

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A41/11

In the appeal between:-

DANIEL THAELE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, J *et* MOLEMELA, J

HEARD ON:

13 JUNE 2011

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

17 JUNE 2011

[1] This is an appeal against the conviction and sentence. The appellant was tried in the Ladybrand Regional Court on a charge of assault with intent to do grievous bodily harm and one of rape. Notwithstanding his plea of not guilty, he was convicted as charged on 29 March 2010. On the same day he was sentenced to five years imprisonment and life imprisonment in connection with the assault and rape charges respectively.

- [2] The appellant is aggrieved by the verdict as well as the punishment. He now comes on appeal against both. He has an automatic right of appeal by virtue of the sentence of life imprisonment imposed on him. The respondent opposes the appeal.
- [3] As regards the merits, the version of the respondent was narrated by three witnesses, namely, Ms Makhotsa Olga Sefako, an adult woman 25 years of age, the complainant in the case; Mr. Ntso Vrydag Mei, aka Tswepe, a customer and Mr. Pule Isaac Mohalingoane, aka Mushupu, also a customer. In addition to the oral evidence, the documentary evidence by Inspector M.D. Majoro and Dr. W.H. Enslin was received as exhibit "A" and exhibit "B" respectively and formally admitted by the defence.
- [4] The complainant and her friend, Ms Nkele (Mkhele) Ntome were at Lepolankeng Tavern at Mandela Park, Clocolan on Saturday, 1 March 2008. Early the next day, Sunday 2 March 2008, at or about 01h30 or 02h00 she left the tavern alone. On her way home she was surprised by a man. She identified the man who stealthily stalked her in a deserted

walkway in the middle of the night as Sono (or Solo), the appellant. Then and there he confronted and captured her. She broke loose and tried to flee. The appellant chased her, caught her and stabbed her after her fruitless attempt to escape. He also threatened to kill her if she screamed again or tried to run away again.

[5] From Motseng's place he took her to two different places where he raped her on two occasions. He finally took her to his house where he continued to rape her. Hours later her two witnesses came in. She whispered to them what the appellant had done. They left. Shortly after their departure she was rescued by the police.

[6] The second prosecution witness, Mr. Mei, testified that on Sunday 2 March 2010, he and his friend, Pule, went to the appellant's drinking place, Solo's Place. There they saw the complainant. The appellant told them stories of how he found her in his bed the previous night. He added that he had sex with her. He also ordered the complainant to show her injuries to them. Despite their request, the appellant refused to let her go immediately. The appellant was not

keen to let her go during daytime because her clothes were bloodstained and torn. The complainant managed to tell them that, contrary to the appellant's explanation, she was assaulted by nobody but the appellant himself.

[7] The witness and his friend left the appellant's place. They met the police in the street and reported the matter. The evidence of Mr. P.I. Mohalingoane, the third prosecution witness, was the same as that of Mr. K.S. Mei in many respects. It is not necessary to summarise it.

[8] The version of the defence was narrated by Mr. Thaele Daniel Thaele, aka Solo. His evidence was that on Saturday, 1 March 2008, he agreed to pay Tswepe R400,00 to fetch his wife from Qwa Qwa. The next day, on Sunday 2 March 2008, Tswepe, Mushupu and the complainant came to his tavern. He and Tswepe were supposed to travel together to fetch his wife. While he was busy attending to his other customers, the two prosecution witnesses vanished together with the complainant. Shortly after their disappearance the complainant re-appeared. She was accompanied by the police.

[9] On the second occasion her previous male companions were nowhere to be seen. The police arrested him in connection with the complainant's rape accusation. He claimed that the complainant and her witnesses had conspired to falsely accuse him. To beef up his claim, he alleged that Tswepe was indebted to him in respect of a motorcar. The complainant and Mushupu, so he claimed, collaborated with Tswepe to falsely incriminate him, because he was their employer.

[10] The trial court analysed the evidence and evaluated the complainant as follows:

"Ek is van oordeel dat daar inderdaad niks inherent onwaarskynlik aan die klaagster se weergawe is nie wat daarop dui dat haar weergawe ongeloofwaardig en onbetroubaar is nie. Ek dink ook nie sy het haar ernstig in haar getuienisaflegging weerspreek nie."

