IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A326/2017

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 17 FEBRUARY 2022

SIGNATURE: [redacted]

In the matter between:

ABEL SEKOALA	First Appellant
RAMESA JOHANNES RATHEBE	Second Appellant
And	
THE STATE	Respondent

J U D G M E N T

BALOYI-MERE AJ

1. Mr Abel Sekoala, the First Appellant and Mr Ramesa Johannes Rathebe, the Second Appellant ("collectively referred to as the Appellants") were arraigned in the Pretoria North Regional Court and charged with eleven (11) counts of rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997. Both Appellants pleaded not guilty, the First Appellant pleading that he had consensual sex with the Complainant while the Second Appellant pleaded that he did not have any sexual intercourse with the Complainant at all. Both the Appellants were convicted on all eleven (11) counts of rape and each sentenced to ten (10) years direct imprisonment with three (3) years suspended on condition that the Appellants are not found guilty of any violent crime committed during the period of suspension.

2. This sentence was handed down on the 24th July 2015. On the same day, the Appellants applied for leave to appeal which application was refused by the Presiding Magistrate whose reason was that another court will not come to a different conclusion. The Appellants then subsequently filed an application for special leave to appeal to the Judge President of the High Court, in Pretoria, in accordance with section 309C of the Criminal Procedure Act 51 of 1997. On the 31st May 2017 the Honourable Justices De Vos and Van Der Westhuizen granted leave to appeal in respect of both the conviction and the sentence imposed on the Appellants. It needs to be noted that the Appellants had only applied for leave to appeal for the conviction only and not for the sentence.

3. The Appellants were subsequently released on bail pending the appeal in 2017 and they are still out pending the judgment in this appeal. The Appellants were also notified of a possibility of the sentence being increased in terms of Section

309(3) of the Criminal Procedure Act in case the appeal on conviction is not upheld.

4. The merits of this case have been captured adequately by the Presiding Magistrate in the Regional Court in her judgment and I will not rehash the merits, save to indicate that the Complainant knew the two Appellants in that the First Appellant was(is) an ex-boyfriend of the Complainant while the Second Appellant is a friend to the First Appellant. The Complainant ended up at the First Appellant's house where she had previously on a number of occasions visited the First Appellant as his girlfriend and on that fateful night, the Complainant ended up being raped by both the First and the Second Appellant. The First Appellant's defence is that he had consensual sex with the Complainant while the Second Appellant denied ever having sexual intercourse with the Complainant.

5. Two other aspects bear mention, namely, that the First Appellant took the Complainant's cellphone before he had sexual intercourse with her without her consent and that the house was locked and the keys were hidden were never disputed by the Appellants. The other issue that stood out was the fact that the Complainant was not confronted during cross-examination by the Appellants about the fact that she testified that the house was only unlocked when the lady doing the laundry came.

6. I now deal briefly with the facts of the rape incident itself. The First Appellant was previously in a love relationship with the Complainant. Apparently the relationship had soured and the Complainant still held some hope that the relationship could be revived. On the day that the rape incident happened, the

Complainant received a call from the Second Appellant who informed her that the First Appellant wanted to speak to her. Because the Complainant still held some hope that her relationship with the First Appellant could be saved, she proceeded to go and visit the First Appellant's home. In a proper reading of the record, there is a bit of a confusion on whether the Complainant was called by the Second Appellant and later spoke to the First Appellant or she is the one who initiated the calls. That does not take the matter any further, what is significant is that the Complainant arrived at the First Appellant's house on that particular day.

7. The First Appellant and the Second Appellant have been friends for approximately 10 years and the Complainant knew the Second Appellant through her love relationship with the First Appellant. Both the Appellants were not strangers to the Complainant to the extent that every time there was a problem between the First Appellant and the Complainant in their love relationship, the Complainant would ask the Second Appellant to intervene. On the day of the incident, that is the 20th February 2010, the First Appellant and the Complainant had an argument immediately after the Complainant arrived at the First Appellant's house. The Second Appellant intervened and told the First Appellant to stop fighting with the Complainant. Both the First and the Second Appellant testified that during that tussle between the First Appellant and the Complainant, the First Appellant grabbed the Complainant by the arm and tried to push her out of the house. The other two friends that were outside the First Appellant's house also came in and called the First Appellant to order. Later the two friends left as already described in the preceding paragraphs.

8. The First and Second Appellants, accompanied by the Complainant, drove one of the First Appellant's friends home and later came back to the First Appellant's house. According to the record and the evidence, the First Appellant called both the Second Appellant and the Complainant to his bedroom where he announced that he was ending the love relationship between himself and the Complainant. The Complainant apparently begged the First Appellant that he should not end the relationship but the First Appellant informed the Complainant that he is no longer interested in her and the Second Appellant is apparently interested in having a love relationship with the Complainant. The Complainant refused the proposition that she should have a love relationship with the Second Appellant.

9. The Complainant then informed the First Appellant that because it is late at night and she cannot travel back to her home, she will sleep on the couch in the living room. The First Appellant offered her the spare bedroom.

10. The Complainant testified that the First Appellant left her and the Second Appellant in the living room. The Second Appellant also testified that only himself and the Complainant were left in the living room where the Complainant was begging him to talk to the First Appellant not to end their relationship. The Complainant further testified that, after a few minutes, the First Appellant appeared in the living room naked and took her to the Second bedroom where he instructed the Complainant to take off her clothes because the First Appellant wanted to have sexual intercourse with her. The Compliant refused. The Complainant testified that First Appellant grabbed her, tore the buttons of the dress that she had on her, pushed her and undressed her as she lay on the

bed. When the Complainant tried to scream, the First Appellant put his hand over her mouth and overpowered her and undressed her further. The First Appellant had sexual intercourse with the Complainant without her consent. After the First Appellant had ejaculated, he then invited the Second Appellant into the second bedroom. The Complainant testified that the Second Appellant also entered the second bedroom naked as well.

11. The First Appellant then grabbed her so that the Second Appellant could have sexual intercourse with her. The Complainant further testified that the First and Second Appellants took turns raping her, holding her on her arms as they each raped her about 5 – 6 times. She further testified that the two Appellants raped her all night allowing her no break except when they changed roles. At all times when the two Appellants raped her, they used condoms. The First Appellant raped her for the last time in the morning and in that particular instance he did not use a condom.

12. The First Appellant's version was that he had consensual sexual intercourse with the Complainant and at the request of the Complainant. The Second Appellant's version is that, after the First Appellant announced that he was no longer interested in a love relationship with the Complainant and the Second Appellant was left in the living room with the Complainant, he, being the Second Appellant, fell asleep and only woke up in the morning. His version is further that he did not see nor witnessed any sexual activities between the First Appellant and the Complainant and further that he did not participate in raping or engaging in sexual intercourse with the Complainant.

13. The Complainant was adamant that the First and Second Appellants raped her repeatedly the whole night and each holding her so that the other could rape her, meaning that the First Appellant after raping her, held her down so that the Second Appellant could proceed to rape her and vice versa.

14. In my view, when the different versions of the First and Second Appellants are taken together with the Complainant's version and weighed against what was put or not put to the Complainant and them considered with the first-report-witness, it paints a picture that indeed the Complainant was raped by the two appellants.

15. The evidence of Ms Baloyi, the first-report-witness called to testify on behalf of the state was not disputed by the Appellants. The undisputed facts testified thereto by Ms Baloyi are that she received a call from the Complainant on Saturday the 20th February 2010 at about 19h00 informing her that the Complainant is going to visit the First Appellant. Again at around 21h00 the Complainant called Ms Baloyi to report that she and the First Appellant were fighting. The next call that Ms Baloyi received was on Sunday the 21st February 2010 from the Complainant at around 08h00 during which the Complainant was crying and informed Ms Baloyi that the First and Second Appellant raped her. the Complainant further informed Ms Baloyi that she was still in Soshanguve. At around 10h00 on the same day, that is Sunday the 21st February 2010, the Complainant again called Ms Baloyi and informed her that the First Appellant let her go and she requested Ms Baloyi to come to her residence. Unfortunately Ms Baloyi was unable to come to the Complainant residence because she was

in Pretoria West. This evidence by Ms Baloyi was never challenged by the Appellants.

16. The Appellants rely heavily on the fact that the J88 did not indicate any visible injuries to the Complainant's gynaecological area which would indicate that there was unconsented and forceful penetration. Firstly, the definition of rape simply provides that: "*Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape*". The definition does not specifically require evidence of injuries or, indeed any use of force. Consent is the determinative element.

17. What is evident from the record is that on the J88, the injuries sustained by the Complainant on her upper arms are consistent with the evidence that while the First Appellant raped her the Second Appellant would hold her down on her arms and also when the Second Appellant raped her the First Appellant would also hold her down by her arms. The injuries are therefore consistent with that evidence which by itself indicate an absence of consent.

