THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***8th June 2021*** Signature: _____

APPEAL CASE NO: A87/2020

COURT *A QUO* CASE NO: 43/56/2018

DPP REF NO: 10/2/5/1-(2020/067)

DATE: 8th JUNE 2021

In the matter between:

NENE, MUZIWENHLANHLA Appellant

and

THE STATE Respondent

Coram: Twala *et* Adams JJ

Heard: 25 February 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 8 June 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 8 June 2021

Summary: Criminal Law – rape and kidnapping – appellant convicted of one count of kidnapping and three counts of rape, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('minimum sentence regime') – as a single witness, the complainant's testimony was required to be satisfactory in all material respects, or there had to be adequate corroboration for it – did the State prove appellant's guilt beyond a reasonable doubt –

Factual findings of trial court – absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual findings – appeal dismissed – conviction and sentence confirmed –

Evidence – admission of hearsay – s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 – 'first report' statement admitted into evidence.

ORDER

On appeal from: The Soweto Regional Court, Protea (Regional Magistrate Zakwe sitting as Court of first instance):

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentence is dismissed.

(3) The appellant's conviction by the Protea Regional Court and his sentence be and are hereby confirmed.

JUDGMENT

Adams J (Twala J concurring):

[1]. This is an appeal by the appellant against his conviction on one count of kidnapping and three counts of rape by the Soweto Regional Court, as well as against the effective sentence of life imprisonment imposed by the trial court. On 21 November 2019 the appellant, who was legally represented, was convicted on charges of having kidnapped the complainant, a 27-year-old female, in the early hours of Saturday, 6 January 2018, and having thereafter raped her three times whilst holding her against her will. The rape charges on which the appellant was

convicted was formulated as a contravention of sections of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007, read with s 51 and schedule 2 of the Criminal Amendment Act, Act 105 of 1997. The 'minimum sentence regime' is therefore applicable.

[2]. On 10 December 2019 the appellant was sentenced as follows: -

(a) On count 1 (kidnapping): direct imprisonment for a period of five years;

(b) On count 2 (rape): direct imprisonment for life;

(c) On count 3 (rape): direct imprisonment for a period of ten years;

(d) On count 4 (rape); direct imprisonment for a period of ten years;

Ex lege, the sentences run concurrently.

[3]. In view of the appellant's sentence of imprisonment for life, the appeal is before us on the basis of s 10 of the Judicial Matters Amendment Act, Act 42 of 2013, in terms of which the appellant has an automatic right to appeal against both his conviction and sentence.

[4]. The appeal against conviction principally turns on the reliability of the evidence of the complainant and her witnesses as contrasted against the evidence of the appellant, who claimed, in a brief plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA'), that the sexual intercourse with the complainant was consensual. The appellant also denied the allegations against him in relation to the kidnapping charge. In essence, there are two mutually destructive versions of the events which happened on the morning in question – one being that of the state and the other being that of the defence.

[5]. The issue to be decided in this appeal is whether the trial court was correct in accepting the State's version and rejecting that of the appellant. There is also an issue relating to the admissibility of the 'first report' statement by the complainant's sister, who was not available to give *viva voce* evidence. The said statement was admitted by the learned Regional Magistrate in terms of the provisions of Section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1988 ('the Act'). I shall return to this aspect of the matter in due course.

[6]. The complainant testified that on Saturday morning, 6 January 2018, between 06:00 and 07:00, she was walking home from a tavern at the Nancefield Hostel. She was then accosted by the appellant, who approached her from

behind, brandishing a knife. Under threat of stabbing her, he forcefully dragged her to a nearby graveyard. During this process and because of the violent manner in which the appellant tugged her, she lost her shoes and the appellant did not give her an opportunity to get them back. At the cemetery, he raped her once by inserting his penis into her vagina, whilst lying on top of her with her lying on her back. Before the rape, the appellant had taken off her pants and her underwear, leaving her completely naked from the waist down. During this ordeal the complainant also cut two of her fingers, when she grabbed the knife when the appellant attempted to stab her.