[11] The court was aware that the complainant was a single witness. In considering her evidence, the court carefully scrutinised it in accordance with the cautionary rule applicable to the testimony of a single witness. The court

found her evidence materially satisfied all the requirements of the rule. She made an extremely good impression on the court. See **S v SAULS AND OTHERS** 1981 (3) SA 172 (AD).

[12] The court also found that the version of the complainant was supported by very strong evidence of two credible and reliable witnesses, namely, Mr. Mei and Mr. Mohalingoane. The most important aspects of their evidence was that they found the complainant in the appellant's house; that she was semi-nude; that she was wounded; that the appellant volunteered to tell them that he had sex with the complainant and that they alerted the police about her plight. Those then were the strong corroborative features of the version of the complainant by the witnesses.

[13] The court commented as follows about the two witnesses:

“Dan bevestig hulle ook dat beskuldigde teenstrydigende verduidelikings gegee het oor wat daar sou gebeur het. Hy het aanvanklik die indruk geskep hy was weg, toe hy terugkom toe kry hy die klaagster daar en dat hy toe die oggend daar op die

bed saam met haar gekry het en toe met haar gemeenskap gehou het. Dan ook dat beskuldigde gevra het wat moet hy nou doen, hier is nou 'n krisis, hoe moet hy hulle te werk gaan en hulle aan hom probeer raad gee het hoe om die situasie te hanteer.

Wat hierdie twee here betref Mushupu en Tswepe het hulle my eweneens beïndruk as geloofwaardige en betroubare getuies. Ek kan nog geen onderliggende rede of motief vind hoekom hulle die beskuldigde valslik sou wil inkrimineer nie.”

[14] The court was not at all impressed by the appellant. It evaluated him as follows:

“Beskuldigde daarenteen het my hoegenaamd nie oortuig met sy getuienisaflegging. Sy getuienis gaan mank aan trefkrag en selfvertroue. Hy beweer dat hierdie is 'n gefabriseerde weergawe teen hom, deur drie getuies wat hy toegee veral wat die klaagster betref en Mushupu wat geen motief het waarvan hy bewus is waarom hy hom sou valslik inkrimineer nie.”

[15] There is no appealable irregularity or misdirection committed during the appellant's trial. In coming to this conclusion I am fortified by the concession made by Mr. Van der Merwe, counsel for the appellant. The evidence against the

appellant was overwhelming. There were no contradictions, internal or external, no improbabilities, no inconsistencies of any note which rendered the veracity of any of the prosecution witness suspect.

[16] On the contrary the court *a quo* found that the appellant was an untruthful witness, whose version was not only highly improbable, but that it was beyond reasonable doubt false.

[17] We are here sitting as a court with appellate jurisdiction. Because we are in that mode, we are bound by all the credibility findings made by the trial court in respect of each and every witness. It was never suggested, let alone submitted, that those findings were clearly wrong. **J v S** [1998] 2 ALL SA 267 (A); **S v FRANCIS** 1991 (1) SACR 198 (AD) at 204 c – e

[18] In the circumstances I am inclined to dismiss the appeal as regards conviction.

[19] As regards the sentence, the circumstances of the rape are classified under Part I Schedule 2. The appellant raped the

victim on three occasions. Section 51 of Act 105 of 1997 as amended prescribes a minimum sentence of life imprisonment. The trial court had a discretion to deviate from the imposition of the sentence of life imprisonment provided there were substantial and compelling circumstances to justify a less severe sentence.

[20] The court *a quo* profiled the appellant's personal circumstances as follows:

- He was never formally educated.
- He was a married man.
- He had two minor children – 13 and 14 years of age.
- He was incarcerated for about two years.
- He was a first offender.

Those then were the mitigating factors.

[21] The court *a quo* also took into account the following aggravating factors:

- The nature and the seriousness of the crime.
- The physical injuries the appellant inflicted on the victim by means of a knife.

- The number of occasions he raped the victim.
- The lack of remorse on his part.
- The prevalence of the offence.
- The interest of the community.

