

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A84/10

In the matter between:

DINGANE MABITSE

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* MOLEMELA, J

HEARD ON: 6 SEPTEMBER 2010

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 9 SEPTEMBER 2010

[1] This is an appeal. The appellant was convicted on a charge of rape and sentenced to ten years imprisonment in the Welkom Regional Court on 9 October 2009. He now comes on appeal against the sentence with the leave of the court *a quo*.

[2] The grounds of the appeal are: that the court *a quo* erred by not properly taking into account the personal circumstances of the appellant; that the court *a quo* erred by finding that the aggravating factors

overshadowed the mitigating factors and that the court *a quo* erred by finding that there were no substantial and compelling circumstances to justify deviation from the prescribed minimum sentence.

[3] On behalf of the appellant, Mr. Van der Merwe submitted that if the court *a quo* had struck a proper balance between the personal circumstances of the appellant and the crime he committed, instead of overemphasising the nature and the seriousness of the crime, on the one hand, but underemphasising the personal circumstances of the appellant, on the other hand, it would have found that substantial and compelling circumstances existed.

[4] On behalf of the respondent, Ms Giorgi supported the sentence imposed. She contended, contrary to the foregoing contention of the appellant, that the court below properly considered all the relevant factors in a balanced manner. Her submission, therefore, was that the court below did not err in finding that there were no substantial and compelling circumstances present in this case.

[5] There were mitigating factors present in the case. The appellant was born on 17 December 1975. He was 32 at the time he committed the offence and 33 years of age at the time of the imposition of the sentence. He was educated up to matric. He was employed as a distributor or vendor

of a magazine. He was in the employ of Soccer Laduma, a print media business enterprise. He earned R1 900,00 per month. He used his wages to maintain himself, his sisters and their children. He had a clean criminal record.

[6] There were also aggravating factors present in the case. The trial court took into account the seriousness of the crime of rape; its prevalence in the particular region; the legitimate interest of society in the punishment of rape offenders; the fact that the victim was a child; the fact that she was emotionally traumatised by the violation; the fact that she trusted the appellant and went to his shack for help and that he took advantage of her.

[7] Having considered the aggravating factors and the mitigating factors the court *a quo* concluded with the following findings:

“Minimum sentences are not to be departed from lightly and for flimsy reasons.”

Vide p. 91: 22 – 23 record)

“..... the Court finds that the circumstances as a whole cannot be described to be substantial and compelling.....”

Vide p. 92: 5 – 7 record)

[8] The crucial question in the appeal is whether or not the finding that no substantial and compelling circumstances existed, which finding

unlocked the door for the imposition of the prescribed minimum sentence, was correct.

[9] It is so that the victim did not sustain visible, external, physical injuries during the course of the incident. Counsel for the appellant contended that the absence of such injuries in itself demonstrated that the appellant used minimal measure of violence to attain his criminal objective. **A T WATSON v THE STATE** – unreported appeal decision of this division – case no. A267/2009 per Kruger J and Jordaan J. However counsel for the respondent contended that the fact that the victim did not sustain serious physical injuries did not count in favour of the appellant. **BOOYSEN v S** [2009] JOL 24464 (ECG)

[10] In **BOOYSEN v S**, *supra*, it was contended that the trial judge had erred in concluding that there were no substantial and compelling circumstances within the meaning of section 51(3)(a) in that, *inter alia*, he held that the absence of physical injuries on the part of the rape victim was not a substantial and compelling circumstances. At par. [3] Jones J said the following about the contention:

“[3] It is so that the complainant did not suffer physical injuries other than those which follow upon the act of rape, and that Jansen J did not take that consideration into account in the appellant's favour. In my opinion, his failure to do so was not a misdirection. The complainant was 10 years old. She was

a tiny child, slender and slightly built, and quite incapable of offering resistance to a sexual assault by an adult. These would presumably be among the considerations which motivated section 51(3)(aA) of the Act which says that the apparent lack of physical injury shall not constitute substantial and compelling circumstances for the purpose of the Act in the case of the rape of a girl under the age of 16 years.”

The victim was a girl, 10 years of age.

[11] In **S v GN** [2010 \(1\) SACR 93](#) (TPD) at p. 98 (par. [16]) Du Plessis J commented as follows about the uninjured rape victim:

“It is true, as counsel pointed out, that the complainant suffered no physical injuries. In my view, that fact, although relevant, cannot carry much weight. Rape itself is 'an act of violence committed against a woman' (*S v Ncheche* [\[2005\] ZAGPHC 21; 2005 \(2\) SACR 386](#) (W) in para 25). If the victim is physically injured in the course of the rape, a crime that is inherently serious is rendered even more serious. Moreover, one should not place too much emphasis on physical injuries or the absence thereof, as such injuries would ordinarily heal in the course of time.”

The victim was a girl, 5 years of age.

[12] Section 51 [Criminal Law Amendment Act, No. 105 of 1997](#) was recently amended. The Amendment Act, No. 38 of 2007 came into operation on

31 December 2007. Section 51(3)(a) (1997) legislation was amended by the insertion of section 51(3)(aA) (2007) legislation. The latter reads:

“(a A) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.”

