REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA
CASE NO: A35/15
In the matter between:

TEBOGO PHAGE Appellant

And

THE STATE Respondent
J U D G M E N T
TEFFO. J:

[1] This is an appeal against sentence only. The appellant was arraigned in the regional court, Potchefstroom, where he faced two counts of rape, which were read with the provisions of sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 (the Act). He pleaded not

guilty but was ultimately convicted and sentenced to life imprisonment on each count. The two sentences of life imprisonment were ordered to run concurrently.

[2] The appellant also brought an application for condonation of the late filing of the appeal. The application was not opposed and it was accordingly granted.

[3] He appeals against the sentence with leave of this Court having been granted on petition.

[4] Briefly the evidence led in this matter was as follows:

On 6 October 2007 Ms E M, the complainant in this matter, was at her house watching a soccer match together with her friend and neighbour, Mr L M. During half-time Mr M went away. After he left her homestead and at approximately 18:00 the complainant closed the curtains and locked the house. Subsequently she heard a person knocking at the door. Upon asking who the person was, there was no response. She opened the door and an unknown man entered the house. She thought the person had mistaken her house for a spaza shop in the neighbourhood and gave him the direction to the spaza shop. The person told her that he was not looking for the spaza shop. He in fact wanted her to make love with him as he heard people saying she had good sex with men. She screamed for Mr M who had just left her homestead. The unknown man closed her house and locked it. At that time he had a bottle of beer in his possession. He put it on the TV-stand. He started throttling her. She screamed and in the process she fell with her knees on the floor and got hurt. Her assailant pulled her with her clothes towards the bathroom where he put her inside the bathtub and opened the tap to let the water flow. She got wet. The assailant took her out of the bathtub, took off her jersey and tried to tear her skirt. He did not succeed. He immediately went to the kitchen where he fetched a knife and tore off the complainant's skirt. She

struggled to crawl to her bedroom where she sat on top of the bed as her assailant was walking alongside her. He undressed himself and took off his shoes. Eventually he took out a condom, put it on his penis, tore off her skirt, tights and panty, and inserted his penis into her vagina. He made love to her on the bed while the knife was next to him. While he was busy having sex with her, she managed to push him backwards with her hands. The condom that was on his penis fell on the bed. He put another condom which he took out of his pocket onto his penis and inserted his penis for the second time into her vagina thereby once more having sexual intercourse with her.

The first sexual intercourse took place on the bed. It could have lasted for about 4 minutes. The second sexual intercourse took place while her assailant was leaning on the floor and could have lasted for about 10 minutes. After he had finished having sexual intercourse with her, he put on his clothes and left. He locked the house and left with the house keys. While he was out of the house, he threw the keys of the house inside the house through the sitting room window. The complainant eventually took the keys and locked herself inside the house. She managed to crawl with her knees to her bedroom where she took out her cellphone and called Mr M. She saw her assailant prior to the incident, standing with Mr M at the time he had just left her homestead while she was closing the door. Mr M immediately rushed to her house after receiving her call and she showed him what the man he saw standing with him outside her house did to her. No one could have heard her screaming because it was raining that evening and her assailant closed the door immediately he heard that she was screaming. Neighbours and police were called to the scene and she was taken to the hospital by ambulance. The police arrived, looked around inside the house and found the

bottle of beer her assailant was carrying at the time. She did not know the accused prior to the incident.

Mr M corroborated the complainant's evidence with regard to her encounter with him on the day of the incident and that he met the accused on his way home after he had left the complainant's house. He did not know the appellant's name but knew his face. The appellant requested him when they met to wait for him at his home as he was coming to see him and tell him who he was. The appellant was linked to the offences with the fingerprints which were found on an empty 450 ml beer bottle he left behind at the complainant's house.

[5] The following personal circumstances of the appellant were placed on record in mitigation of sentence:

That he was 33 years old at the time of the commission of the offence. He has three children aged 17, 8 and 3 years respectively. He worked as a loader and packer at Chubby Chick prior to his arrest. He maintained and supported his children and his elderly parents with the income he earned at the time. He spent three years and one month in custody while awaiting trial.

