

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A152/11

In the matter between:-

FANI DANIEL MOSIA

Appellant

and

THE STATE

Respondent

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

HEARD ON: 19 MARCH 2011

JUDGMENT BY: RAMPAL, AJP

DELIVERED ON: 19 APRIL 2012

[1] This is an appeal against sentence. The appellant was convicted in the regional court on 28 April 2004 and sentenced in the high court on 9 September 2004 to life imprisonment and 8 (eight) years imprisonment in respect of rape and attempted murder respectively. He was aggrieved by the sentence imposed on him.

[2] The appellant was arrested, charged and tried as accused number 2, together with a certain Thabang David Mosia

accused number 1. His co-accused is not before us in this appeal. Therefore the appeal does not concern him.

[3] The appellant was tried in the Sasolburg Regional Court. The trial started on 11 July 2003. On that day he pleaded not guilty to six criminal charges before Mr. J.H. Ludick. Mr. W. J. Herrington appeared for the state and Ms T. Volschenk for the defence. Notwithstanding his plea, he was found guilty on 28 April 2004 in connection with two of the six charges.

[4] The appellant was accused of one count of kidnapping, four counts of rape and one count of attempted murder. At the end of the trial, he was acquitted of kidnapping and three counts of rape, but convicted in respect of the second and the sixth charges, namely rape and attempted murder. The offences were committed at Zamdela, Sasolburg on Friday 1 March 2002. The victim was Morwesi Josephine Noge, an adult female.

[5] Subsequent to his conviction, the proceedings in the regional court were stayed. The appellant was, in terms of section 52

of the Criminal Law Amendment Act, No. 105 of 1997, referred to the provincial division of the high court for sentence. On 9 September 2004 Malherbe JP sentenced him to life imprisonment in respect of the second charge, *viz* rape and 8 (eight) years in respect of the sixth charge, *viz* attempted murder.

[6] The appellant comes on appeal with the leave of the court *a quo* granted per Cillié J on 27 May 2011. The leave to appeal was granted in respect of the life sentence only. For that reason I shall say no more about the sentence relative to the charge of attempted murder.

[7] It is a salient principle of our law that the sentencing of an offender is the prerogative of the trial court and that a court with appellate jurisdiction cannot interfere with the sentence entrusted to the trial court merely because it would have exercised such discretion differently – **S v SALZWEDEL AND OTHERS** 1999 (2) SACR 586 (SCA).

[8] The grounds of the appeal were that the court *a quo* erred by sentencing the appellant as it did because:

- 8.1 the sentence of life imprisonment was shockingly inappropriate ;
- 8.2 the seriousness of the crime was overemphasised;
- 8.3 the personal circumstances of the appellant were underemphasised; and
- 8.4 there were substantial and compelling circumstances present to warrant deviation from the prescribed minimum sentence.

[9] The central issue in the appeal was whether, on the facts, the court *a quo* misdirected itself in finding that there were no substantial and compelling circumstances to justify a departure from the ordained legislative norm.

[10] On the one hand, Ms Kruger, attorney for the appellant, submitted that the negative finding of the court *a quo* constituted a misdirection. Therefore she urged us to interfere.

[11] On the other hand, Ms Liebenberg, counsel for the respondent, sharply differed. She submitted that the negative finding of the court *a quo* was unassailable.

Therefore she urged us to dismiss the appeal and to confirm the sentence.

[12] The appellant chose to give no evidence. Moreover, no evidence at all was led by anyone on his behalf in mitigation of sentence. From the bar his personal circumstances were placed on record by Advocate Mene.

[13] In sentencing the appellant the court *a quo* took into account that the appellant was 36 years of age; that he was a first offender; that he had dependent minor children and that the appellant's personal circumstances, which traditionally played a role as mitigating factors, still had to be cumulatively considered in the process of determining whether or not substantial and compelling circumstances were present.

[14] Malherbe JP did not expressly make reference to the appellant's incarceration. The record shows that the appellant was arrested on 4 March 2002; that, although he was granted bail, he was never released on bail from custody and that he was effectively incarcerated for 30

months before he was sentenced on 9 September 2004. About the appellant's childhood, level of formal education, age at the time of rape, marital status and occupation, nothing was said. To these must be added the omission of the court *a quo* to comment, during sentencing, on the victim's seemingly superficial bodily injuries.

[15] In **S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 g – j Olivier JA held:

“Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535A - B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (*supra*) at 684B - C; *S v Pillay* (*supra*) at 535E).

Furthermore, a mere misdirection is not by itself sufficient to

entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in *S v Pillay (supra)* at 535E - G)."

