

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

Appeal No. : A292/2011

In the appeal between:

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| <b><u>SEUN BUYA LUNGA</u></b>   | First Appellant  |
| <b><u>LAWRENCE MAKHUBO</u></b>  | Second Appellant |
| <b><u>MOLEFI HLABANE</u></b>    | Third Appellant  |
| <b><u>MBUYESELO BOTHA</u></b>   | Fourth Appellant |
| <b><u>TIMOTHY MOKHOETSI</u></b> | Fifth Appellant  |

and

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| <b><u>THE STATE</u></b> | Respondent |
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| <b><u>CORAM:</u></b> | VAN DER MERWE, J <i>et</i> MATLAPENG, AJ |
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| <b><u>JUDGMENT BY:</u></b> | MATLAPENG, AJ |
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| <b><u>HEARD ON:</u></b> | 12 NOVEMBER 2012 |
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| <b><u>DELIVERED ON:</u></b> | 6 DECEMBER 2012 |
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[1] The five appellants were charged and convicted of rape in the regional court Sasolburg. They were sentenced as follows:

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| Appellant 1 | 15 (fifteen) years imprisonment. |
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| Appellant 2, 4 & 5 | Each 15 (fifteen) years imprisonment<br>and the court ordered that the |
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sentences should run concurrently with the sentences they were serving at the time.

Appellant 3 20 (twenty) years imprisonment and it was also ordered that the sentence should run concurrently with the sentence he was serving.

They applied for leave to appeal, which was refused by the trial court. Leave to appeal against both conviction and sentence was only granted after they petitioned the Judge President of this court.

- [2] The five appellants, together with the complainant, were involuntary visitors of the state penitentiary. They shared a cell. On the day of the incident, according to the complainant, first appellant and fifth appellant approached him whilst he was sitting on his bed watching TV. First appellant ordered him to go to the showers and when asked the reason therefor he started hitting complainant with open hand. Fifth appellant approached him and wrapped a sheet around his face and the two appellants took him to the shower.

[3] At the shower he managed to unwrap the sheet from his face. Fourth appellant approached, slapped him and ordered him to undress. He did not do as ordered. At that stage appellant 4 was with appellants 1, 2, 3 and 5. The appellants started arguing among themselves as to who was going to start first. First appellant undressed him and ordered him to face the wall; applied vaseline in his anus; ordered him to bend over; put on a condom and penetrated him through the anus.

[4] Thereafter the four other appellants ravished him. He could not tell in what order they followed each other. He also mentioned that No 4's condom burst while busy raping him. After the incident he was instructed not to tell anyone as his life would be in danger should he do so. He went to sleep and the following day he reported the incident to a prison warder, who took him to the clinic and was then referred to hospital where a doctor examined him and gave him anti-retrovirals as post exposure prophylaxis therapy.

[5] The prison warder and the doctor were called. The prison warder confirmed that the complainant approached him and

informed him about the rape and the doctor too confirmed that. She examined the complainant after allegation of rape was made to her. She could not find any injuries on the complainant and was not surprised by lack of injuries as it was alleged that vaseline was used and it acts as a lubricant. The complainant's anus could without any resistance admit one finger. The doctor confirmed that she had completed the J88 form although none could be found. She further based her testimony on the notes she made in the hospital file, the same notes she used to complete the J88. That concluded the state's case.

- [6] Only first appellant testified in his own defence. The others closed their cases without testifying. Appellant no 1 stated that he knows the complainant as they shared a cell. The complainant was his "girlfriend". On the day in question he asked for sexual favours from the complainant, who agreed. They went to the showers where they had sexual intercourse. Whilst busy the curtain to the shower was opened and he saw appellant no 5. He finished the sexual act, left the complainant, who was busy putting his clothes on and he saw all four other appellants at the door. He walked

past them and went to his bed. Later the complainant came and made a report that he was assaulted by the four appellants.

[7] On appeal it was submitted that the trial court erred in convicting the appellants, based on the following:

7.1 the complainant was a single witness and his evidence was not satisfactory in all material respects if regard is had to the following inconsistencies:

7.1.1 the evidence of the first report contradicted the complainant by failing to indicate how many rapists there were; or where in the cell the complainant was raped.

7.1.2 Complainant failed in his statement to the police to mention that he was assaulted by fifth appellant and further that fifth appellant wrapped a sheet over complainant's face.

7.1.3 Complainant testified that he saw only appellants 1 and 4, as he did not see what is going on.

[8] As a starting point, the court sitting on appeal will always defer to the factual findings of the trial court unless recorded

evidence clearly shows that they were wrong. This was stated as follows in **S v HADEBE AND OTHERS** 1998 (1) SACR 422 (SCA) at 426 B:

“... the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial Court are so well known that restatement is unnecessary.”

- [9] The major complaint levelled against the decision by the trial court to accept the evidence of the complainant, is that such evidence does not accord with the guidelines laid in **R v MOKOENA** 1932 OPD 79 at 80 where it is stated:

“the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect.”

