IN THE **HIGH COURT OF SOUTH AFRICA,**

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Appeal number: A230/16

In the matter between:

NKEJANE ABEDNIGO MASOOA Appellant

and

THE **STATE** Respondent

CORAM: LEKALE, J *et* MHLAMBI, J

HEARD ON: 8 MAY 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 11 MAY 2017

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[1] On 21 October 2016 the appellant, who was legally represented, was convicted of rape of a mentally retarded 18 year old girl and sentenced to life imprisonment by the Regional Court at Bethlehem. He feels aggrieved by both the conviction and sentence. He, as such, now exercises his automatic right of appeal against the same.

[2] On returning the guilty verdict the trial court found that the contradictions in the evidence against the appellant were not material and, further, concluded that state witnesses were *ad idem* as to his identity as the culprit. The court a *quo,* further, found that it was clear from the evidence of the victim's mother as well as the J88 medical report admitted into evidence with the appellant's consent that the complainant was, in fact, a rape victim in that sexual penetration did take place and she could not, in law, have consented thereto because she was severely mentally retarded.

[3] The trial court, further, found no cause, in the form of substantial and compelling circumstances, to deviate from life imprisonment as the prescribed minimum sentence in the circumstances of the instant matter. In this regard the court below held that the appellant showed no remorse and the gravity of the offence as well as the interests of society outweighed, by far, his personal circumstances.

[4] On the papers and in argument before us the appellant, through Ms Kruger, submits, *inter alia,* that the state witnesses would not reasonably possibly have been able to identify him as the culprit insofar as they did not see the face of the perpetrator at the scene of the alleged crime and one of his captors, who actually apprehended him, lost sight of the miscreant during the chase. The three states witnesses, further, contradicted each other on the height of the grass at the scene of the alleged rape and on how the victim was dressed as well as the manner in which she was allegedly lying on the ground after the alleged rape. In the appellant's view the court below erred in concluding that the state proved the element of sexual penetration beyond reasonable doubt when there existed no factual basis for such a decision. As far as the sentence is concerned it is submitted for and on behalf of the appellant that the trial court erred in not finding cause to deviate from life imprisonment as the prescribed minimum sentence regard being had to, *inter alia,* the appellant's personal circumstances as well as the period he spent in custody awaiting finalization of the trial.

[5] On its part the state supports the conviction and submits, through Ms Nameka, that the court below evaluated the evidence correctly and correctly found that the contradictions in the evidence of its witnesses were not material. Ms Nameka, however, does not support the sentence and feels that same is shockingly severe and inappropriate regard being had to the appellant's personal circumstances and the fact that the victim sustained no serious injuries, among others. In her view 20 years

imprisonment would be more appropriate as a sentence in the instant matter.

[6] The factual findings of the trial court, its acceptance of oral evidence and conclusions thereon are presumed to be correct unless and until they are shown to be demonstrably wrong or wrong on adequate grounds. (See **S v Francis** 1991(1) SACR 198(A)).

[7] The factual basis for the conviction, as accepted and found by the trial court, is apparent from the oral evidence of the four witnesses who testified for the state as well as the medical report *viz.* J88, the psychological report and the statement of the police officer, one **Sello John Mokone,** all admitted into evidence with the appellant's consent.

[8] **M. L. D.** testified under oath to, *inter alia,* the effect that on the fateful day and around 12:15 she was in the company of her fellow congregants when she coincidentally noticed a man on top of a girl child raping her in the open field between a school and a house. She alerted her companions and they returned and went in the direction of the scene to inspect. The appellant stood up and pulled his trousers up as they were lying low on his legs and ran away when he noticed that the members of the congregation were drawing nearer. Her companions gave chase and one **N. M. (N.)** and one **T. M. (T.),** who were part of the congregation,

eventually caught up with him and brought him back to the scene. On her part she proceeded to the victim and found her lying supine with both her panty and pants on her legs. The appellant was dressed in a yellow ANC T-shirt, a grey jacket and brown pants. About four metres from the scene there was an unknown male person who was just standing there. The victim could not speak but was angry and trying to use her hands to say something to her. The victim pointed towards her (the victim) private parts and she helped her to dress up.

