



| | |
|---------------------------|--------|
| Reportable: | Yes/No |
| Circulate to Judges: | Yes/No |
| Circulate to Magistrates: | Yes/No |

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

*CASE NO.: CA&R 53/2022
Date heard: 07-11-2022
Date delivered: 02-06-2023*

In the matter between:

Orapeleng Thompson

1st Appellant

Letlhogonolo Motshabi

2nd Appellant

And

The State

Respondent

CORAM: TLALETSI JP et WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. Messrs Orapeleng Thompson and Letlhogonolo Motshabi, respectively the first and second appellant, were each convicted on a count of rape (count 1) and a count of robbery with aggravating circumstances (count 2). On 12 April 2022, in the Regional Court, Warrenton, they were both sentenced to life imprisonment on count 1 in terms of s51 (1) of Act 105 of 1997

- and to 15 years imprisonment on count 2 in terms of s51 (2) of the same Act. This appeal lies against the sentences imposed.
2. The second appellant was two months late in filing his Notice of Appeal and brought an application for condonation. In his accompanying affidavit he states that he was under the impression that he had an automatic right of appeal and did need to note the appeal. As soon as he was advised of the correct position he filed his Notice of Appeal. Ms Molefe, who appeared for the State did not oppose the application and in the interests of justice condonation was granted.
 3. The grounds of appeal for both appellants can be summarized as follows:
 - 3.1 The trial court erred in over-emphasizing the seriousness of the offences and the interests of the community;
 - 3.2 The trial court erred in not finding that substantial and compelling circumstances exist which would justify a deviation from the prescribed minimum sentences; and
 - 3.3 The sentences imposed are disproportionate to the seriousness of the offences, the interests of society and the moral blameworthiness of the appellants.
 4. The accepted evidence in this matter is briefly as follows. The complainant, a 37 year old woman, was walking back home on the evening of 1 October 2018 after escorting a friend halfway to her house, when she was accosted by the two appellants in the street. The first appellant grabbed her around the neck from behind and pushed her down against a fence, all the while

holding a knife to her neck. The second appellant proceeded to undress and rape her. Thereafter the appellants dragged the complainant into the nearby veld where, despite wrestling with the appellants and managing to grab the knife away from the first appellant, the second appellant succeeded in taking R750,00 from her which she had kept in her bra and her cellphone, before the first appellant raped her while the second appellant held her down.

5. As a result of the assault the complainant suffered abrasions on her right knee, a 2cm laceration on her left shin and a 2 cm laceration in her left armpit.
6. In essence, the argument for the appellants was that the trial court had failed to give proper consideration to the mitigating factors present when considering whether substantial and compelling circumstances existed which would justify the imposition of a lesser sentence.
7. Rape is a very serious offence and whether or not physical injuries have been sustained it leaves lasting psychological scars. The complainant who wrote her own Victim Impact Statement, which was read into the record by the prosecutor during the sentencing phase of the trial, described the effects of the rape on her as follows;

“ . . . after these boys raped me my life was not pleasant anymore. Every movement or even the sound of the wind blowing scared me and made me panic. I couldn't sleep at night, every sound outside scared me. I

would peep through the windows wondering if it was not them, trying to enter the house to harm me. I couldn't even go to town anymore, I just remained in the yard because of fear. . ."

8. The impact of rape on the victims' lives cannot be overstated. However, it is important to bear in mind what was stated by Majiedt JA in *S v SMM 2013(2) SACR 292 (SCA)* at 297 b-c thereof.

*“. . . It is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in *S v Rabie*:*

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'

9. It is easy and perhaps only human to lose perspective when it comes to cases of rape and gender based violence, considering the enormous problems this country has with these offences. Judicial officers are however held to a higher

- standard of responsibility, objectivity and judgment than the general public, and should avoid the temptation to pander to the moral outrage of society, to the detriment of those accused persons who appear before them and to the interests of justice.
10. Unfortunately, the trial court failed to heed the advice given in the extract from *S v SMM* quoted above as well as what is stated in *S v Malgas 2001(1) SACR 469 (SCA)* at paragraph 9 thereof, when determining whether substantial and compelling circumstances exist. That is, no factors are excluded from consideration; the court should look at the cumulative effect of all the circumstances to see whether they justify a departure from the prescribed minimum sentence; and that such circumstances need not be exceptional to qualify for consideration.
 11. Mr Ishmael and Mr Fourie who appeared for the first and second appellants respectively are correct that mere lip service was paid to the evaluation of all the circumstances relevant to sentencing by not considering the cumulative effect thereof. What the trial court did was to consider each of the mitigating factors separately and to reject it as not constituting on its own, substantial and compelling circumstances. This is not allowed.
 12. Having said that, we are free to determine whether substantial and compelling circumstances exist in this matter. I start with the personal circumstance of the appellants.

13. The first appellant was 19 years old when the incident occurred and 23 years at the date of sentencing. He left school in grade 8 and worked as a farm labourer, earning R150 per day. He has no children and lived with his parents. He is a first offender.
14. The second Appellant was 24 years old at the time of the offences and 26 years when he was sentenced. He has no children and earned a living by doing odd jobs. He is also a first offender.
15. Other mitigating factors to be taken into account would be the fact that the two appellants were under the influence of alcohol when they committed the offences; the offences were not planned or premediated, but were committed on the spur of the moment and lastly, but most contentiously, the rape was not one of the most severe forms of rape that have come before our courts. The physical injuries which I have alluded to herein appear to have been caused during the struggle between the appellants and the complainant, so much so that the complainant, for instance, could not remember how and at which stage of the events she sustained the laceration in the armpit. In my view the appellants should get the benefit of the doubt that this particular wound was not inflicted intentionally.
16. That being said, there are aggravating factors present beyond those usually associated with rape. In the case of the first appellant, he was well known to the complainant as being a friend of her son, which would have rendered the experience

even more humiliating for her. The second appellant concocted a version whereby he was enticed by the complainant who followed him home after meeting her at a tavern, thus further victimizing her.

17. However, whilst not making light of the seriousness of the offences, the impact it had on the complainant and the interests of society, the mitigating factors mentioned above and the personal circumstances of the appellants, in my view constitute substantial and compelling circumstances which would justify the imposition of lesser sentences than the minimum sentences prescribed.
18. The appellants are youthful first offenders deserving of a sentence tempered with a measure of mercy and which will allow them an opportunity to rehabilitate themselves. Given the seriousness of the offences a lengthy term of imprisonment proportional to the offences, would be the only appropriate sentence. I do also take into consideration the fact that both appellants spent a period of 9 months in custody awaiting trial.

In the circumstances the following orders are made;

- a) **The appellants' appeal against the sentences imposed on both charges succeeds.**
- b) **The sentences imposed are set aside and replaced with the following:**

- “(i) On count 1 (rape) the accused are each sentenced to a period of 20 years imprisonment;**
- (ii) On count 2 (robbery with aggravating circumstances) the accused are each sentenced to a period of 12 years imprisonment.**
- (iii) The sentences imposed on count 1 and count 2 in the case of each of the accused are to be served concurrently.”**
- (iv) The sentences are ante dated to 12 April 2022.**

CC WILLIAMS
JUDGE

I concur

LP TLALETSI
JUDGE PRESIDENT

For 1st Appellant: Mr R C Ishmail
Legal Aid South Africa

For 2nd Appellant: Mr P Fourie
Legal Aid South Africa

For the State: Adv K Molefe
Office of the DPP