

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

Appeal No.: 104/2006

In the appeal between:

SOTHO PETRUS BOSIU

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* MOLEMELA, AJ

JUDGEMENT: RAMPAL, J

HEARD ON: 20 NOVEMBER 2006

DELIVERED ON: 30 NOVEMBER 2006

[1] The appellant was tried in the Botshabelo Regional Court where he was accused of rape. He pleaded not guilty on the 2nd April 2004. Notwithstanding his plea he was later convicted as charged. On the same day, the 9th June 2004 he was sentenced to 10 years imprisonment. He now comes on appeal against the conviction and the sentence.

[2] The prosecution alleged that the appellant raped the victim, Dipolelo

Miniah Masego, an adult female at 2328 Section F in Botshabelo on Saturday the 25th October 2003.

[3] The version of the prosecution was narrated by four witnesses, namely: Dipolelo Minah Masego, the victim, Leshenyemo Thomas Sekonyela, the arresting police officer, Anna Pinki Molokoane, the victim's nearby resident and Monyalleng Jeanette Makhetha, the victim's direct neighbour.

[4] Their testimonies may be collectively summarised as follows: The victim and the appellant were acquaintances. They met by coincidence at Section K on the day in question. From there they walked together to Section F. There the appellant insisted to enter the victim's house. Inside the house the appellant strangled the victim. During the wrestling, the appellant dragged her outside. The victim screamed for help but nobody came to her rescue. Her neighbour Makhetha heard the victim's outcry but she was afraid to venture out at night.

[5] The appellant pulled the victim back into the house where he threatened to shoot her. During the course of the night he raped her twice between 20h00 and 04h00. At ±05h30 the victim met Molokoane and told her that the appellant had raped her. Molokoane accompanied the victim to the local police community service centre where she

reported the incident. Inspector Sekhonyane tracked the appellant down at a pub and informed the appellant about the charge. The appellant denied the charge. Although he admitted that he had sexual intercourse with the victim, he averred, that the victim had consented. The appellant then begged the victim to forgive him.

[6] The version of the defence was narrated by three witnesses, namely: Sootho Peter Bosiu the appellant, David Moduka, the appellant's friend and Nzimeni Petrus Mbola, also the appellant's friend.

[7] Their testimonies may collectively be summarised as follows: The appellant met the victim at Section K. The victim went to Wayawayaya Tavern with the appellant and his companions or rather witnesses. The victim pretended to be the appellant's girlfriend so that she would not be bothered by other men. She later invited the appellant to her residence at Section F telling him that her husband was not home but at Virginia where he was working. At her place she asked for sex and gave him condoms to wear. By mutual consent they indulged in a sexual intercourse.

[8] The trial court found that the prosecution witnesses were credible and reliable, saying with reference to the victim in particular:

“Ten spyte van die enkele onbevredigende aspekte wat die Hof reeds uitgelig het in die klaagster se weergawe vind die Hof dat daar voldoende staving in die ander twee getuies Ponky en Monyaleng se weergawes is dat die Hof haar weergawe as geloofwaardig en betroubaar kan aanvaar.”

Vide page 170:5-9.

[9] The trial court was not at all impressed by the evidence of the appellant and his witnesses. It regarded the appellant his witnesses Maduka and Mbola as untrustworthy witnesses. According to the trial court Maduka was a pathetic witness whose evidence was worthless. In rejecting the version of the appellant the trial court described his testimony as follows:

“Daar is soveel swak plekke en onbevredigende aspekte en weersprekings in die beskuldigde se weergawe dat die Hof nie oortuig is dat sy weergawe redelik moontlik waar is nie.”

Vide page 169:27 – page 170:3.

[10] Mr. Nkhahle, who argued the appeal on behalf of the appellant at the request of Mr. Skibi, contended that the trial court misdirected itself in finding that the victim was a credible and reliable single witness whose evidence was satisfactory in all material respects.

[11] However, Ms. Bester, counsel for the respondent, disagreed with Mr.

Nkhahle. She contended that the trial court made correct findings as regards the credibility of all the witnesses in general and the victim and the appellant in particular. She submitted that there was no misdirection to warrant any interference with the judgment.

