

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A224/09

In the appeal between:

BANGANI HENDRIK NKHOHLISO

Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J *et* KUBUSHI, AJ

HEARD ON:

7 MARCH 2011

DELIVERED ON:

24 MARCH 2011

KUBUSHI, AJ

[1] This is an appeal against the judgment of the Regional Court, Kroonstad. The appellant was charged and convicted of rape. He was sentenced on 24 April 2009 to life imprisonment. He is now, with leave of the trial Court, appealing against the imposed sentence.

[2] The complainant's evidence was that on 18 November 2007 and at about 20h00 she was accosted by the appellant whilst on her way back from the shop. The appellant grabbed her

and forced her to go with him to where he stayed. He also hit her with open hands on the face. The appellant took the complainant to a house made of plastic near the dumping site where he raped her. He kept her there for the whole night against her will. He had sexual intercourse with her without her consent four times.

[3] The appellant's case was that complainant was his girlfriend and that he had consensual sexual intercourse with her twice that evening.

[4] Mr. Makhene, appellant's counsel, contended that the appellant's personal circumstances were clearly canvassed at the hearing but that the trial Court failed to find that substantial and compelling circumstances existed. He further argued that the trial Court failed to take into account the fact that the appellant was under the influence of liquor at the time of the incident. In the Heads of Argument he submitted that the sentence imposed by the trial court would not have been imposed by this Court had this Court been a court of first instance.

[5] The issue to be decided by this Court is whether the trial

Court erred in not finding that substantial and compelling circumstances existed that would justify a departure from the prescribed sentence of life imprisonment and whether the Court of appeal could have imposed a different sentence if it was a court of first instance.

- [6] The law is that an appellate Court may interfere with the sentence imposed by the trial Court when the disparity between the sentence imposed by the trial Court and the sentence which the appellate Court would have imposed if it were the court of first instance is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. If the difference between that sentence and the sentence actually imposed is so great that an inference can be made that the trial Court acted unreasonably and therefore improperly, the Court of appeal will alter the sentence. If there is no such degree of difference the sentence will not be interfered with. See **S v MALGAS** 2001 (1) SACR 469 (SCA) at 478 f - h and **S v ANDERSON** 1964 (3) 494 (A) 495 F – H

- [7] I fully support the conclusion by the trial Court that no

substantial and compelling circumstances existed warranting a deviation from the sentence of life imprisonment as imposed. I am content that the trial Court considered all the relevant circumstances as to the nature of the offence committed, the personal circumstances of the accused and the interests of the community.

[8] The appellant's counsel contended that though the personal circumstances of the appellant were fully canvassed the trial Court failed to find substantial and compelling circumstances. I am satisfied that the appellant's personal circumstances are overshadowed by the aggravating factors in this case. The long list of previous convictions, which I am not going to repeat here, the nature and gravity of the offence and the interests of the community in this case speak for themselves. I cannot over emphasise the trauma the complainant went through, the humiliation of being sexually disgraced by a person she referred to as her child and who grew up before her eyes, is appalling.

[9] In support of the fact that the appellant was under the influence of liquor at the time of the incident and that the trial

Court failed to consider that factor as mitigating, Mr. Makhene referred this court to a citation from *Straf in Suid Afrika*: Etienne Du Toit at page 64. The trial Court did not deliberate on this issue and rightly so in my view as it was immaterial. There is nothing on record that indicates what effect, if any, the liquor had on the appellant. It is not apparent from the record whether the appellant was affected by the said consumption of liquor to the extent that 'sy sinne afgestomp, sy vermoë tot selfbeheer en sy optrede ooreenkomstig sy inrigte in te rig, verminder het' as stated in the authority referred to above.

[10] After careful consideration of all the relevant circumstances as to the nature of the offence committed, the personal circumstances of the accused and the community interests, nothing persuaded me to impose a sentence different from that imposed by the trial Court. In my view the sentence imposed is just and appropriate to this particular offence and there is no justification to temper with it.

[11] As ordained by section 51 of the Criminal Law Amendment Act, Act 105 of 1997, life imprisonment is a sentence which

must ordinarily be imposed in circumstances such as these.

[12] In the circumstances I would dismiss the appeal.

E.M. KUBUSHI, AJ

I concur and it is so ordered.

K.J. MOLOI, J

On behalf of appellant:

Adv. O.J. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. S. Giorgi
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp