

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. A 263/10

In the review between:

GODFREY SELLO MADINGOA	1st Appellant
ISAK TSIETSI MABASO	2nd Appellant
ELLY MATSHIDISO RICHARD MORATA	3rd Appellant
ABRAHAM MOHLOUWA NCHECHE	4th Appellant
PETRUS BAMBISO	5th Appellant

versus

THE STATE	Respondent
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<u>CORAM:</u>	CJ MUSI, J <i>et</i> NAIDOO, AJ
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<u>JUDGMENT BY:</u>	NAIDOO, AJ
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<u>HEARD ON:</u>	13 FEBRUARY 2012
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<u>DELIVERED ON:</u>	16 FEBRUARY 2012
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NAIDOO AJ

- [1] The appellants were charged with two counts, the first
 being Rape and the second being Assault with Intent to

do Grievous Bodily Harm. The appellants are alleged to have raped A M V (the complainant) on 7 September 2008 at Monyakeng in Wesselbron in the Free State and on the same day at the same place to have stabbed her with a knife. They were convicted on both counts in the Wesselbron Regional Court and sentenced to life imprisonment on count 1 and two years' imprisonment on count 2. The sentences were ordered to run concurrently. The appellants now appeal against their conviction and sentence. It should perhaps be pointed out that the notices of appeal which were lodged by the appellants indicated that they were appealing against both their conviction and sentence in respect of the rape charge. When the notice of appeal was filed by their legal representative, the appeal appeared to be only in respect of sentence in respect of the rape charge. They were legally represented during the trial in the Regional Court. Mr L Tshabalala appears on behalf of the appellants in this court and Mr WJ Harrington on behalf of the State.

[2] On the evening of 7 September 2008, the complainant

left a tavern in the company of two male friends. As they walked along, she noticed eight men whom she had seen in the tavern and who were known to her approach her and her companions. They then grabbed her and dragged her to a nearby school. They took her behind the school, stripped her of her clothes and threw her to the ground. Thereafter they took turns to rape her. She knew five of the men, who are the appellants in this matter. The other three she did not know and they were not arrested. Prior to the rape, the third appellant stabbed her on her head with a knife. She was further assaulted by being kicked on her body and face by a number of her assailants.

- [3] After she was raped, the second appellant took to his brother's house as there was some talk of killing her. At his brother's house, he made a bed for them to sleep, but at that time the third appellant and a male person that the complainant did not know arrived at the house she was in. They kicked the door which was then opened. These two men then grabbed the complainant and dragged her to another zinc structure where the

third appellant and the unknown male raped her again. They made her lie on the bed between them. A few hours later, while the third appellant was asleep, the unknown male then left, and the complainant climbed over the sleeping third appellant and escaped. She went back to the school yard to collect her clothes, and thereafter she stopped at a nearby house to ask for something to wrap around her bleeding head. She was given a scarf with which she wrapped her head. Thereafter, she went to the house of her uncle and reported the rape to her cousin, Mamoketi Merriam Mphaka, the second State witness (Mphaka). This was shortly before 6H00. Thereafter Mphaka took her to the police station where a charge was laid. The complainant was then taken to the hospital for medical attention. The appellants were thereafter arrested, mainly with the assistance of the complainant who identified the various appellants. As indicated earlier, she knew only five of her attackers. The other three who raped her were never arrested.

[4] Appellants 1, 2, 4 and 5 offered bare denials of the

charges as their respective defences. Appellant 3 changed his plea of not guilty to one of guilty in respect of both charges shortly before the State closed its case, indicating that he admits, as correct, the complainant's version in so far as it relates to him. The third appellant also admitted the correctness of the DNA report which linked him to the crimes, such admission being recorded in terms of Section 220 of the Criminal Procedure Act 51 of 1977 (the CPA).