[6] It was argued on behalf of the appellant that the trial court misdirected itself when it imposed a sentence of life imprisonment in each of the two counts of rape while the appellant faced charges which were read with the provisions of sections 51(2), 52(2), 52A and 52B of the Act. It was also pointed out that the trial court overemphasised the seriousness of the offence and the interest of the community at the expense of and to the exclusion of the appellant's personal circumstances. Counsel for the appellant further submitted that the appellant used a condom at the time of the rape. He did not physically assault the complainant. She was only threatened. No evidence was presented which indicated how the rape incident

emotionally affected the complainant. Counsel for the appellant referred the court to the case of S *v Nkawu* 2009 (2) SACR 407 ECG and submitted that the court in that case concluded that the proper interpretation of section 51(3)(aA)(ii) of the Act does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered permanent injuries along with other relevant factors to arrive at a just and proportionate sentence. He argued that all the aforementioned factors cumulatively taken, should have persuaded the trial court to deviate from imposing the sentence of life imprisonment.

[7] While the State conceded that the charges the appellant faced were read with the provisions of section 51(2) and not section 51(1) of the Act, it was argued after reference was made to the case of S *v Kolea* 2013 (1) SACR 409 (SCA) that the court should look at the evidence presented before the trial court. The Kolea matter approved the minority judgment in S *v Mashinini and Another* 2012 (1) SACR 604 (SCA). Counsel for the State further submitted that the fact an incorrect section of the Act was relied upon when the appellant was charged, does not mean that the correct section which is supported by the evidence presented at the trial court, is not applicable. He further argued that the trial court was correct in imposing the prescribed minimum sentence of life imprisonment The following submissions were made in aggravation of sentence: That the offence of rape was serious and prevalent in the country. That the complainant was threatened with a knife. She was attacked in the sanctity of her home. The appellant invaded the privacy of a woman who was much older than him. He did not show any remorse. The complainant suffered both emotional and physical pains. She suffered serious physical and vaginal injuries which is an indication that this was a violent, cruel and horrific rape. The appellant has two previous convictions of rape where he was convicted in November 1994 and August 2000 respectively. He is a danger to women and the previous sentences of rape did not deter him from raping innocent women.

[8] The basic approach in every appeal against sentence was set out in S *v Rabie* 1975 (4) SA 455 (A) at 857D-F to be the following: the court hearing the appeal -

"(a) should be guided by the principle that punishment is 'preeminently a matter for the discretion of the trial court', and
(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly' exercised

The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see also S *v Giannoulis* 1975 (4) SA 869 (A), S *v Barnard* 2004 (1) SACR 191 (SCA) at 194C-D, S *v Mayisela* 2013 (2) SACR 129 (GNP) at [13].

[9] The court in S *v Malgas* 2001 (1) SACR 469 (SCA) at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court, is so marked that it be described as *'shocking', 'startling'* or '*disturbingly* inappropriate (see also *Madiba v S* [2015] JOL 33686 (SCA)).

[10] The J88 medical report describes the injuries sustained by the complainant as follows: tears on the labia majora, bruises on her cheek, breast, leg, hand and neck due to throttling. The evidence is clear that the complainant was assaulted, having been throttled by the appellant. She sustained serious injuries as described above. The submission by the appellant's counsel that the complainant was not physically assaulted is therefore without merit.

[11] Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of privacy, dignity and the person of the victim. The rights to dignity, privacy and integrity of every person are basic to the ethos of the

Constitution and to any defensible civilisation (S *v Chapman* 1997

(3) SACR 341 (SCA)).

[12] I find it prudent to deal with the matter of S *v Kolea supra.* The Supreme Court of Appeal in the *Kolea* matter held that a sentencing court is not precluded from imposing a life sentence or referring a matter to a high court for consideration of sentence, solely on the basis that the charge sheet erroneously refers to section 51(2) instead of section 51(1) of the Act. The appellant in that matter was convicted of one count of rape where the victim was raped more than once by more than one person. The charge that he faced was read with the provisions of section 51(2) instead of section 51(1). The magistrate when convicting the appellant accepted from the complainant's evidence that she was raped by more than one person and that a co-perpetrator managed to evade the arrest. After convicting the appellant, he was informed that as he was liable to be sentenced to life imprisonment, which sentence was beyond the jurisdiction of the regional court at the time, the magistrate accordingly referred the matter to the high court for sentence.

Proceedings in the regional court were confirmed by the high court. The appellant was sentenced to 15 years imprisonment after the High Court which sentenced him under section 51(1) found that there were substantial and compelling circumstances. He was subsequently granted leave to appeal to the full court against the conviction and sentence. The full court dismissed his appeal against conviction, found that there were no substantial and compelling circumstances present and sentenced him to life imprisonment.

[13] The *Mashinini* matter *supra* also related to one count of rape which was committed by more than one person (a gang rape). The accused in that matter

were also charged under section 51(2) instead of section 51(1) but it was clear at the commencement of the proceedings that more than one accused person was charged with one single count of rape.

