

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A52/11

In the appeal between:

VICTOR MOEKETSI MOKONE

Appellant No. 1

EPHRAIM LEBOHANG MOFOKENG

Appellant No. 2

and

THE STATE

Respondent

CORAM:

MOLOI, J *et* KUBUSHI, AJ

HEARD ON:

25 JULY 2011

DELIVERED ON:

25 AUGUST 2011

KUBUSHI, AJ

[1] This is an appeal from the Regional Court, Bethlehem. The Appellants were convicted on a charge of rape in terms of section 3 of Act 32 of 2007 and sentenced to life imprisonment. The Appellants have in terms of section 309 (1) (a) of the Criminal Procedure Act, Act 51 of 1977, as amended, an automatic right of appeal. This appeal is therefore against the conviction and sentence imposed.

[2] The facts are that on the 5 July 2008 the complainant went to look for her niece at her place of residence. She did not find her and she went to a nearby tavern where she spent some time. On her way home from the tavern she heard people running from behind her. She looked back but she could not see them properly as it was dark. She could, however, discern three male figures. When the men came up to her, one of them grabbed her by the neck and she fell down. When she stood up there were only two men next to her, the third was no longer there. The two men assaulted her by hitting her with open hands all over her body. A certain Poso Makhalemele (Poso), who heard her screams tried to stop the two men from assaulting her. He was however overpowered by the two men who pushed him away and one of them even hit him with an open hand. Poso left the complainant with the appellants and telephoned his uncle who is a police officer for assistance.

[3] The two men dragged the complainant to an open veld where they each raped her. She testified that the first one even had her ejaculated inside her but the second one did not ejaculate because the police arrived at the scene. At the

time the police arrived his penis was still inside her but he had not yet ejaculated. When the two men saw the police approaching and calling them by their names, they ran away.

[4] The complainant did not know the two men, but Poso and the two police officers who responded to Poso's call, namely, Joel Nhlapo, Poso's uncle, and Petrus Lebakeng, knew them and could identify them as the appellants. According to Poso, he grew up with the appellants and they lived in the same location. The police officers saw the appellants at the scene of the incident and even called out to them by their names. The appellants were found guilty and each was sentenced to life imprisonment.

[5] As regards the conviction, the appellants' grounds of appeal were that, firstly, the trial court erred by not applying the cautionary rule to the evidence of the complainant as a single witness; and secondly, by failing to accept the evidence of the appellants as reasonably possibly true. At the appeal hearing the appellant's legal representative abandoned the appeal against the conviction.

- [6] The appellants contended, in their heads of argument, that when passing sentence the trial court erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the minimum sentence of life imprisonment. According to them, the trial court over-emphasized the interest of the community and deterrence as against the personal circumstances of the appellants. They contended that the trial court failed to take into consideration the fact that the complainant did not suffer any serious physical injuries and that there was no evidence regarding the emotional scars. I therefore had to determine whether the trial court erred in coming to such a conclusion.
- [7] The offence with which the appellants were convicted falls within the provisions of the Criminal Law Amendment Act, 105 of 1997 as amended in as far as sentencing is concerned. In terms of section 51 (1) thereof, read with part I of schedule II, a sentence of life imprisonment must be imposed when rape was committed by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy unless there are substantial and compelling circumstances which justified

the imposition of a lesser sentence. The inquiry therefore is whether there were substantial and compelling circumstances in this case.

[8] The court in the case of **S v Malgas** 2001 (1) SACR 469 (SCA) at 481 para [25] g – j – 482 para [25] a – f set out the guidelines which a court should follow when determining whether there were substantial and compelling circumstances present to justify the imposition of a lesser sentence. According to that decision a trial court must consider all the factors that may reduce the blameworthiness of the offender and mitigate his culpability to come to a conclusion whether substantial and compelling circumstances existed or not.

