

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A284/2009

In the matter between:

TANKISO TOBOKO

Appellant

and

THE STATE

Respondent

CORAM:

C J MUSI, J *et* KUBUSHI, AJ

HEARD ON:

23 MAY 2011

DELIVERED ON:

23 JUNE 2011

KUBUSHI, AJ

[1] The appellant appeared in the Regional Court in Bloemfontein on a charge of rape of a ten year old girl. He pleaded not guilty but after the state had led the evidence of the complainant and her father, the appellant changed his plea to guilty. He was found guilty and on 23 July 2009 sentenced to life imprisonment. He is now, with leave of the trial court, appealing against the imposed sentence.

[2] The facts of the case are that on 24 February 2007 the

complainant was playing with two of her friends, Lindane and Fumane outside Lindane's home. Lindane's father, the appellant, sent Lindane and his sibling to buy liquor for him. He later sent his wife to look for them as they were taking too long. In the absence of his wife the appellant called the complainant into his house where he threatened to cut her throat should she scream and raped her. The complainant testified that her vagina was painful and that she had to walk with 'open legs'. When she arrived home her father noticed that she was walking with 'opened legs' and alerted her mother. The complainant told her mother that the appellant raped her. Her father went to the appellant to make enquiries and the appellant chased him with a stick. The rape was then reported to the police.

- [3] The appellant knew that he was HIV positive when he raped the complainant. Both legal representatives informed us that the medical status of the appellant was disclosed with his consent.
- [4] The appellant in his heads of argument contended that the minimum sentence of life imprisonment induced a sense of

unease and it is a sentence which this court would not have imposed had it been a court of first instance. At the hearing of the appeal, Mr Tshabalala, the appellant's counsel, did not argue the matter and maintained that he was abiding with the heads of argument.

[5] The respondent's counsel, Mr Chalale, in his argument, conceded that although the personal circumstances of the appellant were placed on record the trial court did not mention them when passing sentence. He however contended that the trial court correctly found that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence than the minimum sentence of life imprisonment.

[6] The issue to be determined is whether or not this court would have imposed a different sentence were it the court of first instance.

[7] The crime, which the appellant was convicted of, 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 person is convicted of an offence of rape and the victim is a person under the age of 16 years the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence. In terms of section 51 (1) read with part I of schedule II, where a person is convicted of an offence of rape when committed by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

[8] In determining whether in a particular case substantial and compelling circumstances exist a court has to follow the guidelines as set out in **S v Malgas** 2001 (1) SACR 469 (SCA) at 482C and consider the well known traditional triad of factors relevant to sentence – the crime, the criminal and the needs of society.

[9] The trial court failed, as conceded by the respondent's counsel, to mention the personal circumstances of the

appellant when considering whether there are substantial and compelling circumstances. It concentrated more on the circumstances leading to the commission of the offence and the aggravating factors. In **S v Malgas** *supra* at 477f it was said that all factors traditionally taken into account in sentencing (whether or not they diminish the moral guilt) continue to play a role. As endorsed in **S v Mahomotsa** 2002 (2) SACR 435 (SCA) and in **S v Nkomo** 2007 (2) SACR 198 (SCA).

[10] It is trite that the appeal court may interfere with the sentence imposed by a trial court if *inter alia* there is disparity in the sentence imposed or where the trial court failed to exercise its discretion properly or exercised it unreasonably or where there is a misdirection by the court. In *casu* the trial court misdirected itself in that it failed to take the personal circumstances of the appellant into account when considering sentence. This court is therefore at large to consider sentence afresh.

[11] The appellant was 41 years old, married with two children aged between one year and three years. At the time of his

arrest he was employed at Botes Glass Work for four years and earning a salary of R3 500-00 per month. He never attended school. His wife is unemployed and survives on the children's social grant. The appellant pleaded guilty – he told his legal representative that the commission of the offence was a mistake on his part and that he does not know what caused him to do it. He had no previous conviction and had been in custody for seventeen months for this offence.

[12] As per the appellant's heads of argument, the appellant is a person who can be rehabilitated. At face value the appellant's circumstances are not indicative of an inherently lawless character. However in my view the personal circumstances are overshadowed by the gravity of this offence, particularly because the appellant raped the complainant without using a condom well knowing that he was HIV positive. This is an aggravating factor by its very nature.

[13] As stated, rightly so, by the trial court, this was not a spur of the moment incident. The offence was premeditated – the appellant sent the children to buy liquor for him and the

mother was sent after them apparently to look for them. In my view he did not show genuine remorse. He chased the complainant's father with a stick when enquiries were being made. He pleaded guilty only after he became aware of the DNA analysis results which implicated him. The impact of the liquor on him is not evident from the record and it can thus not be said that he was under the influence of liquor when he committed this offence.

[14] After careful consideration of all the relevant circumstances I could not find that there are substantial and compelling circumstances which justify the imposition of a lesser sentence than life imprisonment. There is nothing that persuades me to impose a sentence different from that imposed by the trial court. The sentence imposed is just and appropriate to this particular offence and there is no justification to temper with it.

[15] Consequently the following order is granted;

1. The appeal is dismissed and the sentence imposed by the trial court is confirmed.

E. M. KUBUSHI, AJ

I concur.

C. J. MUSI, J

On behalf of the appellant:

Adv. Tshabalala
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Chalale
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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