18. The Presiding Magistrate, in her judgment, took into account all the evidence that was submitted and weighed it and examined it before she came to a conclusion. The Learned Presiding Officer came to a conclusion that the Appellants had throughout their actions acted in furtherance of[1].

19. In **S v Janse Van Rensburg and Another** [2] the following was said:

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[1] Tshabalala v The State; Ntuli v The State [2019] ZACC 48.
[2] 2009 (2) SACR 216 (C) at 220 b-e.

"[8] Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the state has mustered the requisite threshold-in this case proof beyond reasonable doubt.

20. In ***S v Van Der Meyden***[3] it was stated as follows:

"it is difficult to see how a defence can possibly be true if at the same time the State's case which is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all of the evidence."

[3] 1999 (1) SACR 447 (W) at 449 f-i.

21. The Presiding Magistrate took into consideration all of the evidence that was submitted before her, before she came to the conclusion to convict. In my view the Presiding Magistrate cannot be faulted in having reached this conclusion and I therefore do not find any fault or any misdirection in her convicting the two Appellants of the eleven (11) counts of rape.

22. The imposition of a sentence falls within the discretion of the trial court and an appeal court may only interfere with a sentence if it satisfied that the trial court's discretion in sentencing was not judicially and properly exercised[4].

23. The court of appeal can increase a sentence *mero motu* after having given the Appellants notice of such a possibility[5]. It was also held in *S v Bogaards*[6] that a court on appeal may impose a sentence in excess of the original sentence imposed by lower court, when prior notice has been given to the Appellant. In the Bogaarts' case per Kampepe J (as she then was) at paragraph 72, it was stated as follows:

> *".. the notice requirement is merely a prerequisite to the appellate court's exercise of his discretion after notice has been given and the accused person has had an opportunity to give poignant submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires."*

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[4] S v Pieters 1987 (3) SA 717 (A) at 727 F-728 C
[5] S v De Beer 2018 (1) SACR 1229 (SCA).
[6] 2013 (1) SACR CC.

24. It is also not a requirement that the state should have cross-appealed the sentence[7]. From the De Beer case, it follows that this court has jurisdiction to consider the sentence afresh after prior notice has been given to the Appellants and to accordingly exercise its sentencing discretion *de novo* when it is of the view that the original sentence imposed by the lower court is manifestly inappropriate and that justice was not done. In *S v Motloung*[8] the Supreme Court of Appeal reiterated the established principle that the court of appeal may not interfere with sentence unless the imposed sentence is disproportionate to the crime, startlingly inappropriate or where a material misdirection by the trial court warrants such interference. In this case I find that the sentence imposed is startlingly inappropriate and therefore this court of appeal exercises its inherent discretion to increase the sentence.

25. The numerous cases wherein repeated perpetration of rape, being one of the heineous manifestations of gender based violence directed at women, have featured in comparable circumstances, indicate that a sentence of direct imprisonment in excess of the sentences imposed by the magistrate in this case, is not only justifiable, but fitting. See, inter alia *S v Nohaji* 2016 JDR 0575 (ECM); *S v Ngwane* 2014 JDR 2699 (WCC); *S v Maliwa* 2017 JDR 1644 (ECM); *S v Qila* 2014 JDR 2256 (ECG); *S v Makaringe* 2016 1327 (NWM); *S v ZF* 2015 JDR 2411 (KZP); *S v Malgas* 2016 JDR 0909 (ECG) and *S v Ntsasa* 2014 JDR 1215 (FB).

[7] S v Joubert 2017 (1) SACR 497 (SCA).
[8] 2016 (2) SACR 243 (SCA) at 247 C-J.

26. Order

In the circumstances I propose that the following order be made:

26.1 The appeal on both convictions and sentence is dismissed;

26.2 The sentences of ten years direct imprisonment and three years suspension thereof are set aside and replaced by the following;

"Appellants one and two are both sentenced to an effective twenty years direct imprisonment".

EM Baloyi-Mere
Acting Judge of the High Court
(Gauteng Division, Pretoria)

I agree and it is so ordered

N Davis
Judge of the High Court
(Gauteng Division, Pretoria)

Date heard: 23 August 2021

Judgment: 17 February 2022

Appearance:

1st Appellant: Adv P F Pistorius SC with Adv S F Fisher-Klein

Instructed by: KP Seabi & Associate Attorneys

2nd Appellant : Adv L A Van Wyk

Instructed by: Pretoria Justice Centre

Respondent: Adv J P Krause

Instructed by: Director of Public Prosecution