

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A176/2011

In the case between:

DANIEL MOTSEPE

Appellant

and

THE STATE

Respondent

CORAM:

H M MUSI, JP *et* MOLOI, J

JUDGMENT:

MOLOI, J

HEARD ON:

31 OCTOBER 2011

DELIVERED ON:

10 NOVEMBER 2011

[1] The appellant had been convicted in the Regional Court, Sasolburg, on a charge of rape in contravention of section 3 of Act 32 of 2007 and a sentence of 18 years imprisonment was imposed on 18 November 2009. The appellant was given leave to appeal after a petition to this court was successful. The appeal is against both the conviction and the sentence imposed.

[2] The evidence against the appellant was that on 25

December 2008 he had sexual intercourse in his house with the complainant who was then seven (7) years old and thus raped her. The incident took place after he had undressed her and promised to give her R1,00. The incident was seen by his then 13-year-old daughter. The complainant was examined by her mother and grandmother who concluded that she may have been raped and the matter was reported to the police. The complainant was subsequently examined by a doctor whose report confirmed penetration of her vagina by a male sexual organ but found no scars to her vagina.

[3] According to the appellant, he had been so drunk on Christmas night in question that he could not remember seeing the complainant or having sexual intercourse with her. All that he could remember was that he had been asleep in his bed the whole night.

[4] At the hearing of the appeal, Mr Tshabalala, who represented the appellant, conceded, correctly, to my mind, that he could not convincingly argue against the conviction. He, however, argued against the sentence imposed as

being too harsh in the circumstances of the case. He relied on the judgment of **S v NKOMO** 2007 (2) SACR 198 (SCA). In this case, the complainant had been held overnight against her will, severely assaulted and demeaned, and thereafter raped five times overnight. The trial court imposed life imprisonment in terms of the provision of section 51 read with part 1 of schedule II to the Criminal Law Amendment Act 105 of 1997 as amended. On appeal, it was found that there had been substantial and compelling circumstances justifying the imposition of a lesser sentence and a sentence of 18 years imprisonment was substituted. Mr Tshabalala argued that the rape in the instant matter is far more less serious than the rape in **NKOMO** and submitted that the sentence imposed by the regional court is shockingly inappropriate.

- [5] A court of appeal is entitled to interfere with the sentence imposed by the trial court if the court *a quo* had failed to exercise its sentencing discretion properly: **S v ANDERSON** 1964 (3) SA 494 (A) or if the sentence “induces a sense of shock”. A court of appeal will also be entitled to interfere with the sentence where there is a

striking disparity between the sentence imposed by the trial court and the sentence that the appeal court would have imposed. See **S v DE JAGER & ANOTHER** 1965 (2) SA 616 (A).

- [6] In this matter the trial court found that substantial and compelling circumstances were present entitling it to deviate from the prescribed minimum sentence of life imprisonment: **S v MALGAS** 2001 (1) SACR 496 (SCA) paras [8] – [10]; **S v MATYITYI** 2011 (1) SACR 40 (SCA). This finding of the trial court is correct. I, however, agree with counsel for the appellant that 18 years imprisonment in the circumstances of this case is shockingly inappropriate. It should be noted that there was in fact no full sexual intercourse but only a slight penetration of the complainant, which would explain why she was not seriously injured. Nor was she assaulted. Besides, the influence of liquor is a factor to be taken into account. The appellant appeared to have been so drunk that he did not even notice the presence of the young witnesses and simply put on his pants in front of them. In addition, the appellant was a first offender, was gainfully employed and had spent a year in

custody whilst awaiting trial. Regarding the latter factor, see **S v VILAKAZI** 2009 (1) SACR 552 (SCA) para 60.

[7] I am of the view that sufficient reasons exist to interfere with the sentence imposed and I think a sentence of 10 years imprisonment would be appropriate.

[8] In the premises, the appeal succeeds in part and the following order is made:

8.1 The conviction is confirmed.

8.2 The sentence of 18 years imprisonment is set aside and replaced with a sentence of 10 years imprisonment to be antedated to 18 November 2009.

K. J. MOLOI, J

I concur and it is so ordered.

H. M. MUSI, JP

On behalf of the appellant: Adv. L. M. Tshabalala
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. A. M. Ferreira
Instructed by:
The Director of Public Prosecutions
BLOEMFONTEIN

/EB