- [5] At the hearing of the matter before this court, Mr Tshabalala conceded that the convictions in respect of all five appellants were in order and made no further submissions in respect thereof. He addressed the court only in respect of the sentence of life imprisonment, relating to the rape charge. Mr Tshabalala submitted that the fact that the appellants spent nineteen months in custody prior to the conclusion of the trial should have been taken into consideration by the trial court and that a lesser sentence should have been imposed on the appellants. He also referred the court to **S v Nkomo 2007 (2) SACR 200 (SCA)**, where it was held that

factors such as the age and absence of previous convictions could be taken into account as mitigating factors. While he urged this court to do likewise and interfere with the sentence of life imprisonment, Mr Tshabalala conceded, however, that Nkomo was distinguishable from the present matter because of the circumstances under which the offences in this matter were committed, and that if he were to argue the matter independently of the Nkomo case, he would be unable to take that argument further.

- [6] Mr Harrington submitted that the sentence of life imprisonment was wholly appropriate in the present matter. The complainant was gang raped by eight men, some of whom raped her again at a place other than the original crime scene. She was as a result raped ten times or more. She was severely assaulted and stabbed on her head. In addition, the perpetrators were assaulting each other with knives in order to get a turn to rape the complainant. He also submitted that when one views the seriousness of the circumstances of this matter as a whole, the nineteen months in custody did

not amount to such a long period of time. The time spent in custody, awaiting trial in this matter could and should not, therefore, be regarded as substantial and compelling enough to deviate from the prescribed minimum sentence. In addition to Mr Harrington's submissions, it can perhaps also be noted that the treatment to which the complainant was subjected was cruel, inhumane and callous. She was made to walk naked and bleeding in the street firstly by the second appellant when he took her to his brother's house and then by the third appellant and his companion when they dragged her from the house of the second appellant's brother. In addition, she was obliged to walk naked in the morning from the room in which the third appellant and his friend held her captive, until she reached the school yard where she retrieved her clothes

- [7] It is clear and not in dispute that the Criminal Law Amendment Act 105 of 1977 (the Act) is applicable in this matter. Section 51 (1) of the Act provides that
- “Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High***

Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.”

Part 1 of Schedule 2 of The Act provides that rape

“(a) when committed-

i) In circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

ii) By more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

iii)

iv)

(b)

(c) involving the infliction of grievous bodily harm.

Section 3(a) of the Act provides for the imposition of a lesser sentence than the prescribed minimum if the court is satisfied that substantial and compelling circumstances exist to justify the deviation from the

prescribed minimum sentence.

- [8] The learned magistrate undertook an extensive examination of the circumstances of this case as well as the dicta of many leading cases on the way the offence of rape should be viewed. He also dealt with the approach, as set out in our case law, which the courts should adopt in sentencing persons convicted of rape. He examined the personal circumstances of each appellant in detail and concluded that he could find no substantial and compelling circumstances that justified his imposition of a lesser sentence than life imprisonment. The learned magistrate also stated that he did not consider the time spent in custody awaiting trial to be a substantial or compelling circumstance. Although the learned magistrate did not say, in so many words, why he did not think so, it is clear, when regard is had to the circumstances of the offence as I have outlined above, that the time spent in custody awaiting trial is not particularly significant for the purposes of sentence, and is overshadowed by the aggravating factors dealt with by the magistrate and also raised by

Mr Harrington in his address to court. It is perhaps also useful to record that Mr Tshabalala very candidly conceded the aggravation inherent in those factors. I cannot, therefore, fault the learned magistrate's reasoning or his conclusion, and I agree with the sentence of life imprisonment imposed on each appellant in respect of count 1.

[9] I, accordingly, make the following order:

- a) The appeal be dismissed.
- b) The convictions and sentences are confirmed.

NAIDOO, AJ

I agree,

CJ MUSI, J

**Counsel for Appellant:
Instructed by:**

Mr LM Tshabalala
Bloemfontein Justice
Centre
113 St. Andrew Street
St Andrew Building
Bloemfontein

**Counsel for the Respondent:
Instructed by**

Mr WJ Harrington
Director of Public
Prosecutions
Bloemfontein