[7]. After he was done, the appellant then yanked her backed to her feet and dragged her to his shack, which, according to the complainant, was ‘quite a distance’ from the graveyard. The complainant was naked from the waist down. She had not been given a chance to retrieve her clothes and to get dressed before she was marched unceremoniously to the appellant’s shack, where, so she testified, her ordeal continued. On their way to his shack, the appellant gave her his track suit top to cover the lower part of her body.

[8]. Once inside his shack, the appellant locked the door and proceeded to rape her a second time. This time around the appellant raped the complainant by inserting his penis into her vagina and into her mouth – twice into the mouth and twice into the vagina. The complainant’s evidence furthermore was that, after he had ejaculated, he got off her and laid beside her. After just five minutes he raped her again by inserting his penis into her vagina.

[9]. Bizarrely, so the complainant’s evidence went, the appellant, after raping her, asked her whether she loved him. She responded in the affirmative and she did so, so she explained, only ‘to soften him up’ so that she could make her get away when the opportunity presents itself. The appellant also asked her if she wanted a beer and she confirmed that she would like to have one. The appellant then left to go and buy the beer after locking the door to the shack with her inside. He returned with a Hunters Dry cider.

[10]. She furthermore testified that after he had returned to the shack with the beer, the appellant gave her one of his shorts and a vest to wear. Thereafter, the two of them went outside, sat under a tree and consumed the Hunters Dry, which

the appellant had bought. She observed another male person sitting nearby at a neighbouring shack. At that point, she did not try to escape or attempt to solicit assistance from the neighbour, her plan being, instead, to 'soften up' the appellant and, as soon as he let down his guard, she would make a run for it.

[11]. The opportunity presented itself when the appellant went to buy another cider. She took the opportunity and made a run for it. She went home, where she found her sister, and went straight to bed, without telling the sister what had happened to her. At about 13:00 she was awoken by her sister, who noticed that she was crying and enquired from the complainant what the matter was. At first, the complainant was reluctant to tell her sister about the incident, but she eventually confided in the sister and explained to her that she had been raped, whereupon her sister advised her to go and report the matter to the police, which she did.

[12]. After the evidence of the complainant was completed, a professional nurse, Ms Patience Pikoli, gave evidence, confirming the contents of the Form J88 Medico-Legal report, which she completed at about 21:30 on 6 January 2018. Ms Pikoli confirmed that she examined the complainant and found certain injuries, which 'seem consistent with history of vaginal penetration'. Importantly, the report given to Ms Pikoli by the complainant on 6 January 2018 accorded with the complainant's version. So, for example, the Sister found that the second and the third fingers of the complainant's left hand had been cut, which confirmed the version of the complainant that she grabbed the knife at the cemetery when the appellant tried to stab her.

[13]. The state thereafter applied for the admission into evidence of the written statement by the complainant's sister. In support of its application, which was in terms of s 3(1)(c) of the Act, the state led the evidence of Warrant Officer Thaba, who testified that, notwithstanding his every endeavour to that end, he had been unable to secure the attendance at court of the complainant's sister, who apparently was avoiding appearing in court. His evidence was that he had arranged with the witness to pick her up on the day on which she was scheduled to give her evidence in court. This arrangement was made in person between W/O Thaba and the witness one day before the day on which she would have given her evidence. However, on the following day on which she was due to

testify, the witness was nowhere to be found. She had apparently gone to the Eastern Cape, but W/O Thaba was not able to ascertain her exact whereabouts.

[14]. Despite fierce opposition from the defence, the trial court ruled admissible the statement by the sister, which, in a nutshell, confirmed that the complainant had reported to her that she had been raped by the appellant. The trial court was of the view that the appellant would not be prejudiced by the admission of the hearsay evidence, hence its ruling that the statement should be received into evidence. This may be an appropriate juncture at which to deal with the correctness of the ruling by the trial court.

