

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A171/2010

In the appeal between:

DANIEL MANYAKE LECHAMO

Appellant

and

THE STATE

Respondent

CORAM: MUSI, JP *et* JORDAAN, J *et* KUBUSHI, AJ

HEARD ON: 21 FEBRUARY 2011

DELIVERED ON: 12 MAY 2011

KUBUSHI, AJ

[1] This is a full bench appeal against the judgment of Van Zyl, J. The appellant was convicted of murder and rape and sentenced to life imprisonment in respect of the murder and to ten years imprisonment in respect of the rape. Both sentences were to run concurrently. The appellant is now, with leave of the court *a quo*, appealing against the convictions and the imposed sentences.

[2] The facts of the case are as follows: During the early hours

of the 16 June 2008 and at or near Odendaalsrus a body of an unknown woman was found at the back of a business complex at which the appellant was seen leaving earlier that day at about 5h00 by one of the State witnesses. Another State witness testified that the appellant confessed to him to the effect that he (the appellant) raped a certain woman and murdered her by hitting her on the head with bricks because she had seen his face.

[3] The night before the body was discovered the deceased and the appellant, though not in each other's company were seen at a tavern. The deceased came in the tavern looking for someone and did not talk to the appellant. A DNA sample taken from the deceased positively linked the appellant to the deceased.

[4] Appellant's story is that the deceased was his girlfriend and that they had had consensual sex during the day of the 15 June 2008 and denied having murdered her.

[5] The appellant's legal representative argued at the appeal

hearing that the trial court misdirected itself by accepting the evidence of the State witnesses Sebata Mahloane (Sebata) in respect of the confession made to him by the appellant and that of Vincent Pakiso Malete (KD) in respect of identification of appellant.

[6] In the Heads of Argument it was argued on behalf of the respondent in support of the conviction. With regard to sentence it was argued that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment. This was on the gravity of the two offences and in particular the manner in which the deceased was murdered.

[7] The issue to be decided by this court is whether the trial court misdirected itself by finding the evidence of the appellant not reasonably possibly true, and if not, whether the sentences imposed were appropriate under the circumstances of the case.

[8] It is established law that a court of appeal rarely interferes

with the credibility and factual findings of a trial court. As it was stated in **S v Francis** 1991 (1) SACR 198 (A) the powers of the court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the acceptance of a witness' evidence, is presumed to be correct on the basis that the trial court had the advantage of seeing, hearing and appraising a witness.

[9] Having studied the record I find no evidence that indicates that the trial court misdirected itself in any way in its credibility and factual findings and my view is that such findings must stand. I am guided in my conclusion by the **S v Francis**-case above wherein it was stated that in the absence of any misdirection the trial court's factual and credibility findings must stand.

[10] In terms of section 208 of the Criminal Procedure Act 51 of 1977 an accused may be convicted on the evidence of a single competent witness. In **S v Sauls & Others** 1981 (3) SA 172 (A) it was noted that there is no rule of thumb test or formula to apply when it comes to the consideration of the

credibility of a single witness. The Appellate Division in **S v Francis** above voiced a reminder that the test in the final analysis is whether the court after proper consideration of the evidence with the caution required in law is beyond all reasonable doubt satisfied that the story told is essentially true.

[11] The trial court relied on the evidence of two cardinal State witnesses each one of whom it regarded as a single witness for the purpose of this case, and thus applied the cautionary rule. The two State witnesses were Sebata in respect of the appellant's confession and KD in respect of the identification of the appellant.

[12] The objective correctness of the content of the confession supports the truthfulness of Sebata's evidence. The confession by the appellant tied with all the facts of the commission of the offences and confirms that Sebata was telling the truth. Appellant confessed to Sebata that he killed the deceased by hitting her with bricks after raping her and the injuries the deceased sustained were similar to the wounds that could have been inflicted by bricks. Indeed

bricks were found lying around the scene of the crime. The DNA results confirmed that he had sexual relations with the deceased which fact the appellant explained by saying the deceased was his girlfriend and he had consensual sex with her. The only reasonable inference, which I support, the trial court could come to was that the appellant murdered the deceased after raping her because she had seen his face, as he in fact confessed to Sebata. Sebata testified that appellant had threatened to implicate KD should KD tell that he saw him and indeed that is what happened.