[12] The victim frantically screamed for help in the middle of the night. Her neighbour Makhetha heard her screaming. The next morning, hardly two hours after her ordeal had ended, she tearfully told Molokoane that “Bushi”, in other words the appellant, had raped her. In **S v HAMMOND** [2004 \(2\) SACR 303](#) (SCA) at paragraph 21 Cloete JA observed as follows as regards the emotional state of the victim:

“[21] Caution must be exercised when the emotional state of a complainant is taken into account. The English cases on this point are collected and discussed in Ramesh Chauhan (1981) 73 CAR 232. In one of those cases, Redpath (1962) 46 CAR 319 at 321 - 2 Lord Parker CJ said:

'It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to

that evidence because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and simulate distress. But in the present case the circumstances are entirely different.'

The circumstances in Redpath were that the distressed condition of the little girl who had been the subject of the assault was observed by someone whom the little girl did not know to be there."

The victim's behaviour in my opinion was consistent with that of a woman who had been raped.

[13] Mr. Nkhahle attacked the victim for her failure to tell Makhetha about the incident the next morning. The victim's behaviour was quite understandable in my view. Makhetha heard about her plight at night before she was raped but did nothing.

[14] The further contention was that the victim should have run out after the first incident of rape. Her failure to do so, so went the argument, supported the appellant's claim that she had consented to have sex with him. This contention was fallacious. It was wrongly premised on the incorrect assumption that the appellant fell asleep after the first sexual intercourse. There was no evidence that the appellant fell asleep between the first and the second sexual acts. The correct evidence was merely that the appellant rested after the first episode.

[15] There were several and material defects in the appellant's version.

Firstly he and the victim were not even secret lovers. Secondly they met by sheer coincidence that particular evening. Thirdly his farfetched story of the suspicious footprints on the victim's premises did not impress as an excuse as to why he entered the victim's house. Fourthly his plea for forgiveness was an indirect acknowledgement that indeed he had wronged the victim. Finally his explanation that he left the victim's dwelling at an ungodly hour of 04h00 because the victim's brother-in-law had seen him there was absolutely ridiculous. This belated piece of evidence was never put to the victim. On that score alone no weight at all can be attached to it.

[16] The court below was mindful of the cautionary rule applicable to the evidence of a single witness. It correctly applied the principle and found the victim's evidence satisfactory in all material respects. That finding is one which I on appeal cannot hold to be wrong. I am not persuaded that the trial court misdirected itself as alleged or in any other manner whatsoever. In the absence of any misdirection as regards the facts or the law we are not at liberty to interfere. I would therefore dismiss the appeal as regards the merits.

[17] In sentencing the appellant the court below considered as mitigating factors the following: That the appellant was 25 years of age; that he

was unmarried; that he was the father of a two year minor child and that he was a first offender.

[18] The court below also took into account the following as aggravating factors: that rape was a serious crime; that rape was rife in its jurisdiction; that the interests of society demanded appropriate punishment for the rapists; that the appellant betrayed the trust the victim had in him and that the appellant was still remorseless.

[19] The court below came to the conclusion that there were no substantial and compelling circumstances to justify deviation from the prescribed minimum sentence of 10 years. This conclusion was arrived at after the due and the balanced weighing up of the mitigating factors as against the aggravating factors. Mr. Nkhahle contended that the court below failed to consider the cumulative effects of the aforesaid mitigating factors coupled with certain additional factors which he argued the court failed to take into account. He submitted that cumulatively considered such factors constituted substantial and compelling circumstances. However, Ms. Bester supported the finding that no substantial and compelling circumstances existed in this case.

[20] As I see it, the trial court applied the sentencing principles in a balanced manner. The fact that the victim was a sexual active adult woman;

that she sustained no serious physical injuries; that there was no evidence of psychological trauma; that the appellant had imbibed alcohol plus the other mitigating factors had to be considered against the backdrop that the appellant raped the victim in her own house. He used a very deceptive ploy to get there. These two factors in addition to the aggravating factors already mentioned above were singularly strong aggravating factors. I am of the view that the finding of the trial court that there were no substantial and compelling circumstances in favour of the appellant is one which I cannot, on appeal, hold to be wrong. The mitigating factors were overshadowed by the aggravating factors. It cannot be said that the trial court attenuated the cumulative impact of the appellant's personal circumstances. I can find nothing particularly disturbing about the punishment meted out by the court below. It cannot be persuasively argued that the sentence of 10 years imprisonment was shockingly severe in the circumstances. I would, therefor uphold the sentence.

[21] Accordingly I make the following order:

21.1 The appeal fails in *toto*.

21.2 The conviction and the sentence are confirmed.

M.H. RAMPAL, J

I concur.

M.B. MOLEMELA, AJ