[15]. The statement by the sister of the complainant was admitted and received into evidence by the learned Regional Magistrate in terms of the provisions of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ('the Act'), which reads as follows:

'3 **Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) … … …;

(b) … … …;

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[16]. In his very helpful written Heads of Argument, Mr Guarneri, the appellant's Counsel, submitted that the trial Court erred in admitting the statement of the complainant's sister into evidence. The trial court did not have regard to all of the considerations mentioned in the subsection, so Mr Guarneri contended. The

question to be considered by this court is therefore whether the requirements for admissibility in terms of s 3(1)(c) of the Act had been met.

[17]. As was pointed out by the SCA (per Navsa JA) in *Makhathini v Road Accident Fund*[1], a decision on the admissibility of evidence in terms of s 3 of the Act is one of law. A court of appeal is therefore fully entitled to enquire into the correctness of such a decision by a lower court.

[18]. The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In *Metedad v National Employers' General Insurance Co Ltd*[2] it was stated as follows at 498I - 499G:

'It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value … There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the Court is bound to apply it when so required by the interests of justice.'

[19]. In each case the factors set out in s 3(1)(c) are to be considered in the light of the facts of the case. Importantly, the factors set out in s 3(1)(c)(i) - (vii) should not be considered in isolation. One should approach the application of s 3(1)(c) on the basis that these factors are interrelated and that they overlap.

[20]. In considering the application of s 3(1)(c) to the facts of the present case, the trial court appears to have emphasised the possibility of prejudice to the appellant. The learned Regional Magistrate concluded that the appellant would not suffer any prejudice if the statement was to be received into evidence, and accordingly admitted same. This is however not to say that other factors mentioned in the sub-section were not considered by the trial court.

[21]. Section 3(1)(c)(i) requires a consideration of the nature of the proceedings. *In casu*, one is dealing with a criminal trial, with its attendant consequences. The

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[1] *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA)

[2] *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W)

effect of the introduction of hearsay evidence may be such that an accused person may suffer prejudice of a kind such that it would not be in the interests of justice to admit the evidence. However, in this case the hearsay evidence does not relate to an issue central to the matter, but only to corroboration of evidence relating to the core issue in the trial. This point applies equally to s 3(1)(c)(ii), which requires that the nature of the evidence be considered, because as stated earlier, the various factors are interrelated.

[22]. Section 3(1)(c)(iii) requires scrutiny of the purpose for which the evidence is tendered. The main purpose of the evidence was to prove the 'first report'. As such it is not a central issue. Importantly though the evidence carries the hallmark of truthfulness and reliability in that it accords in all the material respects with all of the other evidence led by the State. On this basis alone, it is arguable that its reception is justified.

[23]. Section 3(1)(c)(iv) requires that the probative value of the evidence be considered. Again, questions of relevance and reliability arise in the application of this subsection. The Warrant Officer who received the report was an impartial outsider. The statement was made on the day of the alleged rape at about 23:30. Regard being had to these factors one is led to the conclusion that the statement sought to be admitted has relevance and probative value.

[24]. Section 3(1)(c)(v) of the Act requires that a court enquire into the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends. I have already alluded to those reasons *supra*. Counsel for the appellant criticised the State for failing to place evidence before the trial Court about the steps taken to trace the whereabouts of the sister. In my view, it is a legitimate point of criticism against the State's case, but is not, in itself, decisive.

[25]. Section 3(1)(c)(vi) requires a consideration of prejudice to the party against whom the evidence is sought to be adduced. The inability on the part of the appellant to test by cross-examination the accuracy of the statement recorded by the policeman is obviously prejudicial but prejudice of that nature is implicit when hearsay evidence is admitted. It is the degree of the prejudice that must in each case be taken into account to determine whether an injustice will be done

to the party against whom it is sought to be adduced and that, as has been stated earlier, is a matter of fact to be determined in the circumstances of each case. In my view, the prejudice in this case to the appellant is minimal at best. As already indicated, the statement and the evidence contained therein relates only to the fact that the complainant reported the rape to her sister on the same day on which it occurred. There is a warrant of reliability to be found in the probabilities, particularly the fact that the statement accords with all of the other evidence led by the State.

[26]. Finally, in terms of s 3(1)(c)(vii) of the Act, the Court is required to take into account any other factor, which must refer to any relevant factor not yet covered by any of the preceding categories. I can think of no others.