[13] The confession was made voluntarily without any duress from any one and the trial court was entitled to accept it. The court in **S v Yolelo** 1981 (1) SA 1002 (A) confirmed the common law rule as formulated in **R v Barlin** 1926 AD 459 that the common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made.

[14] The trial court also, rightly so, accepted the evidence of KD in having correctly identified the appellant. KD testified that

he saw the appellant near the scene of the incident in the early hours of 16 June 2008. He knows the appellant very well as they grew up together and lived in the same residential block. He played football with the appellant's brother. It was in the early hours of the morning and KD must have been in a good state of mind. There was enough light around the complex and at a distance of about 10 – 12 meters he was able to clearly see the appellant's face. He had visibility of his face for about seven seconds. Under these circumstances he could not have mistakenly identified the appellant. The fact that KD was not able to identify him by his clothing or any other identifying mark or characteristics, as suggested by appellant's legal representative, was not important. In **R v Dladla & Others** 1962 (1) SA 307 (A) the Appellate Division approved the following remarks by the trial court:

“in cases where the witness has known the person previously, questions of identifying marks, of facial characteristics and clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified.”

[15] The trial court rejected out of hand the appellant's suggestion that Sebata and KD had a motive to falsely implicate him because Sebata wanted appellant's girlfriend for himself and secondly that KD wanted to get the money offered by the police for information that would lead to the arrest of the suspect. In the circumstances there is no basis on which this court can interfere with the credibility and factual findings of the trial court.

[16] The trial court also considered the probabilities of both the State's evidence and the defence's evidence. See **S v Singh** 1975 (1) SA 227 NPD at 228. I am convinced that there was no way in which the trial court could have accepted appellant's version as reasonably possibly true. If one is to consider the evidence of the appellant: he alleges that the deceased was his girlfriend before he went to jail the first time. But nobody knows about her, even his best friends do not know about her. He does not know where she stays. They meet per chance after a long time and had sex but he does not ask her where she stays, nor does he accompany her back to see where she stays. Another State witness,

Mami Mponeng, testified that she saw both the appellant and the deceased the same day that appellant alleges to have met the deceased, at the tavern. The deceased came into the tavern apparently looking for someone and she and the appellant did not talk to each other. Nor was there any indication that they knew each other. If his contention that they had met and had sex earlier that day is true surely the deceased could have gone to him since he was already at the tavern. I also find it odd that the appellant did nothing to assist the police in their investigation if the deceased was indeed his girlfriend. He declined to give them any information. This story cannot be regarded as reasonably possibly true.

[17] As regards sentences, appellant's legal representative conceded, correctly so, that the sentences imposed were appropriate and just given the seriousness of the offence as well as the appellant's previous convictions.

[18] The crimes of which the appellant was convicted falls within the provisions of the Criminal Law Amendment Act, 105 of 1997 as amended ("the Act"). In terms of section 51 (1) read

with part I of schedule II, where a murder was committed *inter alia* when the death of the victim was caused by the accused in committing or attempting to commit rape and in relation to the rape where the rape involved the infliction of grievous bodily harm, the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence. The inquiry therefore is whether there are substantial and compelling circumstances in this case.

- [19] In determining whether there are substantial and compelling circumstances which will justify the imposition of a lesser sentence a trial court must consider the particular circumstances of the case in the well known traditional triad of factors relevant to sentence. The court in **S v Malgas** 2001 (1) SACR 469 (SCA) at 477 e – g made the following observation:

“There is no indication in the language it (Parliament) has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed on a radically different way, namely, by

eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence.”

[20] Guided by the **Malgas** case above the trial court considered the traditional triad of sentencing, namely, the personal circumstances of the accused, the nature and seriousness of the crime and the interests of society in deciding whether there are substantial and compelling circumstances justifying a deviation from the prescribed sentences.

[21] Firstly, the court evaluated the personal circumstances of the appellant in great detail. Appellant was 21 years old at the time of the commission of the offence. His mother died when he was 11 years and he was 14 years when his father died. Since the death of his father he has been staying at his parents' house with his younger sister, who is 19 years old. He passed grade 11 and attempted grade 12 but did not pass it. At the time of his arrest he was busy with a course at Prestige College. He did piece jobs at a construction company where he earned R850-00 per week. His sister is unemployed. During his first arrest his grandmother took

care of his sister. Since his current arrest his sister has been receiving assistance from her girlfriend. He has a child who he must maintain. He said that he wanted to complete his matric and be an exemplary person in the community. He wanted to go back home and care for his sister who was staying alone.

