FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A161/2010

In the case between:

VESSEL THABETHE Appellant

and

THE STATE Respondent

CORAM: RAMPAI J *et* VAN ZYL J

JUDGMENT: RAMPAI J

HEARD ON: 30 AUGUST 2010

DELIVERED ON: 9 SEPTEMBER 2010

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[1] This is an appeal. The appellant was tried in the regional court on a charge of rape. He was found guilty and sentenced to life imprisonment. He now comes on appeal against the conviction and sentence.

[2] His trial commenced in the Harrismith regional court on the 27 July 2007. He pleaded not guilty to the charge that he had raped Ms Ntebaleng Selina Ncala on Springdale farm

in the district of Kestell on the 18th July 2004. He explained in terms of section 115, Act No. 51 of 1977 that he did not have sexual intercourse with the victim as alleged and that he was not on the alleged scene but elsewhere at the time the victim was raped as alleged.

[3] Notwithstanding his plea, the appellant was convicted on 13 January 2009. The conviction was the outcome of a trial during which the court heard the evidence of six witnesses.

[4] On the same day the court below (per Mr H S van Niekerk) imposed a sentence of life imprisonment in terms of section 51(1), Act No. 105 of 1997.

[5] The appellant was aggrieved. On the 10th November 2009 he noted an appeal against both the conviction and sentence.

[6] The grounds of appeal, as regards the verdict, are fully set out in paragraph 1 of the notice of appeal. There are 12 grounds on which the appellant's challenge is based.

Among others, the appellant contended that the trial court misdirected itself in finding that he did meet the victim on the 18th July 2004; that there never was any intimate relationship between him and the victim and further that the victim had no motive to falsely accuse him – paras 1.2 and 1.3 – notice of appeal.

[7] The version of the prosecution was narrated by two witnesses, namely: Ms N S Ncala, the victim; and Ms S M Tshabalala, the victim's sister. According to the victim – her parents lived at Bethlehem, her sister at Kestell on Springdale farm and she at Witsieshoek where she attended school. During the winter school vacation in 2004 she was visiting her sister on the farm.

[8] One day, on Sunday the 18th July 2004, after a social visit to her friend, Ms Ndina Tshabalala, on a neighbouring farm, she walked alone back to Springdale. She met the appellant at the farm gate at or about 17H00. There the appellant created a scene. He confronted her, accused her of meddling in his marital affairs and insisted that she accompanied him to his house so that the matter could be

sorted out in the presence of his wife. She denied the accusation but accepted the invitation to meet the appellant's wife in order to refute it.

[9] Shortly after their arrival, the appellant left her alone sitting on a chair in the lounge saying he was going to call his wife. After about 5 minutes or so later the appellant re-entered the lounge alone and immediately attacked her. He did so by slapping her several times in the face and kicking her in the abdomen. She was yelling during the assault. Between 18H00 on Sunday and 06H30 the next morning on Monday 19th July 2004 the appellant repeatedly had sexual intercourse with her against her will.

[10] Ms Tshabalala testified that the victim did not sleep home on Sunday 18 July 2004, that she arrived home in the morning of Monday 19th July 2004 and that she tearfully reported to her what the appellant did to her. She noticed that the victim's cheeks were swollen. She advised her to report the incident to the police.

[11] By agreement between the prosecution and the defence,

exhibit b was then handed in. It was the DNA test result from the forensic laboratory in Tshwane. The prosecution case was then closed.

[12] The version of the defence was narrated by three witnesses. They were:

Mr Vessel Thabethe, the appellant;

Mr Nicolaas Thabethe, his younger brother;

Mr Mthandeki Jacob Thabethe, his father.

[13] The version of the appellant was that the victim was his mistress since April 2004. By the time he was arrested on Monday the 19th July 2004, he and the victim had had sexual intercourse on several occasions. They last did so on Friday the 16th July 2004. His wife did not know about it. He did not meet the victim at all on Sunday the 18th July 2004. Although he lived and worked on the farm Springdale, he was at Warden, where his parents lived, on Sunday the 18th July 2004. His plan was to hitch-hike from Warden back to Kestell. But while he was still waiting for a good Samaritan to come by and give him a lift, he received an urgent call from his employer, Mr Pieter Roos – who

wanted to see him. He then called his father and informed him. His father came with his sister and they took him from Warden to his residence on Springdale farm at Kestell. Using his father's car he and his brother drove to the homestead where they received instructions from the farmer. His father and sister left Springdale after 19H00. After their departure, he remained behind with his brother, Nicolaas. He denied that the victim was ever there during the night in question.

