

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A155/2011

In the appeal between:

MOHAU ISHMAEL THEBE

First Appellant

MOHLABANE DAVID NTWATSABONE

Second Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, J *et* LEKALE, J

JUDGEMENT BY:

RAMPAL, J

HEARD ON:

17 SEPTEMBER 2012

DELIVERED ON:

27 SEPTEMBER 2012

Rampai, J

- [1] These proceedings were concerned with an appeal. Mohau Ishmael Thebe, the first appellant, and Mohlabane David Ntwatsabone, the second appellant, were together tried, convicted and sentenced as accused number 1 and accused number 2 respectively in the Botshabelo Regional

Court on three criminal charges. They came before us on appeal with the leave to appeal granted by the court *a quo*.

[2] The first appellant's appeal was not heard. Advocate D Greyling appeared on his behalf. She carried a brief from the local lawfirm Kramer Weihmann & Joubert. She applied for a postponement of the appeal as a whole. The application to have the whole appeal postponed was refused but it was partially granted in respect of the first appellant. His appeal was accordingly postponed to Monday the 28 January 2013 by agreement between Advocate S. Chalale, counsel for the respondent and Advocate D Greyling. In the light of all these, I shall say no more about the first appellant during the course of this judgment.

[3] The scope of the second appellant's appeal was limited. He was aggrieved by the sentence only. The court *a quo* had imposed an effective sentence of a 28-year term of correctional imprisonment.

[4] The second appellant was convicted on the 16 March 2010 by Ms M Khoduga, the regional magistrate. The particulars of the first charge were that he and others unlawfully and intentionally had consentless sexual intercourse with the first victim, Ms N at Section K, Botshabelo on Saturday the 28 February 2009. The particulars of the second charge were pretty much the same as those of the first. The particulars of the third charge were that he and others had attacked, stabbed and, by violent means, robbed Mr Lucky Boneficious Nzaka of his money. The gentleman, in other words, the second victim, was also known as Zembe.

[5] About two weeks later, on the 29 March 2010, the second appellant was sentenced to 20 years imprisonment in respect of the first charge of rape, to a further 20 years imprisonment in respect of the second charge of rape and to 8 years imprisonment in respect of the third charge of robbery with aggravating circumstances. The trial court directed in terms of section 280 of the Criminal Procedure Act, 51 of 1977 that the second appellant serve the first and second sentences concurrently. Therefore, the

effective sentence imposed on him was 28 years imprisonment.

[6] The grounds of the second appellant's appeal were that the trial magistrate misdirected herself in two ways in sentencing him as she did. Firstly, he contended that the court *a quo* misconstrued the purpose of sentencing. Secondly, he contended that the court *a quo* did not properly take into account his peculiar personal circumstances.

[7] On the one hand, Ms Kruger, counsel for the second appellant, submitted that as a result of those two misdirections, the effective sentence imposed on her client was so severely harsh and unbalanced that it warranted appellate interference.

[8] On the other hand Mr Chalale, counsel for the respondent, sharply differed. He submitted that the individual sentences imposed on the second appellant though stiff, were not too severe to justify any interference on appeal,

regard being had to the peculiar circumstances of this particular case.

[9] In sentencing the second appellant the court *a quo* took into account his personal circumstances. He was 22 years of age at the time he committed the crimes. He was 23 years of age at the time he was sentenced. He received formal education up to grade 11. He was unmarried. He had no dependent minor children. He was employed as a general worker. He earned R1 200,00 per month as wages. He was arrested on 17 June 2009. He had a clean criminal slate. Those then were the mitigating factors pertaining to his unique profile as an individual.

[10] In sentencing the second appellant the court *a quo* also took into account certain factors as aggravating factors. As regards the crime of rape the court *a quo* aligned itself with a very authoritative decision that rape was a very serious and brutal crime which humiliates, degrades, invades and impairs the human dignity, the privacy and the person of the victim – **S v CHAPMAN** 1997 (3) SA 341 (SCA) at 344I – J.

[11] The trial magistrate firmly held the view that notwithstanding very punitive legislative measures enacted in 1997 the incidence of rape in the country, particularly in Botshabelo, remained alarming. I share the same view with the learned regional magistrate. When the Criminal Law Amendment Act 105 of 1997 was enacted it was hoped that the alarmingly high incidence of rape in general and rape gangsterism in particular would substantially decline. Now if it would appear that the legislative measures have not achieved the contemplated objective as yet. Almost 15 years later it remains a lamentable state of affairs to note that women still cannot walk peacefully on the streets of our cities and suburbs or our towns and townships because criminal gangs are prowling on the streets in order to rape them almost at will.

[12] The prevalence of rape gangsterism at the place concerned has done untold harm to the public interest of the community. It is high time that the scourge of rape gangsterism which appears to be spreading like a wave of an acid in that part of the province is drastically curbed if

not entirely eradicated. The courts must deterrently, preventatively and retributively punish convicted gangsters.