[9] N. and T., on their respective parts, testified under oath and confirmed the evidence of L. D. with regard to how she drew the congregants' attention to the rape. They further each testified that they only saw the appellant stand up from behind the high grass of about 1.5 metres and run away. They gave chase and eventually apprehended him some 60 metres from the scene after Nee tripped him. Although N. did lose sight of the appellant during the chase he eventually saw him and pursuit him until he caught up with him. T., on his part, never lost sight of the appellant from the moment he saw him emerge from the grass until he was apprehended. They brought the appellant back to the scene and members of the community assaulted him by hitting him with open hands and so did the victim. The police eventually arrived and took both the appellant and the victim away.

[10] The victim's mother **K. A. N.** testified under oath to, *inter alia,* the effect that she was doing washing when she left the victim to fetch some water from the tap. When she came back the victim was missing and she sent her son to go search for her. After a while she saw the victim in the police vehicle which was passing nearby and she stopped the same. The police, however, told her to get ready as they would come later to fetch her. She was, eventually, taken to the police station where she met the victim who made a report to her. She was allowed an opportunity by the police to inspect the victim. She found that the victim had been raped insofar as she bled from her private part and there was some grass thereon as well as at the back of her head. They were, thereafter, taken to the hospital where the victim was examined and given some treatment. The victim is mentally handicapped and cannot speak. After the incident the victim is afraid to walk in the street and she can, further, no longer go to the toilet alone which is a bit far from the house. The victim communicates with her by using her hands.

[11] In the medical report the doctor concluded, *inter alia,* that **"fresh tear in posterior fourchette and bruise to fossa navicularis suggest recent penetration/trauma to the area".**

[12] The psychologist deposed to an affidavit to, *inter alia,* the effect that she examined and evaluated the victim by a process requiring skill and competence in human behavioural science. That she established that the victim is mentally retarded and

functions intellectually on severe retardation level. That the victim is not capable of consenting to sexual intercourse and of understanding formal court processes.

[13] On his part police officer **Sello John Mokone** deposed to, *inter alia,* the effect that the appellant stated that he was walking with the victim and made a proposal. He placed his arm around the victim not realizing that she was mentally retarded. He deposed, further, that the appellant smelled of alcohol and when he stood up he noticed that "his belt was loose, his trousers and zip were completely open."

[14] It is true, as correctly found by the trial court, that the state's witnesses contradicted one another insofar as N. and T., *inter alia,* testified that the grass at the scene was 1.5 metres high while L., on her part, testified that the grass was 50 centimetres high. N. testified that the victim was lying prostrate while the version of T. and L. was to the effect that she was lying on her back after the appellant ran away. L. and N. testified that the victim's panty was on her legs while T.'s version was that it was lying beside her.

[15] I am, however, satisfied that the court below was correct in his finding that the contradictions in question were not material. The contradictions related to the scene of the crime as well as the condition in which the victim was found. It was, however, not in dispute that the victim was found where the state alleged she was

found. It was, further, not in dispute that the victim's mother inspected her at the police station and found that she was in fact raped. It was, furthermore, common cause between the parties that the doctor effectively opined in the medical report that carnal penetration did take place. It was, further, not in dispute that the victim could not consent to sexual intercourse.

[16] The issue to be decided by the trial court was whether or not carnal intercourse took place in that the victim was penetrated vaginally and if so, whether or not the appellant was the perpetrator. The contradictions did not relate to the said questions as effectively found by the trial court. They were, as such, not material to the dispute before the court a *quo*.

[17] The evidence of the victim's mother and the medical report as well as L.'s evidence with regard to what caused her to blow the whistle on the scene were sufficient to establish sexual penetration as the required *actus reus.*

[18] I am, further, satisfied that the identity of the appellant as the person who was caught *in flagrante delicto* was established beyond reasonable doubt insofar as N. and T. gave chase and apprehended him. Even though N. conceded that he at some stage lost sight of the appellant, I am satisfied that T. never lost sight of him and L. confirmed that the apprehended person was the same person she saw on top of the victim and the one who stood up and ran away. The admitted affidavit of Sella

J. M. also confirms the appellant's contact with the victim before his apprehension as well as the condition of his trousers after his apprehension.

[19] The appellant elected to exercise his constitutional right to silence in the face of all the damning evidence against him which clearly called out for some positive response from him. His choice had consequences and he must, therefore, stand or fall thereby. (See **S v Boesak** 2001 (1) SA 912 (CC) at par [24]).

[20] In my judgment the conviction cannot be faulted and stands to be confirmed insofar as there exists nothing before us to suggest that the factual findings of the trial court, its acceptance of oral evidence and conclusions thereon are demonstrably or clearly wrong.

