent from paragraph [5] of the founding affidavit read with paragraph [9] thereof that applicant intends to appeal against his conviction as well.
- [3] On receipt of the file I requested the office of the DPP as well as the Bloemfontein Justice Centre to file heads of argument to deal specifically with the conviction and sentence in respect of count two. Advocates Botha and Makhene from

the DPP and Bloemfontein Justice Centre respectively, are thanked for their valuable heads of argument which I sincerely appreciate. I confirm that both counsel could not argue the matter on the time and date set and agreed upon, whereupon they agreed that I could deal with the application in chambers.

- [4] Applicant and three others were convicted in the regional court Bloemfontein on 17 July 2004 on two counts of rape whereafter the matter was referred to the Free State High Court for purposes of sentence. On 11 October 2004 the Free State High Court, per Van Coppenhagen J, confirmed the convictions and after hearing evidence of the complainant in count two, sentenced applicant to 12 years' imprisonment in respect of the first count and life imprisonment in respect of the second count.
- [5] On 26 March 2009 CJ Musi J struck applicant's application for leave to appeal from the roll as it was not accompanied by an application for condonation. On 6 May 2013 a further four years down the line applicant, through the offices of the Bloemfontein Justice Centre, served and filed the notice of motion referred to in paragraph one *supra*.
- [6] Mr Botha indicated in his heads of argument that the State did not oppose the application for condonation. I must say that the reasons advanced for the delay are not at all convincing, but taking into consideration the situation of applicant as a sentenced prisoner, the seriousness of the matter, the infringement of applicant's rights if condonation is not granted and the prospects of success in respect of the

sentence imposed in respect of count two, I am of the view that condonation should be granted.

- [7] I had serious concerns whether the conviction on count two was in order. I considered granting leave to appeal in this regard. It is common cause that applicant never raped the particular complainant. However, having considered the totality of the evidence and the authorities referred to I am satisfied that applicant was an accomplice to the rape in count two and that he acted in the execution of a common purpose with the other accused. Although he did not rape the complainant in count two, he and accused three were responsible for taking the two complainants away from the build-up area to an open veld next to a dam. Appellant was armed with a kerie. When he was busy raping the complainant in count one, his colleague, accused three, was raping the complainant in count two. At that time the two other accused and a fifth person arrived and took over. The two complainants were raped by these persons as well. Thereafter the five males accompanied the two complainants, eventually to disperse whilst accused three took the complainant in count two to his house where he raped her again during the night.
- [8] I am satisfied that applicant through his conduct facilitated, assisted in and/or encouraged the rape of the complainant in count two by accused three and the other perpetrators. It would not be possible for accused three, acting on his own, to force the two ladies from the township to the open veld to be raped there. It is also clear from the evidence that applicant very well knew that he and accused three and

probably the others as well, would have sexual intercourse with the two complainants against their will and therefore he associated himself with the acts of those that raped the complainant in count two. See **S v Msomi** 2010 (2) SACR 173 (KZP) at 176 and 177.

[9] In adjudicating this application I also considered **S v Kimberley and Another** 2005 (2) SACR 663 (SCA). This judgment must be distinguished as the facts therein are not on all fours with the facts *in casu*. It was found in para [12] at p 669 that appellant one in that case was an accomplice and not a co-perpetrator, but it was not found that he acted in the execution of a common purpose or conspiracy. In *casu* and notwithstanding the absence of proof of a prior agreement, I am satisfied that the pre-requisites for a conviction based on common purpose have been met. See **S v Mgedezi and Others** 1989 (1) SA 687 (AD) at 705I – 706C.

[10] Consequently I am satisfied that there are no reasonable prospects of success on appeal in respect of the conviction on count two. I did not even require argument pertaining to the conviction on count one as the evidence against applicant was overwhelming and there is just no reasonable possibility that another court may come to a different conclusion.

[11] Regarding sentence I must say that the sentence of 12 years' imprisonment in respect of count one seems to be too lenient. There is no reasonable prospect that another court may come to a conclusion that the sentence is too harsh should be reduced. The only further issue that merits

attention is the sentence of life imprisonment in respect of count two.

[12] Van Coppenhagen J heard the evidence of the complainant in count two and made it clear that it was apposite to individualise and impose different sentences in respect of the two counts. It appeared from the evidence that the complainant in the second count had to be hospitalised for three months as a result of depression. She even attempted to commit suicide. Her personality changed totally as a result of the rape and furthermore she was tested positively for HIV. Clearly the rape was regarded as a severely traumatic experience that had a significant impact on such a young lady.

[13] I fully embrace the convictions of our Supreme Court of Appeal as *inter alia* set out in **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [23], p 53 and **S v Malgas** 2001 (1) SACR 469 (SCA) to the effect that minimum sentences have been ordained by the legislature and should be imposed, unless there are truly convincing reasons for departing from them. I also endorse the *dicta* of the SCA in **S v Chapman** 1997 (2) SACR 3 (SCA) at 5 b-e.

[14] Having said this I am of the view that another court, acting reasonably, may find that life imprisonment was not warranted in *casu*. Applicant was not a co-perpetrator in respect of count two as he at no stage raped or attempted to rape the complainant or threatened to do so. He parted ways with accused three and the complainant where after she was raped again more than once during the night.

Although he should be blamed for the traumatic experience which the complainant encountered, his role in the whole ordeal is much lesser and not as severe as that of accused three in particular.

- [15] Consequently I am of the view that applicant's case is more than arguable and that there are reasonable prospects that another court may come to a different conclusion in respect of the sentence of life imprisonment. It is not necessary to refer the matter to the Supreme Court of Appeal and leave should therefore be granted to the Full Bench of the Free State High Court.

ORDER

- [16] Therefore the following orders are made:

- 1. The application for condonation is granted;**
- 2. Leave is granted to applicant to appeal to the Full Bench of the Free State High Court against the sentence imposed in count two only.**

J. P. DAFFUE, J

On behalf of applicant: Adv. J. S. Makhene
 Instructed by:
 Justice Centre
 BLOEMFONTEIN

On behalf of respondent: Adv. J P du P Botha
 Instructed by:

The Director: Public Prosecutions
BLOEMFONTEIN

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