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

Appeal No: A95/2014

In the matter between:-

SELLO DAWID MOFOKENG Appellant

And

THE STATE Respondent

CORAM: MOLOI, J *et* POHL, AJ

JUDGMENT BY: POHL, AJ

HEARD ON: 15 SEPTEMBER 2014

DELIVERED ON: 18 SEPTEMBER 2014

INTRODUCTION:

[1] This is an appeal by the appellant against the sentence of ten years imprisonment imposed on him by the regional court. The appellant was convicted of one count of rape in terms of the provisions of section 3 of the Criminal Law Amendment Act, Act 32 of 2007. At all relevant times hereto, the appellant was legally represented.

FACTUAL MATRIX:

[2] The complainant was 39 years of age at all relevant times hereto.

[3] Although the appellant had a previous conviction of theft, he was sentenced as a first offender. He was charged and convicted of only one count of rape, although the allegation in the charge sheet was that he had intercourse with the complainant three times. The complainant's evidence was to the effect that the appellant had intercourse with her and soon thereafter penetrated her vagina with his finger and once again soon thereafter had intercourse with her again. From the court *a quo's* judgment, it is clear that the court considered, correctly so, the abovementioned three actions as one continuous act of rape.

[4] In the premises, the prescribed minimum sentence that is and was applicable, is one of no less than ten years imprisonment, unless substantial and compelling circumstances existed, which could have justified the imposition of a lesser sentence - section 51(2)(b) of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997. The court *a quo* found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence.

[5] The appellant's personal circumstances were duly taken into account by the court *a quo*. These were as follows:
He was 27 years old at the time of the sentencing. He had one child of 5 years old and the child resided with the appellant's

mother. Appellant supported the child at the time of his arrest. He was employed and earned a salary of R1 180.00 as a farm labourer. Appellant attended school up to Grade 9.

[6] The complainant had no physical injuries as a consequence of the rape and no evidence of permanent or serious emotional trauma was placed on record. The court *a quo* also accepted that the appellant had consumed intoxicating liquor on the day in question. The court *a quo* accepted that it is an aggravating factor that the complainant will for ever be reminded of the rape incident and furthermore took into account that there is a public outcry against crimes of this nature, hence the prescribed minimum sentence.

THE RELEVANT LEGAL PRINCIPLES

[7] In the decision of **S v Chapman** 1997 (2) SACR 3 (SCA) the following dicta appears at p 5b – c:

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."

The court then went further and at p 5e the court found as follows:

> "The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

The Supreme Court of Appeal held in the decision of **S v Malgas** 2001 (1) SACR 469 (SCA) at p 481j – 482a as follows:

> "D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[8] Section 51(3)(aA) of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997, *inter alia* provides:

> "(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
> (i) …
> (ii) an apparent lack of physical injury to the complainant;"

The Supreme Court of Appeal however dealt with this issue and the true test as to whether or not there should be a deviation from the prescribed minimum sentence, in the following way in the decision of **S v SMM** 2013 (2) SACR 292 (SCA) at p 302 par [26] and [28]:

> "[26] In considering whether substantial and compelling circumstances existed justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(aA)(ii) of the Criminal Law Amendment Act 105 of 1997, as far as the absence of serious physical injuries to

the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences. I agree with the learned judge that 'to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied'. 29 He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually.

[28] Having weighed the mitigating factors against the aggravating ones, the imposition of the statutorily prescribed minimum sentence by the high court was in my view grossly disproportionate to the offence. This court is therefore obliged to set it aside and impose a fresh sentence. The offence is, nonetheless, deserving of severe punishment so as to convey the gravity of the offence and society's justified abhorrence thereof. I am of the view that a sentence of 15 years' imprisonment would meet the objectives of sentencing and would fit the crime, the criminal and the needs of society. The appellant has been serving his sentence since the date of

sentencing, namely 14 March 2011, and the sentence should consequently be antedated accordingly."

THE CRUX OF THE APPEAL:

[9] The crux of the appeal is the submission on behalf of the appellant that the court *a quo* erred by finding that there were no substantial and compelling circumstances present to deviate from the prescribed minimum sentence. It is submitted on behalf of the appellant that these circumstances were present and that the appropriate sentence would have been eight years of imprisonment. It is trite that when a court of appeal considers the judgment of the court *a quo*, it should not anxiously seek to discover reasons adverse to the conclusions of the court *a quo*. No judgment can ever be perfect and all-embracing, and it does not follow that, because something has not been mentioned, therefore it has not been considered – **Rex v Dhlumayo and Another** 1948 (2) SA 677 (A).

[10] It is to my mind clear that an analysis of the magistrate's judgment on sentence shows that he contemplated the relevant principles he was required to in terms of the authorities referred to in paragraphs [7] and [8], *supra*, despite the fact that he did not refer to these authorities by name. There is no indication that he did not exercise his discretion correctly in respect of the existence or not of substantial and compelling circumstances. It cannot be found that on the totality of the evidence and all mitigating and aggravating circumstances, that the magistrate's imposition of the

statutory prescribed minimum sentence of ten years imprisonment is disproportionate to the offence.

ORDER:

[11] In the premises the order that I make is the following:

1. The appeal is dismissed.

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L. le R. POHL, AJ

I concur.

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K.J. MOLOI, J

On behalf of appellant: Mr S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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