- [13] In **S v ZITHA & OTHERS** 1999 (2) SACR 404 (W) at 418g – i Goldstein J had this to say about a gang of three who had committed a series of horrific multiple acts of invasions on the bodily sanctity of the victim:

“The word must go out to the cities and to the suburbs, to the towns and townships and to the countryside that parliament has directed the courts to punish the perpetrators of gang rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and that the courts will not shrink from their duty of carrying out this directive however painful it may be to do so.”

- [14] Twelve years since that very stern legislative warning of heavy sentences was sent throughout the country, the rape gangsters are not slowing down. The second appellant and his cohorts clearly did not heed the warning. The first rape victim and her companion, the robbery or second victim, were peacefully walking in an alley at Section K when they were surprised by the second appellant and his cohorts.

The first victim ran away when she saw that her male companion was under attack. The second victim managed to escape although he was already wounded. The first victim was not that lucky. She tried very hard to flee. However, the gangsters relentlessly pursued her and caught her on a residential property where she had run to seek help. From the presumably fearful inmates of that particular house she received no help.

[15] The gangsters audaciously dragged her out and away from there to an open veld where each member of the gang shamelessly raped her. As if those three horrific and invasive acts of rape were not despicable enough, the gangsters dragged her away one more time from the first scene in the open veld to the second scene inside a dilapidated and disused building structure. There the second appellant raped her yet again. So did each of his two fellow gangsters.

[16] As a result of the violent attack and physical assault by the criminal gang the first victim sustained certain bodily injuries in addition to her genital injuries. The court *a quo* found,

among other aggravating factors, that the second appellant was remorseless. Against that backdrop of aggravating factors, relative to the second appellant, this appeal has to be considered.

[17] The second appellant's criminal conduct as outlined in the paragraph preceding the foregoing paragraph attracted the prescribed minimum sentence of life imprisonment. That was so seeing that he actually raped the first victim twice and practically helped each of his two fellow gangsters to do likewise. In theory and in law the second appellant by so doing, made himself guilty of six acts of rape – vide section 51 of the Criminal Law Amendment Act 105 of 1977 as amended read with Part 1 Schedule 2 thereto with particular reference to paragraphs (a)(i), (a)(ii) and (c). The criminal actions of the second appellant fell squarely within the ambit of those three specific categories. Now, any of these categories of rape attracts life imprisonment as the ordained prescribed minimum sentence for such an offender.

[18] There were serious aggravating factors against the second appellant. Notwithstanding such factors the court *a quo*

found that there were substantial and compelling circumstances present which justified deviation from the imposition of the prescribed minimum sentence of life imprisonment. The court *a quo* recorded two factors, which in the view of her worship, constituted the cornerstones of her finding, those were: the status of the second appellant as a first offender and the 9.5 months presentence incarceration he had to endure. I have some reservations as to whether, in this case, those two factors will properly be. I say no more about that finding.

- [19] The real attack on the sentence imposed on the second appellant was that despite the foregoing favourable finding for deviation, the effective sentence of 28 years imprisonment was clearly shockingly severe and thus inappropriate. It was contended on behalf of the appellant that the court *a quo* failed to attach sufficient weight to the fact that the second appellant had saved the life of the first victim when his cohorts mooted out the idea that she should be killed.

[20] I am persuaded that the second appellant rescued the first victim from the verge of imminent danger. He prevented them from killing her, took her away from a very dangerous scene, gave her protective shelter for the rest of the night and refrained from raping her any more in his shack. By so doing, the second appellant morally distinguished himself from his fellow gangsters. Some force of intrinsic goodness rekindled the fading spark of humanity inside him. The good prevailed over evil. He adopted admirable apathetic attitude towards the troubled poor victim at a very crucial moment of her endangered life. In this way the gained high moral ground over his co-perpetrators. That subsequent compassion and respect for human life was, in my view, the strongest of all the mitigating factors attributed to him. In spite of his initial heinous misdeeds.

[21] He did not only rescue her at that fateful moment in the middle of the night. The next morning he went a step further. He advised her to report the incident to the police. Moreover, he did not ask for any special favour from her. He knew she would incriminate him in her report or statement to

the police. It seemed to me that he was prepared to pay the price.

[22] Those aspects of his subsequent conduct demonstrated his remorseful acknowledgment of the wrongs he had done. All those decent aspects of his conduct tended to diminish the otherwise high moral blameworthiness of his prior criminal conduct. In my view all those acts of compassion signified that he has the potential to be rehabilitated. The rescue of the first victim by the second appellant was a substantial factor which compelled the conclusion that it would be unjust to impose the ultimate criminal punishment on him.

[23] To the extent that the court *a quo* failed to give the second appellant substantial and compelling credit for saving the life of the first victim, it erred in my view. I firmly believe that the humane manner in which he ultimately treated the poor woman deserved not only to be recognised as a substantial and compelling factor which justified deviation, but also to be meaningfully acknowledged and reflected in a form of a distinctive sentence imposed on him. It was not done in the court *a quo*. As I see it real differentiation should have been

made between the sentence imposed on him and that imposed on his co-perpetrator as regards the two counts of rape.

