

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

Appeal No. : A338/2004

In the appeal between:

SEBATHA EDGAR MOKHEMISE

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL J *et* MOLOI AJ

JUDGMENT BY:

MOLOI AJ

HEARD ON:

12 FEBRUARY 2008

DELIVERED ON:

21 FEBRUARY 2008

[1] This matter came before us as an appeal against both the conviction on a charge of rape and sentence of twelve (12) years imprisonment imposed by the Regional Magistrate, Bethlehem sitting at Senekal. The appellant, a 30 year old man, had pleaded not guilty to a charge of rape and denied any sexual intercourse with the complainant.

[2] The conviction was based on the evidence of the complainant that on Saturday, 7 April 2001 at approximately 22h00 she went to a tavern at Matwabeng, Senekal, looking for her boyfriend. She did not find her boyfriend there but the appellant, who then left with her to his residence under the pretext that he was going to wear a different pair of shoes.

[3] When they got to the appellant's residence he unlocked his house and opened the door, he grabbed her and pushed her into the house and told her she was going to spend the rest of the night with him, which she resisted. The appellant ordered her to leave using a different door than the one they came into the house with. When she reached the other door to exit the place, the appellant slapped her on the right hand side of her face in the vicinity of her eye. She retaliated by throttling him and he let go of her.

[4] She moved to the other door and he hit her again in her face whereupon she grabbed his private parts and he shouted "I don't fight, leave my place". She let go of him and hurried to the nearby telephone booth to call the police. As she was talking to the police, the appellant came, assaulted her once more, overpowered her and led her into his house where he asked her if she wanted him to use a condom or not. He then had sexual intercourse with her after wearing a condom. He thereafter fell asleep.

[5] She took her clothes and left the house through the window as she could not open the door. She again went to the telephone booth and called the police where after she went home where she reported the incident to her mother who then sent children to call

the police. The police came and the following day she was examined by the doctor. Her eye was sore, her tooth loose but experienced no pain in her private parts. The sexual act took place without her consent and she could not fight back as she was then tired.

[6] Though she knew the appellant well as he often visited her home, she had no relationship with him nor had he ever suggested an amorous relationship to her. She had no reason to incriminate him falsely.

[7] In cross-examination the appellant suggested that the complainant found him in the tavern sitting and drinking with other people including a policeman (later found to be the court orderly), that complainant asked him for money, which he gave and the complainant bought liquor which they all drank. She denied these allegations. He also denied having raped her. He alleged she fetched him from the tavern and she consented going to his house with him and that they slept there without having any sexual intercourse. He also contended that she reported him to the police because she stole money from him as well as two new blankets; they were often together as the complainant frequented his house

because they have a love affair. Complainant denied these allegations.

[8] The State called the two policemen that received the calls made by the complainant. They confirmed the receipt of the calls on the 10111 number. The only discrepancy in their evidence is that the first call received by Inspector Serahanye was alleged to have stated that the complainant had already been raped when she made a call whereas, according to the complainant, she was raped only before the second call.

[9] The State further presented the evidence of the complainant's mother P.G., who confirmed that when the complainant arrived home she was crying and told her what happened, her pants were not buttoned up, her tooth was loose and there were injuries to her nose and eye and she was emotionally shaken. She confirmed that the complainant frequented the appellant's (Buti) house as they are used to each other. She confirmed further that the appellant (Buti) often came to her place because she had a relationship with the appellant's brother, which relationship no longer existed at the time of the incident. She denied there was a relationship between the complainant and the

appellant.

[10] The appellant testified and denied having raped the complainant. He alleged the complainant fetched him from the tavern where he was sitting with, among others, the court orderly and enjoyed drinks. The complainant asked him for money to buy liquor which he gave and after she bought liquor she refused to give him the change and suggested they leave. They went to his house where they slept. He did not know what time she left. He thought why the complainant laid a charge of rape against him is because she stole his money and two new blankets. He was surprised when the police confronted him with rape allegations. They had known each other for some time and they had a relationship approximately two years before the date. When they went to sleep the night before, there was nothing wrong with the complainant. When he was charged, he also laid a charge of theft against her. He will, however, not call the policeman to whom the charge of theft was laid.

