



IN THE NORTH WEST HIGH COURT, MAFIKENG

CA 22/12

In the matter between:

JOHN LUCKYBOY TSIPANE

Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

HENDRICKS J; KGOELE J

DATE OF HEARING : 22 FEBRUARY 2013

DATE OF JUDGMENT : 01 MARCH 2013

COUNSEL FOR THE APPELLANT : MR NKOSI

COUNSEL FOR THE RESPONDENT : ADV RASAKANYA

JUDGMENT

HENDRICKS J

[A] Introduction:-

- [1] The Appellant was arraigned before the Regional Court, Taung and charged with housebreaking with intent to rape and rape as well as four further charges of rape. He was convicted on all five counts and sentenced to life imprisonment as all five counts were taken as one for the purpose of sentence.

The Appellant now appeals, with the leave of the court *a quo*, the conviction as well as the sentence.

[B] The Merits

- [2] It is alleged that the Appellant broke into the house of Kolobetso Letta Chelechele on the evening of the 26th March 2011 and raped her on five different occasions during that evening in different rooms and at an adjacent house. The different occasions of sexual penetration constitute the different counts of rape against the Appellant. The Appellant who pleaded not guilty to all the charges levelled against him, stated in his plea explanation that as far as count 1 is concerned, he did not break into the said house but that the complainant opened for him after he had knocked. The sexual encounters which form the basis of counts 1 and 2 were consensual. Count 3, 4 and 5 were bare denials.
- [3] It is common cause that the Appellant and the complainant are related to another in that complainant's mother and Appellant's

mother are sisters. At times the Appellant would visit at the complainant's house and even stay over. According to the complainant, on the evening in question, she heard a sound at the window and realized that someone was entering the house. She screamed but nobody came to her assistance. Whilst shouting, the Appellant called her name and identified himself. She confronted him for entering through the window and he replied by saying that he knocked but she did not open for him. She prepared a bed for him. On her way back to her room, he struck her on her head with a stone, and she sustained an open wound. She fell and he dragged her to her mother's bedroom. He threw her onto the bed and undressed her. He also undressed himself and had sexual intercourse with her.

[4] Thereafter, he took her to her grandmother's house, a separate house situated nearby. He opened the door and they went inside. He took her to her uncle's bedroom where he again had sex with her. Thereafter, he took her to her grandmother's bedroom where he caused her to lie on her stomach and had sex with her. After that he caused her to stand in a bending position towards the bed and had sex with her. Lastly, he caused her to stand against the wall and had sex with her in that position. He left at 05h00 the following morning.

[5] After he had left, she went and sat outside the house with her two minor children aged 4 and 2 years respectfully. A neighbour Boikie Moepeng walked passed her. She called him and made a report to him about the rape.

- [6] Her evidence in this regard is corroborated in material respects by Boikie Moepeng, who observed that the complainant was frightened and had an open wound on her head.
- [7] In contrast to the evidence tendered on behalf of the State, is the evidence of the Appellant who testified that he had a secret love relationship with the complainant because she was involved with someone else. On the evening in question, he knocked and she opened the door for him. She invited him into her mother's bedroom because she did not want to have sexual intercourse with him in front of her children. They had two sexual encounters after which she prepared food for him. There was a knock on the door and one Tumisang entered. The complainant said that they should go to her grandmother's house because Tumisang sleeps in the room in which they were. They then left. She went to the first house because the child was crying and he slept at her grandmother's house. The following morning at 05h00 he woke her up and told her that he is leaving.
- [8] It is not in dispute that the Appellant was at the complainant's house on the evening in question. Furthermore, that he had sexual intercourse with the complainant on more than one occasion (twice on his version). What is in dispute however is whether the Appellant broke into the house and whether the sexual intercourse was consensual.
- [9] The learned Regional Magistrate, in his carefully reasoned judgment, dealt comprehensively with the probabilities and improbabilities as well as the discrepancies that are evident in the

evidence tendered on behalf of the State. His reasoning cannot be faulted.

[10] A crucial aspect that needs to be emphasized is the injury that the complainant sustained on her head. Her explanation that the Appellant hit her with a brick or a stone is corroborated by Boikie Moepeng, who saw the laceration on her head. If indeed, there was a love relationship between them, why did the Appellant (on the version of the complainant), assaulted her so severely and on top of it all had consensual sexual intercourse with her? This is, to say the least, mindboggling.

[11] Furthermore, according to the Appellant, Tumisang showed up and they had to vacate his bedroom. This is not so, according to Tumisang, and serves to lend credence to the evidence of the complainant, that it never happened that way. Tumisang's evidence was unchallenged by the Appellant.

[12] I am satisfied that the conviction is in order and should be confirmed. The appeal against conviction should be dismissed.

[C] The Sentence:-

[13] Sentence is primarily in the discretion of a trial court and a court of appeal will not lightly interfere with the sentence imposed by a trial court. A court of appeal will only interfere if there is a material misdirection on the part of the trial court or where the sentence imposed is shockingly severe and totally disproportioned to the crime committed.

See:- **S v Kgosimore** 1999 (2) SACR 238 (SCA);
 S v Malgas 2001 (1) SACR 469 (SCA).

[14] It is submitted on behalf of the Appellant that the sentence of life imprisonment is “*unduly harsh and excessively long*”.

[15] The following personal circumstances were placed on record:-

- Appellant is 31 years of age;
- he was unemployed;
- he is unmarried;
- he has no dependants;
- he enjoys good health;
- he attended school up until Standard 7;
- he is not a first offender because he has relevant previous convictions of rape and malicious damage to property. For the rape, he was sentenced to 15 years imprisonment on 16 May 2002 and for the malicious damage to property he was sentenced to a fine of R1 000.00 or four months imprisonment on 31 March 2009. He was released on parole on 11 February 2011 to expire on 14 March 2017. These offences were committed on 26 March 2011, one and a half months (six weeks) after being released on parole.

[16] Counsel for the Appellant, quite correctly in my view, conceded that it cannot be submitted with a clear conscience that the trial court misdirected itself, but however contended that the sentence

of life imprisonment goes beyond what he considers to be an appropriate sentence of between 20 and 22 years.

[17] It is trite law that a court of appeal will not merely substitute a sentence imposed by a trial court because it would have imposed a different sentence had it be the trial court.

[18] Having regard to the personal circumstances of the Appellant, the nature and the seriousness of the offences of which he is convicted, the interest of society as well as the interest of the complainant – and in particular the position of trust and familiarity, I am of the view that the sentence imposed is indeed appropriate under the circumstances of this case, and should be confirmed. I am astutely aware of the *dictum* in **S v Matyityi** 2011 (1) SACR 40 (SCA) in which it was emphasized that High Courts (and may I add also Regional Courts) should not deviate from imposing life imprisonment were it is so ordained by the legislature, for the flimsiest of reasons.

[D] Conclusion:-

[19] Consequently, I am of the view that the appeal against both the conviction as well as the sentence should fail.

[E] Order:-

[20] Therefore, the following order is made:-

[i] The appeal against conviction and sentence is dismissed.

[ii] The conviction and sentence are confirmed.

**R D HENDRICKS
JUDGE OF THE HIGH COURT**

I agree.

**A M KGOELE
JUDGE OF THE HIGH COURT**