[22] Appellant's legal representative argued that appellant's youth should be considered as a substantial and compelling circumstance. The court, correctly so in my view, rejected this argument on the basis that youth per se is not a substantial and compelling circumstance but that a court should accept youth as a factor only where such youth is still innocent and shows characteristics of a person who can still be rehabilitated. Appellant is not such a person. He has lost his innocence and crime has become a way of life for him. There are no prospects of rehabilitation for him. It must also be noted that violence remains an element in all of his previous convictions and it has escalated with each offence to the extent that he ended up killing.

[23] Secondly, the trial court also analysed the crime of which the

appellant had been convicted. The manner in which the offence was executed was absolutely horrendous and repugnant. As it appears from the post-mortem report the deceased brain was squashed in the process. Her mutilated face and squashed brain are evident from the photos handed in as annexure A and from the post-mortem photos handed in as annexure D of the record. The wounds were inflicted with bricks. As the trial court stated, it is unthinkable what degree of fear and pain the deceased went through from the beginning of the attack until she died. The murder was committed with the intention to prevent the deceased from identifying the appellant.

[24] Thirdly, the trial court took the interests of society into account and commented that in case of such serious offences the interests of society comes first. The community must be protected against persons like the appellant and that the type of sentences to be meted out in this case must be a deterrent to other potential murderers and rapists.

[25] Lastly, the trial court considered the aggravating factors which were the appellant's previous convictions. He was not

a first offender. In terms of his previous convictions as per the SAP 69 handed in, he was convicted of assault on the 19 February 2003 – at the time he was about 15 or 16 years old and was sentenced to six months imprisonment suspended in whole for five years. A year later he was found guilty of robbery and sentenced to thirty months imprisonment. On the 27 May 2004 he was found guilty of indecent assault and sentenced to two years imprisonment. He was found guilty of two counts of robbery on the 6 October 2004 and sentenced to three years imprisonment. He was released on parole on the 17 March 2008. And three months later whilst still under correctional supervision he committed this offence.

[26] Based on the above evaluation the trial court concluded that there were no circumstances justifying a deviation from the prescribed minimum sentences. I agree with this conclusion prescribed minimum sentences should not to be departed from lightly and for flimsy reasons which could not withstand scrutiny such as in this case.

[27] As regards the conviction of murder I am satisfied that an injustice will not be done if the sentence of life imprisonment

is imposed. The brutality of murder is regrettably too regularly a part of life in South Africa. Courts are expected to send out a clear message that such behaviour will be met with the full force and effect of the law. **DPP, Kwazulu – Natal v Ngcobo & Others** 2009 (2) SACR 361 (SCA).

[28] In relation to the rape the trial court imposed a sentence of ten years imprisonment. It is not apparent from the record on what basis was the sentence imposed. At page 309 – 310 of the record the trial court made the following comment:

“In hierdie geval is daar egter ook sekere voorgeskrywe minimum vonnisse wat opgele moet word ooreenkomstig die bepalings van die Strafwetwysigingswet, Wet 105 van 1997. In terme van hierdie wetgewing is ek verplig om lewenslange gevangenisstraf ten opsigte van die aanklag van moord op te le en 10 jaar gevangenisstraf ten opsigte van die aanklag van verkraging tensy daar wesenlike en dwingende omstandighede bestaan wat die oplegging van mindere vonnis regverdig en noodsaak.”

[29] In my view the trial court misdirected itself in respect of the crime of rape. As stated in para [18] above in terms of

section 51 (1) read with part I of schedule II of the Act where the rape involved the infliction of grievous bodily harm the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence. This point was not picked up by both the legal representatives and was therefore not argued. In the circumstances this court will not temper with the sentence.

[30] I am satisfied that the trial court did not misdirect itself in concluding that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence in this case. I am also satisfied that the sentences imposed are just and appropriate in the circumstances. The appeal on both the conviction and sentence must not succeed.

[31] In the circumstances I would make the following order:

The appeal is dismissed and the sentences as imposed on both counts are confirmed.

E.M. KUBUSHI, AJ

I concur.

H.M. MUSI, JP

I concur.

A.F. JORDAAN, J

On behalf of the appellant:

Mr. P.L. van der Merwe
Instructed by:
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On behalf of the respondent:

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