[11] The appellant called the court orderly as a witness and he denied the appellant was sitting with the complainant in the tavern that evening. The appellant also called one Joseph

Mohapi who confirmed having seen the complainant visiting the appellant's house previously but did not know what she was doing there.

[12] After considering this evidence the Regional Magistrate rejected the appellant's version and convicted him of rape.

[13] The appeal was based on the grounds that the State had failed to prove a case against the appellant beyond a reasonable doubt in that

- (a) there was no medical evidence tendered to support the complainant's allegation of forced sexual intercourse;
- (b) that the two police officers did not corroborate each other and they did not corroborate the complainant either with regard to when the alleged rape occurred; and
- (c) the identity of Buti who was alleged to be the perpetrator and that the appellant's version was wrongly rejected as false.

[14] On considering this appeal this Court finds that there was no irregularity or misdirection on the credibility findings of the Regional Magistrate to warrant a different view and that the

medical evidence complained of would not take the matter further as the complainant testified that she did not suffer any injuries to her private parts and that she was an adult and matured woman. The evidence of the two police officers had in fact, corroborated the evidence of the complainant and the seeming discrepancy of the nature of her report to the first police officer, was not material. The identity of Buti did not actually matter as the appellant himself confirmed having been with the complainant at his house and both slept there for the night though he denies having had sexual intercourse with her. Moreover, the complainant's mother, when testifying about the appellant, she referred to him as Buti. The conviction is consequently confirmed by this Court.

- [15] The second leg of the appeal related to the sentence of twelve (12) years imprisonment imposed by the Regional Magistrate. The trial court has unfettered discretion to impose an appropriate sentence and a court of appeal may only interfere therewith only if there was a misdirection committed (**S v KGOSIMORE** 1999 (2) SACR 238 (SCA)) or when the sentence is considered to be shockingly harsh and inappropriate. For this offence the minimum sentence

prescribed in terms of section 51 of the Criminal Law Amendment Act, No. 105 of 1997, is ten (10) years imprisonment. The trial court must look, therefore, for substantial and compelling circumstances to justify a deviation from the minimum prescribed sentence. It is equally true that the substantial and compelling circumstances are not exceptional circumstances: **S v MALGAS** 2001 (1) SACR 496.

[16] In the present case the Regional Magistrate considered the appellant's personal circumstances, *viz* that he was a 30 year old unmarried and unemployed male having no children of his own but supporting his sister's children. He passed Standard 5 at school and has a previous conviction for attempted robbery and attempted rape for which he was duly sentenced. These factors were balanced against the nature and seriousness of the crime of rape and the interests of the community to arrive at a sentence of 12 years imprisonment which is an upward deviation from the prescribed minimum sentence of ten years.

[17] This Court is of the view that the trial court did not take into

consideration other factors that could have persuaded it to impose the prescribed minimum sentence e.g. the fact that the complainant did not suffer serious physical or emotional injuries and the close relationship the appellant had with the complainant prior to the date of the commission of the offence. The court must hasty to add that these factors would not constitute substantial and compelling circumstances now after the enactment of section 51(3) of the Criminal Law (Sentencing) Amendment Act, No. 38 of 2007, which came into operation on 31 December 2007, but did then. A further factor not taken into account by the trial court is the state of intoxication the appellant was in during the commission of the offence and the fact that he had started drinking before the complainant made her appearance at the tavern. This suggests that he did not imbibe liquor in order to assault the complainant.

[18] Although the aforesaid circumstances are not enough to constitute substantial and compelling circumstances which necessitate imposing a lesser sentence than the prescribed minimum of ten years, they do constitute mitigating factors which should have been taken into account by the trial court. In the circumstances this Court feels bound to interfere with the sentencing discretion of the court *a quo* and impose a

sentence of ten (10) years imprisonment.

[19] Accordingly the following order is made.

1. The appeal against the conviction is dismissed and the conviction is confirmed.
2. The appeal against the sentence succeeds. The imposed sentence is set aside and substituted with one of 10 years imprisonment, which sentence should be considered to have been imposed on 6 June 2001.

K.J. MOLOI, AJ

I concur.

C.VAN ZYL, J

On behalf of appellant:

Adv. R.J. Nkhahle

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent:

Adv. S. Chalale

Instructed by:

Director Public Prosecutions

BLOEMFONTEIN

/sp