

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A323/2010

In the appeal between:-

TANKISO ABEL MOKOENA

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, AJP *et* PHALATSI, AJ

HEARD ON:

6 FEBRUARY 2012

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

9 FEBRUARY 2012

[1] This is an appeal. The appellant Tankiso Abel Mokoena was tried as accused number one in the Fouriesburg Regional Court. He and his co-accused, Tankisa Ambrose Mokoena pleaded not guilty to a charge of rape. Notwithstanding their plea, both of them were found guilty on 20 March 2009.

[2] On the same day they were sentenced to life imprisonment. The appellant was aggrieved. He now comes on appeal against the sentence. His co-accused is not before us. Therefore the appeal does not concern him.

- [3] The appellant was convicted of rape. The court *a quo* found that he and his co-accused had raped Ms M G M at Mashaeng, Fouriesburg on 25 August 2007.
- [4] The hearing started on 9 June 2008. The two accused were legally represented. The version of the prosecution was narrated by Ms M.G. M, the victim and Ms B.A. Masitha, the victim's mother. In addition to their oral testimonies, two documents were exhibited in court as part and parcel of the prosecution case, viz the medical report form j88 completed by Dr. M.B. Radebe and the sworn statement in terms of section 212 Criminal Procedure Act 51 of 1977 made by Superintendant H.C. Botha, the forensic analyst. The two documents were marked exhibit "a" and exhibit "b" respectively. They were received as evidence with the consent of the defence. As a result of the agreement, neither the doctor nor the analyst testified.
- [5] After hearing the testimony of the victim's mother, the case was postponed for further hearing. Meanwhile the DNA test results became available. The appellant was positively connected to the victim's rape through the DNA evidence. He then made a formal admission. Thereupon the state

case was closed. The appellant did not testify. His version was never told by any witness. Obviously his earlier denials, which were put to the witnesses through the lips of his legal representative, fizzled into thin air in the light of the forensic evidence and his admission thereof.

[6] Having listened to argument in mitigation and in aggravation of sentence, the regional court found that no substantial and compelling circumstances existed to warrant deviation from the prescribed minimum sentence. Where, as in this instance, a woman is raped by two or more men, the prescribed minimum sentence is life imprisonment – section 51(1) Criminal Law Amendment Act 105 of 1977, as amended, read with Part I Schedule 2 thereto.

[7] The crisp question in the case before us is whether, on the peculiar circumstances of this case, the foregoing finding of the trial court was justified.

[8] On the one hand, Mr. Reyneke submitted, on behalf of the appellant, that the trial court erred in reaching the conclusion that there were no substantial and compelling circumstances. Therefore he urged us to uphold the appeal, to nullify the

sentence of life imprisonment and to adjust the sentence downwards.

[9] On the other hand, Mr. Harrington submitted, on behalf of the respondent, that the trial court was correct in coming to that conclusion. Therefore he urged us not to interfere.

[10] The trial court said the following about the personal circumstances of the appellant:

“Die beskuldigde se persoonlike omstandighede is aan die hof voorgehou. Beskuldigde 1 het vorige veroordelings en dien hy ook tans gevangenisstraf uit weens misdrywe wat nie met die onderhawige misdryf verband hou nie. Daarom sal beskuldigde 1, soos beskuldigde 2, as ‘n eerste oortreder beskou word.”

[11] The sweeping statement by the trial magistrate was unhelpful on appeal. It was not enough to simply comment that in sentencing an accused person, the court has taken into account his personal circumstances as presented to the court by his legal representative or as placed on record. It is of utmost importance that all the factors relevant to an offender’s personal profile, be specified by the sentencing

court itself in the sentence component of the trial proceedings. This is particularly so in a case where the crime committed attracts the severest form of punishment, life imprisonment. It was not done in this case.

[12] The trial court fleetingly glossed over the appellant's mitigating factors. Where such mitigating factors are not so specifically mentioned and meaningfully assessed, considered and properly weighed up, a reasonable perception or doubt is thereby inevitably created that the offender was not properly individualised before he was sentenced.

[13] It is of paramount importance to have an offender adequately profiled before the sentence is imposed. Unless this is seen to have been done, it cannot be said that the punishment fits an offender – **S v RABIE** 1975 (4) SA 855 (AD).

