

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A169/2012

In the appeal between:-

BUTINYANE JACOB MAILE

and

THE STATE

CORAM: HANCKE, AJP *et* MATLAPENG, AJ

JUDGMENT BY: MATLAPENG, AJ

HEARD ON: 29 OCTOBER 2012

DELIVERED ON:

- [1] The appellant was charged and convicted of housebreaking with intent to rape and rape (read with the provisions of section 51(1) and (2) of the Criminal Law Amendment Act, No 105 of 1997 as amended as well as and robbery with aggravating circumstances read with the provisions of section 51(1) of the Criminal Law Amendment Act, No 105 of 1997 as amended in the Regional Court, Bloemfontein. At the conclusion of the trial he was sentenced to life imprisonment in respect of the rape and fifteen

years imprisonment in respect of robbery. With leave of the trial court, he appeals to this court against both the conviction and sentence.

[2] The appellant was legally represented during the trial. The facts leading to his conviction are set out as follows: The complainant was on the day in question seated in her room with one Isaac drinking liquor. She claims she was not under the influence of liquor. It was at night but the lights were on. The door to her room was not locked and whilst so seated the appellant kicked the door open and entered the room. He was accompanied by a person who was known to her. Both appellant and his companion were known to her as she used to see them at the premises she was residing at. It appears that her landlady was running a shebeen and they used to be patrons of this shebeen.

[3] The appellant had a knife in his possession when he entered her room. They demanded money and cellphones from both the complainant and Isaac. The appellant then threw the complainant on her bed tore off her panties and proceeded to rape her in front of Isaac and the other person. After finishing, the appellant and his friend pulled her out of her room and led her

to a certain place. At this place the two cut off her night dress with a knife and the appellant ordered her to bend over the table. He proceeded to rape her by penetrating her from behind and after finishing his companion also followed suit by penetrating her from behind.

- [4] After this violation the two perpetrators took her back to her room. They found Isaac still in this room and they proceed to drink the liquor they found in this room. She asked Isaac to tell them to leave her alone but they just laughed at her. She was crying but they ordered her to put on another night dress, panties and a jacket. She was still being threatened with knives. Appellant then pushed her out of the room and his companion stabbed Isaac under the eye for not having money. She was pulled to a certain shack where she was raped again. The appellant's companion raped her first and left her with the appellant. The appellant proceeded to rape her. She states that the sexual act took a long time and at a certain stage she felt the appellant suddenly stopping and remaining still. She pushed the appellant from on top of her took her clothes and went out of the shack put her clothes on with the exception of her panties which she had left inside the shack.

- [5] She met people along the way and as she was crying one man asked her what was the matter and she made a report to him. They accompanied her home and upon arrival she saw that there were blood stains inside her room. She went to her landlady to report what had happened. Her neighbour and co-tenant also came and made a report about Isaac's fate. The police were called and she took them to the shack where she left the appellant. They found him still half naked with his trousers at his knees and fast asleep. Her panties and cellphone were on top of the bed. The police spoke to the appellant but as she is not conversant in Sesotho she could not get the gist of the conversation. The appellant was then arrested. She was taken to the hospital where a J88 was completed.
- [6] The state called her co-tenant as well as the police officer who arrested the appellant. Their evidence corroborated that of the appellant relating to how the appellant was arrested. Importantly they also corroborated the complainant regarding the way the appellant was found half naked as well as the finding of the complainant's panties at this shack. The co-tenant also confirmed that Isaac was stabbed below the left eye.

- [7] Appellant testified in his own defence. He does not deny that the complainant was attacked and raped on the night in question. He however denies that he is the person who committed this offence.
- [8] The issue that arose in the trial was therefore whether the appellant had been correctly identified as the person who committed the offence.
- [9] In a well considered judgment the learned magistrate found that the appellant had been properly identified as the person who committed this offence. In this court, on behalf of appellant it was never argued that the learned magistrate was wrong in finding that the appellant has been properly identified. Counsel for the appellant conceded indirectly by referring this court to what was stated in **S v NTULI** 2003 (1) SACR 613 (W), paragraph [4]:

“[4] There are, of course, limitations to the content of counsel's argument. Counsel may not misrepresent the facts or the law. At a minimum, however, counsel is required to uphold the interests of his or her client without fear of the consequences. There may be occasions when it is proper to make concessions. Seldom, if ever, will there be a case in which no useful submission at all can be advanced in a client's favour.”