[14] The victim asked him to give her some money the last time they were together, on Friday the 16th July 2004. Because he refused she threatened to tell his wife about the secret affair.

[15] The version of the appellant was corroborated by his brother and father as regards his visit to Warden and his mode of transport back. The brother added that he was aware of the intimate relationship between the appellant and the victim. He did not see the victim in the appellant's bedroom. The appellant's wife was at Warden on the Sunday in question. She returned to Springdale farm on

Monday, which I take to mean Monday the 19th July 2004. The defence case was then closed after the appellant's father had testified.

[16] After the close of the prosecution case the court *mero motu* recalled the victim. She denied the sexual intercourse and the intimate relationship the appellant alleged to have had with her. The court also called Dr Monatisa. His evidence was that he was a pathologist and that he examined the victim at Elizabeth Ross Hospital on Monday the 19th July 2004 at 16H54 – exhibit "A". Asked to comment on exhibit "B", regard been had to the appellant's version and the victim's, he answered that, if the appellant and the victim had had sexual intercourse on Friday the 16th July 2004 it was highly unlikely to find his semen in the victim's vagina three days later given the victim's habitual hygiene routine. That concluded the evidence.

[17] The trial magistrate analysed the evidence and came to the conclusion, firstly, that the version of the defence was not reasonably possible and therefore rejected it as false; and secondly that the version of the prosecution was

satisfactory and acceptable. He found that it showed beyond reasonably doubt that the appellant had raped the victim.

[18] On behalf of the appellant, Mr Van Rensburg criticised the aforesaid conclusion. He submitted that the court *a quo* erred in reaching such a conclusion. On behalf of the prosecution, Mr Strauss disagreed. He submitted that court *a quo* did not misdirect itself in arriving at such a verdict.

[19] About the version of the appellant the trial court made the following critical observation:

> "In die beskuldigde se getuienis hoor ons vir die eerste keer van die skelm liefdesverhouding met die klaagster en 'n daad van geslagsgemeenskap op 16/7/2004. Die redes wat hy aanvoer waarom hy nie hierdie feite aan sy prokureur openbaar het nie, is onaanvaarbaar."

[20] The appellant was seriously implicated by the forensic evidence, exhibit "B". It is important to bear in mind that such DNA evidence which sexually and positively linked

the appellant to the victim was not yet available when the trial started. It only became available right at the end of the prosecution case, on the 29th May 2009, some ten months after the victim and her witness had testified. Until then there had virtually being no suggestion by the defence of any relationship of some sort let alone an intimate one between the appellant and the victim. Similarly there had been no intimation whatsoever of any prior sexual inter course between the two.

[21] Before us Mr Van Rensburg contended that the appellant gave a sound explanation about such glaring omissions. According to him the reason why he did not disclose, in terms of section 115 when he pleaded, that he and the victim had sex by consent on Friday the 16th July 2004 was because he was not asked to do so. When he was earlier asked as to whether he had informed his legal representative about it during consultation, he answered that he did not, because as he said, all these allegations confused him. These then were the reasons which the trial court dismissed as being unacceptable.

[22] Indeed they were lame excuses. These omissions of important aspects of his defence have an adverse impact on the credibility of the appellant as a witness. They drastically watered down his belated defence that the victim became his secret lover six months earlier; that they made love on several previous occasions and that the last occasion was two days before the alleged date of the crime.

[23] The appellant's brother claimed, in support of the defence version, that the victim and the appellant were involved in an intimate affair. Counsel for the appellant contended that the evidence of Mr Nicolaas Thabethe strongly corroborated that of the appellant. I am not persuaded. From Mr Nicolaas Thabethe the court *a quo* heard, for the first time, I must point out, that the victim once worked on the farm Springdale. The undisputed evidence was that her parents lived at Bethlehem, her sister on the farm Springdale and she at Witsiehoek where she attended school. She stated that she only visited her sister on the farm during the school vacation.

[24] It is important to remember that, although her sister lived on the farm, she did not work there. Therefore, it is improbable that the victim, who did not even live on the farm, woud have worked there in the sunflower field as the appellant's brother claimed. His evidence was that before July 2004 he never had any discussion with the victim. It appears highly improbable that a man would work with a woman without ever saying a word to her – especially when such a woman is his brother's mistress and there was no animosity between them. The victim's evidence was clear. She said that she did not know Mr Nicolaas Thabethe. This aspect of her evidence was also unchallenged. In my view therefore, the court *a quo* correctly rejected the evidence of the appellant's brother concerning the alleged relationship.