[14] The facts in the present matter clearly indicate that although the complainant was only raped by one person, the appellant in this matter, he raped her more than once (twice) and that she sustained injuries during the rape. Given these facts the State chose to charge the appellant with two counts of rape which were read with the provisions of section 51(2) instead of charging him with one count of rape read with the provisions of section 51(1). Section 51 (2) of the Act provides for the imposition of a minimum sentence of 10 years' imprisonment in respect of a first offender, while section 51(1) prescribes a sentence of life imprisonment. The appellant in the present matter faced two counts of rape where it was alleged that he raped the complainant once in each count. Nowhere in the proceedings that led to the conviction did the State and/or the magistrate refer to the provisions of section 51(1) of the Act. The section was only referred to when the magistrate sentenced the appellant after hearing arguments on mitigation and aggravation of sentence.

[15] I am of the view that the present matter is distinguishable from the *Kolea* and the *Mashinini* matters as I have highlighted the facts in those matters *supra.* In the present matter although the evidence establishes one count of rape read with the provisions of section 51 (1) it was erroneous for the magistrate to sentence the appellant to life imprisonment on each count of rape. In any event the record does not even reflect the reasons why the appellant was sentenced as such. I would agree with the State's submission as supported by the decision in the *Kolea* matter if the appellant was convicted with one count of rape which was incorrectly read

with the provisions of section 51(2) instead of section 51(1). If one looks at the charge sheet it cannot be said that the State incorrectly charged the appellant under section 51(2). The appellant was charged with two separate counts of rape which were read with the provisions of section 51(2) each where the victim in each count was raped once. The magistrate did not even make a finding that the two counts of rape were committed with the infliction of bodily injuries. It is therefore my view that the submission by counsel for the appellant has merit.

[17] The appellant in the present matter is not a first offender. He has two previous convictions of rape. In November 1994 he was convicted of rape and sentenced to 7 years imprisonment. On 18 August 2000 he was also convicted of rape and sentenced to 10 years' imprisonment. He committed the second rape on 19 November 1999 before the expiry of the period of his sentence of 7 years imprisonment in the first rape. The present rape was committed on 6 October 2007 although he was convicted on 21 June 2012. The appellant is therefore regarded as a third offender in terms of the offence of rape. Section 51(2) of the Act provides for a minimum sentence of 30 years in respect of a third and subsequent offender.

[18] There is no doubt that the circumstances under which the rape was committed are aggravating. The complainant was raped in the sanctity of her own home where she thought she was safe. She sustained physical injuries as a result of the throttling. She also suffered genital injuries. She was raped by a person who could be regarded as her son. The complainant will definitely live in her house with fear. Obviously her disposition will never be the same to men as it was prior to the incident of rape. The rape was committed under violent circumstances. In my view, taking into account the factors mentioned in mitigation and aggravation of

sentence, and the circumstances under which the rape was committed, the magistrate should have invoked the provisions of section 51(2) of the Act and exercised his discretion of increasing the sentence with the period of 5 years imprisonment. It is therefore my view that the magistrate committed a misdirection entitling this Court to interfere with the sentences of life imprisonment imposed on both counts.

[19] The finding of the magistrate that there are no substantial and compelling circumstances in this matter cannot be faulted.

[20] In my view the appropriate sentence under the circumstances should have been a sentence of 35 years imprisonment on each count of rape and the sentences on both counts should have been ordered to run concurrently. There is therefore a striking disparity between the sentence imposed by the trial court and that which this Court would have imposed had it sat as a trial court. The sentence of the trial court therefore falls to be set aside.

[21] In the premise I make the following order:

21.1 The appeal against sentence is upheld and the sentence of the court *a quo* is set aside and replaced with the following sentence:

"The accused is sentenced to 35 years imprisonment on count 1.
The accused is sentenced to 35 years on count 2.
The sentence in count 2 is ordered to run concurrently with the sentence in count 1. The accused is therefore effectively sentenced to serve a period of 35 years in prison"

21.2 In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substituted sentence is antedated to 26 June 2012, being the date on which the appellant was sentenced.

M J TEFFO
JUDGE OF THE HIGHCOURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

S A THOBANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG

DIVISION, PRETORIA

FOR THE APPELLANT	**L A MORE**
INSTRUCTED BY	**PRETORIA JUSTICE CENTRE**
FOR THE RESPONDENT	**R S MATLAPENG**
INSTRUCTED BY	**THE DIRECTOR OF PUBLIC PROSECUTIONS**
DATE OF JUDGMENT	**21 JUNE 2016**