[10] The appellant was known to the complainant. She testified that he was a patron of the shebeen at which she was a tenant. The appellant did not deny that he used to drink at this shebeen. He only stated that he started going there when the complainant was no longer residing there. Which begs the question if he did not know the complainant, how can he assert that the complainant was no longer lodging at this premises. Appellant admitted that the shack in which he was arrested belongs to him. He did not deny that the police found him at this shack. He could not explain why the complainant's pair of panties and cellphone were in his shack. His evidence corroborates that of the complaint that he had fallen into a heavy sleep as he was awakened by the police.

[11] Based on the above, I am of the view that the concession albeit made obliquely was properly made. The finding by the magistrate that the appellant was properly identified as the perpetrator of the offence cannot be faulted and has to stand. In the circumstances the appellant was properly convicted.

[12] It was submitted that the sentence imposed by the trial court is unreasonably excessive. It is trite that sentencing is pre-eminently the discretion of the trial court. The court on appeal will only interfere in certain limited instances. See **S v M** 1982 (1) SA 589 (A) at 592g – h. In **S v FAZZIE AND OTHERS** 1964 (4) SA 673 (A) at 684b – c the following is said:

“Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh.”

[13] The offence the appellant was convicted of, warrants in terms of the Criminal Law Amendment Act, No 105 of 1997 a minimum sentence of life imprisonment unless it can be shown that there are factors which amounts to substantial and compelling circumstances justifying the court to deviate from imposing such a sentence. It was submitted that three considerations qualified as compelling and substantial circumstances. These are the youthfulness of the appellant, he was a first offender and that he was under the influence of liquor.

[14] In **S v MALGAS** 2001 (1) SACR 469 (SCA) at 481i – j and 482a the following is said:

“B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.”

[15] The following personal circumstances of the accused were placed before the trial court: he was unmarried, had no dependant except his younger brother, a first offender, was employed earning R90,00

per day as an assistant taxi driver, he was 22 years of age at the time of the commission of the offence and he appeared to have been under the influence of liquor.

[16] In aggravation the following came to the fore: The offence is rife in the jurisdiction of the court, it is committed by young men of between 20 and 29 years of age, the rape was brutal, the complainant was raped numerous times by two people.

[17] It is self-evident that in determining whether there are substantial and compelling circumstances the court has to take cumulatively the personal circumstances of the appellant and as well as aggravating circumstances in order to make a proper determination.

[18] There is no doubt that the rape was a brutal one. It was also demeaning to the complainant. She was raped in the sanctuary of her house in the presence of a friend, taken to a place where she was made bend over a table and penetrated from behind. Her clothes were torn off her body using a knife and she was taken home to put on other clothes. Although it was at night she was

walking the streets half naked with the risk of being seen by members of the public.

[19] Although she appears not to have suffered any serious physical injuries I am enjoined by legislation in section 51(3)(aA)(ii) of Criminal Law Amendment Act, No 105 of 1997 not to take this into consideration when determining the absence or presence of substantial and compelling circumstances.

[20] It is no comfort to a woman to be told that she did not suffer any physical injury. To a woman being raped does not start and end with the physical act. It is an aggressive act that includes psychological as well as emotional affectation. This manifests in several ways as the victim will have self doubt, self blame, feeling of helplessness and inadequacy. In the present case although no victim impact report was compiled, that the complainant has psychological scars cannot be denied as is evidenced by her incessant crying during the trial two years after the rape. The complainant's person was not only violated, she was also demeaned in a dehumanising manner.

[21] I am satisfied that taking both the mitigating and aggravating factors into account, the appellant's personal circumstances viewed cumulatively do not constitute substantial and compelling circumstances. The trial court was correct in its finding in this respect.

[22] In the light of the above, the appeal has to fail.

ORDER

[23] In the circumstances I make the following order:

The appeal is dismissed.

D. I. MATLAPENG, AJ

I concur.

S.P.B. HANCKE, AJP

On behalf of appellant:

Adv.

Instructed by:

BLOEMFONTEIN

On behalf of respondent:

Adv.

Instructed by:

The Director:

Public Prosecutions

BLOEMFONTEIN

/eb