

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A138/2010

In the appeal of:-

PAKISO THOLE

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J *et* VAN ROOYEN, AJ

HEARD ON:

22 AUGUST 2011

DELIVERED ON:

30 AUGUST 2011

MOLEMELA, J

[1] This is an appeal against sentence only. The appellant was convicted of rape and murder by the regional court, Bloemfontein and sentenced to life imprisonment on each count.

[2] The facts that led to the appellant's conviction can be gleaned from the statement made by the appellant in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, ("plea explanation"). According to this plea explanation, the sequence of events was that the appellant accosted the deceased in the street, after which he dragged her to a certain house. There he had sexual intercourse with her without her consent. After having raped her, he stabbed her twice with an Okapi knife, which resulted in her death. The state having not adduced any evidence in aggravation of sentence, the court called for the evidence of the deceased's daughter, who testified about the impact of the deceased's death on her family but had no firsthand knowledge regarding how the offences were committed. At the end of the day, the factual matrix upon which the court a quo decided the matter was

purely on the basis of the contents of the appellant's plea explanation.

[3] It is common cause that in his plea explanation, the appellant acknowledged that *"the provisions of section 51(2), 52(2), 52(A) and 52(B) of Act 105 of 1997 as amended"* are applicable on both counts. The applicable parts of Schedule 2 of that Act were however not referred to.

[4] Counsel for the appellant, Mr. Reyneke, argued that in respect of count 1 (rape) the court *a quo* misdirected itself by imposing a sentence of life imprisonment on the strength of its applicability to rapes contemplated in Part 1(c) of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 ("the Act") which, inter alia, is applicable to a rape *"involving the infliction of grievous bodily harm"*. According to Mr. Reyneke, the applicable minimum sentence to the circumstances *in casu* is the one contemplated in Part III of Schedule 2, i.e. rape *"in circumstances other than those referred to in Part I"* and for which the prescribed minimum sentence is 10 years' imprisonment. It is common cause that the court *a quo* mistakenly stated that the applicable minimum sentence in respect of a rape contemplated in Part III of Schedule 2 of the Act is 15 years imprisonment. Nothing turns on this mistake, as in the end, the court *a quo* found that the rape committed by the appellant was one contemplated in Part 1(c) of the Act and duly imposed a sentence of life imprisonment.

[5] Mr. Reyneke argued that given the manner in which the charge-sheet was couched, the court *a quo* had correctly remarked in its judgment that *"on the face of it count 1 of rape reads like an offence that would be listed under Part III of Schedule 2"*. According to Mr. Reyneke, the failure of the state to adduce evidence indicating that the appellant had stabbed the deceased before or during the rape precluded the court *a quo* from finding that the rape was of a nature that could be described as *"involving the infliction of grievous bodily harm"* and thus attracting a life imprisonment sentence. Mr. Mohlala, on behalf of the state, argued that Part I(c) of Schedule 2 of the Act does not provide that the infliction of bodily harm has to precede the rape. He argued that most English dictionaries define the word "involve" as "to have as a

necessary feature or consequence” or “to include something as a necessary part of an activity, event or situation”. He argued that *in casu* the stabbing was a necessary feature of the rape and that the court a quo had correctly classified that rape as falling under Part I(c) of the Act.

[6] In view of the afore-mentioned submissions, it is apt to quote how the charge was formulated in the charge sheet. It is couched as follows:

“That the accused is guilty of the crime of Rape (read with the provisions of section 51(1), 51(2), 52(2); 52A and 52B of the Criminal Law Amendment Act 105 of 1997 as amended) in that upon or about 08/09/2007 and at or near Bloemfontein in the district of Bloemfontein and within the jurisdiction of the Regional Division Free State, the accused did unlawfully and wilfully assault an adult female and there did unlawfully, violently and against her will have carnal intercourse with her.”

[7] In his plea explanation, the appellant narrated the incident as follows:

“4. The plea of guilty is placed on the following facts:-

Count 1

That on or about the 8th day of September 2007 and at Freedom Square in the regional division of Bloemfontein, I did unlawfully and intentionally assault one Keromamang Mokhotsoane an adult female and then and there did unlawfully, violently and against her will have carnal intercourse with her without her consent.

Count 2

That on or about the 8th day of September 2007 and at Freedom Square in the regional division of Bloemfontein, I did unlawfully and intentionally kill one Keromamang Mokhotsoane by stabbing her with an Okapi knife twice.

5. On the above-mentioned date I was from the third house from my house drinking liquor then went to my house. On the way I met the deceased in the same street. I spoke to her. She was

refusing to go with me to my place. I forced her to a certain house dragged her behind the house and started to have sexual intercourse with her. I did not know the complainant and her name was unknown to me. After having raped her, I then stabbed her twice with an Okapi knife that was confiscated by the police at my place.” (My underlining for emphasis).

[8] It has been held in a number of cases that where an accused pleads guilty and hands in a written statement in terms of section 112(2) of the Criminal Procedure Act No. 51 of 1977 detailing the facts on which his plea is premised and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed. See **S v JANSEN** 1999 (2) SACR 368 (C) at 370g – 371g; **S v CALENI** 1990 (1) SACR 178 (C). Also see the unreported appeal judgment of **VAN DER MERWE & OTHERS v THE STATE**, Appeal No. A366/10 at paragraph 30, where the following was stated:

“Such an essential factual matrix [set out in the plea explanation] cannot be extended or varied in a manner that adversely impacts on the measure of punishment as regards the offender. The plea, once accepted, defines the *lis* between the prosecution and the defence – once the parameters of the playing fields are so demarcated, it becomes a foul play to canvass issues beyond.”

[9] As stated above, no evidence was adduced before the court *a quo* relating to how the offences were committed by the appellant. For these details, the court relied entirely on the appellant’s plea explanation. That being the case and following on the principle enunciated in the aforementioned cases, the sentence imposed on the appellant should therefore have been premised on the factual foundation as set out in the appellant’s plea explanation. Significantly, when it comes to the rape charge, the charge-sheet makes no mention of the infliction of grievous bodily harm. It is clear

from this plea explanation that the stabbing was only done after the act of rape had already been concluded and not as part of the rape. This distinction is in my view critical as the involvement of the infliction of grievous bodily harm is one of the factors that brings a rape that would ordinarily have fallen within the purview of Part III of Schedule 2 of the Act (attracting 10 years imprisonment as a minimum sentence, within the purview of Part 1(c) of the Act, for which a more severe minimum sentence is applicable.

[10] The appellant's plea explanation embodied the exclusive facts on which the appellant pleaded guilty. The court *a quo* did not direct any questions to the appellant relating to the facts as expressed in his plea explanation. The state accepted the appellant's plea explanation as such. It adduced no evidence that sought to give a different account of events than the one set out by the accused in his plea explanation. It was only during the address in aggravation of sentence that the prosecutor seemed to highlight the sequence of events, submitting that the stabbing occurred before the rape. The court *a quo* correctly dealt with it as follows in its judgment:

"... And you say thereafter [after the rape] you produced your knife and stabbed her twice therewith. The state did accept this version, as you put forward, from the onset of the trial. But on more than one instance the prosecutor seemed like she wanted to challenge this version. She wants to say how you injured the deceased first before you could rape her. I do recall that I did give her the opportunity to present evidence in aggravation of sentence if she so desires, unfortunately she could not."

Surprisingly, notwithstanding the above-mentioned remarks, the court *a quo* went on to find that the rape the appellant was convicted of, was the one listed under part 1(c) of the Act *"because you did inflict injuries which resulted in the death of the deceased."*

[11] One of the dictionary meanings of the word "involved" alluded to by Mr. Mohlala in his heads of argument is: *"to include something as a necessary part of an activity, event or situation"*. Given this meaning, there is no room

for finding that the stabbing that occurred after the rape was a necessary part thereof. In my view, from the content of the plea explanation, it can safely be concluded that the appellant formed the intention to rape, went ahead with that deed and after concluding it, formed the intention to murder the deceased. Insofar as the court *a quo* found otherwise, it misdirected itself materially, thus justifying interference by this court. In my view, the applicable minimum sentence is that mentioned in Part III and not in Part I of Schedule 2 of the Act. And the prescribed minimum sentence is ten years' imprisonment.

[12] Mr. Reyneke further argued that there are substantial and compelling circumstances warranting deviation from the prescribed sentence. According to him, the following factors, cumulatively viewed, warrant this deviation:

(i) the appellant was 26 years of age at the time of commission of the offences; (ii) that he was unmarried and had no children; (iii) that he attended school up to standard 6; that he was raised by his grandmother; that he was remorseful for what he had done; that he had been drinking before the incident that he was a first offender.

[13] It is clear from the record that the aforementioned circumstances were properly taken into account by the court *a quo*. The court *a quo* also considered the interests of the community, as well as the seriousness of the offences. I cannot fault the court *a quo* in its consideration of this triad of sentence. Indeed, the aggravating factors far outweighed the mitigating circumstances. Indeed, it was totally unnecessary for the appellant to kill the deceased after raping her. The reasons for killing the deceased were not advanced in the appellant's plea explanation. With regards to the appellant's plea of guilty, the court is mindful of the fact that the state had a formidable case against the appellant, for he was linked to the deceased through his DNA. Furthermore, he was, on his own version, almost caught in the act, as members of the public arrived at the crime scene soon after he had finished committing the offences and chased after him, leading to his arrest. A plea of guilty under such circumstances cannot, without more, be considered to be indicative of his contrition. Although the appellant did allude to his remorse in his plea explanation, he did not take the witness stand to articulate it so that

its genuineness could be tested. In my view, genuine contrition cannot be assumed, it must be demonstrated. See **S v MATYITYI** 2011(1) SACR 45 AT 47C. I am therefore satisfied that the court *a quo* was correct in finding that there are no substantial and compelling circumstances warranting deviation from the prescribed sentences of 10 years imprisonment in respect of rape and life imprisonment in respect of the murder.

[14] In deciding on the appropriate sentence, I have taken into account that the appellant spent 21 months in custody awaiting trial. See **S v VILAKAZI** 2009 (1) SACR 552 at 575. I would therefore make the following order:

1. The convictions in respect of rape and murder are confirmed.
2. The sentences imposed by the court *a quo* are set aside and replaced with the following:
 - 2.1 Count 1, rape: 10 years imprisonment.
 - 2.2 Count 2, murder: life imprisonment.
 - 2.3 The sentence imposed in count 1 is to run concurrently with the sentence imposed in count 2.
 - 2.4 With regards to count 2, the determination of the appellant's consideration for parole, if he so qualifies, is to be effected 21 months earlier than would ordinarily have been the case.
3. The sentences mentioned in paragraph 2.1 and 2.2 above are antedated to the 12th June 2009.

M.B. MOLEMELA, J

I concur.

P.C.F. VAN ROOYEN, AJ

On behalf of the appellant: Adv. J.D. Reyneke
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of the respondent: Adv. M.A. Mohlala
Instructed by:
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/sp