[25] The medical evidence by the forensic pathologist, Dr Monatisa, was that it was highly improbable that the appellant's semen forensically detected in the victim's vagina was deposited there almost three days prior to the date on which he examined the victim. Such evidence strongly fortified the victim's subsequent denial, when she

was recalled by the court, that she never had sex with the appellant on Friday the 16th July 2004 or at any other time before the consentless incident on Sunday the 18th July 2004.

[26] The contention by the appellant that Dr Monatisa was not a qualified expert to express such an opinion failed to impress me. Firstly, the expertise of Dr Monatisa was never an issue in the case. Since it was not an issue on trial it could not be properly raised as an issue for the first time on appeal.

[27] Secondly, down there and up here, it was accepted by all and sundry that the medical witness was not a general practitioner but a pathologist. The dictionary defines the word 'pathologist' as:

> "An expert in or a student of pathology; especially a specialist in the laboratory examination of samples of body tissues, usu for diagnostic or forensic purposes."

See the New Shorter Oxford English Dictionary, Volume 2,

1993 edition, p. 2123 – Lesley Brown. This settles the argument once and for all. The appellant's contention must, therefore, fail.

[28] The trial court commented and correctly so in my view, that:

> "Die beskuldigde het vanuit die staanspoor geslagsgemeenskap met die klaagster ontken en is hy duidelik onkant betrap deur die verslag van die DNS toetse. 'n Plan moes beraam word om die positiewe uitslag van die toetse te verduidelik."

I am in agreement. The appellant simply had no genuine defence to the strong prosecution case against him. His secondary defence was recently fabricated. It was not only belated but also opportunistic. It was materially flawed and therefore not reasonably possible.

[29] The primary defence of the appellant was an alibi. The trial court also dismissed the appellant's alibi although his alibi was supported by two witnesses. If it is accepted, as I think it must be, that the trial court committed no

appealable misdirection in rejecting, not only as improbable but also as false, the belated version of the appellant, and in accepting the version of the victim, objectively corroborated, as materially satisfactory – then nothing much can positively be said for the appellant's alibi.

[30] The first difficulty I have is this: The appellant's parents lived on a farm called Vinknes, district Warden. On Sunday the 18th July 2004 the appellant and his brother were on the farm visiting their parents. Both of them lived together and worked together on the farm Springdale, district Kestell. Both of them were supposed to be at work the next day, Monday the 19th July 2004. In these circumstances one would have expected the brothers to have left Warden together to return to Kestell. However, for no apparent reason, the court *a quo* was told that the appellant left alone and that his brother remained behind on the farm Vinknes. It sounded rather strange.

[31] Then, out of the blue, the appellant received a cellular call from his employer while he was still at Warden trying to get a ride back to Kestell. Because the employer, Mr Roos

wanted to give him instructions for the next day, he in turn called his father to rush him back to Kestell. According to the brother the appellant contacted their father at or about 17H00 while he was still at Warden. He and his sister accompanied their father as he was driving off to the crossing to pick up the appellant. I found it puzzling why the appellant had to be taken back in such a great hurry at such a great expense when such instructions could have been cheaply given over the cellular phone.

[32] It follows from this that they picked up the appellant out there at the crossing outside Warden some time after 17H00. The family arrived on the farm Springdale at Kestell between 18H00 and 19H00 according to Mr Nicolaas Thabethe. This evidence that at 17H00 the appellant was still at Warden was in sharp contrast to the appellant's explanation in terms of section 115 that, at that time, he was elsewhere on the farm with another person. There is therefore a material discrepancy as regards the exact whereabouts of the appellant at 17H00 on Sunday, the 18th July 2004. Was he on the farm Springdale as the victim alleged or was he at the crossroads at Warden as

his brother alleged.

[33] On account of this material inconsistency alone it became apparent that there was no grain of truth in the appellant's alibi. Therefore, the fact that the testimony of the appellant's father was left unchallenged cannot be said to have redeemed the alibi. The foundation of the alibi was already on the shiveringsand. The father as an alibi witness could do no damage control. The sons had already caused irreparable harm to the alleged alibi. In the circumstances there was no point in calling the employer as a witness. The appellant's alibi was beyond a point of salvation.

