

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CRIMINAL APPEAL NO. 32 OF 2002
HIGH COURT CRIMINAL COMMITMENT NO 3 OF 2001

In the matter between

ITUMELENG LEJONE

APPELLANT

Versus

THE STATE

RESPONDENT

Appellant in person

Mrs. M. M. C. Abram and Ms. Mojewa for the respondent

J U D G M E N T

CORAM: N. W. Zietsman J.A.
C. Plewman J.A.
A. M. Akiwumi J.A.

ZIETSMAN J.A.

The appellant was found guilty of rape and of malicious injury to property in the magistrate's court. A subsequent Human Immune System Virus test on the appellant found him to be H.I.V. positive and the case was then submitted to the High Court for purposes of sentence. The learned Judge of the High Court treated the matter as though it involved also an appeal by the appellant against his convictions. She

came to the conclusion that the two offences had been proved beyond all reasonable doubt. She then proceeded to sentence the appellant for the two offences.

Although the appellant was found to be H.I.V. positive, it was not proved that he was H.I.V. positive at the time of the rape and the judge correctly held that section 142 (4) (a) of the Penal Code (as amended), which provides for a minimum sentence of 15 years imprisonment, was not applicable. The learned judge also correctly held that section 142 (2), which provides for a similar minimum sentence where the rape is attended by violence resulting in injury to the victim, was also not applicable. Although the evidence indicates that violence was used in committing the rape there was no evidence that the victim (the complainant) was injured as a result of that violence.

The learned judge correctly concluded that in this case the minimum sentence for the rape, in terms of section 142 (1) (ii) of the Penal Code, was 10 years imprisonment. She however, after considering the circumstances and the manner in which the rape was committed, sentenced the appellant to 15 years imprisonment.

On Count 2, the malicious injury to property count, the learned judge sentenced the appellant to 2 years imprisonment and ordered that this sentence would run concurrently with the sentence for the rape.

The appellant noted an appeal against his convictions and sentences. He appeared in person to argue his appeal in this court and he immediately indicated that he was abandoning his appeal against his convictions. This was not surprising as the case against the appellant was overwhelming.

The complainant's evidence, briefly, was that she went to the community hall in Molepolole on the night of the 26th February 1999. As she left the hall, in the early hours of the next morning, the appellant grabbed hold of her and said that she must accompany him. She refused and he then slapped her. This was seen by the witness Tshepo Tumelo. Tshepo went to call Justice Mogale and he arrived to find the appellant holding on to the complainant who was crying. The complainant alleged that the appellant raped her three times. Her evidence to this effect was supported by the witnesses Mogorosi Marumo and Jeff Selema. The medical evidence given by Dr. Kavuru was further confirmation of the fact that the complainant had been raped.

When the appellant was arrested he told detective constable Temogo that the complainant was his girlfriend and that she had consented to have sexual intercourse with him. The appellant gave evidence in which he admitted being with the complainant at the relevant time but he denied that he had had any sexual intercourse with her.

It is clear from the evidence that the Magistrate was justified in rejecting the evidence given by the appellant and in finding that it had been proved by the State, beyond all reasonable doubt, that the appellant had raped the complainant, and as stated above the appellant in fact in this court abandoned his appeal against his conviction.

The evidence given by the complainant, and supported by the witnesses Mogorosi, Marumo, Jeff Selema and Shinko Machobane, was that after he had raped the complainant the complainant and the other witnesses ran into a house owned by the witness Shinko Machobane. The appellant returned to the house and by throwing bricks he smashed a window and damaged the front door of the house. This resulted in his conviction for malicious injury to property and a sentence of 2 years imprisonment. The appellant indicated to us that he did not appeal against this conviction or sentence.

