**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(LIMPOPO DIVISION, POLOKWANE)**

**CASE №: A32/2022**
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
Date: 29/05/2023

In the matter between:

**SHONNY RAPITSI** **APPELLANT**

**And**

**THE STATE** **RESPONDENT**

**Heard :** **17 March 2023**

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **MAY 2023** at **10:00**

**Coram:** **MULLER J et PILLAY AJ**

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**JUDGMENT**

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**PILLAY AJ**

[1] The Appellant was convicted in the Groblersdal Regional Court on the 19 April 2018 of C/S 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] (Rape) read with the provisions of Section 51(1) part 1 of Schedule 2 of The Criminal Law Amendment Act[2]. The Appellant was sentenced on the 20 September 2018 to Twenty (20) years imprisonment.

[2] The Appellant's leave to Appeal was refused and the Appellant's Petition in terms of Section 309C of the Criminal Procedure Act[3] was successful. The Appellant was granted leave to appeal his conviction and sentence on the 28 October 2022 by the High Court Polokwane.

[3] The appellant sought condonation for the late filing of the notice of appeal and appeal which was not opposed by the State. The explanation provided in respect of the delay was reasonable. The only question needing determination is the prospect of success in respect of the conviction and sentence imposed by the Regional Court.

[4] The appellant was 23 years old at the time of his arrest and he admitted to having had sexual intercourse with the complainant once on the date in question. According to him, the sexual intercourse was with the consent of the complainant. All the evidence tendered was done under oath with the use of the language practitioner. The evidence briefly summarised was as follows.

[5] On the 18 September 2016 in the early hours of the morning the complainant[4] was in the company of her friend Juliet returning from town. They received a lift, and inside the vehicle was the appellant, the driver and another passenger. The appellant was known to Juliet and they travelled in the direction of their homes. Juliet exited the vehicle at the spot near her home whilst the complainant remained behind as her home was further away and the appellant had promised to walk her home. The appellant requested to stop by his residence before taking her home.

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[1] *Act 32 of 2007 as amended*
[2] *Act 105of 1997 as amended*
[3] *Act 51 of 1977 as amended*
[4] *Pg 89 to 155 of the record.*

[7] They walked to his room with her carrying his bag and him drinking a can of beer. He unlocked, put down the bag, lit a candle and invited her into the room. He went outside and spoke with someone and on his return, he locked the door whilst she was requesting to go home. It was at this stage that the room key was misplaced and they both looked for it with no success. The appellant thereafter informed the complainant that since she was unable to find the key, it was an indication that she was not interested in going home.

[8] The complainant in response persisted in wanting to leave. She was subsequently struck with an open hand and fist on her face causing her nose and mouth to bleed. She was given a wash rag to wipe the blood and warned if she dared him, she would be locked in the room for a week without food if she tried to scream. Some of the blood fell on her jersey. She was instructed to undress and forced to sleep with him amidst her refusal. The appellant opened her tights and continued till she slept with him. She was forced to have sexual intercourse with the appellant twice before going to sleep. In the morning he requested to sleep with her again and she refused but she was forced to have sexual intercourse with him once more. During the sexual intercourse he inserted his penis into her vagina and thrust into her.

[9] In the morning after the sexual intercourse the key appeared and the door was opened and she left and went to Juliet's residence. She reported the incident to Juliet and Rivonia and they suggested that they would go with her later between 17h00PM and 18H00PM to confront him, but when they arrived at his room, he was not there.

[10] Later that evening they accompanied her home and on arrival, she was confronted about her whereabouts and injury to her face, she lied that she was involved in an altercation with another woman. She was forced to take her brother to show him the female person, whom she alleged, had this altercation with her. In her absence Rivonia reported the incident to the family. She was later taken to hospital and treated. The incident was reported to the police and the appellant was later arrested. Juliet left the area as soon as she heard she was a witness and was not traceable to testify. The complainant did not know the appellant prior the incident. The appellant did not propose love to her and she did not consent to having sexual intercourse with the appellant.

[11] Under cross examination she conceded that on the night in question she had left home without permission which was in conflict with her evidence in chief, that she only went out with the permission of her mother. She explained that she was not at home with her mother, but rather at her granny's house earlier that evening and when she met Juliet and accompanied her to town, she was with her cousin walking to the shop.

[12] She confirmed that Juliet had offered that she sleep over at Juliet's home but as no one in her family knew where she was, she preferred to go to her home especially as the appellant offered to accompany her home. She conceded that she only went much later that night to her home.