[27]. When all of the factors enjoined to be weighed are taken together I think that it is in the interests of justice to admit the statement of the complainant's sister. The deficiencies in the statement – such as the contradiction relating to the number of times that the complainant was raped – must obviously be taken into account when the ultimate question to be determined is what reliance, if any, can be placed on the contents thereof. Bearing all these factors in mind, I have come to the conclusion that the learned Regional Magistrate was correct in admitting the statement of the complainant's sister into evidence.

[28]. That then brings me to the version of the appellant, whose evidence was that he and the complainant, whom he knew by a name totally different from her actual name, had been involved in a relationship since the previous month, that being December 2017. It bears emphasising that in his evidence-in-chief the appellant made reference to the complainant by a name and a surname, which have no resemblance to those of the complainant. On the morning in question, so the evidence of the appellant continued, he had been with the complainant at the tavern. In the early hours of the morning, the appellant and the complainant left the tavern together. This was at about 07:00, after the complainant had told the appellant that she was tired and requested him to accompany her.

[29]. Whilst on their way from the tavern, the two of them were confronted by the father of her child, who enquired from the complainant where she had been as he had been looking for her for a long time. The appellant came to her defence

by putting his arms around, thus protecting her from a possible attack from the aggressor, who then stabbed the appellant on the nose. The appellant thereafter, so his evidence went, threw a brick at the attacker, thus chasing him away. After the altercation, the two of them, at the insistence of the complainant, so the appellant testified, went to his shack where they engaged in consensual sex on two occasions.

[30]. An important part of his evidence-in-chief reads as follows:

'Accused: Your Worship, I dispute that. The court can call Shegle and Mbongeni, the people whom I was with at that shebeen, they can come and corroborate what I say.

Mr Bantwini: And she further informed the court that you also raped her on two occasions, while you were at the hostel.

Accused: Your Worship, I did not kidnap her, neither did I rape her. We had consensual sex and it was not the first time being intimate with her.

Mr Bantwini: She does not know you and she further denied that the other names as you call her. She said her name is known as [A… D…].

Accused: Your Worship, she told me that she is [M…], surname [T…]. I even went an extra mile by making her have a conversation with a person who comes from Nameti, since she mentioned that her father is from Nameti. I then asked her that how come you are [T…], whereas you speak isiXhosa. She then mentioned that [T…] is her father's surname and she grew up in the Eastern Cape where her mother is based.

Mr Bantwini: She further informed the court that it was her first time to come into contact with you.

Accused: Your Worship, that is a lie. Mr Madondo is known to her. Therefore, we ended up having a conversation together. Therefore, I dispute that.'

[31]. In sum, the appellant denied that he raped the complainant at the cemetery – there was no incident there. And, as regards the intercourse in his shack, that he claimed was consensual. His explanation for the fact that she ended up wearing his clothes and his tekkies was that she, after taking a bath at his place, asked to wear his clothes. Why she ended up wearing his oversized shoes remained unexplained. 'Those clothing items, that I borrowed her, I was going to collect them in the evening', so his evidence on that aspect went.

[32]. His evidence was furthermore that they parted company on the day in question at about midday, after the complainant indicated that she was meeting

up with friends to drink some more and it was arranged that they (the appellant and the complainant) would meet up later that evening.

[33]. The appellant, also called a witness, who testified that he had seen the complainant and the appellant together on the morning of the incident. They told him about the incident with the father of the complainant's child. The complainant, according to this witness, appeared happy to be in the company of the appellant and he did not observe any trouble between them.

[34]. The evidence on behalf of the State I have summarised above. The question is whether this evidence is sufficient to prove the guilt of the appellant beyond a reasonable doubt. Put another way, the question is whether, at the end of the trial, the evidence as a whole was sufficient to ground the conviction of the appellant.

[35]. To determine whether the state had proved the guilt of the appellant beyond a reasonable doubt, the whole mosaic of evidence must be considered. This evidence as a whole should be considered in deciding whether the version of the appellant that he had consensual sexual intercourse with the complainant in his shack, is reasonably possibly true.