The point for us to decide is whether the appellant's appeal against his sentence of 15 years imprisonment for the rape should succeed. In his argument before us the appellant alleged that he had not been given a proper hearing in the court a quo in that he had been given insufficient time to prepare his argument on the question of sentence and had been denied the opportunity of addressing the court in mitigation of sentence. This was clearly not the case. The Magistrate on 16 August 2000 committed the case to the High Court for sentence. On 3 December 2001 the appellant submitted written argument to the court and on 12

December 2001, after hearing further oral argument from the appellant, the learned judge delivered the sentences.

In his submissions to us the appellant pointed to the fact that his sentence for the rape was 5 years more than the prescribed minimum of 10 years imprisonment. He stated that he was 19 years old at the time of the rape and submitted that it was youthful exuberance that caused him to commit the offence. He also stated that he was drunk at the time when he committed the offence. No evidence to this effect was given at the trial. The only evidence he gave on this point was that he and his friends had been drinking beer and entertaining themselves in the community hall. The appellant stated further that he is now remorseful and has turned over a new leaf, and he states that he would now like to preach the gospel to the youth and to warn them of the dangers of alcohol and unprotected sex. Similar statements were not made at his trial.

In deciding to sentence the appellant to a period of imprisonment longer than the stipulated minimum period of 10 years the learned judge stated the following:

"In deciding the appropriate sentence, I take into consideration the following facts. The complainant was a young girl, aged 16 years old. This would have been a harrowing experience for her and consequences of which are not only physical, but emotional as well. Another factor is the particular arrogance of the appellant. He committed the offence in the face of not just the screams and protests of the complainant, but after interventions by at least two sets of people. He was so self absorbed that only what he wanted to

do mattered. Then there is the fact that he threatened to stab the complainant with a knife. Rape is of course a crime of violence, but the actions of the appellant took the violence to a higher level. Another factor is that these are times of AIDS/HIV, sex can kill. This fact, even though there is no evidence that this particular appellant was HIV positive at the time of the rape, must be considered. The complainant must deal with the possibility of HIV infection, especially in a case such as this one, where she sustained tears during the sexual encounter. Taking all these factors into consideration, the appellant is sentenced to 15 years imprisonment."

It is our conclusion that the learned judge was correct in taking the said factors into consideration and in deciding that in this particular case a sentence more severe than the prescribed minimum sentence was justified.

We have one problem with the sentences passed by the learned judge.

Section 142 (5) of the Penal Code (as amended) provides as follows:

"(5) Any person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence whether the other sentence be for the offence of rape or any other offence."

The learned judge in this case erred in ordering that the sentence of 2 years imprisonment on count 2 would run concurrently with the sentence for the rape. The learned judge therefore clearly misdirected herself as to one element relevant to the sentence to be imposed. In the light of such a misdirection we are entitled to review the sentence. Indeed since it involves a direction which is contrary to law we are in fact obliged to do so.

The learned judge clearly intended to sentence the appellant to an effective sentence of 15 years imprisonment for the two offences which offences were committed on the same date and at almost the same time and place. Such an effective sentence we consider to be a reasonable sentence in the circumstances. An effective sentence of 17 years imprisonment for the two offences will, we consider, be excessive. In the circumstances we have decided to reduce the sentence for rape to 13 years imprisonment and to order that the two sentences run consecutively.

We make the following order -

1. The appeal against the two convictions is dismissed and the convictions confirmed.
2. The sentence in respect of count 1 (the rape charge) is reduced from 15 years imprisonment to 13 years imprisonment.
3. The appeal against the sentence of 2 years imprisonment on count 2 is dismissed and the sentence confirmed, but it is ordered that this sentence is to run consecutively to the sentence on count 1.

4. The sentences are backdated to 28th February 1999 being the date of the appellant's arrest.

DELIVERED IN OPEN COURT THIS DAY OF JANUARY 2003.



**N. W. ZIETSMAN
JUDGE OF APPEAL**

I agree



**C. PLEWMAN
JUDGE OF APPEAL**

I agree



**A. M. AKIWUMI
JUDGE OF APPEAL**