[13] She confirmed being willing to accompany the appellant to his home and then to her home, amidst the fact that she did not know him. She trusted and believed him that he would take her home. She realised that he was under the influence of alcohol after they had exited the vehicle and she saw he was drinking. She had not consumed alcohol that night and whilst she was walking with the appellant she declined his offer to have a beer.

[14] She conceded to lying to her family concerning the injuries she sustained to her face. She was afraid to tell anyone about what had occurred to her on account of the appellant having threatened to kill her if she told anyone.

[15] The witness Rivonia[5] confirmed that the complainant came early in the morning to her home where Juliet was staying. She saw the blood stain on her jersey and she questioned the complainant about what was wrong with the complainant. The complainant started crying and eventually told her that she was assaulted and raped by an unknown guy. She could see that the complainant had swellings on her face. The complainant was reluctant to disclose what had happened. And she had to question her for details concerning the incident. She accompanied the complainant to report the incident to her family in the late afternoon as she was busy with her business

[5] Pg 159 to 166 of the record

and the complainant was afraid to go home alone and report the incident. She was informed by the complainant that the appellant had threatened her that he would kill her if she told anyone about being assaulted and raped. Revonia testified that the complainant only knew the room where the appellant lived and not his details. She confirmed that he was known by Juliet.

[16] Dr Letsoalo testified[6] to being in charge of the clinical services at Groblersdal hospital and that Dr Maharaj was the medical practitioner who compiled the J88 medical report in respect of the complainant. He indicated that Dr Maharaj was no longer in their employ at Groblersdal.

[17] The J88[7] compiled by Dr Maharaj was handed in by consent, content admitted. It was compiled at 22h36 on the night of the incident. The medical practitioner recorded that there was increased friability of the posterior fourchette with the clitoris and urethral orifice reflecting redness. The conclusion was signs that intercourse took place. Samples were taken for DNA analysis but no further evidence was led in this regard. The appellant's version was that of consensual sexual intercourse with the complainant.

[18] The complainant's mother[8] testified concerning the child's date of birth being the 19 August 2002 and that she was 14 years old at the time of the incident. Her evidence was not tested under cross examination by the appellant.

[19] The appellant testified[9] confirming his plea of not guilty and his admission that he had consensual sexual intercourse with the complainant. He confirmed meeting her whilst in Juliet's company and that she remained in the vehicle continuing to travel to her home after Juliet alighted as he had assured her that they would travel together since it was late and she was afraid to walk alone.

[6] Pg 156 to 158 of the record.
[7] Pg 334 of the record.
[8] Pg 167to 168 of the record.
[9] Pg 184 to 197 of the record.

[20] He indicated that they exited the vehicle and walked on the street with her carrying his bag as he was drinking from a can of beer. On route they saw people and the complainant informed him that she did not want to see people, as these people would notice and inform her sister. On arrival at his room he opened, lit a candle and invited her to enter. The appellant left to consume alcohol with his neighbour and on his return found the complainant lying naked on the bed. He asked her if he should sleep on the ground or bed and she said that they could sleep together on the bed.

[21] He undressed got on the bed and she started touching him and he responded by touching her. She kissed him and he returned the kiss. He told her he did not have condoms and she said she was also human and she got feelings and that was when they had sexual intercourse. In the morning he accompanied her out to the corner of his home and they parted ways, he went to Tzaneen.

[22] He had no knowledge when and how she was injured and crying. He denied locking her in the room and striking the complainant causing her injuries. He indicated that the complainant told him she was afraid of her sister scolding her for being away from home.

[23] He testified that he was intending to visit her once he returned from Tzaneen but on his return it was too late. He said he did not know her address but knew her family name. He indicated that he accompanied her to the corner of where he lived and she continued walking alone. He did not know her age and she told him her name as they were walking.

[24] He indicated that the complainant did not ask for sex but after they were kissing she said she was a woman, having feelings and he said let us carry on. According to the appellant the sexual intercourse was once and same was consented to by the complainant.

[25] Based on the evidence tendered the appellant was convicted and subsequently sentenced. The appellant's appeal is directed against both conviction and sentence. What this Court must determine is whether in the light of the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt. If it is found that

the appellant was properly convicted, this court must determine whether the sentence meted out to the appellant was appropriate.

