

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A311/2008

In the appeal between:-

THABANG LEKHORA

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MTHEMBU, AJ

HEARD ON:

7 NOVEMBER 2011

DELIVERED ON:

8 DECEMBER 2011

MTHEMBU AJ

[1] The appellant was convicted on rape of a 13-year old girl on 27 February 2008. He was sentenced to life imprisonment. The court *a quo* found that there were no substantial and compelling circumstances present.

[2] He was aggrieved by the sentence. He comes to us with the leave to appeal granted by this court. The sentence imposed on him is not supported by the respondent.

- [3] The respondent accused the appellant of raping a 13-year old girl, M J M, on 19 December 2007. He was arrested on 20 December 2007.
- [4] The appellant appeared before Mr M I Menong, in the Ficksburg Regional Court for trial. Mr T C Namola appeared for the state and Mr H Claasen for the accused. He then pleaded guilty. The statement he made in terms of section 112(2) of the Criminal Procedure Act, number 51 of 1977 was read out and handed in by his attorney as exhibit "A". He was convicted on the strength of his plea.
- [5] The grounds on which the appellant rely upon why his appeal against sentence should succeed, are that inappropriate. The court *a quo* erred in not taking proper notice of the following:
- 5.1 that the pleaded guilty;
 - 5.2 he had no previous convictions
 - 5.3 the court *a quo* erred in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[6] The mitigating factors and personal circumstances of the appellant are:

- 6.1 he was 26-years old at the time of sentencing.
- 6.2 he is married and has one child, 12 months of age at the time of sentencing.
- 6.3 his wife and both his parents were unemployed and at the time of sentencing he was maintaining them.
- 6.4 he is a traditional healer and earned an income of approximately R4 000,00 per month.
- 6.5 He attended school up to Standard 7.
- 6.6 He is a first offender.
- 6.7 He pleaded guilty.
- 6.8 He has shown remorse for what he has done.
- 6.9 He was in custody awaiting trial for a period of 2 months.

[7] In sentencing the appellant, the court *a quo* took into account the following aggravating factors:

- 7.1 the age of the complainant;

7.2 the position of trust that existed, due to the fact that the appellant raped the complainant while under his care as a traditional doctor.

[8] Ms Kruger, attorney for the appellant, submitted that the court *a quo* erred in not finding that there were no substantial and compelling circumstances. He submitted that the following factors constitute substantial and compelling circumstances.

8.1 The appellant pleaded guilty, therefore did not waste the court's time;

8.2 He is a first offender;

8.3 The complainant had, apart from a small tear in the term of life imprisonment is shockingly inappropriate since the factors referred to in paragraph 8 above, individually and cumulatively, constitute substantial and compelling circumstances for the court to deviate from the prescribed term of life imprisonment. He submitted that a term of 17 to 20 years imprisonment will be more appropriate.

8.4 The personal circumstances of the appellant as indicated in paragraph 6 above.

[9] Ms Kruger, submitted that the appeal against sentence should succeed as the term of life imprisonment is shockingly inappropriate since the factors referred to in paragraph 8 above, individually and cumulatively, constitute substantial and compelling circumstances for the court to deviate from the prescribed term of life imprisonment. He submitted that a term of 17 to 20 years imprisonment will be more appropriate.

[10] In **S v MKOMO** 2007 (2) SACR 198 (SCA) at 200 a – b, the court held as follows:

“It was also to be borne in mind that life imprisonment as a sentence for rape should be imposed only where the case was devoid of substantial factors compelling the conclusion that such a sentence was inappropriate and unjust.”

[11] I submit that the following factors constitute substantial and compelling circumstances:

11.1 The appellant pleaded guilty.

See **S v SEBATA** 1994 (2) SACR 319 (C) at 326F:

“... those who are prepared to co-operate with authorities should receive credit; they make a very real contribution towards combating the crime...”

11.2 The appellant is a first offender in **S v WOODS** 1973

(4) SA 95 (RA) at 96H – 97B the court held that:

“...The question of the appropriate sentence in the case of the first offender almost always presents a judicial officer with problems of particular difficulty. ... The publicity of the trial, his exposure as a criminal, the far-reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of a first offender, aspects of punishment which should never be over-looked or underestimated.”

11.3 The complainant did not sustain serious injuries. The appellant did not use violence during the rape.

See **RAMMOKO v DIRECTOR OF PUBLIC**

PROSECUTIONS 2003 (1) SACR 200 A at 205c – d,

where the court refers to **S v ABRAHAMS** 2002 (1)

SACR 116 SCA:

“Some rapes are worse than others and the life sentence ordained by the legislature should be reversed for cases devoid of substantial factors compelling the conclusion that

such a sentence is inappropriate and unjust.”

11.4 The personal circumstances of the appellant.

[12] I am of the view that the court *a quo* closed its mind to these important mitigating factors. These strongly mitigating factors were played down and the court *a quo* emphasised the aggravating factors.

[13] The appellant, pleaded with genuine remorse guilty to the charge. Those who genuinely do so should receive credit. See the **SABATA** case above.

[14] These crucial mitigating factors should have been allowed to influence the trial court in its difficult task of determining an appropriate measure of punishment. They did not. None of them was considered. The appellant's personal circumstances, though mentioned, were not meaningfully considered. Instead, the value(s) which should have been properly attached to such significant factors were virtually watered down. They were not fully explored, assessed and properly taken into account.

[15] The seriousness of the appellant's actions should not be allowed to _____ by overshadow his peculiar circumstances as an individual. Here, I am convinced that an error has been committed:

“A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard.”

S v KIBIDO 1998 (2) SACR 213 (SCA) at 216h – I per Olivier JA.

[16] In the circumstances, I am convinced that the regional court magistrate materially misdirected himself. The misdirection was of such a nature, degree and seriousness that it can be said that the court *a quo* did not properly or reasonably exercise its sentencing discretion – **S v PILLAY** 1977 (4) SA 531 (A) at 535A – B per Trollip JA.

[17] Ms Bester, on behalf of the respondent, agreed that a sentence of 20 (twenty) years imprisonment would have

been an appropriate sentence here. She submitted that in determining whether there were substantial and compelling circumstances, the cumulative effect of the mitigating factors must be looked at.

[18] Accordingly, I make the following order:

18.1 The appeal against the sentence and succeeds.

18.2 The convictions stands.

18.3 The sentence of life imprisonment on the appellant on 27 February 2008 is set aside and substituted with the one below:

18.3.1 The appellant is sentenced to 20 (twenty) years imprisonment.

18.3.2 The sentence shall be deemed to have been imposed on 27 February 2008.

J. B. MTHEMBU, AJ

I concur.

M. H. RAMPAL, J

On behalf of appellant:

Attorney S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Bester
Instructed by:
Deputy Director:
Public Prosecutions
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