[10] In subsequent decisions notably **R v ABDOORHAM** 1954 (3) SA 163 (N); **R v MOKOENA** 1956 (3) SA 81 (A) and **R v T** 1958 (2) SA 676 (A) the courts were unanimous that the remarks in **R v MOKOENA** must not be elevated to an absolute rule of law. In **S v SAULS AND OTHERS** 1981 (3) SA 172 (AD) at 180C – g it was stated that:

“Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to ‘the single evidence of any competent and credible witness’; it provides merely that

‘an accused may be convicted on the single evidence of any competent witness’”.

The absence of the word ‘credible’ is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out, ‘indefinite degrees in this character we call credibility’. (*Wigmore on Evidence* vol III para 2034 at 262.)

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPF JA in *S v Webber* 1971 (3) SA 754 (A) F at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is

satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

‘that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well founded’

(*Per* SCHREINER JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

- [11] With regards to contradictions regard should be had to the principles enunciated in **S v MKOHLE** 1990 (1) SACR 95 (A) at 98F – G where it was stated that:

“Contradictions *per se* do not lead to the rejection of a witness’ evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”



[12] In this court several contradictions and inconsistencies apparent in the complainant's evidence were referred to and it was submitted that they were material contradictions. I do not agree.

[13] In this matter the trial court was alive to the principles mentioned above when it evaluated the evidence on record. It made a finding on the credibility of the complainant and the reasons for its finding. I cannot fault the approach adopted by the trial court. The contradictions referred to in the complainant's evidence, namely whether Banyane (the warder) confronted the five appellants or not, whether the lights in the cell were on for twenty four hours or were switched off at 22h00, were of such a minor nature that it cannot be said that they go to the root of his credibility. The mere fact that complainant failed to inform (according to the statement that he made to the police) the investigating officer that appellant's condom burst, cannot be held against him. He explains that because of the language barrier he could not mention this fact to the investigator. Of importance is that he informed the doctor about this which led to him being given prophylaxis. He also mentioned this to the court.

When he made the statement to the police it must be kept in mind that he was not under cross-examination.

[14] In my view although the other appellants other than no 1 did not testify under oath, when their case was put to the complainant, it complemented the complainant's testimony. Appellant no 1 also in his testimony placed the other four appellants at the shower. This supports the complainant's version that all five appellants were at the shower where the rape took place.

[15] Only first appellant testified. His testimony contradicted what was said to be his defence during plea explanation stage. His plea explanation was that him and the complainant were hit by appellants 2 – 5, because they had sex in the cell against the rules. He later stated that he was only assaulted by appellant no 2. He also contradicted the version put on his behalf and that of other co-appellants, which was to the effect that appellant 2 – 5 hit the complainant because he contravened the rule prohibiting sex. He later stated that he does not know why the other appellants hit the complainant. He was clearly economic with the truth. I am by no means

convinced that the trial court erred in rejecting his evidence as false beyond reasonable doubt.

- [16] Regarding the four appellants who did not testify, what was said in **S v BOESAK** 2001 (1) SA 912 (CC) at 923E – F is apposite, namely:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.”

- [17] Appellants no 2 – 5 in the face of the evidence that needed explanation, elected to exercise their right to silence. Their silence strengthened the state's case in that only the version before the court was that of the state. However, the trial court adopted a proper approach when evaluating the evidence. It looked at and took into account both the probabilities and improbabilities in both the state version and defence's version emanating from cross-examination before

reaching a conclusion. In the circumstances I am of the view that the convictions are in order.

### **SENTENCE**

[18] A court of appeal is not at liberty to interfere with the exercise of a discretion in imposing a sentence unless it is satisfied that the discretion has not been exercised judicially. See **S v MAKONDO** [2002] 1 ALL SA 431 (A) at 435d.

[19] It was submitted that the trial court erred in that the sentence it impose, is inordinately harsh and shocking. I disagree. The offence the accused were convicted of attracts a minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997. The sentence delineated is life imprisonment unless the court finds that substantial and compelling circumstances are present which merits the imposition of a lesser sentence.

[20] In mitigation the court took into account that all five appellants were reasonably youthful; they have been incarcerated for some time before the case was finalised. Although they were sentenced prisoners there was a

possibility that they could be rehabilitated and the cumulative effect of the sentences the appellants were already serving and the one imposed by the court was also taken into account. The trial court came to the conclusion that substantial and compelling circumstances were present and it deviated from the minimum sentence it could have imposed.

[21] In my view the trial court was correct in this finding: The sentence imposed falls within the bench mark delineated by the legislature cannot be said to be shockingly disproportionate.

[22] In the result the appeals are dismissed and the convictions and sentences confirmed.

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**D.I. MATLAPENG, AJ**

I agree.

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**C.H.G. VAN DER MERWE, J**

On behalf of the appellants:

Mr J D Reyneke  
Instructed by:  
Legal Aid SA  
BLOEMFONTEIN

On behalf of the respondent:

Adv M Strauss  
Instructed by:  
Director Public Prosecutions  
BLOEMFONTEIN

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