[24] Besides that, it has to be borne in mind that the court *a quo* correctly found that he did not play a leading role even though he was actively involved. That too was an important factor which the court *a quo* overlooked in sentencing the second appellant.

[25] It follows, therefore, that the second appellant was not adequately individualised during the sentencing component of the judgment - vide **S v MOKOENA** 2012 JDR 0212 (FB) paras [11 - 13] per Rampai AJP *et* Phalatsi AJ. He and his co-accused were simply painted with the same brush without much ado. His conduct was characterised by important considerations and distinctive features which justified substantial and not a mere marginal differentiation in the sentences imposed. Perhaps a differentiation of three years in respect of each count of rape would have been fair, just and equitable. So much about the sentencing relative to the rape charges.

[26] Now I turn to the sentence imposed on the second appellant in connection with the charge of robbery with aggravating circumstances. The evidence showed that the second victim was confronted by one member of the gang. During that confrontation, the second appellant was a passive spectator. He did not participate when the aggressive member of the gang searched the second victim, when he took his money and when he stabbed him. It was so that the second appellant was armed with a knife like his two co-cohorts and that he took part in the subsequent chasing of the second victim as he was fleeing from danger. As I have already said the second victim eluded the gang, managed to escape and to hide. The gangsters readily gave up and called off the search. They did so because the female and not the male was the prime target of their common criminal enterprise.

[27] The question arose during the course of argument on appeal as to whether, on those facts, the conviction of the second appellant could be sustained. Mr Chalale readily conceded that it could not. Ms Kruger was in agreement. In my view the concession was correctly made. It was clear and

obvious that the three members of the gang had jointly conspired to rape the second victim's female companion. That much was evident from the similar actions from which a prior criminal pact could be inferred with ease. I am persuaded, as Mr Chalale said, that the gangster who actually robbed the second victim was indeed on a criminal frolic of his own when he did so.

[28] However, as regards the charge of armed robbery, the proven objective facts relative to the second appellant did not exclude all other reasonably possible inferences save the one drawn by the court *a quo* against the second appellant. That court found that he was involved in the robbery incident as well. I cannot agree with that finding. There were two reasonably possible scenarios or explanations as to why the second appellant participated in the chasing of the second victim. The first was that it might well have been that the second appellant wanted to rob or to assault the second victim further when he actually became involved in the chasing.

[29] The second possible explanation, which was no less probable and plausible than the first, was that it might well have been that the second appellant did not intend to rob or to assault the second victim at all when he chased him as he did but merely wanted to get him out of the way in order to get to the first victim. It must be borne in mind that when the chasing started the robbery of the second victim was an accomplished fact. At worst for the second appellant he ran the risk of being convicted as an accessory after the fact, and nothing more, by chasing the second victim. But even such a conclusion would have been grounded on a very weak and thin factual foundation.

[30] In those circumstances the method of inferential reasoning as authoritatively enunciated in **R v BLOM** 1939 AD 188 appeared to have been misapplied. The inference drawn by the court *a quo* was not consistent with all the proven facts. Because it was inconsistent it could not have been legitimately drawn. The second appellant was entitled to the less burdensome of the two equally reasonable possibilities, explanations or constructions. The court *a quo* clearly misdirected itself in implicitly drawing, as the only valid

inference, that could be legitimacy drawn from the proven objective facts, an adverse inference that the second appellant participated in the armed robbery merely because he took part in the subsequent chasing of the second victim. There was no direct evidence that he did and no criminal intent to do so could properly have been inferred from his *ex post facto* conduct.

- [31] On the facts, it could not be said that, by merely chasing the second victim, the second appellant's conduct constituted the requisite criminal act of association which triggered off the operation of the doctrine of common purpose (see **S v LUMGILE AND ANOTHER** 1999 (2) SACR 597 (SCA) paras [10 – 11]). I am therefore inclined to interfere with the conviction on the question law. The finding of the court *a quo* that the second appellant positively acted in consent with the fellow gangster who actually robbed the second victim is one which I, on appeal, cannot hold to be correct. Such a finding was a material misdirection which vitiates his conviction – **S v JIMENEZ** 2003 (1) SACR 507 (SCA) at 517g - h. It follows, without saying, that if the conviction of the second appellant is set aside as regards the charge of

armed robbery, the sentence of 8 years imprisonment imposed on him in connection with that offence automatically falls away.

[32] Accordingly I make the following order:

32.1 The convictions in respect of the first and the second charges of rape stand.

32.2 The conviction of the second appellant in respect of the third charge viz robbery with aggravating circumstances is annulled.

32.3 The sentences of 20 years imprisonment imposed on the second appellant in respect of the first and second counts of rape are set aside.

32.4 The foregoing sentences are substituted with a sentence of 17 years imprisonment in respect of each count of rape.

32.5 The second appellant shall serve the two sentences concurrently.

32.6 The effective sentence is therefore 17 years imprisonment.

M. H. RAMPAL, J

I concur.

L. J. LEKALE, J

On behalf of appellant:

Ms D Kruger
Instructed by:
The Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. S Chalale
Instructed by:
Director: Public Prosecutions
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