[14] It has to be mentioned that legal argument is not supposed to form part of the appeal record. See **S v RAMAVHALE** 1996 (1) SACR 639 (A). This practice should be strictly observed. In that way the tendency, by certain trial courts, of casually and vaguely referring without actually and fully

detailing the personal circumstances of the offenders will hopefully cease or at least significantly drop. The trial court may sometimes be in a privileged position of giving *ex tempore* verdict and likewise imposing sentence while legal argument is still fresh on its mind. A court of appeal, however, can never have such an advantage. It is precisely here where the danger lies.

[15] It is imperative, therefore, that the sentence segment of the proceedings should be so independently crafted that the mitigating factors and indeed the aggravating factors can be readily ascertained *ex facie* the sentence segment itself without any reference to legal argument. As I have already pointed out such argument is not supposed to form part of the appeal record and rightly so. *In casu* it was erroneously included.

[16] In sentencing the appellant, the following mitigating factors would traditionally have been taken into account:

- that the appellant was born on 1 January 1983;
- that he was 25 years of age at the time he was sentenced;

- that he was 24 years of age at the time he committed the crime;
- that his formal school education ended in standard 7;
- that he earned his livelihood as a proprietor of a spaza shop;
- that he was a married man;
- that he had one dependent minor child aged 12 months of age;
- that his wife was unemployed;
- that he was the sole breadwinner for his family;
- that he was incarcerated for almost 19 months before he was sentenced; and
- that he had no previous rape conviction.

[17] In sentencing the appellant the court *a quo* took into account the following aggravating circumstances:

- that the appellant had committed a serious crime;
- that the interests of society required appropriate sentence for offenders of such crimes.

[18] The circumstances of this case showed that the victim and her friend, Pontsho, went to Lusaka Tavern at Mashaeng on

Saturday 25 August 2007. They left her parental home at or about 22h00. By 22h15 they were already seated inside the tavern. They ordered some alcoholic beverages. At one stage Pontsho decided to go to the ladies bathroom. While she was gone, a certain Lefu, apparently her boyfriend, confronted and threatened the victim. He blamed her for Pontsho's disappearance from the tavern that night. Shortly after the incident the victim decided to leave. It was approximately 02h00 in the early morning hours of Sunday.

[19] Outside the tavern the appellant and his companion approached her. Their names suggest that they could be twin brothers. They told her that they had heard Lefu threatening her. They then offered to escort her home. On the way they demanded a reward from her in the form of sex. She refused. Thereupon they overpowered her, took her to the stadium against her will and there they took turns to rape her. They were armed with a knife. When they were done, they took her home. She knew them by sight.

[20] From the foregoing unchallenged account of the incident, further aggravating factors become apparent:

- Firstly, the appellant and his companion hatched a

cunning and deceitful scheme to lure the unsuspecting away from the tavern to the lion's den.

- Secondly, the appellant and his companion projected themselves to the victim as her saviours, whereas in fact and in truth, they were wolves in a sheep's skin.
- Thirdly, they took the victim to a dilapidated dressing-room at the stadium where they sexually penetrated her via the vagina.
- Fourthly, the appellant was armed and dangerous. He was still brandishing a knife while he was undressing her.
- Finally, the appellant stood there on the scene of the crime and watched while his companion also sexually assaulted the victim in the furtherance of a common criminal enterprise. Women, just like men, have the right to freely walk to and from taverns at any time without fear of rapists – **S v CHAPMAN** 1997 (2) SACR 3 (SCA). That right the appellant and his companion violated.

[21] I have already alluded to the appellant's personal profile – *vide* paragraph [16] *supra*. I wish to revert to the

incarceration as a mitigating factor. The issue was raised at the trial as well as on appeal. The appellant was arrested on 25 August 2007. He was sentenced on 20 March 2009, about 19 months later. Between those two dates he was apparently convicted of housebreaking and sentenced to 18 months imprisonment.

[22] The housebreaking was obviously committed before the rape. He was not remanded in custody in connection with that offence which was why he was able to rape the victim. It can be seen, therefore, that he was incarcerated because of rape and not housebreaking. As to precisely when he was convicted cannot be ascertained *ex facie* the record. Similarly, the precise details of the sentence appear nowhere on the record, not even on his criminal record – form SAPS69C. His last recorded conviction according to his official criminal record was on 5 April 2005.

