

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

Appeal No.: A29/2008

In the appeal between:

PIET SETHUNYA MOKHACHANE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MABESELE, AJ

JUDGMENT:

RAMPAI, J

HEARD ON:

15 SEPTEMBER 2008

DELIVERED ON:

15 SEPTEMBER 2008

- [1] The appellant was tried in the Botshabelo Regional Court where he pleaded not guilty on the 16th January 2008 to the charge. Notwithstanding his plea he was convicted on the 15 February 2007 on the charge of rape. He committed the crime at Botshabelo on 9th September 2006. He was sentenced to 10 years imprisonment on the 15 February 2007.

[2] He now comes to us on appeal against the sentence only. The main ground of his appeal is that the court below erred in finding that no substantial and compelling circumstances existed to justify any deviation from the prescribed minimum sentence.

[3] The respondent opposes the appeal. The sentence is therefore supported. The main ground of resistance is that the court below correctly found that no substantial and compelling circumstances existed to justify the imposition of any sentence other than the prescribed minimum sentence of 10 years imprisonment.

[4] In sentencing the appellant the trial court took the following circumstances as mitigating factors:

- that he was 25 years at the time that he committed the offence;
- that the highest level of education he attained was grade twelve;
- that he was an unmarried man;
- that he had no dependent minor children;

- that he was gainfully employed on a mine where he earned R1 800,00 per month;
- that he financially supported his unemployed mother; and
- that he was a first offender.

[5] The court also took into account the following circumstances as aggravating factors:

- that the appellant attacked and raped the victim in her own house;
- that he raped a woman who could have been his mother;
- that he raped her in her own bed;
- that rape was a serious offence; and
- that the crime of rape was prevalent in the jurisdiction of the court below.

[6] Mr. Makhene, counsel for the appellant, submitted that the court below misdirected itself by overemphasising two of the aggravating factors, namely the seriousness of the crime as well as the prevalence thereof.

[7] Mr. Botha, counsel for the respondent, differed. He submitted that all the material facts and factors relevant to sentencing were properly taking into account in a balance manner by the court in considering what an appropriate punishment should be.

[8] On page 89: 2 - 8 the learned magistrate said:

“You are also a first offender, but rape is a very serious offence and prevalent in this particular area and to put it bluntly, it is annoying. There is no day that goes by without a case of rape on this court’s roll. Apart from your case today there is one, two, three cases on the roll of rape. And there are always marches all over the country against this sexual abuse of women and children.”

[9] Still on page 89: 9 – 14 the trial court continued as follows:

“The government is also using each and every media available to teach people about the abuse of women and children and appeals to the communities to stop it. And because of this alarming rate of this offence the Legislature then enacted the minimum sentence legislation to stop or to curb this type of an abuse.”

[10] Mr. Makhene argued that the foregoing passages show that the learned magistrate was angry and emotionally during the course of sentencing the appellant. Such anger and emotions, counsel argued further, so beclouded the mind or judgment of the court that it did not take into account:

- that although rape is a violent crime, the complainant did not suffer any genital or physical injuries;
- that although the knife was brandished, it was never used against the complainant;
- that there was no evidence of the rape, having had any dramatic or psychological effects on the complainant;
- that the appellant was relatively young; and
- that he had a clean criminal record.

[11] As regards physical injuries, it is so that the victim did not sustain any physical injuries. However, the emotional injury to the rape victim should never be underestimated. I have always have reservations about the tendency by lawyers to rely on the absence of physical injuries in a rape

case as such a weighty mitigating factor as to be always treated or regarded as an important ingredient of the substantial and compelling circumstances. This is so because rape is not just a mere physical attack of the body. It is fundamentally a devastating attack of the soul. As one judge once put it, a rapist does not kill his victim but kills her soul. This is particularly so where the rapist is armed, as was the case here.

- [12] It is so that there is no evidence of the psychological effects of the rape on the victim. This is precisely where the courts must be careful. Lack of evidence does not necessary mean absence of psychological trauma. It may and often does simply mean that the victim, on account of her low social standing in the community coupled with her own modest socio-economic means – was not psychologically examined, or assessed and counselled in order to determine whether or not the victim has suffered any permanent traumatic effects. Where there is no expert evidence, the adverse impact of the incident of rape on the victim remains unknown. Because it is an unknown factor, it cannot properly be relied upon either as a mitigating

factor or aggravating factor. It is a neutral factor. We may debate about its subsequent effects on the victim, but no objective person can ever deny that *ex tempore* rape must be a traumatic experience to any victim.