[16] The thrust of Ms Kruger's argument was that the victim's physical injury was not, in actual fact, as grievous as the court *a quo* made it out to be. She heavily relied on the medical report by Dr. S. Zylstra (exhibit "a"). I accept that the critique, as I have previously outlined, levelled at the court *a quo*, was fair. Fair enough, the medical report does not create an impression that the bodily injuries inflicted on the victim by the appellant and his brother, were not serious. However, it must be borne in mind that Advocate Mene represented the appellant and that, on behalf of the appellant, he placed on record those factors which he and the appellant reckoned carried adequate weight to constitute substantial and compelling circumstances.

[17] Malherbe JP fully recorded the factors which the defence relied upon. Then unlike now, it was never the appellant's case that the victim did not sustain serious physical injuries

during the course of the incident. Way back in 2002, unlike now, it was still perfectly permissible to heavily rely on the victim's minor injuries as a factor which substantially compelled the conclusion that an injustice will be done if the prescribed minimum sentence was imposed. Such an omission by the defence implicitly suggested that the appellant accepted that the victim had sustained serious injuries on the night in question, as she averred. Her averment was not challenged, because it was impermissible to attack it on appeal.

[18] Ms Kruger could give no sound reason as to why the clinical notes of a doctor should be preferred over the testimony of the victim and the live observations made by the sentencing judge. Based on the clinical notes made by a doctor, who saw the victim once only and just hours after the assault, counsel for the appellant appeared to have chiefly concentrated on the victim's physical injuries as described by the doctor to the exclusion of the other evidence. The rape incident was breathtakingly brazen and executed with callous brutality.

[19] One shudders to think of what could have happened to her

had she managed to climb on the drum to put her head in the noze tied up to the rafters. Although the violent conduct of the appellant was correctly dichotomised into two separate and distinct crimes by law, to the victim what her rapists did to her after they had raped, could not be divorced from what they did before they raped her. To her the two phases of the violence were but one continuous agony. Therefore, Malherbe JP was correct in commenting on the entire mosaic of the circumstances prevailed and cruelly agonised her.

- [20] The victim's evidence was that before, during and after the rape incident, she was forcibly pulled from the street into the house; that she was punched in the face; that she was kicked all over; that she was repeatedly struck with an iron rod; that she was stripped naked; that her wearing apparels were shredded; that she was called a harlot; that she was persistently assaulted until she powerlessly collapsed and that she was then raped first by the appellant's brother, accused number 1, and then by the appellant himself. Seemingly none of the two rapists used any condom while physically molesting the victim. It must be borne in mind that

the brutal assault took place before the actual preparatory endeavours were made to hang her by her neck.

[21] The victim was called to testify in aggravation of sentence.

Malherbe JP noted that she walked to the witness box with a great deal of discomfort. Asked to explain to the court why she walked in that fashion, she complained about the excruciating pains in her feet, legs, hips, back and neck. During her testimony it emerged that the vicious incident had serious adverse effects on the quality of her life. She agonised about the possibility that she might have been infected with the deadly HIV virus. Ever since the brutal rape incident, she endured endless pains. Getting intimate with her husband was unbearingly painful. She did not enjoy her husband anymore, because apart from the physical pain, intimacy rekindled the emotional hurt of the humiliating experience. The incident had devastating impact on her marital relationship.

[22] She was forced to give up working as a domestic worker on account of her now physically impaired body. She explained that she could no longer do basic domestic chores like any

able-bodied woman or housewife. Two and a half years after the brutal rape incident, she was still receiving medical treatment and physiological counselling. Objective examination and evaluation of her evidence creates a chilling realisation that she is permanently disabled.

[23] Advocate Mene was well aware of the fact that the extent of the victim's injuries, physical and emotional, could not be explained on the basis of the medical report. However it was never suggested to the victim that her evidence was untrue. Accordingly it could not be contended for the first time on appeal, as Ms Kruger did, that the victim's version of her injuries was not corroborated by any medical evidence. The point was not pertinently raised during the course of the victim's presentence cross-examination or in the appellant's notice of appeal, as one of the grounds of his appeal. The inadequacy of the medical report was readily appreciated in the court *a quo*. Mr. Botha, counsel for the state, described it as a very unhelpful medical report. Perhaps this explains why the victim was called to testify about the impact of the incident on her and why the court *a quo* painstakingly dwelled on her injuries, physical and emotional.