[34] Both the father and the brother had a motive to falsely support the appellant's alibi as the trial court found. The version of the victim that at 17H00 the appellant was at the farm gate of a rural road leading to Springdale at Kestell and not at the alleged cross-roads at Warden was, in my view correctly accepted and the appellant's alibi correctly rejected by the court *a quo.*

[35] On the evidence as a whole, I am not persuaded that the trial court committed any material misdirection, which warrants our interference on appeal. In the absence of such misdirection, I am inclined to uphold the conviction. On the merits, the conclusion of the court *a quo* is one, which, on appeal, I cannot hold to be wrong.

[36] As regards sentence, it was submitted on behalf of the appellant that the sentence of life imprisonment was an unjust punishment for the appellant in that it was disproportionate to the crime, the offender and the interest of society.

[37] The appellant was 35 years of age at the time he was sentenced. He went as far as standard 9 (grade 11) at school. He was a married man and a father of three dependent minor children. He was employed on the farm as a contract harvester. His employer was Mr Pieter Roos of Springdale farm in the district of Kestell. He earned R2 500,00 per month.

[38] The court *a quo* found that the appellant was convicted of a

serious crime. The incidents of rape, it found, were prevalent in the jurisdiction of the court. There was prior planning. The appellant lured the victim to his house under false and cunning pretext. He held her captive for the whole night and repeatedly raped her. The legitimate interests of society, the trial court pointed out, were adversely affected by the scourge of rape. As a result of this crime, the trial court noted, with regret, that many women lived in constant fear of rapists. These then were the aggravating factors found by the trial court.

[39] In determining whether or not substantial and compelling circumstances existed in favour of the appellant to justify a lighter sentence than the prescribed minimum sentence of life imprisonment the court *a quo* commented:

> "Die Hof neem deeglik kennis van die beslissings in S. v. MALGAS 2001 (1) SACR 469 (SCA) en THEMBALETHU SAM v. THE STATE (343/2007) ZASCA 9 (20 Maart 2008). Dit is uit hierdie beslissings duidelik dat daar nie ligtelik afgewyk kan word van die voorgeskrewe minimum vonnisse nie. Hierdie Hof wil ook nie 'n party wees by die minagting van die wense van die meerderheid mense in hierdie land wees."

The court *a quo* then found that there were no substantial and compelling circumstances to justify any deviation from the prescribed minimum sentence of life imprisonment.

[40] It has been held on more occasions than one that because life imprisonment is the ultimate sentence that our courts can impose in our country, it should be reserved for the most serious of cases. Indeed there are rape cases and there are rape cases. Some are worst than others even though they may statutorily fall in the same penal category. The life sentence ordained by the lawmaker should generally be reserved for the worst cases of rape devoid of substantial factors compelling the conclusion that such a sentence is inappropriate or unjust. See **S v ABRAHAMS** 2002 (1) SACR 116 SCA; **S v MAHOMETSA** 2002 (2) SACR 435 SCA; **S v KNOMO** 2007 (2) SACR 198 SCA; **S v VILAKAZI** 2009 (1) SACR 552 SCA; **S v RABAKO** 2010 (1) SACR 310 (O). However, a fair word of caution has previously been sounded to the effect that the worst case scenario rule must not be understood to mean a rigid rule that life sentence can only be imposed in the most serious

of cases. Such a price is too big to pay. To do so would certainly stifle the sentencing discretion. The proper exercise of such discretion is by no means an easy task.

[41] In **S v GN** 2010 (1) SACR 93 (T) on 97 at para [12] Du Plessis J writing for the unanimous full bench **held that even where the law prescribes a minimum sentence the courts must still seek to differentiate between sentences of cases falling in the same category in accordance with the dictates of justice.** In other words the statutory category of the crime, in this instance, Part I Schedule 2 (p1s2), does not in itself rigidly call for the imposition of the ultimate punishment.

[42] Du Plessis J had this to say about the correct sentencing approach to the scheduled first category offences for which the ordained punishment is life:

> "[11] … In my view the quoted passage, and its application in the other two cases referred to, conveys that, **even where imprisonment for life is prescribed as a minimum sentence, a court must bear in mind that it is the ultimate penalty that the courts in this county can impose. As**

such, it must not be imposed lightly, even when it is a prescribed minimum sentence."

Vide **S v GN** *supra,* para [11].

I am in respectful agreement.

In the instant case it would appear that no serious endeavour was made to make any such differentiation. There, in my view, lies a misdirection.

