



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

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

Case No: 69/2021

In the matter between: -

THE STATE

and

MPHO ELIAS NIKIKANA

ACCUSED

CORAM: MATHEBULA, J

HEARD ON: 7, 8 & 9 MARCH 2022

DELIVERED ON: 09 & 10 MARCH 2022

Introduction and Plea

[1] This is a sordid tale of a father's conduct towards his girl child. The accused, a Lesotho national, brought his young family to the Republic probably for better prospects in life, only to make it a living hell for an

innocent fourteen (14) year old. Once here, he wasted no time to violate the person of her eldest daughter in every conceivable manner.

- [2] The accused is arraigned on a plethora of charges to *wit* rape, attempted rape and assault. They are nine (9) in total. On eight (8) charges, the complainant is her eldest daughter M[....] N[....]. Only on one (1) charge, the complainant is his wife M[....] N[....].
- [3] It was not an easy task to understand the plea entered by the accused. Initially he pleaded guilty to charge 1 and 2 and not guilty on the rest of the charges. After I gave him an opportunity to consult with the defence counsel and I had broached the issues with him, it became apparent that he was not admitting all elements of the offences stipulated on the charges. In terms of section 113 of Act 51 of 1977, I entered a plea of not guilty on his behalf.

Evidence

- [4] The first state witness namely Mabakoena Nkikana took to the stand and testified as follows. She is the elder sister of the accused and a traditional healer. She stays just two (2) houses from them and was also a regular visitor at their house.
- [5] On 26 July 2021 she paid them a visit as always. She asked the accused and his wife (M[....]) why the complainant looked thin. The accused answered that its because she was pepper sprayed by the police. After sometime the accused left to go buy cigarettes at the shop.
- [6] She persisted with her questions to his wife. After some persuasion, M[....] told her that she is being abused sexually by the accused. Apparently this matter was kept under wraps because the accused had told them that he will kill them should they divulge the details to any person. At all times the complainant was within earshot and she cried when this subject was discussed.

- [7] It seems that the main reason why he did that, is because he had dreamt that the complainant was plagued by a “Thokolosi”. In order to exorcise it, he had to engage in sexual intercourse with the complainant (his daughter). This was some form of cleansing her. The complainant confirmed to her that they had sexual intercourse. She correctly reported the matter to the local police.
- [8] The complainant testified and confirmed engaging in sexual intercourse with the accused. M[...] confirmed being aware of one occasion that it occurred. After the accused was arrested, the complainant confirmed that it happened six (6) times. These occurred without her consent and only after the accused had coerced her into submission. All the sexual acts took place in their shack in the company of her stepmother and siblings. The stepmother was aware that the accused was performing these acts on her.
- [9] The complainant gave details with clear particularity about how each incident took place. On the first occasion, which occurred in May 2021, the accused put on a condom before inserting his manhood into her. A week later, he had unprotected sexual intercourse with her for the first time. She attempted to resist but it was quelled by assault and strangulation.
- [10] The third and fourth incidents also took place marred by assaults when she resisted. Incidentally, these are the two (2) sexual acts that the accused admitted to. In the light of this admission, there is no need for further discussion.
- [11] On one occasion he was on top of the complainant assaulting and even calling her a bitch when he was interrupted by his brother. He even assaulted her. The last incident occurred on 25 July 2021, a day before the matter was reported to the police. Again, he waited until the wife and all the children were asleep. He took them to the bed and surreptitiously

slid under the blankets of the complainant. Again, he had sexual intercourse with her. This in the nutshell is her evidence.

- [12] Sergeant Moeketsi Thabana, the investigating officer, testified that she reduced the statement of M[....] N[....] to writing. This is the document that was handed in as exhibit "D". Mabohlokoa has gone to ground and despite diligent search he has been unable to locate her. Apparently, she has returned to the Kingdom of Lesotho.
- [13] The accused testified in his defence and outrightly admitted to two (2) acts of sexual misconduct. These occurred as a result of excessive intake of alcoholic beverages. On both occasions, words escape him in his quest to describe his deviant behaviour. On all others he simply denied the version of the complainant.

Evaluation of Evidence

- [14] When all is said and done, the court must look at all evidence to make a determination whether the State has proved its case beyond reasonable doubt. The correct approach of evaluating evidence was succinctly laid out in **S v Chabalala 2003 (1) SACR 134 (SCA)** at 139I-J. There the court said that all elements that point towards the guilt of the accused must be weighed against those that are indicative of his innocence. This means that proper accharge must be taken of inherent strengths and weaknesses, probabilities and improbabilities on both sides. The essence is that evidence must be considered in totality.
- [15] I take cognisance of the fact that the State relied on the evidence of a single witness to prove its case. Furthermore, this is also the evidence of a child which has its inherent dangers. It is trite in our law that a person may be convicted on the evidence of a single witness if it is material in all respects. I deem the evidence for the State to be such evidence.