[23] It may well be that the appellant was sentenced in connection with such burglary a day before he was sentenced in connection with this rape case. That is a reasonable possibility which cannot be excluded in view of the very scanty information known about such burglary. The

fact that such conviction is not reflected on his criminal record, fortifies this possibility. Seeing that there is so much that is unknown and so little that is known about the burglary, the court *a quo* should have given the appellant credit in mitigation of sentence for the agony of the 19 months he endured in incarceration. To the extent that the court *a quo* did not, it erred.

[24] In **S v STEVENS AND ANOTHER** 1994 (2) SACR 163 (W) at 168 e – g Schultz J, as he then was, observed that the agonising period an accused spent behind bars while awaiting his fate was the equivalent of a sentence twice that length. I share those sentiments. So much about incarceration.

[25] Next I wish to deal with the issue of the victim injury. It is so that the victim did not sustain physical injuries during the course of the incident. Moreover, there was no evidence led concerning her possible lasting emotional scarring. The absence of injury to a rape victim has been considered in a few decided cases. See **A T WATSON v THE STATE** (2009) HCSA (A267/10) (FSB) per Kruger J *et* Jordaan J; **BOOYSEN v S** (2009) JOL 24464 (ECG) par. [3] per Jones

J; **S v GN** 2010 (1) SACR 93 (T) par. [16] per Du Plessis J; **S v NKAU** 2009 (2) SACR 402 (ECG) par. [11] per Plasket J; A. Kruger: **Hiemstra's Criminal Procedure**: Service Issue 4 2011 ed on p. 28-24.

[26] In passing sentence, the court *a quo* said the following concerning the absence of injury:

“Dit is ter versagting voorgehou dat die klaagster geen beserings opgedoen het nie, maar dit word reeds deur die nuwe Wet op Seksuele Misdrywe uitgesluit as ‘n versagtende faktor en die hof stem ‘n honderd persent met die nuwe wetgewing in daardie verband saam.”

[27] The Sexual Offences and Related Matters Act 32 of 2007, on which the court *a quo* relied in disregarding the lack of physical injuries to the victim, came into operation on 31 December 2007. So was the Criminal Law Amendment Act 38 of 2007 which amended section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 by the insertion of subsection 3(aA)). The new subsection 51(3)(aA) Act 105/1977 provides, *inter alia*, that when a court imposes a sentence in respect of rape, apparent lack of physical injury

to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

[28] It will be readily appreciated that the appellant was convicted in connection with the rape he committed on 25 August 2007, some four months before the aforesaid legislative enactments relating to the physical injury of a rape victim were enacted. Accordingly the court *a quo* erred on a question of law by retrospectively applying the amended provisions to the appellant in this case. It follows therefore, that the court *a quo* was not precluded to consider the apparent lack of physical injury to the victim as one of the relevant factors in the process of determining whether substantial and compelling circumstances existed or not.

[29] In **MABITSE v THE STATE** (2010) HCSA (A84/10) 9-9-2010 (FSB) par. [17] per Rampai J *et* Molemela J the court, while recognising that rape was by its very nature a violent act, said the following about physical injury to the victim:

“Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next (Jones J in

S v BOOYSEN, *supra*, at par. [7]) so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next. The physical injury symbolises the measure of violence a perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the degree of the rapist moral blameworthiness. I am of the firm view that dictates of justice demand that in meting out sentence differentiation be made based on the degree of violent and brutal force used."

[30] The court went on to say:

"If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors for inclusion in the melting pot and consideration in order to make a determination in terms of section 51(3) regarding the existence or otherwise of substantial and compelling circumstances – Plasket J in **S v NKAWU**, *supra*, at par. [17]."

[31] The absence of physical trauma in this case, cannot be fairly disregarded as an irrelevant or a neutral factor. In my view it was an important mitigating factor for which the appellant

should have been credited. It indicates that the case we are here dealing with does not resort under the category of the most serious rape cases. Mr. Harrington correctly conceded that, all things been equal, the degree of violence employed in two rape incidents may justify different responses from a court as to how the two rape offenders should be sentenced. The greater the degree of violence, the greater the natural inclination of the court will be to impose the prescribed minimum sentence. So will the community's expectation be. The converse also holds true.