[43] The misdirection justifies our interference. In my view this case, despicable though it was, was certainly not among the worst I have seen. Probably it was not the worst ever tried by the court *a quo*. The court *a quo* approached the sentencing issue from the angle that it could not lightly deviate from the prescribed benchmark. The correct angle from which to approach p1s2 offences is that the courts should not lightly impose the ultimate sentence of life imprisonment. The sentence imposed on the appellant instantly made me feel uneasy about it. The debate on appeal hardened my uneasiness into a solid conviction that an injustice would be perpetuated if the ultimate sentence, the gravest of the sentences that can be imposed, were to

be upheld on appeal.

[44] It was about such moral conviction Marais JA so eloquently wrote in **S v MALGAS** 2001 (2) SA 1222 SCA at 1234H (para 22):

> "[22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society."

[45] Perhaps it is necessary to give examples to elucidate differentiation. Imagine these, two scenarios: X is a 35 year old first offender. He is employed as a crop harvester on a farm. He lives on the same farm at the foot of the Drakensberg Mountains not far from Clarens. The place has exceptionally cold winter seasons. One day, on a very cold

night in July 2004, he lured a young beauty to his house. There he raped her in a bedroom nicely warmed by strong firewood flames. When he was done, he took her outside and, with her hands tied behind her back, chained her to a pole in a filthy pigsty with an offensive smell. He then left her out there in the cold and took a rest in his cosy bedroom. When he was rested, he unchained her, ordered her to have a cold shower before he again sexually imposed himself on her. He repeated the process of violating her inside and chaining her outside over and over throughout the freezing night.

[46] Imagine the second scenario where Y also lured a young beauty into the same house a day later. The weather conditions remained pretty much the same. It was still bitterly cold. He too repeatedly raped his victim several times during the cold night but in a warm bedroom cushioned with an electric blanket in addition to the firewood flames.

[47] Now both X and Y have individually committed the same crime of multiple rapes, p1s2 category. The law prescribes

life imprisonment as a minimum sentence. However, the comparatively enormous disparity between the moral blameworthiness of the two dictates that penal differentiation has to be made in sentencing Y. Unless differentiation is made between the degrees of moral blameworthiness, Y would get the same sentence of life imprisonment, which on the facts, X appears to deserve. Therefore to do no differentiation on the basis of moral blameworthiness of their actions would perpetrate an injustice as against Y.

[48] Although Y has committed a crime classified in the same category (P1S2) just as X, a sentencing court has to go beyond the applicable category and calibrate the moral blameworthiness of the offender in order to determine whether or not deviation from the prescribed minimum sentence is justified. Doing such an exercise is not the same thing as drawing distinctions so subtle that they can hardly be seen to exist.

[49] These imaginary facts compellingly require that a distinction be made between the same class of offenders or rapists. Such differentiation is material and not cosmetic and it is

founded on the enormous disparity between the moral blameworthiness of the offenders. Such are dictates of justice inherently germane to the sentencing discretion.

[50] It is my considered view and conviction that the circumstances of this particular case render the prescribed minimum sentence of life imprisonment unjust. I consider that the personal circumstances of the appellant taken together with the circumstances of the case in general entitle me to characterise them as substantial and compelling to justify a lighter punishment than life imprisonment. In so far as the court *a quo* considered such circumstances cosmetic factors which are unsubstantial and uncompelling to justify discretionary deviation, it erred.

[51] In all other respects it adopted the correct approach to the question of sentence. The strongest mitigating factor in favour of the appellant was his clean criminal record. At the age of 35, it was commendable record. He earned his livelihood through honourable means. He was gainfully employed. He was adequately educated. He waited for four agonising years to be sentenced. It would appear that he

has the potential prospect of rehabilitation even if he should go to jail for a long period of imprisonment. These factors, cumulatively regarded, satisfy me that life imprisonment would be unjust. They qualify, in the circumstances of this particular case as a whole, as substantial and compelling circumstances within the meaning of the provision. In my judgment a sentence of 12 year imprisonment will appropriately satisfy the legitimate interest of society, the offender and the crime.

[52] Accordingly I make the following order:

52.1 The appeal fails as regards the verdict;

52.2 The verdict is confirmed;

52.3 The appeal succeeds as regards the sentence;

52.4 The sentence of life imprisonment is set aside and substituted with one of twelve years imprisonment;

52.5 The sentence so imposed is antedated to the 13 January 2009 being the date on which the sentence of life imprisonment was imposed.

M. H. RAMPAI, J

I concur.

C. VAN ZYL, J

On behalf of appellant:	Adv. T. B. van Rensburg Instructed by: Jacques Groenewald Prokureurs BLOEMFONTEIN
On behalf of respondent:	Adv. M. Strauss Instructed by: Die Direkteur: Openbare Vervolgings BLOEMFONTEIN

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