IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO.: CA 56/2014

In the matter between:

MODISAOTSILE DAVID MALAKEJE **APPLICANT**

And

THE STATE **RESPONDENT**

LEEUW JP & LANDMAN J

JUDGMENT

Landman J:

[1] Modisaotsile David Malakeje, the appellant, was convicted in the Regional Magistrate' Court of the rape of a 15 year old girl and sentenced to life imprisonment. He appeals against his conviction and sentence as provided for in section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

Conviction

[2] The first question which arises is whether the complainant reliably identified the appellant as the person who attacked and raped her. Her evidence is that she was in her room at about 19:00 on 3 November 2007 holding a lighted candle when the corrugated iron sheet which serves as a window was moved and fell down. The appellant entered, threw her to the ground, took of her skirt, undressed himself and raped her. She screamed but he threatened her with a knife and said that if she screamed he would stab her. She screamed and he cut or stabbed her on her upper arms, lower arms and also on her thighs. Then he said to her: 'I am now leaving. So think that you will see me again?' He then left. She went out of her bedroom and met her sister. They went to her neighbour N. But she was not home. They went to a house were a function was being held and met a man who inspected her wounds by means of a cellphone. She was bleeding at this stage. She also met up with Ms N M, her neighbour. She reported that she had been raped by R.

[3] It is common cause that the complainant and the appellant live in the same village. He knows her and she knows him. She had seen him earlier that

day. She described his clothing. She identified him by means of candlelight before it was extinguished. It is also common cause that Ms M knows the appellant.

[4] The appellant says he did not rape the complainant. He left the village at 07:00 on Saturday 3 November 2007 to go to S to visit his aunt. He left home alone. Later that afternoon around 17:00 his younger brother also arrived at his aunt's place and they spent the night there. He returned home alone on Sunday. He was arrested on the Monday. R is a nickname which Ms M gave him.

[5] The appellant's younger brother testified that his brother separately went to S on the Saturday. Under cross-examination, he said that he and the appellant went to his aunt's place on the Sunday, i.e. the day after the rape. Under further questioning he said he and the appellant slept at his aunt's place on the Saturday night. Importantly he testified that what he had told the court is what the appellant had instructed him to say.

[6] The learned Magistrate was satisfied that the complainant was a credible witness who made a favourable impression on the court. He warned himself about the rule relating to the evidence of a single witness. The learned Magistrate was also alert to the requirement that the evidence of identification must be reliable. The learned Magistrate says:

'It is common cause that she knew the accused before this incident, and although initially denied by the accused that he was known as R. Although it was dark in the room in which the incident occurred, the complainant had a candle in her hand, the accused approached her and blew out the candle when they were face-to-face. He was very close to her. Candlelight is sufficient to identify a person properly, especially in that close vicinity and especially also in the light that she knew the accused before this incident. She immediately after the incident informed N who the perpetrator was and she had also seen the accused earlier wearing the same clothes that he was wearing that night, so the court is satisfied that he can also rely on the identification of the complainant that the accused is the perpetrator.'

[7] Even though the learned Magistrate was satisfied as regards the evidence of the complainant, it was necessary to consider whether the accused's evidence was reasonably possibly true. Clearly his *alibi* was false. His own brother contradicts him and moreover his brother says that the appellant told him what to say.

[8] I am satisfied that there are no grounds to interfere with the conviction of the appellant.

Sentence

[9] The charge sheet does not refer to the minimum sentence legislation. However, some months prior to the trial; the learned Magistrate advised the appellant to seek to the legal representation on account of the seriousness of the offence and explained that the minimum sentence for rape was life imprisonment. The appellant said that he understood this explanation and that he elected to conduct his own defence. But changed his mind and he was represented at his trial by a legal representative.

[10] I am satisfied that although the charge sheet did not refer to the minimum sentence that the appellant was made aware that a sentence of life imprisonment could be imposed and that he had taken the warning to heart and secured the services of a legal representative. See **S v Ndlovu** 2003 (1) SACR 331 (SCA) at para 12 where it was held that:

> *'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least*

be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

[11] Mr Nkhahle, who appeared on the half of the appellant, submitted that the sentence of life imprisonment was too harsh as it was disproportionate to the crime, interests of society and the personal profile of the offender. See **S v Malgas** 2001 (1) SACR 469 (SCA) at 741.

[12] The appellant's personal circumstances are the following:

- He was 49 years of age;
- He was a first offender;
- He did a meaningful odd jobs as a bricklayer; and
- His girlfriend and child have passed on.

[13] The crime was committed against a 15-year-old girl in her bedroom after the appellant gained entry by removing the corrugated iron sheet. The appellant was armed with a knife which he used to cut or stab the complainant on her arms and thighs when she screamed.

[14] Society has an interest in such matters as, our society believes that young girls should be protected and feel safe in their homes and that rape is a

serious violation of their bodily integrity, which causes, at the very least, pain, emotional distress and anxiety.

[15] Taking all these factors into account I am of the opinion that the learned Magistrate was correct to conclude that they were in no substantial and compelling circumstances present. The sentence of life imprisonment is not disproportionate in the circumstances.

Order

[16] In the premises I make the following order:

The appeal against conviction and sentence is dismissed and the conviction and sentence are confirmed.

AA Landman

Judge of the High Court

I agree

MM Leeuw

Judge President of the high Court

APPEARANCES:

DATE OF HEARING	:	22 APRIL 2016
DATE OF JUDGMENT	:	9 JUNE 2016
COUNSEL FOR THE APPELLANT	:	ADV. NKHAHLE
ATTORNEYS FOR THE APPELLANT	:	MAFIKENG JUSTICE CENTRE
COUNSEL FOR THE RESPONDENT	:	ADV. MOETAESI
ATTORNEYS FOR THE RESPONDENT	:	THE DIRECTOR OF PUBLIC PROSECUTIONS