

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Appeal No. : A138/2011

In the appeal between:-

**THABISO JOSIA TSHABALALA**

Appellant

and

**THE STATE**

Respondent

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**CORAM:** RAMPAL, AJP *et* DAFFUE, J *et* PHALATSI, AJ

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**HEARD ON:** 19 MARCH 2012

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**JUDGMENT BY:** PHALATSI, AJ

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**DELIVERED ON:** 5 APRIL 2012

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[1] This is an appeal against the sentence imposed by Moloi, J in the High Court sitting in Harrismith, leave to appeal against sentence having been granted by the Court *a quo*.

[2] The appellant, a 16 year old male, was charged together with his co-accused, on four counts, being:

- Count 1 - housebreaking with the intention to commit rape;

- Counts 2 and 3 – being contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, in that they broke into the complainants' (Violet Makgauta Cindy and Amelia Lebohang Mokoena) house and unlawfully and intentionally had sexual intercourse with them, without their consent.
- The fourth count is one of robbery with aggravating circumstances as envisaged in section 1 of the Criminal Procedure Act, 51 of 1977.

[3] Both accused were found not guilty on count 1 and they were both convicted on counts 2 and 3. On count 4, the court found that no robbery was committed and both accused were convicted of theft.

[4] On 14 September 2010, both accused were each sentenced as follows: 9 (nine years imprisonment on each of counts 2 and 3, and 2 (two) years imprisonment on theft. The court then ordered the sentences to run consecutively so that they each have to serve 20 (twenty) years imprisonment.

- [5] The facts of the case are, briefly, that on 18 August 2008, the two complainants, Violet Makgauta Cindy, who was 19 years of age at the time of the commission of the crime, and Lebohang Amelia Mokoena, who was 18 years old, were sleeping on one bed, together with a 13 year old boy, Morena Innocent Mokoena.
- [6] At approximately midnight they woke up as the two accused forcibly opened the door and entered the house that they were sleeping in. Each one of the accused was armed with a knife.
- [7] Each of the accused raped the complainants in the presence of the 13 year old boy, at knife point. They thereafter took the items from the house and left.
- [8] The appellant was 15 years old at the time of the commission of the crimes.
- [9] During sentencing, the trial court correctly held that the provisions of the Minimum Sentencing Act are not applicable in respect of the appellant and that is where it ends.

- 9.1 In respect of the appellant's personal circumstances, the court relied on the probation officer's report which was handed in as an exhibit.
- 9.2 The learned judge quotes at length from the report, but only factors that are adverse to the appellant, which leads to the assumption or conclusion that he never applied his mind to the report as a whole.
- 9.3 He never mentioned any mitigating circumstances in respect of the appellant, as set out in the report.
- 9.4 The report states the following:
  - 9.4.1 The appellant was raised by a single parent.
  - 9.4.2 His father left his mother whilst he was still a toddler and he consequently does not know him.
  - 9.4.3 He does not have previous convictions.
  - 9.4.4 There is a high risk of juvenile delinquency in the area wherein he lived.
  - 9.4.5 All his family members are unemployed.
- 9.5 Amazingly, he did not even mention and take into account the fact that the appellant was 15 years of age at the date of commission of the crime, as a mitigating factor. It is therefore not surprising that there is no distinction made between the sentence of the appellant

and that of his co-accused in the Court *a quo*. This is a serious misdirection which enables the court of appeal to interfere with the sentence.

[10] The Court *a quo* further quotes with approval from the report, the fact that

“the act in question and the age does not correspond as he committed an offence suitable to be committed by an adult.”

I do not know of any offences that are suitable to only be committed by adults, but I know that children do sometimes commit heinous crimes. This was so elegantly put by Cameron, J in the matter of CENTRE FOR CHILD LAW v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS (NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE RE-INTEGRATION OF OFFENDERS, AS AMICUS CURIAE) 2009 (2) SACR 477 (CC) at pages 490 – 491 paragraphs [28] and [29]:

“[28] These are the premises on which the Constitution requires the courts and Parliament to differentiate child

offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

[29] This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no less than Parliament. The affidavit on behalf of the Minister rightly points to legislators' concern about violent crimes committed by under-18s. The Constitution does not prohibit Parliament from dealing effectively with these offenders. The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that '(a) child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."

In **S v B** 2006 (1) SACR 311 (SCA) at page 318 paragraph [14], the court stated that

“The recognition that children accused of committing offences should be treated differently to adults is now over a century old.”

[11] *In casu*, the Court *a quo* correctly held that the appellant has committed very serious crimes by attacking and raping the complainants in the sanctity of their homes, that broke into their home in the middle of the night and raped one of the complainants in the presence of a 13 year old boy. I have, however, already found that the learned judge virtually ignored the appellant’s personal circumstances and failed to recognise that the appellant, as a child, had to be treated differently during sentencing.

[12] I am of the view that this court should interfere with the sentence imposed by the Court *a quo*. In the light of the seriousness of the crime, the personal circumstances of the appellant, as set out in the report and the fact that the appellant was a child when the crimes were committed, I am of the opinion that the sentences imposed by the Court *a*

*quo*, should run concurrently in such a way that the appellant should serve an effective sentence of 15 (fifteen) years imprisonment.

[13] I therefore make the following orders;

1. **The conviction stands.**
2. **The appeal against sentence succeeds.**
3. **The effective sentence of twenty years imposed by the court *a quo* is set aside and replaced with the following:**  
  
**“The 2 years imprisonment imposed in respect of count 4 and 3 years of the 9 years imprisonment imposed in respect of count 3, shall run concurrently with the 9 years imprisonment imposed in respect of count 2 in such a way that the appellant shall serve an effective sentence of 15 years imprisonment.**
4. **The sentences are antedated to 14 September 2010.**

**N.W. PHALATSI, AJ**

I concur.

**M.H. RAMPAL, AJP**

I concur.

**J.P. DAFFUE, J**

On behalf of appellant:

Mr. J.D. Reyneke  
Instructed by:  
Bloemfontein Justice Centre  
Legal Aid SA  
BLOEMFONTEIN

On behalf of respondent:

Adv. E. Liebenberg  
Instructed by:  
Director Public Prosecutions  
BLOEMFONTEIN

/sp