[13] My brother and author A. Kruger: **Hiemstra's Criminal Procedure** comments as follows about the rape victim's physical injuries:

“If the provision regarding the apparent lack of physical injuries is interpreted literally, it is unconstitutional because it would mean that Parliament is attempting to instruct judges to ignore factors which are relevant when imposing sentence, and to impose sentences which would consequently be unfair (*S v Nkawu* 2009 (2) SACR 402 (ECG) par [15] per Plasket J). The provisions should however be read so as to preserve constitutional values. Section 51(3)(aA)(ii) should be read to mean that any one of the factors mentioned on their own may not be regarded as a substantial and compelling circumstance justifying departure from the prescribed sentence, but each of the factors may be considered together with the other factors cumulatively to amount to substantial and compelling circumstances. On this

interpretation the court is not precluded from considering the fact that the complainant suffered no serious or permanent injuries, along with the basket of other factors, in order to arrive at a just and proportionate sentence (par [17]).”

I respectfully subscribe to this view.

[14] In **S v NKAWU** [2009 \(2\) SACR 402](#) (ECG) at 405 (par. [11]) Plasket J remarked:

“[11] The physical injuries suffered by the complainant were not serious. They are indicative of a relatively minor degree of force being used. They are not permanent in nature. There is evidence that she suffered discomfort and pain for a while.”

[15] Still in **S v NKAWU**, *supra*, at par. [10] Plasket J said the following about young rape victims:

“[10] As a general rule, it can be said that a rape will be progressively more serious the younger the victim, if only because the younger the victim, the more vulnerable she will be and the greater the chance of serious injury. In this instance the victim was a ten-year-old girl.”

I share the views by the learned judge.

[16] Indeed rape is by its very nature a violent act as Du Plessis J correctly

pointed out in **S v GN**, *supra*, at par. [16]. It is so that physical injuries may heal with the passage of time. However, at times rape victims become permanently deformed by the physical injuries which had long healed. Such physical scarring may constantly remind the victim of her dreadful rape ordeal. In such a case a victim's emotional healing process might well be retarded by her physical deformity occasioned by the excessive violence employed by a rapist.

[17] Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next (Jones J in **S v BOOYSEN**, *supra*, at par. [7]) so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next. The physical injury symbolises the measure of violence a perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the degree of the rapist moral blameworthiness. I am of the firm view that dictates of justice demand that in meting out sentence differentiation be made based on the degree of violent and brutal force used.

[18] If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors for

inclusion in the melting pot and consideration in order to make a determination in terms of section 51(3) regarding the existence or otherwise of substantial and compelling circumstances – Plasket J in **S v NKAWU**, *supra*, at par. [17].

[19] I turn now to consider the factors relative to sentencing in the particular case. The victim was raped on 10 February 2008, ten days after section 51(3)(aA) became operative.

[20] There is no doubt that this rape case remained a despicable misdeed even though the appellant used minimal violence. From experience we know that rapists, almost invariably, physically harm or threaten to harm their victims. They usually brandish some dangerous weapons to force their victims into submission. None of such things were done in this case. There are rape cases and there are rape cases. Some are worse than others – **S v ABRAHAMS** [2002 \(1\) SACR 116](#) (SCA) at par. [28]. There are rape offenders and there are rape offenders. Some are more brutal than others. These are not subtle or cosmetic or meaningless or flimsy distinctions. These are real important factors which must be practically recognised and reflected in the way rape offenders are punished. To ignore these distinctions and to paint rape offenders with the same brush simply because they fall in the same penal category (p2s2), in other words part 2 schedule 2, would boil

down to a disregard of the discretion entrusted to a sentencing court in terms of section 51(3)(a) Act No. 105 of 1997.

[21] The absence of physical trauma in this case, cannot be fairly treated as an irrelevant or a neutral factor. It was an important mitigating factor for which the appellant should have been credited. The significance thereof lies in the fact that it indicated that the case we were dealing with did not resort under the most serious rape cases. By far worse case scenarios are conceivable. Injuries or no injuries, condoms or no condoms, rape strikes at the very core of the victim's femininity. This is true in all rape cases. However, it must also be accepted that lack of brutal force is a factor which diminishes the moral blameworthiness of a rape offender's actions.

[22] In the instant case a number of factors count in favour of the appellant. At the age of 33 years he still had a clean slate. Certainly it was a commendable record for the appellant. He was formally an enlightened man. He has passed grade 12. He was gainfully employed. Although he was single with no dependent minor children, he took it upon himself to maintain his sisters and their children. The evidence suggests that he did not, seriously or at all, plan the crime in advance. He did not go out of his way, as is often the case, to lure the victim to his dwelling. His unlawful behaviour was not remarkably characterised by violent, brutal

or gruesome features. The effect of this was that the degree of his moral blameworthiness was comparatively low. His crime did not rank among the worst of rape cases, serious though it was.

[23] These factors cumulatively considered, together with the rest of his personal circumstances, are substantial factors which compellingly called for a different response from the prescribed minimum sentence. To the extent that the trial court found them flimsy, unsubstantial and unconvincing, it erred in my respectful view.

[24] Since the misdirection was material, I am inclined to interfere. The prescribed minimum sentence was, in my view, unjust in the circumstances of this particular case as a whole. It seems to me that a decremental deviation of two years imprisonment would be an appropriately extent of appellate interference. Such a sentence would not only be deterrent but also rehabilitative. This kind of sentence will, in my opinion, justly satisfy the legitimate interest of society in the sentencing of the offenders.

[25] Accordingly I make the following order:

25.1 The appeal succeeds.

25.2 The conviction stands.

25.3 The sentence of ten years imprisonment is set aside. It is substituted

with one of eight years imprisonment.

25.4 The substitute sentence is antedated to 9 October 2009, a date on which the original sentence was imposed on the appellant.

M.H. RAMPAL, J

I concur.

M.B. MOLEMELA, J

On behalf of appellant: Adv. P. van der Merwe
Instructed by:
The Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. S. Giorgi
Instructed by:
Deputy Director of Public Prosecutions
BLOEMFONTEIN