[9] I agree with the appellants. The trial court failed to take into consideration all the material circumstances of the case when considering whether there were substantial and compelling circumstances present or not. The trial court focused on the interests of the society and the offence and did not take the personal circumstances of the appellants into consideration. The personal circumstances of the

appellants were as follows: the first appellant was 28 years of age at the time of sentencing; he was unmarried and had three minor children whose ages were twelve and six years and the other child was six months old; his wife was unemployed and the children were not receiving state grants; he was the sole financial provider for his family, his parents and siblings; he was employed as a construction worker and earned a salary of R2 000 per month.

[10] The second appellant was thirty six years of age; was unmarried and had six minor children; the children's ages were as follows: twins aged 15 years, the others were thirteen, seven and eight years old; one of the children's age was not on record; the mothers of the children were unemployed and the accused was the sole financial provider for their maintenance; he was employed as a construction worker and earned a salary of R1 600 per month.

[11] One can never over emphasise the gravity of the offence of rape. Rape is a violation that is invasive and dehumanising and its consequences for the rape victim are severe and permanent. For many rape victims the process of

investigation and prosecution is almost as traumatic as the rape itself. Rape constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. See an unreported Supreme Court of Appeal case of **De Beer v The State** (121/04) (delivered on 12 November 2004) para [18] and **S v Chapman** 1997 (2) SACR 3 (SCA) at 5b – e.

- [12] However, in this instance, I agree with the appellants, the complainant did not suffer any severe physical or genital injuries as a result of the rape. The state did not proffer any aggravating factors except to state that the complainant suffered severe injuries on her face as well as in her vagina. The evidence did not show that the complainant suffered severe physical injuries. No medical evidence or any evidence whatsoever as to the extent of the injuries sustained by the complainant was led at the trial. The J88 form, which was admitted into the record without the medical doctor giving evidence simply stated that the complainant sustained multiple abrasions and small cuts to the cheeks, slight bleeding in the inside of the lip and a small tear on the left leg. The vagina was inflamed, tender and slightly

bleeding. These, in my view, are not severe injuries.

[13] A psychological report was also not submitted to determine the extent, if any, of the impact of the rape on the complainant. It is quite unrealistic to suppose that the complainant might not have experienced psychological damage as a result of this incident, it is however not possible in the absence of appropriate evidence to quantify its likely duration and degree of intensity. This I concede should not mean that one should approach the question of sentence on the footing that there was no psychological harm. See **S v MAHOMOTSA** 2002 (2) SACR 435 (SCA) at 441 h – j.

[14] These factors, to my mind, must cumulatively, be taken into account in the process of considering whether substantial and compelling circumstances warranting a departure from the prescribed sentence were present or not. I therefore find that the trial court misdirected itself in finding that no substantial and compelling circumstances existed. The sentence must therefore be considered afresh.

[15] When considering all the factors of this case I am of the view

that the imposition of a life sentence by the trial court was disproportionate. The mitigating factors and the lack of aggravating factors in this case, cumulatively considered, render the sentence of life imprisonment disproportionate and unjust. Life imprisonment as a sentence for rape should be imposed only where the case is devoid of substantial factors compelling the conclusion that such sentence is appropriate and just. See **S v ABRAHAMS** 2002 (1) SACR 116 (SCA) at 127 d.

[16] An appropriate sentence must fit the crime, the offender and be in the interests of society. The courts have held that even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as “ordinarily appropriate” is a consideration that the courts are to “respect, and not merely pay lip service to”. When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as a “benchmark”. See **S v MALGAS** *supra*.

[17] I therefore consider the sentence of 20 years imprisonment as appropriate and just in the circumstances.

[18] Accordingly I would make the following order:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence succeeds.
3. The sentence imposed by the trial court is set aside and replaced by the following:

“20 years imprisonment antedated to the 29 June 2009”.

E.M. KUBUSHI, AJ

I concur and it is so ordered.

K.J. MOLOI, J

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