[36]. It is trite that the State bears the onus of establishing the guilt of the appellant beyond a reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford*[3]). In *S v Van der Meyden*[4], which was adopted and affirmed by the SCA in *S v Van Aswegen*[5], it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration <u>of all the evidence</u>. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[37]. What is important is the overall picture. If the version of the appellant is to be accepted, it would mean that the state witnesses fabricated and concocted

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[3] *R v Difford* 1937 AD 370 at 373, 383

[4] *S v Van der Meyden* 1999 (2) SA 79 (W)

[5] *S v Van Aswegen,* 2001 (2) SACR 97 (SCA)

their entire story from beginning to end. The version of the appellant also does not explain the medical evidence of the injuries sustained by the complainant. Viewed holistically the version of the appellant is not tenable. What is also instructive is the fact that the appellant did not know the correct name of the complainant, who supposedly had been his girlfriend for about a month. Also, he did not know where exactly she lived.

[38]. Although the complainant was a single witness in respect of the incident, the court *a quo* evaluated her evidence with caution, as it was required to do. See: *R v Mokoena*[6]; *S v Stevens*[7]. Section 208 of the CPA provides that a Court is entitled to convict an accused person on the evidence of a single witness. I am of the view that the appellant was convicted upon the evidence of a single witness which was substantially satisfactory in all material respects and corroborated. (*S v Ganie*[8]).

[39]. I am of the view that the Court *a quo* correctly approached the evidence of the complainant with extra caution. The Court *a quo* correctly found that the complainant's version is substantially corroborated by independent evidence, notably the clinical findings in the Form J88 Medico-legal Report, which is clear evidence that the complainant was threatened with a knife.

[40]. The evidence that the complainant ended up wearing the clothes and shoes of the appellant fits in with and corroborates the version of the complainant 100%. She had an injury on her hand and her clothes were missing. She reported to her sister on the same day that she had been raped. In my view, this is not the natural behaviour of a young woman who had consensual sexual intercourse.

[41]. There are almost always some contradictions to be found between the evidence of state witnesses. If the inconsistencies and differences which exist are of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction, if anything the

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[6] *R v Mokoena* 1932 CPD 79

[7] *S v Stevens* 2004 JDR 0505 (SCA)

[8] *S v Ganie* 1967 (4) SA 203 (N)

contradictions points away from any type of conspiracy between the witnesses. See: *S v Mkohle*[9].

[42]. I am of the view that the court *a quo*, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellant to convince the court of the truth of his explanation, correctly held the evidence of the appellant was inherently improbable and false beyond a reasonable doubt. The learned Magistrate's finding that sufficient corroboration existed for the evidence of the complainant cannot be faulted. The improbability or implausibility of the appellant's version, particularly the fact that on his version the state witnesses concocted the whole story against him, is apparent. The version of the appellant also does not explain the injury sustained by the complainant to her fingers.

[43]. Mr Guarneri submitted that there are a number of discrepancies in the version of the complainant, which was not considered by the trial court in its assessment of the evidence. These include the fact that the complainant claimed to have grabbed the knife that the appellant was brandishing. Yet on her own version she only sustained superficial cuts, when one would have expected a more serious injury. Also, so the appellant submitted, it is improbable that the complainant at no stage screamed for help during her ordeal, be it at the graveyard or at the appellant's shack. One other aspect viewed by the appellant as an improbability in the version of the complainant relates to the fact that, according to her, the appellant was able to have intercourse a mere five minutes after he had ejaculated.

[44]. I am not persuaded by these submissions. The explanation by the complainant for her failure to shout out for help is simply that the appellant was threatening to stab her. It could not be expected of the complainant to be a brave heart especially after the appellant tried to stab her at the graveyard.

[45]. The version of the complainant is, in my view, not improbable. Far from it. It is a plausible and natural story, with a ring of truth to it. The same cannot be said of the version of the appellant, who wanted the trial court to believe that he

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[9] *S v Mkohle* 1990 (1) SACR 95(A)

did not know the correct name of the person he claimed to be his girlfriend.

