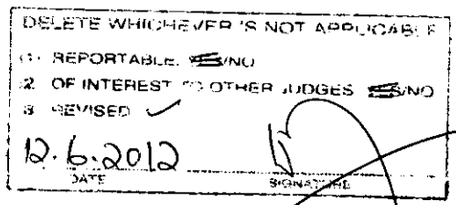
PN

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)



CASE NO: A854/11

13/6/2012

In the matter between

LUCAS CHOCHOE	**APPELLANT**
VS	
THE STATE	**RESPONDENT**

JUDGMENT

MSIMEKI, J

[1] On 8 May 2003 the Appellant stood trial in the Regional Court, Klerksdorp on one count of rape and one count of malicious injury to property. Duly represented, he pleaded not guilty to the charge of rape and guilty to the charge of malicious injury to property. A statement in terms of section 112 (2) of the Criminal Procedure Act no. 51 of 1977 ('the

CPA') which was tendered on behalf of the accused, was read into the court record.

[2] On 16 June 2003 the appellant was convicted as charged and the matter, in terms of section 52 (1) of Act 105 of 1997, was referred to the High Court for sentence.

[3] On 8 March 2004 the matter served before Shongwe J who confirmed the conviction after he found that the proceedings in the court *a quo* had been in accordance with justice.

[4] The High Court (The Western Circuit Division sitting in Potchefstroom) on the same day sentenced the Appellant on the charge of rape to life imprisonment and to a fine of R1.000.00 or six(6) months imprisonment on the charge of malicious injury to property.

[5] On 23 July 2010 the Supreme Court of Appeal granted leave to appeal against the conviction and sentence after same had been refused.

[6] This court condoned the late filing of the Heads of Argument by the Appellant. The application was not opposed.

[7] The rape charge, the subject matter of the appeal, was formulated by the state as follows:

"Dat die beskuldigde skuldig is aan die misdaad VERKRAGTING.

Deurdat op of omtrent die 10 (sic) dag van Augustus 2002 en te of naby Jouberton in die streekafdeling Suid Transvaal die beskuldigde wederregtelik en opsetlik met Regina Moleleki (n volwasse vrou) teen haar sin en wil met haar vleeslike gemeenskap gehad het".

[8] The annexure to the charge sheet makes no reference to the fact that section 51(1) of Act 105 of 1997 applies to the charge nor that the charges should be read together with section 51(1) of Act 105 of 1997. (See page 16 of the court record)

[9] The Appellant's appeal is based on the following grounds:

1. That the court *a quo* erred when it found that:

   1.1 The state had proved the guilt of the Appellant beyond a reasonable doubt.

   1.2 The state's version did not have improbabilities.

   1.3 The state witnesses had been satisfactory witnesses.

   1.4 The evidence of the state witnesses could be criticised on matters of detail only while same had been contradictory.

   1.5 The differences in the Appellant's evidence and that of his witness justified the rejection of the Appellant's evidence.

2. In convicting the Appellant the court *a quo* erred in not properly analysing or evaluating the evidence of state witnesses and properly considering the improbabilities inherent in the state's version.

3. That the court *a quo* erred:

3.1 When it rejected the Appellant's evidence and holding that it was not reasonably possibly true.

3.2 When it accepted the evidence of the state witnesses.

3.3 When it held against the Appellant contradictions between his evidence and what was put to witnesses in cross examination.

3.4 When it blamed the Appellant for issues which were not put to witnesses.

3.5 When it gave importance to minor discrepancies in evidence of the defence witnesses.

[10] The Appeal against sentence was based on:

1. The fact that the effective term of life imprisonment was out of proportion to the totality of the accepted facts in mitigation and the fact that the period of time which the Appellant spent in custody awaiting trial had been disregarded.

2. The absence of previous convictions, the absence of planning, the age and personal circumstances of the

Appellant, the rehabilitation element and the mitigation factors which, according to the Appellant, ought to have influenced the Court *a quo* to impose a shorter term of imprisonment coupled with community service and/or a further suspended sentence.

3. The fact that the court *a quo* erred in overemphasising the seriousness of the offence, the interests of society, the prevalence of the offence, the deterrent effect of the sentence and the retributive element of sentencing.

[11] A point *in limine* was taken on behalf of the Appellant by Mr. Mojuto in respect of the sentence of life imprisonment. He submitted that the Appellant was not supposed to have been sentenced in terms of Section 51(1) of Act 105 of 1997 as he had been charged with rape under common law and that he ought to have been sentenced as charged. This submission, for the reasons I shall give later, in my view, is correct and has merit.

[12] Section 35(3) (a) of Act 108 of 1996 (The Constitution of the Republic of South Africa) provides:

> ***"(3) Every accused person has a right to a fair trial which includes the right -***
>
> ***(a) to be informed of the charge with sufficient detail to answer it;"***

[13] Lewis JA in ***S v Makatu 2006 (2) SACR 582 (SCA) at 587 paragraph [7]*** said:

> ***"As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to***

testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice." **See also *S v Legoa 2003 (1) SACR 13 (SCA)* and *S v Ndlovu 2003 (1) SACR 331 (SCA).***

[14] The court *a quo* in pronouncing the verdict on count number 1 said:

> ***"SKULDIG BEVIND SOOS AANGEKLA OP DAARDIE KLAGTE"***
>
> (See page 71 – court record)

The Appellant, indeed, was not made aware of the application of the minimum sentence Act or the state's intention to rely on the Act. This was at no stage done either by the state or the court *a quo* itself. The only time this became apparent was when the matter was referred for sentence in terms of Section 52(1) of Act 105 of 1997. This is borne out by the correspondence between the DPP'S office and the office of the

Regional Magistrate as is evident from their letters dated 28 July 2003, 8 September 2003 and 14 January 2004 respectively. Sight, at this point in time, was lost by both the state and the Court *a quo* that the charge had not been in terms of Section 51 (1) of Act 105 of 1997.

[15] Although the Appellant faced a very serious charge he nevertheless was at no stage informed of the implication and consequences of the charge that he faced. No intention to rely on the minimum sentence's Act was ever communicated to him be it by way of the annexure to the charge sheet or an explanation or intimation by either the court or the state. To do that at sentence stage as ***State v Makatu*** (supra) has shown was wrong and improper. This indeed amounted to a misdirection. (See also **Mashinini v The State 50/11[2012] ZASCA 1 (21 February 2012)**

FACTS OF THE CASE AND CONVICTION

[16] The complainant's testimony is that she on 10 August 2002 visited her boyfriend Tebogo Masinya who lived at a hostel in Jouberton. While preparing to sleep they heard stones being thrown at the windows. Upon investigation, the boyfriend saw a person coming into their room having a jacket pulled over his head. This man, later identified as the Appellant, said he was looking for his wife. He grabbed the complainant and pulled her outside. The Appellant assaulted her by hitting her with a fist, open hands and strangling her. She could not scream. He took her to an open veld where he raped her twice. There he covered her mouth with his hand while strangling her. The Appellant threatened to kill her after raping her. She pleaded with him not to and he then suggested that they go together to his home where he would lie to his wife telling her that he had found the complainant assaulted and abandoned next to a road. They used a taxi to go to his home where he, indeed, lied to his wife as he had suggested. The Appellant at his home washed the blood from her face and proceeded outside to throw away the water that

was used to wash the blood. While the Appellant was outside the complainant told the Appellant's wife the truth of what had happened and that the Appellant had raped her. She spent the night in their house and reported the matter to the police the following morning and thereafter saw a doctor.

The complainant, under cross examination, conceded that she had been in love with the Appellant and that a child aged 13, at the time, was born out of their relationship. They were, however, no longer in love at the time of the incident. This was later confirmed by the Appellant's wife when she testified. She testified that the Appellant took her while she was only clad in her night gown and without her shoes. The Appellant spoke in Zulu saying that he had wanted his wife. The boyfriend did not say anything when she was taken away. She went away with the Appellant because she had been afraid of him. She later told her boyfriend that she had laid a charge against the Appellant.

[17] The complainant's testimony is corroborated by that of her witness, the boyfriend. He confirmed that the windows were broken; that the Appellant spoke in Zulu; that the Appellant indicated that he had been looking for his wife; that he opened the door and saw this man, later indentified as the Appellant, with a jacket pulled over his head; that the Appellant grabbed the complainant and pulled her outside; that he did not follow them; that the complainant had told him that she and the Appellant had been in love in the past; that he had only seen her in the morning and that the complainant had been wearing a night dress with no shoes on when she was taken away.

The appellant in his testimony confirmed that he had broken the windows of the room in the hostel; that he had slapped her twice; that he had taken the complainant to his house; that his wife was present in the house; that the complainant had a laceration on her lip and that he could have caused that; that the complainant slept in their house and only left in the morning. The Appellant's wife confirmed in her testimony that indeed the Appellant had arrived in the night in the

company of the complainant who put up with them for the night and that the Appellant and the complainant were no longer in love when the Appellant brought her to their house.

[18] The Appellant denied that he raped the complainant. According to him the complainant voluntarily accompanied him to his house. He denied that the complainant had no shoes on. His explanation for taking the complainant to his home was that he had wanted to remove her from the boyfriend. He denied that the complainant was bleeding and that she had washed the blood from her face. He denied taking the complainant to the veld. The Appellant's wife called as a witness, denied that the complainant had been bleeding. She testified that she had never asked the Appellant why he had brought the complainant to their home and denied that the complainant had the injuries that she said she had sustained.

[19] The court *a quo,* correctly in my view, when analysing the evidence found that the Appellant's version and that of his

wife had been tainted with improbabilities. The Appellant testified that he had hit the complainant twice with an open hand while the J88 which was accepted by agreement between the parties had shown that the complainant had more injuries than those disclosed by the Appellant. He could not explain how the complainant had received the injuries. He, however, ended up conceding, under cross examination, that some injuries could have been caused by him. He in fact contradicted himself on the aspect. It is indeed improbable that the complainant had voluntarily accompanied him when it was necessary for him to assault her. It is also improbable that he merely intended to remove the complainant from the boyfriend if they, at the time, had not been in a love relationship.

[20] It is also highly improbable that the Appellant's wife would not have wanted to know why the complainant was brought to their home. The wife, clearly, was not a truthful witness. She merely defended the husband. It is indeed improbable that she did not see the complainants' injuries that the complainant testified about. The J88 clearly demonstrates

that the complainant was injured and possibly raped. The Appellant and the wife contradicted each other. For instance, the love relationship between the Appellant and the complainant, according to the Appellant's wife, was over when the complainant was taken to their home. The Appellant testified that he and the complainant at the time, were still in love. The Appellant's version regarding how the complainant was injured was never put to the state witnesses. The Appellant's wife testified that she never spoke to the complainant, yet she testified that she directed the complainant to where the complainant was to sleep for the night.

[21] The complainant's boyfriend was afraid of the Appellant because he spoke in Zulu. This is borne out by his not wanting to get involved when the complainant was removed from the hostel. The court *a quo* was alive to the contradictions between the complainant's evidence and that of the boyfriend. The discrepancies are indeed immaterial. The court *a quo,* in my view, correctly rejected the defence's version and preferred that of the state.

[22] A number of important issues were not put to the state witnesses. These are *inter alia*: that the door at the hostel was not opened when the Appellant knocked; that the Appellant washed the complainant's blood from her face; that he strangled her and that he caused her to lie down in the veld when he wanted to have sexual intercourse with her. The fact that the Appellant's wife provided the complainant with clothing was also never put to the complainant. The court *a quo* was indeed correct in levelling the criticism as it did.

[23] The court *a quo* appears to have considered the evidence in its entirety and made the correct and necessary findings. An appeal court is slow to tamper with the factual findings of the court *a quo* unless they are shown to be clearly wrong. (See ***Koopman v S 2005(1) All SA 539 (SCA) at 539 (head note)*** and ***R v Dhlumayo and Another 1948(2) SA 677 (AD)*** at 706).

The appeal against conviction, in my view, should fail.

SENTENCE

[24] I have already shown that there was a misdirection when the matter was referred to the High Court for sentence as the court *a quo* had clearly convicted the Appellant "as charged". The court *a quo* ought to have sentenced the Appellant accordingly. The need to even refer to the minimum sentences Act ought not to have arisen.

[25] This court is, therefore, at large to consider the issue of sentence afresh.

[26] The mitigating circumstances in favour of the Appellant were given as follows:

The Appellant was 42 years old when he committed the offence. He had a love relationship with the complainant which resulted in the birth of their 13 year old son (when the Appellant was sentenced). He was a first offender. The complainant did not appear to have sustained serious injuries other than the injuries on her forehead which was also

swollen up. No injuries associated with penetration were proved. He, at the time of the sentence, appeared to have been in custody for 18 months awaiting trial.

[27] The sentence of life imprisonment on count 1, in my view, was unwarranted. This court must alter the sentence which must be in line with the conviction and the circumstances of the case. Having regard to the circumstances of the case, a sentence of 10 years imprisonment, in my view, appears to be an appropriate sentence. The sentence must be antedated to the date of sentence.

[28] I would, in the result, make the following order:

1. The conviction on count 1 is confirmed.
2. The sentence of life imprisonment on count 1 is set aside and replaced with the following sentence:

   'The accused is sentenced to 10 years imprisonment'.
3. The sentence is antedated to 08 March 2004.
4. The conviction and sentence on count 2 are confirmed.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree.

A. M. L. PHATUDI

JUDGE OF THE HIGH COURT

I agree.

And it is so ordered.

W. R. C. PRINSLOO

JUDGE OF THE HIGH COURT

Heard on: 09 May 2012
For the: Appellant: Adv. M. J. Mojuto
Instructed by: The Legal Aid Board
For the Respondent: Adv. M. J. Van Vuuren (Ms)
Instructed by: The Director of Public Prosecutions
Judgment delivered on: 13/06/2012