

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A169/2010

In the appeal between:-

MORENA WASHINGTON MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* MOCUMIE, J *et* JORDAAN, J

HEARD ON: 7 MARCH 2011

DELIVERED ON: 10 MARCH 2011

APPEAL JUDGMENT

MOCUMIE, J

[1] The appellant was convicted in the Regional Court, Bloemfontein of rape and assault with intent to do grievous bodily harm. The case was referred to the High Court for sentence in terms of section 52(1)(b) of the Criminal Law Amendment Act, 51 of 1997 (“the Criminal Law Amendment Act”), as it was still applicable in 2008. This Court confirmed his conviction on both counts and sentenced him to life

imprisonment. He lodged an application for leave to appeal against both conviction and sentence which application was dismissed by the Court *a quo*. He petitioned the President of the Supreme Court of Appeal. His petition was upheld against his sentence only.

- [2] The grounds of appeal are set out in the petition as follows:
- 2.1 That the sentence was shockingly inappropriate;
 - 2.2 That the complainant sustained no injuries on her private parts;
 - 2.3 That the Court *a quo* erred in overemphasising the seriousness of the offence;
 - 2.4 That the laceration on the complainant's head was not an injury constituting grievous bodily harm; and
 - 2.5 That the Court *a quo* erred in not attaching enough weight to the appellant's personal circumstances, *inter alia*, that he was relatively young;
 - 2.6 That the appellant had spent two years awaiting trial.
- [3] Mr. Nkhahle, on behalf of the appellant, in his Heads of Argument and in his oral argument submitted that the mitigating

factors of this case and the personal circumstances of the appellant, cumulatively, amounted to compelling and substantial circumstances, which justified the Court *a quo* to have deviated from the prescribed sentence. He highlighted the following as such circumstances:

- 3.1 Appellant's youthfulness at the time of commission of these offences;
- 3.2 The fact that the appellant only completed Standard 8 at school (the current Grade 10);
- 3.3 That the appellant had spent two years awaiting trial.

[4] Mr. Nkhahle submitted further that the complainant did not sustain serious physical injuries except the injury on the head, which he argued was not so serious. She was not as traumatised as in some cases that come before the courts. The fact that she did not receive counselling and that she was still reliving this traumatic experience was not as a result of any doing or omission on the part of the appellant.

[5] Advocate Pretorius, on behalf of the respondent, in his Heads of Argument, as regards Count 1 of rape, submitted that the

Court *a quo* did not commit any misdirection taking into consideration the serious nature of the offence. However during oral argument he submitted that upon revision of the relevant authorities such as **S v Mahomotsa** 2002 (2) SACR 435 (SCA); **Rammoko v Director of Public Prosecutions** 2003(1) SACR 200 (SCA) he was of the view that this was not one of the worst cases of rape that came before the courts. He submitted further that the life imprisonment imposed by the Court *a quo* was excessive and not appropriate in the circumstances.

- [6] As regards Count 2 of assault with intent to do grievous bodily harm he pointed out that the Court *a quo* did not impose any sentence. He submitted that this Court was in the same position as the trial court to impose such sentence it deemed appropriate since it had the appellant's personal circumstances and all other relevant sentencing factors on record.
- [7] The proven facts of this case are shortly that the complainant was walking in the street in Botshabelo just after 19h00 when two young men confronted her. One of them was the appellant.

After they made several demands, including cigarettes and money and a love relationship, which the complainant spurned, the appellant took out a knife, 20-30 cm long, and dragged her behind the butchery store where he raped her for the first time.

[8] After he had raped her for the first time he instructed his companion, who was at all times present and watching, to rape her. The companion made as if he is raping her, but in actual fact just made movements on top of her without penetrating her and whilst he was fully clad.

[9] The appellant then instructed the two to take some other direction opposite to the complainant's home. When the complainant refused to go along, he stabbed her once on the head with the 20-30 cm long knife he was carrying, instructed her to undress herself and raped her for the second time. He again instructed his companion "to rape" her. He again simulated, as he previously did, that he was raping her, without actually raping her. They then left her on her own to go to her parental home, which was not far from there.

[10] The complainant's case was corroborated and bolstered by DNA results, which pointed at the appellant as the only person who had sexual intercourse with the complainant, contrary to the appellant's bare denial of the allegations levelled against him in respect of both the assault and the rape.