[46]. In any event, as was pointed out by Majiedt JA in *Naidoo v S*[10], it is essential for an appeal court to remain cognisant of the strictures on it as far as the trial court's factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual findings. (*S v Hadebe & others*[11]; *S v Modiga*[12]). As was held by the Constitutional Court in *Mashongwa v PRASA*[13], it is not for an appellate court 'to second-guess the well-reasoned factual findings of the trial court'. We, as the appeal court, are not the triers of fact at first instance.

[47]. The point is that, even if an appeal court has reservations about certain aspects of a trial court's factual findings, it shall interfere in those findings in exceptional circumstances, and only when there are demonstrable, material misdirections and clearly erroneous findings.

[48]. I am accordingly of the view that there is no reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellant was overwhelming and the Regional Magistrate was correct in his finding that the appellant raped the complainant three times, as per her evidence.

[49]. As far as the kidnapping charge is concerned, there can be no doubt that the appellant had deprived the complainant of her freedom by forcing her to the graveyard and thereafter to his shack. The offence of kidnapping stood separate and distinct from the rape, and it cannot be said that there was an improper duplication of charges.

[50]. I am therefore satisfied that the appellant's conviction should be confirmed.

Sentence

[51]. I now turn to deal with sentence. The appellant was sentenced effectively to direct imprisonment for life. It is trite that an appeal court can interfere with

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[10] *Naidoo v S* (333/2018) [2019] ZASCA 52 (1 April 2019)

[11] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F

[12] *S v Modiga* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23

[13] *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45

sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[52]. This was a particularly serious case of rape where a young woman was forcibly taken against her will by the appellant first to a cemetery and thereafter to his place of residence, where he subjected her to rape on three occasions.

[53]. 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.

[54]. Section 51(1) of the CLAA reads as follows:

'(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'

[55]. Section (3) of the said Act provides as follows:

'(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed.'

[56]. Part I of Schedule 2 list the crime of 'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

'(a) when committed-

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim-
(i) is a person under the age of 16 years;
(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006).'

[57]. A compulsory minimum sentence of direct imprisonment for life was imposed in respect of one of the rape charges by virtue of part I(a)((i) and (iii) of schedule of Schedule 2. The question to be asked is whether there were any substantial and compelling circumstances justifying a deviation from such minimum sentence.

[58]. I take into consideration what was stated by the SCA in *S v Vilakazi*[14]. 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.'

[59]. 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

[14] *S v Vilakazi* 2009 (1) SACR 552 (SCA)

considering whether substantial and compelling circumstances were present, the learned magistrate had regard to the appellants' personal circumstances and the fact that the appellant was not a first offender.

[60]. Mr Guarneri, in his written Heads of Argument, submitted that the cumulative effect of the appellant's personal circumstances should be regarded and treated as substantial and compelling circumstances. Those personal circumstances are the following: He was 40 years old at the time of his conviction and sentence; he had two children aged 5 and 18 years' old respectively; he was self-employed doing plumbing and tiling; and his highest level of education was Standard 7 (grade 9).

[61]. I cannot agree with this submission. To borrow from *S v Vilakazi* (supra), because of the seriousness of the crimes of which the appellant had been convicted, his personal circumstances, by themselves, will necessarily recede into the background.

[62]. I am satisfied that, the learned Regional 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 appellant, including his moral blameworthiness and the interests of society by which I include the interests of the victim.

[63]. The appellant's appeal against his sentence should therefore also fail.

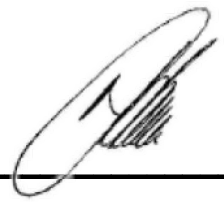
Order

In the result, the following order is made: -

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentence is dismissed.

(3) The appellant's conviction by the Protea Regional Court and his sentence be and are hereby confirmed.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	25th February 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.
JUDGMENT DATE:	8th June 2021
FOR THE APPELLANT:	Adv A E Guarneri
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv L R Mashabela
INSTRUCTED BY:	The Office of the National Director of Public Prosecutions, Johannesburg