[21] The powers of the court of appeal are limited as far as sentence is concerned insofar as it can only interfere with the sentence where the sentencing court failed to exercise its discretion properly or at all by, *inter alia,* failing to strike a healthy balance between the crime committed, the personal circumstances of the accused as well as the interests of society. (See **S v Pieters** 1987 (3) SA 717 (A)).

[22] In the instant matter the trial court was obliged to impose life imprisonment as the applicable prescribed minimum sentence

unless and until legal cause, in the form of substantial circumstances compelling a departure therefrom, was found to exist. Such cause exists where the cumulative impact of the accused's personal circumstances on aggravating circumstances, inclusive of the interests of the society, render such a sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 (SCA)).

[23] The personal circumstances of the appellant were before the trial court and it, *ex facie* the record, took same into consideration when it determined the appropriateness of life imprisonment as the prescribed minimum sentence. It is true, as correctly found by the court below, that the appellant had no remorse for his deeds and that the crime was indeed serious and degrading to say the least. The fact that the victim was so angry that she continued assaulting the appellant even after the arrival of the police only goes to show how bewildered and desperate the vulnerable victim felt. Her condition after the rape as testified to by her mother is, further, aggravating in the circumstances of the present matter.

[24] That the appellant spent some considerable time in custody awaiting finalization of the matter is one of the factors to be taken into account when the sentencing court considers the appropriateness or justness of the sentence to impose but is not, *per se,* substantial in nature to compel deviation from prescribed minimum sentences. (See **Radebe and Another v The State** 2013 (2) SACR 165 (SCA)).

[25] Mentally retarded people like the victim in the instant matter are so vulnerable to opportunistic predators such as the appellant that the legislature, in its wisdom, ordained life imprisonment as the minimum sentence for rapes committed against them so as to protect them.

[26] Having said all the above, I am, however, mindful of and persuaded by submissions by counsel on both sides that cause exists in the circumstances of the instant matter to deviate from life imprisonment as the prescribed minimum sentence regard being had to, *inter alia,* the scant information the trial court had before him insofar as there existed no victim assessment report detailing the impact the rape had on the victim, the fact that the victim did not sustain any serious physical injuries as well as the appellant's personal circumstances as a 36 years old family man who, according to the arresting officer's admitted statement, smelt of liquor and maintained that he was not aware of the victim's condition as a mentally retarded girl. (See **S v Mahomotsa** [2002) 3 All SA 534(A)).

[27] In the aforegoing regard the importance of placing as much information before the sentencing court as possible in respect of the perpetrator, the victim and the circumstances surrounding the crime has been stressed by the Supreme Court of Appeal. If the defence and prosecution fail to adduce relevant evidence the sentencing court is obliged to take steps to receive the same in order to determine whether there exists cause to deviate from

prescribed minimum sentences. In my opinion such a duty on the part of sentencing court is more pronounced where the accused stares life imprisonment in the eye. (See **S v Olivier** 2010(2) SACR 178 (SCA) *para* [8] and **Calvin v The State** [2014] ZASCA 145).

[28] To the extent that the trial court failed to ensure that all the relevant information was before him he misdirected himself materially by effectively depriving himself of the ability to assess the sentence properly and, thus, did not exercise his discretion properly. We are, as such, at large to interfere and consider the sentence afresh regard being had to the fact that the appellant was sentenced more than six months ago. To remit the matter to the trial court would, in my view, only serve to prejudice the appellant.

[29] In my judgment 20 years imprisonment is appropriate as a sentence in the present matter where the appellant's personal circumstances turn the scales in favour of a lesser sentence in circumstances where there is no evidence of serious physical and lasting emotional injuries on the victim. (See **Hlapho v S** (2015] ZAFSHC 68 and **S v Mahomotsa** *(s upra)).*

ORDER

[30] In the result the conviction is confirmed.

[31] The sentence is set aside and in its place and stead is substituted the following:

"The accused is sentenced to 20 years imprisonment in **terms of section 276(1)(b) of Criminal Procedure Act 51 of 1977."**

[32] The orders made in terms of section 50 of Act 32 of 2007 and section 103 of Act 60 of 2000 remain in place.

L.J. LEKALE, J

I concur

J.J. MHLAMBI, J

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

On behalf of respondent: Adv. CZ Nameka
Instructed by:
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