- [32] By far worse case scenarios than this are conceivable. See **S v MATYITYI** 2011 (1) SACR 40 (SCA). In that appeal the learned Judge, Ponnan JA, in a very well written judgment, described the rape incident as breathtakingly brazen and executed with callous brutality. *Vide par.* [19]. The same cannot be said about the rape incident we are here dealing with. In the instant case it seemed to me that the only reason the court *a quo* relied upon for finding that there were no substantial and compelling circumstances to justify deviation from the prescribed minimum sentence of life imprisonment, was its mechanical imposition of life imprisonment because the appellant's criminal conduct fell

squarely within the purview of Part I Schedule 2. Such an uncritical and perfunctory application of the penal provision is lamentable.

[33] Injury or no injury, rape strikes at the very core of the victim's femininity. This is true in all rape cases. This case is no exception to the rule. There is no doubt that this rape case remains a despicable misdeed even though the appellant used minimal violence to achieve his criminal objective. However, it must also be accepted that lack of brutal force is a factor which diminishes the moral blameworthiness of a rape offender's unlawful actions. There are rape cases and there are rape cases. Some are worse than others. See **S v ABRAHAMS** 2002 (1) SACR 116 (SCA) par [28]. There are rape offenders and there are rape offenders. Some are more brutal than others. These are not subtle or cosmetic or meaningless or flimsy distinctions. These are really important factors which must be practically recognised and reflected in the way rape offenders are punished.

[34] To ignore those important distinctions and to blindly paint rape offenders with the same brush simply because they fall in the same penal category – Part I Schedule 2 – would boil

down to a disregard of the sentencing discretion entrusted to a trial court in terms of section 51(3)(a) Act No. 105 of 1997 as amended. (**S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 g – j)

[35] The sentence of life imprisonment is the ultimate sentence that can be imposed on any offender. It is therefore incumbent upon a trial court to do its best to make an offender understand why such an extremely harsh sentence is an appropriate punishment for him or her. It was never done in this case. The sentence about a particularly serious matter concerning two individuals was disturbingly brief. The brevity of the sentence did not do justice to what was indeed at stake. The sentence segment of the criminal proceedings hardly covered two pages of the record. In **S v DLAMINI** 1991 (2) SACR 655 (A) at 666 b – f Nicholas AJA, as he then was, observed that criminal trials in this country were painstakingly conducted with scrupulous care up to the end of the conviction stage, but that the subsequent procedure relative to the sentence stage was almost perfunctory.

“That by and large continues to be the position.”

This is how, two decades later, Ponnann JA in **S v MATYITYI**,

supra, par. [15] lamented the rather casual or careless or unenthusiastic manner in which the sentence phase is sometimes approached by our courts. That is a sad state of affairs. The instant case demonstrates that quite well.

[36] I find the following passage quite apposite to the circumstances of this appeal:

“An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court.”

(per Ponnann JA in **S v MATYITYI**, *supra*, par. [16].

[37] In my view the personal profile of the appellant coupled with lack of credible and reliable evidence of permanent adverse impact on the victim of the rape incident; lack of brutal force; the agony of prison incarceration; the appellant’s criminal record that was unblemished by any rape priors; lack of physical injuries to the victim, cumulatively considered, substantially compelled the conclusion that life imprisonment was not an appropriate punishment.

[38] Accordingly the finding of the court *a quo* that there were no substantial and compelling circumstances to justify any sentence lesser than the prescribed minimum sentence of life imprisonment, constituted an appealable misdirection. In view of these and other misdirections, I am therefore inclined to interfere. On the facts, I am of the firm view that an appropriate sentence option that can be selected because it best fits the unique circumstances of the instant case is one of 17 years imprisonment.

[39] Accordingly I propose the following order:

39.1 The appeal succeeds.

39.2 The conviction stands.

39.3 The sentence of life imprisonment imposed on the appellant by the Fouriesburg Regional Court on 20 March 2009 is set aside and substituted with the one below:

39.4 The appellant is sentenced to 17 (seventeen) years imprisonment which is antedated to 20 March 2009 being the date on which he was sentenced.

M.H. RAMPAI, AJP

I concur and it is so ordered.

N.W. PHALATSI, AJ

On behalf of appellant: Attorney J.D. Reyneke
Instructed by:
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On behalf of respondent: Adv. W.J. Harrington
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