- [16] The complainant gave her evidence with clarity and absolute chronological order of the events. She was resolute and never deviated from her version. Cross examination did not reveal much and she did not depart from her evidence in chief. Importantly, the fact that the accused had sexual intercourse with her is corroborated by clinical findings on exhibit "B". Nevertheless, the accused himself admit to two (2) incidents of sexual intercourse with her. I must point out that the admission is very dodgy. It is not consistent with evidence led. Initially he admitted to charges one (1) and two (2). Later he recanted and referred to charges 3 and 4. His evidence point to charges 5 and 6. Clearly, he was concocting a version.
- [17] The complainant testified about a particular *modus operandi* employed by the accused to sexually violate her. I alluded to it in the summary of the evidence in the preceding paragraphs. On the probabilities, I came to the conclusion that the accused did have sexual intercourse with the complainant on other occasions that she described instead of the only two (2) that he admit to. Obviously, it serves him better to admit to two (2) instead of six (6).
- [18] The accused was a woeful, pathetic and pitiless liar. He did not put up any version. In any event it is not in accordance with our law that he must prove his innocence. His version must simply be reasonably possibly true. However, in the face of such formidable evidence, the accused is duty bound to place his defence before court. On occasions where he proffered a version, he kept on changing it. It is safe to conclude that his version is rejected as not reasonably possibly true.
- [19] Before concluding, I broached the subject of possible duplication of charges to both counsel. This concern stems from charges number six (6) attempted rape and seven (7) assault. The evidence is simply the following. The accused assaulted the complainant with open hands and even called her a bitch. Thereafter he pinned her down. There is no evidence to the effect that he did anything else beyond these two (2)

incidents. As state counsel, correctly conceded, there is no cogent evidence to prove the offence alleged on charge six (6).

[20] It is my considered opinion that in the main the State has proved its case beyond reasonable doubt on all charges bar two (2).

Order

[21] I make the following order: -

21.1. The accused is found guilty of charges one (1), two (2), three (3), four (4), five (5), seven (7) and eight (8).

21.2. The accused is found not guilty on charges six (6) and nine (9).

Sentence

[22] The accused has been found guilty of five (5) charges that attract the minimum sentence of life imprisonment. I can only deviate from imposing these sentences if there are substantial and compelling circumstances. These comprise of any factor either examined individually or cumulatively with others. This is the law. The Supreme Court of Appeal has cautioned that the trial court should not deviate from imposing the prescribed minimum sentence for flimsy reason(s).

[23] It is settled law that our courts, in determining the appropriate sentence, should consider the gravity of the offence, the circumstances of the offender and public interest.¹ I must mention that although sentencing is primarily within the discretion of the trial court, such is limited in matters where the minimum sentence regime is applicable.

[24] The personal circumstances of the accused were presented as follows. He is thirty-seven (37) years old, married with four (4) children aged

¹ See S v Zinn 1969 (2) SA 537 (A).

twenty (20), fifteen (15), seven (7) and four (4). The eldest one is a major and stays on the farm with a relative. The complainant is cared for by her aunt. The other two (2) are under the custody and care of their mother probably in the Kingdom of Lesotho. This means that he is not a primary care giver of any child. His highest scholastic achievement is Grade 3. He has one previous conviction of stock theft dating back to 2011. He eked out a living by doing odd jobs and selling vegetables.

[25] There is nothing outstanding about his personal circumstances whether they are considered individually or cumulatively. Indeed, he repeated a few times that he is remorseful of what he has done. However, few sentences down the road, he will recant and give a different version. Despite conviction on four (4) more charges than those that he admitted, he insisted on his innocence. There can be no talk of remorse in such circumstances. This is only a ploy to gain unwarranted leniency. He is requesting this court to warn him and not to impose custodial sentence. His only concern is his own skin and nothing about those that he had wronged.

[26] The crime of rape is by its very nature a heinous one. It rips apart the soul of the victim and strips her bare. What is more aggravating in this matter is that it was perpetrated by a father. He who was supposed to give love, protection and comfort to someone who regarded him as her first love. It happened in the sanctity of the home. The accused kept her daughter as a sex slave isolated from her peers from enjoying her youth. The accused is a cruel masochist who satisfied his weird sexual desires on a defenceless and vulnerable child under the guise of culture. I am not aware of any African culture that practices acts of moral turpitude. Instead, it is expected of him to show ubuntu to women and children alike. Had it not been for the timely intervention by the aunt, he could still be at it. As the complainant testified, he wanted to impregnate her. I can think of nothing that is so distasteful and abhorrent.

- [27] This is a gruesome offence and this society looks up to the courts to protect women and children from sexual predators as the accused. It is a fact that sentences imposed by courts do result in public outcry either as lenient or hard. However, it is expected by this society that the accused and his ilk must be given long and hard sentences. I am mindful of the fact that whatever sentence is imposed, it should not be designed to break him.
- [28] I have looked at all factors and concluded that there is no justification to deviate from imposing the minimum sentence. This matter is a textbook example where courts should send a strong message to all that such behaviour is intolerable. Those who prey on the weak and vulnerable must feel the wrath of the law.
- [29] The appropriate sentence is the following: -
- 29.1. Charge 1 – Rape – Life imprisonment
 - 29.2. Charge 2 – Rape – Life imprisonment
 - 29.3. Charge 3 – Rape – Life imprisonment
 - 29.4. Charge 4 – Rape – Life imprisonment
 - 29.5. Charge 5 – Rape – Life imprisonment
 - 29.6. Charge 7 – Assault – Two (2) years imprisonment
 - 29.7. Charge 8 – Rape – Life imprisonment
 - 29.8. It is ordered that sentences on charges 2, 3, 4, 5, 7 and 8 will run concurrently with the sentence on charge 1.

M.A. MATHEBULA, J

For the State: Adv MMM Moroka
Instructed by: Director of Public Prosecutions
BLOEMFONTEIN

For the accused: Mr P Mokoena
Instructed by: Legal Aid Board
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