[24] Any suggestion that Malherbe JP misdirected himself by taking into account the gravity of the assault as a strongly aggravating factor when determining an appropriate sentence relative to the charge of rape, because as my brother Phalatsi AJ reckoned, the appellant had also been separately charged, convicted and sentenced for grievously assaulting and attempting to murder the victim loses sight of the material fact that the brutal violence was unleashed, by the appellant and his cohort, on the victim in two vicious instalments.

[25] Any view or suggestion that the violence used in this particular incident should have been exclusively apportioned to the charge of attempted murder for which the appellant was sentenced to 8 (eight) years imprisonment and not to the charge of rape for which he was sentenced to life imprisonment, is untenable and fundamentally flawed. Accordingly, I am in respectful disagreement with the view held by my aforesaid colleague. The sentence imposed in connection with the rape was not improperly loaded with the violence used in connection with the charge of attempted

murder. Moreover, it was not really so contended by or on behalf of the appellant.

- [26] The first phase of the vicious assault was calculated to break the victim's resistance in order to achieve the common criminal enterprise. The joint venture of rape was accomplished by means of a great deal of preceding violence. Then the second phase started. It started after the rape incident. The victim was once again viciously assaulted. The rapist threatened to hang her by her neck until she perished.

“Ek is nie van voorneme om die getuienis verder op te som of te herhaal nie. Na my oordeel is hierdie ‘n baie, baie ernstige geval van verkragting wat baie duidelik permanente fisiese en emosionele skade aan die klaagster gedoen het. Asof die voorafgaande aanranding en verkragting nie erg genoeg was nie, het u nog gedreig om haar op te hang. Sy getuig dat sy te swak was om op die drom te klim waarop u gesê het sy moet klim.” (Malherbe JP)

- [27] The foregoing passage clearly shows that the learned sentencing judge was well aware of the transition between the two phases of the violent attack. The following exchange

between the victim and the public prosecutor was recorded during the victim's direct examination in the regional court:

“Wat het gebeur nadat u nie kon opstaan nie, nadat die persone u nie op die drom kon kry nie? --- Ek het daar gelê, hulle het nog aanhoudend geslaan met hierdie ysters op my.”

- [28] The quotation demonstrates the shift in the criminal mindset when a specific criminal intent was formed to kill the victim. The purpose of the assault after the rape incident and the abortive attempt to murder her was to eliminate a possible rape witness against the appellant and his cohort. I hold the view, and it is a very firm view, that the two perpetrators had been correctly sentenced for the brutal manner in which they first assaulted the victim before and not after they raped her. It is precisely this type of gang rape the lawmaker had in mind when it prescribed the minimum legislative norm. This sort of group rape has to be eradicated at all costs. Whenever an offender is sentenced, the adverse repercussions of his actions on the victim, should never be overlooked – **S v MATYITYI** 2011 (1) SACR 40 (SCA). All too often one hears about flimsy reasons, cosmetically

labelled as substantial and compelling circumstances to justify departure from the prescribed minimum sentence of life imprisonment. This appeal was one such case.

[29] I am not convinced that Malherbe JP misdirected himself as Ms Kruger submitted or at all. In my view he did not improperly or unreasonably exercise his sentencing discretion. The circumstances of the appellant, favourable though they are, and the adverse impact of the ultimate sentence imposed on him, cannot and should not be allowed to outweigh the gravity of the rape incident and the callous disregard for the victim's bodily integrity and emotional feelings. He and his cohort mercilessly assaulted her so badly that members of her brother's family could not immediately recognise her the next morning.

[30] I am not persuaded that the sentence of life imprisonment was disturbingly inappropriate in this case. The criminal joint venture, in which the appellant was involved, was of a very serious nature. The sentence was justified by the interests of society whose members are frequently brutalised and traumatised by rapists who run amok in our communities.

[31] None of the critiques levelled against the sentencing judge were by themselves sufficient to be described as misdirection(s) of such a nature, degree or seriousness as to entitle us, sitting as we were in an appellate mode, to interfere with the sentence. I was not persuaded that, in this matter, the court *a quo* did not exercise its discretion at all or that it exercised such discretion improperly or unreasonable – **S v PILLAY** 1977 (4) SA 531 (A) at 535 E – G.

[32] In the absence of a material misdirection, I would dismiss the appeal – **S v KIBIDO**, *supra* at 216 i – j. The finding of the court *a quo* that there were no substantial and compelling circumstances is one which I, on appeal, cannot hold to be wrong.

[33] Accordingly I make the following order:

33.1 The appeal fails.

33.2 The conviction stands.

33.3 The sentence is confirmed.

M. H. RAMPAL, AJP

I concur.

J.P. DAFFUE, J

On behalf of appellant: Attorney S. Kruger
Instructed by:
The Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. E. Liebenberg
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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