- [13] Rape is a violent crime. The appellant was armed and dangerous. Mr. Makhene contended, and correctly so, that the law concerns itself with facts and not suppositions. However, that is not where it all ends. The law also concerns itself with the probabilities in the circumstances of each case. It is a fact that the appellant did not stab the victim. However, I am of the view that had the victim offered any serious resistance, the appellant would probably have used the knife and would probably have inflicted injuries on her. He would probably not merely have brandished it. From experience we know that rape victims sometimes get killed by their rapists in the hope that, by doing so, they minimised the chances of being arrested, prosecuted and jailed. Quite often, the real agony of the victim while the rape is going on is often forgotten. The agonising fear of death which the victim endures for

the entire duration of the rape is also often forgotten - because she was not stabbed or the knife was never used.

[14] Despite his relative youth and clean criminal slate, the gravity of the crime he has committed and its prevalence in the region of the trial court, the province and the country as a whole cannot and should not be ignored. The appellant forced his way into the victim's house in the evening in question, he was brandishing a knife, he threatened to kill her and at knife-point he raped her in her own bed. The victim was a 45 year old lady, older than the appellant's own mother. His mother is a year younger than the victim.

[15] One's home is supposed to be one's secret refuge and fortress. It is supposed to be one's safest place under the sun. The learned magistrate, mindful of the appellant's status as a first offender, and his relative youth, which are ordinarily strong mitigating factors, turned to the other side of the coin. She quite correctly balanced the scale by referring to the legitimate rights of women to enjoy the peace and tranquillity of their homes without fear, apprehension or insecurity which constantly diminishes the

quality and enjoyment of their lives as Mahomed CJ observed in **S v CHAPMAN** 1997 (2) SACR 3 SCA at 5b – e.

[16] This sort of crime where citizens, particularly woman, are violently victimised in their own sanctuaries epitomizes the worrying and rapidly rising tide of lawlessness in our society. These sorts of criminal enterprises where violent and armed rapists or robbers forage deep into the people's homes and lives have to be eradicated. In the circumstances of the instant case, the rape incident of a victim so old by a man so young must have been an extremely humiliating and degrading experience. That together with the natural indignation of our society are strongly aggravating factors. And this is where I differ with the magistrate. In my view this is an appropriate case where the natural indignation of our society has to be taken into account in aggravation of sentence.

[17] In **S v MALGAS** 2001 (1) SACR 469 at paragraph 12 Marais JA said the following about the restrictive appellate limits we have to observe in hearing appeals:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.”

[18] I am not persuaded that the trial court materially misdirected itself on the facts or on the law in sentencing the appellant. It seems to me that the trial court took into account all the relevant factors and material factors in a balanced manner in considering an appropriate sentence. I am not persuaded that anything aggravating was over-emphasised or that anything mitigating was downplayed at the expense of the appellant. Nothing significant turns on the contention that righteous anger and subjective emotions beclouded the judgement of the trial court. As I see it, the trial court committed no material misdirection which vitiated its sentencing discretion. It is entirely in the discretion of the trial court to determine which factors are really relevant to sentencing and what weight to be

attached to such factors. **S v KIBIDO** 1998 (2) SACR 213 SCA at 216 g – j per Olivier JA.

[19] In the absence of a material misdirection we, sitting as we are in an appellate mode, are not at liberty to interfere with the sentencing discretion entrusted to the trial court. We cannot substitute such a sentence because we would have exercised such discretion differently. The finding of the trial court that, in all the circumstances peculiar and favourable to the appellant, no substantial compelling circumstances existed to justify a punishment less than the prescribed minimum sentence of 10 years imprisonment is a finding which I, on appeal, cannot disturb or upset. I am not persuaded that the mitigating factors individually or collectively considered are objectively compelling to justify any deviation. In the circumstances, the sentence imposed is not shockingly inappropriate. Therefore I would uphold the sentence.

[20] Accordingly I make the following order:

20.1 The appeal fails.

20.2 The conviction stands.

20.3 The sentence is confirmed.

M. H. RAMPAI, J

I concur.

M. J. MABESELE, AJ

On behalf of the appellant: Adv. J. S. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. J. Botha
Instructed by:
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