[11] As I have pointed out the fact that the complainant was raped twice and was 15 years of age at the time of these incidents, brought the application of the Criminal Law Amendment Act into operation. The authoritative case in the application of the Criminal Law Amendment Act is **S v Malgas** 2001 (1) SACR 469 (SCA). In line with this decision on the one hand the sentencing court should not depart from the prescribed minimum sentence simply because of flimsy reasons. On the other hand the prescribed minimum sentence should not be "shocking", "startling" or "disturbingly inappropriate". (See **S v GN** 2010 (1) SACR 93 (T) at 95 j – 96 a.)

[12] It is trite that the notion "compelling and substantial circumstances" differs from one case to another. As is evidenced from the most instructive decisions subsequent to **S v Malgas**, *supra*,

such as **S v Abrahams** 2002 (1) SACR 116 (SCA); **S v Mahomotsa** *supra*; **S v Nkomo** 2007 (2) SACR 198 (SCA), when faced with a case in which a minimum sentence is prescribed, the sentencing court must still have regard to all the traditional factors taken into account when considering sentence.

- [13] Du Plessis J in **S v GN** *supra*, in line with the **Malgas** judgment propounds an approach which courts should adopt in seeking to differentiate between sentences in accordance with the dictates of justice whenever faced with imposing minimum prescribed sentences. He suggests at 97f, which suggestion is correct and I agree with, that where the Act [Criminal Law Amendment Act] prescribed imprisonment for life as a minimum sentence, the fact that it (the imprisonment for life) is the ultimate sentence, must also be taken into account.

- [14] In the same judgment at 97 f - g he continues:

“Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence

is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment.”

[15] In my view, the Court *a quo* did not follow the approach sanctioned in **S v Malgas** and followed in subsequent decisions referred to above properly by considering itself bound to impose the prescribed minimum sentence when it did not find that compelling and substantial circumstance existed. It was still bound to take a step further and consider whether that prescribed sentence was just or in accordance with justice. In that sense the Court *a quo* did not exercise its discretion judiciously and in the result misdirected itself. This Court is then enjoined to consider sentence afresh.

[16] The appellant was 24 years of age when he committed these offences. He had two previous convictions of assault, which sent him to prison for two years and six months. He had spent two years in custody awaiting trial. He was not married nor was he employed. The complainant's injuries were not so serious.

Despite the unquestionable emotional trauma that the rape clearly left on her as reported in the Victim Impact Report before the Court *a quo*, she was reported to have almost overcome the incident except on her birthday as the rape happened two days before it.

[17] In my view, the fact that the appellant had two previous convictions of assault, which circumstances were not placed before the Court *a quo per se* does not mean that there is no room for the appellant to rehabilitate if given the chance to do so. The presentence report which the Court *a quo* was provided with indicates that there is such room. The appellant spent two years awaiting trial which fact the Court *a quo* ignored or simply did not take into account contrary to what is now trite that

“... it would be most unjust if the period of imprisonment while awaiting trial is not then bought into account in any custodial sentence that is imposed.”

See **S v Vilakazi** 2009(1) SACR 552 (SCA) at 575 a - b.

[18] Rape is a very serious offence and must be punished severely.

However, a sentence of life imprisonment as the ultimate sentence is shockingly inappropriate. I am of the view that, considering cases set out above, an appropriate sentence will be that of twenty years imprisonment.

[19] Lastly as the Court *a quo* did not impose sentence in respect of Count 2, assault with intent to do grievous bodily harm, it is only proper that this Court do so. The facts of this case show clearly that the assault was committed during the rape even if it cannot be said that the appellant assaulted the complainant to make her submit to his demands. In that light I am of the view that a sentence of two years imprisonment, which is ordered to run concurrently with the sentence in Count 1, will be appropriate.

[20] In the circumstances the following order is made:

ORDER:

1. The appeal against sentence is upheld.
2. The sentence imposed in respect of count 1, rape, is set aside and substituted by the following:

“The accused is sentenced to 20 (twenty) years imprisonment.”

3. In respect of count 2, assault with intent to do grievous bodily harm, the accused is sentenced to 2 (two) years imprisonment.
4. In terms of section 280 of the Criminal Procedure Act 51 of 1977 the sentence in count 2 is ordered to run concurrently with the sentence in count 1.
5. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentences imposed are antedated to 1 February 2008.

B.C. MOCUMIE, J

I concur.

M.H. RAMPAL, J

I concur.

A.F. JORDAAN, J

On behalf of the appellant:

Adv. R.J. Nkhahle
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA

BLOEMFONTEIN

On behalf of the respondent:

Adv. D. J. Pretorius
Instructed by:
Director of Public Prosecutions
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BCM/sp