



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A113/2023

In the matter between:

MSOKOLI MKHAULEZI

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J et LOUBSER, J

HEARD ON: 12 FEBRUARY 2024

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 9 MAY 2024

- [1] The Appellant in this appeal was convicted in the Botshabelo Regional Court on three counts of rape and sentenced to life imprisonment. His appeal is only directed at the sentence, and not the convictions, which were taken together for the purposes of sentence. In terms of the provisions of Section 10 of the Judicial Matters Amendment Act,¹ the Appellant has an automatic right of appeal against his sentence of life imprisonment.

¹ Act 42 of 2013

- [2] Since the Appellant is not challenging the findings of the Court *a quo* in respect of the merits of the case against him, those findings may safely be accepted as a true reflection of what happened on the night in question. The Court found on the evidence before it, that on the night of 22 November 2014, the Appellant first attacked the female complainant by hitting her with a sealed beer bottle on the eye. He then forced her into a structure that was used as a church, where he raped her. He thereafter took her to an empty reservoir where he forced her inside and raped her for the second time. He then forced her to perform oral sex on him. The Appellant was not done yet, however, because he then took the complainant to the shack where he resided. There he raped her for the third time inside the shack, where he held her captive afterwards for a while, until she managed to escape and to report the events to the police.
- [3] The Court *a quo* also referred to the medical evidence pertaining to the injuries sustained by the complainant at the hands of the Appellant during the incidents of rape. Her right eye was bruised and there was a wound below it, caused by the beer bottle. She had bruises and scratches on her forearm, and her upper left arm was also bruised. In addition, she also sustained injuries to her private parts. A victim impact statement handed in by the State, showed that the complainant is suffering from severe psychological problems in that she cannot sleep at night and does not have a social life any more. She is frightened of men because she does not know what they would do to her.
- [4] In his Notice of Appeal, the Appellant relies on the following grounds for the appeal: Firstly, he submits that the Court *a quo* erred in that the sentence of life imprisonment is shockingly harsh and inappropriate. Secondly, the Court failed to pay proper attention to the mitigating circumstances, including the fact that the Appellant was a first-time offender and showed remorse for his conduct. Thirdly, the Court did not give enough weight to the personal circumstances of the Appellant, especially that the Appellant was only 24 years old at the time when the crimes were committed. Fourthly, the Court did not take into account that the crimes were not premeditated, and fifthly, the Court erred by placing too much emphasis on the interest of society as well as that of the victim, and failed to balance the scales of justice equitably.

- [5] I pause here to mention that the Appellant was not a first-time offender, as alleged in the Notice of Appeal. Although he was a first offender as far as crimes of a sexual nature are concerned, he did have a number of previous convictions which caused him to spend some time in prison. As for the remorse allegedly shown by the Appellant, the Court *a quo* specifically found that he did not show any remorse at all during the trial proceedings. This finding of the Court *a quo* cannot be faulted because the Appellant persisted in his innocence throughout the proceedings.
- [6] Now the point of departure in this appeal against sentence is provided by Section 51(1) of the Criminal Law Amendment Act.² Section 51(1) provides that “notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.” Part I of Schedule 2 refers, *inter alia*, to the offence of rape when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice. In the present matter the Appellant was convicted of raping the complainant three times during the night in question, and therefore he had to be sentenced to life imprisonment in terms of Section 51(1).
- [7] However, in terms of Section 51(3), the Court must impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence of life imprisonment. In the present matter the Court *a quo* found that no such substantial and compelling circumstances existed. The essential question on appeal is therefore whether the Court *a quo* was correct in finding as such.
- [8] Furthermore, this Court can generally only interfere with the sentence imposed by the trial court if it is clear that an irregularity took place during the sentencing stage, that the court misdirected itself in respect of the imposition of sentence, or that the sentence imposed was disturbingly or shockingly inappropriate.³ A court of appeal is not free to interfere with the sentence if it might have imposed a different

² Act 105 of 1997

³ *S v Petkar* 1988 (3) SA 571 (A) at 574 C

sentence had it been the court of first instance. It may also do so if it is convinced that the trial court could not have reasonably passed the sentence that it did.⁴

[9] Where minimum sentences in terms of Act 105 of 1997 are concerned, the Supreme Court of Appeal has reiterated that courts should not depart from the prescribed minimum sentences lightly and for flimsy reasons.⁵ The correct approach by a court of appeal against a sentence imposed in terms of the Act, was also authoritatively stated by the Supreme Court of Appeal as follows: "The approach to an appeal on sentence imposed in terms of the Act should ... be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act... It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not".⁶

[10] A reading of the judgement on sentence in the present matter, leaves no doubt that the trial Magistrate had duly considered each and every circumstance before arriving at her conclusion that there were no substantial and compelling factors which would call for a lesser sentence. After referring to the seriousness of the crimes committed by the Appellant, and the need to protect the interest of society, she dealt with the personal circumstances of the Appellant which counted in his favour. He was relatively young (24 years old) when he committed the crimes, and he had been in custody awaiting trial for almost 3 years. He is not married, but he has a four-year-old child who resides with the mother. His highest level of education is grade 10. At the same time, she referred to the injuries sustained by the complainant. The trial Magistrate then came to the conclusion that the seriousness of the crimes by far outweighs the personal circumstances of the Appellant.

[11] It is clear that the trial Magistrate had balanced all the relevant factors and that she did not over-emphasize any of them. In addition, the facts considered by the

⁴ S v Ncheche 2005 (2) SACR 386 (W) at 388c

⁵ S v Matyityi 2011 (1) SACR 40 (SCA) at par 23

⁶ S v PB 2013 (2) SACR 533 (SCA) at par 20

Magistrate are certainly not substantial and compelling in favour of the Appellant. For instance, his relative youthfulness at the commission of the crimes can be no more than a neutral factor. It is evident from *S v Matyityi*⁷ that the courts generally require an accused older than 20 years to show that his immaturity was such that it can serve as a mitigating factor. In the present case there is no evidence to such effect.

[12] As for the fact that the Appellant spent nearly 3 years in prison awaiting trial, this can also not assist him. The Supreme Court of Appeal has determined that, by itself, a pre-conviction period spent in custody does not constitute substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence.⁸

[13] In the premises, there is no basis upon which this Court can interfere with the sentence imposed by the Court *a quo*. The following orders are therefore made:

1. The appeal is dismissed.
2. The sentence of life imprisonment is confirmed.



P. J. LOUBSER, J

I concur:



C. VAN ZYL, J

⁷ See footnote 5 above, at page 48 b

⁸ *S v Radebe and Another* 2013(2) SACR 165 (SCA) par. 14 page 170

On behalf of the Appellant:

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Instructed by:

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On behalf of the Respondent:

Adv. L. Mkhabela

Instructed by:

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