[22] The grounds of the appeal against sentence were that the court *a quo* misdirected itself in that it underplayed the mitigating factors but overemphasised the aggravating factors at the expense of the appellant. As a result of the misdirection, so contended the appellant, the court *a quo* incorrectly found that there were no substantial and compelling circumstances to justify any other sentence besides the prescribed minimum sentence of life imprisonment.

[23] The court with appellate jurisdiction has limited powers to interfere with the sentence imposed by the trial court. The recognised ground on which we can exercise any appellate interference have been set out in many decisions such as **S v BERLINER** 1967 (2) SA 193 (A) at p. 200 para E – F; **S v WHITEHEAD** 1970 (4) SA 424 (A) at p. 435 par. D; **S v**

GROSS 1982 (1) SA 593 (A) at p. 600 para D – E; **S v PIETERS** 1987 (3) SA 717 (A) at p. 727 para F – G.

[24] In **S v SEEGER** 1970 (2) SA 506 (A) at 510 Rumpff JA restated the principle of disparity as follows:

“On the second issue it is the task of this Court to consider all the relevant facts, and, having regard to these facts, to determine what sentence ought properly to be imposed and to compare such sentence with the sentence actually imposed. If the disparity between the sentence imposed and the sentence that ought to be imposed is of such a degree that the inference can be made that the trial Court acted unreasonably, this Court will alter the sentence imposed.”

[25] In considering what a proper sentence should be imposed, there are certain features in the instant case which militate against the appellate interference and amelioration of the sentence of life imprisonment imposed. There is a tendency by certain men to waylay women at night as they walk home from taverns in order to rape them. The appellant ambushed the victim in such circumstances. The appellant himself, a tavern or a shebeen proprietor, acted in a manner which was

least expected from a person who earned his living by running a tavern patronised by people like the complainant. In the circumstances many people would find his behaviour on that point alone as very disgraceful. In my opinion the court *a quo* was correct to take into account the prevalence of the type of the offence of which the appellant had been convicted.

[26] Although the appellant was a first offender and completely illiterate, the manner in which he went about to accomplish his criminal mission, was very violent, cruel and reprehensible. He grievously stabbed her. He raped the wounded and bleeding woman for the third time. He forced a huge quantity of brandy down her throat. He held her captive for hours, aware of her pains and her steady deterioration. He refused to let her go despite her compassionate plea.

[27] He ridiculed her and exposed her body to his customers to whom he boasted about how she deliberately seduced him. Within her hearing he boastfully told them just how he sexually enjoyed her as if she was manna from heaven.

Those remarks were extremely hurtful to a wounded, anxious and fearful woman. The victim's witnesses also pleaded with him to let her go, but he flatly refused. Until when the appellant intended releasing her was anyone's guess. What was apparent, though, was that he was determined not to release her from captivity during daytime on that particular Sunday. She was eventually rescued because the witnesses who were deeply concerned about what they saw and the whisper they heard from her, immediately alerted the police. Had it not been for them, she would probably have held captive for the whole day at least.

[28] Mr. Van der Merwe, who appeared on behalf of the appellant, conceded that the court *a quo* committed no irregularity or misdirection. He was of the view that the court *a quo* correctly found that there were no substantial and compelling circumstances to warrant any interference with the sentence. Mr. Pienaar agreed with the concession and the submission.

[29] I am of the view that the concession was correctly made. I could find no appealable misdirection which could be

described as material to vitiate the sentence imposed on the appellant. I am not persuaded that the gravity of the crime and the interest of the community were unduly stressed at the expense of the appellant's personal profile. The aggravating factors clearly eclipsed the mitigating factors by a margin so great that I am persuaded that there were no substantial and compelling circumstances favourable to the appellant to compel the conclusion that the prescribed minimum sentence of life imprisonment was unjust or inappropriate in this instance. As I see it, there exists no disparity between the sentence which ought properly to be imposed in comparison with the sentence actually imposed – **S v SEEGERs**, *supra*. Therefore I would uphold the sentence as well.

[30] Accordingly I make the following order:

30.1 The appeal fails *in toto*.

30.2 The convictions and the sentences are confirmed.

M.H. RAMPAI, J

I concur.

M.B. MOLEMELA, J

On behalf of appellant: Attorney P.L. van der Merwe
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. F. Pienaar
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp