IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***Yes***

Date: ***16th November 2017*** Signature: _____

APPEAL CASE NO: A331/2012 & A208/2016

COURT *A QUO* CASE NO: 10/2/5/1 – 2016/314

DATE: 16th November 2017

In the matter between:

SELEKA: WILLY First Appellant

SEJONG: MOSES Second Appellant

- and -

THE STATE Respondent

JUDGMENT

ADAMS J:

[1]. This is an appeal by the first and second appellants against their convictions and sentences. The two appellants, who were legally represented during the trial, were respectively accused 1 and 2 in the court *a quo*, being the Randburg Magistrates Court for the Gauteng North Regional Division (Regional Magistrate Muller). Both pleaded not guilty to both charges against them. On the 25th of July 2008 the appellants were convicted of rape, read with the provisions of s 51 of the Criminal Law Amendment Act, 105 of 1977 ('the CLAA'), and robbery with aggravating circumstances, also read with the provisions of s 51 of the CLAA. On the 20th March 2008 both appellants were each sentenced to life imprisonment on the rape charge and to 15 years imprisonment in respect of the charge of armed robbery. The sentences were ordered to run concurrently, and the appellants were effectively each sentenced to life imprisonment.

[2]. In terms of s 309(1)(a) of the Criminal Procedure Act, 51 of 1977 ('the Act'), the appellants, who were both sentenced to imprisonment for life by the regional court under section 51(1) of the Criminal Law Amendment Act, 105 of 1997, have the right to and did in fact note an appeal without having to apply for leave in terms of section 309B. This appeal is therefore in terms of the provisions of the aforementioned s 309(1)(a) of the Act.

[3]. Throughout their trial in the Magistrates Court both appellants were legally represented by Mr S Sithole, who was instructed by Legal Aid South Africa. In the appeal, the appellants are represented by Ms Britz, and they adopted a line of attack concerned more with the condition of the record of the proceedings in the trial court than with the merits of the appellants' convictions by that court and the sentences imposed.

[4]. On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. In that regard, see *S v Chabedi,* 2005 (1) SACR 415 (SCA).

[5]. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends *inter alia* on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.

[6]. As to the defects in the record under consideration, the whole of the record of the proceedings in the Magistrates Court had to be reconstructed, excepting only the proceedings relating to the sentencing of the appellants. Copies of the charge sheets and all of the exhibits handed up during the trial and received into evidence were also still available. The importance of the exhibits, which were handed up by consent of the appellants and the contents of which were in the main not disputed, become apparent infra, when I discuss the issues to be decided on appeal. The address in aggravation of sentence by the State Prosecutor and the address in mitigation by the defence attorney were mechanically recorded and duly transcribed and it formed part of the record, as was the very brief Judgment on sentence by the Magistrate. As for the rest of the proceedings, my understanding is that the tapes and / or the mechanical recordings could not be found and can and should be regarded as untraceable. This includes the trial court proceedings relating to: the charges being put to the appellants, their pleas and plea explanations, the evidence of the state witnesses, evidence of the appellants and their witnesses, and importantly the judgment of the court *a quo* in respect of the convictions.

[7]. As indicated above, the transcript of the trial court's judgment on conviction is non – existent. Although we know that the court *a quo* had convicted the appellants of rape and armed robbery, there is neither a judgment on conviction nor any indication of the learned Magistrate's reasons for the conviction.

[8]. On the 14th of July 2017 there was a brave and laudable attempt by the Randburg Magistrates Court to reconstruct the record. Matters were not made easy by the fact that the Magistrate, who presided over the trial during 2007 and 2008, Magistrate Muller, has since passed away and the defence Counsel who represented the appellants during the trial as well the interpreters and stenographers, were not able to assist in the reconstruction of the record. The only person who was of any assistance in the reconstruction of the court record was the public prosecutor, Ms Dlamini, who fortuitously is still in the employ of the prosecuting authorities and who gave details of the evidence led at the trial with reference to her contemporaneous notes.

[9]. From her notes, she was able to give details of the evidence led at the trial in the court below of the following witnesses: the complainant (Ms L. K.), Ms S. K. (the complainant's sister), Ms Deborah Mothopa (the girlfriend of the second appellant at the time), the arresting officer (Mr Sentwa), and both the first and second appellants. She also confirmed that the State before closing its case handed in exhibits by consent relating to comparative finger prints, which placed the two appellants at the scene of the crime, as well as documents relating to the DNA results, which linked the first appellant to the complainant.

[10]. At the reconstruction hearing the two appellants, who were legally represented at that hearing by Mr Mkwanazi, confirmed the correctness of the reconstruction of the proceedings by Ms Dlamini.

[11]. The second and main enquiry which we have to engage in relates to the nature of the issues to be decided on appeal. For purposes of this enquiry, I revert to the facts.

[12]. The reconstruction of the record, with which reconstruction the appellants was in agreement and had no objection to, confirmed that the evidence on behalf of the State was that on the 16th December 2006 at approximately 19H40 in the evening the complainant, whilst walking home from her sister's place in Cosmo City, was accosted by the appellants, who each had a beer bottle in their hands. They tried to grab her handbag, which she was carrying across her shoulder, and she resisted. She thereafter tried to flee, but they had grabbed her handbag and ran after her. At some point, whilst pursuing her, one of her attackers threw a beer bottle at her and it hit her on the head, whereafter she fell to the ground.

[13]. She wanted to scream for help, but she was warned not to, and to demonstrate to her how serious they were, one of them hit her over the head with the beer bottle for good measure. The complainant was thereafter dragged to a deserted place with long grass. She attempted to talk her way out of the attack and pointed out to her assailants that they had already robbed her of her two cell phones and some cash. They would have nothing of that and slapped and kicked her, whereafter she again fell to the ground. She was thereafter stripped of her pants and panties by one of the attackers, who proceeded to rape her, whilst she was being held down by the other. After he was done the other attacker also raped her. Neither of them used a condom. After the second attacker was done raping her, he once again hit her over the head with a beer bottle and just left her there in the veld. After they had left, the complainant got up, put on her panties and jeans and walked back to her sister's house. She told her sister and her brother what had happened to her. They then went to the police station and reported the rape and robbery. The complainant advised the

police that she would be able to identify her assailants when she was to see them again.

[14]. Under cross – examination it was put to the complainant on behalf of the first appellant that he had consensual sex with her on the night in question as they were involved in a romantic relationship at the relevant time. First appellant also denied having robbed the complainant. This was denied by the complainant. As far as the second appellant is concerned, under cross – examination of the complainant, his version was put to her as a bare denial of the rape and robbery.

[15]. The second state witness was the complainant's sister, who was the first report witness. She corroborated the version of the complainant in material respects. She confirmed that the complainant had 'come pass' her house on her way home from work. At some point she left, but after about an hour she returned, half naked and clearly in distress. She reported to them that she had been attacked, raped and robbed of her belongings. Again, when she was cross – examined, it was put to her on behalf of the first appellant that he (the first appellant) was the complainant's boyfriend at the time and that they had consensual sex. This was vehemently denied by the witness.

[16]. The third witness, strangely enough, was the girlfriend of the second appellant, who in essence testified that during December 2006 the second appellant had given to her two cell phones belonging to the complainant, and told her to take those to Limpopo, which she did. It later transpired that the phones had been stolen from the complainant during a robbery.

[17]. The fourth witness was the arresting officer, Mr Sentwa, who confirmed that he had collected from the scene of the crime two beer bottles, which had

been sent for fingerprint analysis, which confirmed that the appellants had handled the bottles. After the evidence of Mr Sentwa the State handed in certain documents, which were received as exhibits into evidence by consent of the appellants. These documents related to the scientific results of the fingerprints analysis and the DNA results. The net effect of these documents was that the first and the second appellants were placed at the scene of the rape and robbery by the fact that their fingerprints were lifted from the beer bottles which had been retrieved from the scene shortly after the commission of the crime. This clearly linked both the appellants in time and space to the attack on the complainant. The report relating to the DNA tests revealed that the first appellant had intercourse with the complainant as his DNA was found in the vaginal area of the complainant.

[18]. According to the reconstruction of the record, as led by the public prosecutor, Ms Dlamini, the evidence of the first appellant was that he engaged in consensual sex with the complainant, who was his girlfriend at the time. The version of the second appellant was one of a general denial. He denied that he committed either of the crimes which he was charged with. These versions were the versions of the appellants in their warning statements and also the versions put to the witnesses when they were being cross – examined.

[19]. What is important is the overall picture, and this picture can be garnered adequately from the undisputed reconstruction of the evidence. On the night of the 16th of December 2006 the complainant was raped and robbed of cell phones and cash by two assailants. The only issue therefore to be decided on appeal is whether the rape and the robbery were perpetrated by the appellants. That is the limited nature of the issues to be adjudicated upon by the Appeal Court. If the appellants' denial is to be accepted, it would mean that the complainant and her sister had concocted this entire story from beginning to end. These two individuals, according to the appellants, are picking on them and accusing them of the rape and robbery for no reason. Then there is also the

undisputed scientific evidence, which belies the version of the first appellant that he had consensual sex with the complainant. Similarly, it puts paid to the second appellant's general denial that he was in any way involved in the commission of the crimes. This is not tenable.

[20]. On the complainant's version the appellants were undoubtedly guilty of rape and robbery. The crux of the enquiry is therefore whether the first appellant's version and the second appellant's general denial of involvement in the commission of the crimes could reasonably possibly be true. In the circumstances, the outcome of that enquiry is in turn dependent on the question whether, in the light of all the evidence, the appellants' explanations in response to the version of the complainant could reasonably possibly be true.

[21]. For the reasons mentioned above. I am of the view that the versions of the appellants are not tenable. This is a conclusion, which in my judgment, this court, as the Court of Appeal, can draw based on the facts gleaned from the reconstructed record. The simple fact of the matter is this: In the bigger scheme of things, the versions of the appellants cannot reasonably possibly be true. This would still be the issue irrespective of any additional information which may be derived from more details relating to the evidence led at the trial. Moreover, if regard is had to all of the facts in this matter, the answer to this question would inevitably be that appellants' versions are not reasonably possibly true. The appellants' explanations are so improbable that it cannot reasonably possibly be true.

[22]. It was contended by Ms Britz, who appeared on behalf of the appellants, that the shortcomings in the record rendered a proper consideration of the appeal impossible. Much to our surprise, Ms Serepo, Counsel for the State, agreed with this contention, which was based on the submission that we are dependent on a perusal and consideration and an in – depth analysis of the

evidence led at the trial, as well as the magistrate's judgment on conviction to assess his evaluation of the evidence. I do not agree with this submission. As indicated, the appellants, who were both legally represented at the reconstruction hearing, were in agreement with the reconstruction of the evidence by Ms Dlamini. Therefore, it has to be accepted that the evidence led was as per her reconstruction. That being the case, the matter can, in my view, be decided on the inherent probabilities, which can in turn be determined on the reconstructed record as it stands. Logic dictates that the appellants cannot possibly suffer prejudice because of the lack of a complete verbatim record of the proceedings in the trial court.

[23]. The appellants' versions fall to be rejected because it is so inherently improbable that it cannot reasonably possibly be true. In these circumstances the appeal against the conviction cannot succeed.

[24]. We are of the view that, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellants to convince the court of the truth of their explanation, the evidence of the appellants was inherently improbable and false beyond a reasonable doubt. However one views this matter and the facts herein, sufficient corroboration existed in linking the appellants to the crimes. The improbability or implausibility of the appellants' versions, particularly the fact that on their versions the state witnesses concocted the whole story against them, is apparent.

[25]. It follows that the appeal against the convictions must fail.

Sentence

[26]. That brings me to the appeal against the effective sentences of imprisonment for life which were imposed by the magistrate. Whilst we were not addressed on the suitability of the sentences imposed on the appellants, we have nevertheless had regard to the relevant considerations.

[27]. A convenient starting point is the fact that the provisions of s 51(1) of the CLAA, read with Part I of schedule 2 of the said Act, apply. This means that a minimum sentence of imprisonment for life finds application. The question is whether substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[28]. It appears that, at the time of the trial, the first appellant was 23 years of age and a first offender; that he was employed as a packer at Lanseria Solenta, earning R100 per day; that his highest level of education is standard 8; he has no formal training and he is therefore unskilled; and he had a difficult upbringing. He is not married and he does not have any dependants.

[29]. The second appellant was 28 years old at the time of the trial, and he also has no previous convictions. He is married and has two dependant boy children. He left school during 2001 whilst doing standard 8. His highest level of education therefore is grade 7. At the time of his arrest he was doing piece jobs as a gardener.

[30]. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[31]. The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 ('the Act') would ordinarily apply to the sentencing regime. The rape charge, where the perpetrators gang raped the victim, would attract a prescribed minimum sentence of life imprisonment, unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

[32]. I take into consideration what was stated by the SCA in *S v Vilakazi*, 2009 (1) SACR 552 (SCA). Nugent JA had this to say at par [58]:

> 'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.'

[33]. It was necessary for the court to find the existence of substantial and compelling circumstances before it was entitled to impose a lesser sentence. In considering whether substantial and compelling circumstances were present, the learned magistrate had regard to the appellants' personal circumstances. I have already alluded to those above. The court also had regard to the severity and the seriousness of the offences committed by the appellant.

[34]. I am satisfied that the learned regional court magistrate properly considered whether there were substantial and compelling circumstances to deviate from the minimum sentences provided for in respect of the offences under the relevant provisions of section 51(1) of the CLAA as read with part I of schedule 2 thereof, and also carefully considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the offenders including their moral blameworthiness and the interests of society by which I include the interests of the victim. I am also satisfied that the Regional Magistrate was justified in imposing the minimum sentence. In that regard, the Magistrate had regard to the severity of the crime and the brazen and arrogant manner in which it was committed by the appellants who has very little regard for the complainant's dignity.

[35]. The aggravating circumstances far outweigh the personal circumstances of the appellants. I do not consider there to be any misdirection in the Regional Magistrate's judgment on sentence, which would entitle this court to interfere with the sentences imposed. It moreover cannot be said that the sentences are unduly harsh or inappropriate (see *S v Kgosimore,* 1999 (2) SACR 238 (SCA)). In my view the imposition of the life sentences does not induce a sense of shock nor is it disproportionate particularly having regard to the values to which we subscribe and the application of section 51 of the CLAA.

[36]. It follows that the appeal against sentence must fail.

Order

Accordingly, I make the following order:-

1. The appeal by the first appellant against his convictions is dismissed.

2. The appeal by the first appellant against his sentence is dismissed.

3. The appeal by the second appellant against his convictions is dismissed.

4. The appeal by the second appellant against his sentence is dismissed.

ADAMS J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

RAMAPUPUTLA AJ
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	13th November 2017
JUDGMENT DATE:	16th November 2017
FOR THE APPELLANT	Adv Y J Britz
INSTRUCTED BY:	Johannesburg Justice Centre
FOR THE RESPONDENT:	Adv N P Serepo
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg