

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

Appeal No.: A171/2006

In the appeal between:

ALBERT KOPANO MOKOENA

1st Appellant

SERAME ABEL MOKOENA 2nd Appellant

and

THE STATE

Respondent

CORAM:

H.M. MUSI, J *et* EBRAHIM, J *et*
MOLEMELA, AJ

JUDGEMENT:

H.M. MUSI, J

HEARD ON:

27 AUGUST 2007

DELIVERED ON:

30 AUGUST 2007

[1] This is an appeal against sentence only and comes before this court with leave of the court *a quo*. The two appellants were convicted of rape in circumstances where they had a common purpose to rape and carried out the rape in the execution of such common purpose. Also the victim was raped more than once by the two appellants, each having

had unlawful carnal knowledge of her once. As such the rape falls within the purview of section 51(1) of the Criminal Law Amendment Act No. 105 of 1997 (“the Act”) and life imprisonment had to be imposed unless there were found to exist substantial and compelling circumstances justifying the imposition of a lesser sentence. The regional court, which convicted the appellants, was then obliged to refer the matter to the High Court for sentence in terms of the provisions of section 52 of the Act.

- [2] The matter came before Rampai J for sentence. The learned Judge having considered all the relevant factors, came to the conclusion that the imposition of life imprisonment would in the circumstances of the case amount to an injustice. See **S v KHANYWAYO; S v MIHLALI** 1999 (2) SACR 651 (O) at 657 g, which was approved with some qualification as to language in **S v MALGAS** 2001 (1) SACR 469 SCA. However, having decided that life imprisonment would be unjust and inappropriate, the learned judge went on to impose 28

years imprisonment on the 2nd appellant and 32 years imprisonment on the 1st appellant.

[3] Before us Mr. Pretorius for the appellants submitted that these sentences are excessive and inappropriate and urged us to interfere. He submitted that the court *a quo* overemphasised the gravity of the offence and the interests of the community at the expense of the personal circumstances of the appellants and that on that basis we would be entitled to interfere and impose appropriate sentences. Counsel for the state agreed with these sentiments and declared that she does not support the sentences imposed.

[4] It is trite that once a court comes to the conclusion that there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, it regains its unfettered sentencing discretion and may impose any appropriate sentence. Of course, as was

stated in **S v MALGAS** *supra* at 482 f the prescribed minimum sentences serve as a benchmark and should be kept in mind when considering an appropriate sentence. But once it is found that the imposition of life imprisonment would be unjust, it cannot be correct to then impose a sentence that is in effect as severe as life imprisonment. With respect, the sentences imposed in this matter are open to the criticism that for the appellants it is as good as if life imprisonment had been imposed. I therefore agree that we are entitled to interfere and consider sentence afresh.

- [5] The mitigating factors have been put on record and were fully captured by the court *a quo*. The 2nd appellant was a youth of 19 years at the time of commission of the crime and it is likely that he acted under the influence of his older brother, the 1st appellant, who was a major man of 27 years at the time. Our law recognises that young persons of the age of the 2nd appellant are generally immature and

tend to act on impulse. Both appellants were first offenders and both had been engaged in gainful employment at the time, earning income ranging from R600 to R800 per month. Both had been in custody whilst awaiting trial for two and a half years. The neutral factor is that both are unmarried and have no dependants. The victim of the rape was a major woman and it is to their credit that they did not inflict serious bodily injuries on her.

- [6] On the other hand, there are aggravating factors, the foremost of which is that the victim had been subjected to the most humiliating and traumatic experience a woman can ever experience. In this regard I fully agree with the sentiments expressed by my brother Rampai when passing sentence. In a nutshell the victim has been left with an emotional scar that will remain with her for the rest of her life. One must also not lose sight of the fact that not only is rape a serious offence but also that it has in recent years escalated to the level of an epidemic. No wonder that Parliament has marked it out as one of those crimes in

regard to which severe punishment should be meted out.

[7] I also agree that the 2nd appellant should be treated slightly more leniently than the 1st appellant. In considering an appropriate sentence, one has to take into account that rape committed in circumstances other than those set out in part 1 of schedule 2 to the Act, attracts a minimum sentence of 10 years imprisonment. I would think that this is the minimum beyond which one cannot go in a case like the present. I consider that the terms of imprisonment of 18 years and 15 years respectively for the 1st and 2nd appellants would be appropriate.

[8] In the premises the appeal succeeds and the sentences imposed on each of the appellants are set aside and replaced with the following:

1st Appellant, Albert Kopano Mokoena, is sentenced to 18 years imprisonment on each of the two counts. The

sentences to run concurrently. The 2nd appellant, Serame Abel Mokoena, is sentenced to 15 years imprisonment on each of the counts and the sentences to run concurrently. All the sentences are backdated to 15 February 2002.

H.M. MUSI, J

I concur.

S. EBRAHIM, J

I concur.

M. B. MOLEMELA, WND R

On behalf of the applicants:

Mr. K. Pretorius

Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. E. Liebenberg
Instructed by:
The Director:
Public Prosecutors
BLOEMFONTEIN

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