[26] The onus is on the state to prove its case beyond a reasonable doubt. There is no onus on the appellant. In the case of **S v JACKSON**[10] 1 the court said:

> ''the burden is on the state to prove the guilt of an accused beyond a reasonable doubt, no more or no less.''

[27] In coming to its decision the Court must consider the totality of the evidence led, taking into account the probabilities and improbabilities of the respective versions as well as the credibility of the witnesses.

[28] In evaluating evidence regard was had to the case of **S v Chabalala**[11], the Honourable Judge Hefer AJA said:

> *"to weigh up all the elements which point towards the guilt of the Accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."*

[29] The Court a quo found that amidst the complainant being a single child witness, was truthful concerning the circumstances in which she found herself on the night in question. She answered the questions honestly and the concessions made by her were of a minor nature and what was to be expected of a child witness.

[30] The Court in its judgment made reference to her petite size by stating and I quote, *"I have seen the complainant in that witness box, she is a tiny little child."*[12] This description clearly destroyed the argument by the appellant of the complainant

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[10] *1988[1] SACR 470 at 476 e-f*
[11] *2003(1) SACR 134 (SCA) at paragraph 15*
[12] *Pg 241 of the record*

appearing to be older than 16 years. This is besides her mother's evidence that she was 14 years old at the time of the incident. Her mother's evidence was not disputed by the appellant.

[31] The question concerning there being no medical record of the complainant's alleged assault and injuries to her face was also considered and from the accepted evidence the complainant indicated that the appellant struck her with open hands and fists.[13] She bled on her jersey. Revonia saw the blood and her swollen face.[14] The bruising to her face would surely have been visible for her to have concocted the lie about the fight with another woman. She was confronted by her family, with that lie and forced to point out the person she fought with. It was Revonia who reported the incident to her family in her absence.

[32] The complainant explained that she was afraid to report this incident as she was threatened by the appellant. She did not volunteer the information of the incident to Revonia and her family giving credence to the aspect of her fear of the appellant and the consequence at home.

[33] The fact that the injury to her face was not recorded by the medical practitioner, does not automatically mean she was not injured. She was examined at around 22H36PM, that night almost 20 hours after the incident. The medical doctor was no longer present to testify and provide clarity as to whether the complainant disclosed to him these injuries or not. The presiding officer correctly did not conclude that since the injuries were not recorded, that meant that they were not sustained.

[34] The issue of whether she changed her clothing prior to reporting at the hospital was also not ventilated so no negative inference can be drawn from this aspect. Revonia's evidence concerning her independent observation of the complainant, her clothing and the injuries noted was found to be corroborative of the State's version of the incident.

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*[13] Pg 92 of the record*
*[14] Pg 161 and 163 of the record.*

[35] The appellant did not dispute her injuries but stated that same was sustained possibly in his absence. I am satisfied that the Magistrate accepted the State's version concerning the injuries sustained and the observations made by Revonia in respect of same.

[36] Regard was had to the appellant's argument concerning there being no forced penetration reflected on the J88. According to him this was indicative of the complainant not being sexually assaulted. This argument is without any merit as the doctor referred to the various vaginal injuries noted. Moreover, there is no need for evidence to be led that the penetration was forced for a charge of contravening S3 Act 32 of 2007(Rape), to be sustained. The evidence required is that of a sexual penetration. This was recorded on the J88 and the appellant admitted to committing one act of sexual penetration on the complainant.

[37] The appellant contradicted himself concerning his evidence that in the morning, he accompanied the complainant to the corner and then they parted ways. This was new information which was never put to the complainant under cross examination. This clearly highlighted the manner in which the appellant tailored his evidence to suit the circumstances of being in a relationship.

[38] Even though the evidence of the complainant might not have been perfect, in my opinion, it was clear and satisfactory. Corroboration found in the evidence of the independent witness. In as much as her version had deficiencies, it was more in keeping with the truth than that of the appellant. I am unable to fault the Court *a quo* in convicting the appellant.

The appeal on conviction stands to fail.

[40] In respect of sentence, the appellant was convicted of C/S 3 Act 32 of 2007, read with Section 51(1) part 1 of schedule 2 Act 105 of 1997 as amended. The prescribed sentence was Life Imprisonment, unless the appellant was able to show the Court that substantial and compelling circumstances existed to warrant the Court imposing a different sentence.

[41] In ***Kgosimore v the State***[15], the Court restated that;

> "*It is trite law that sentence is a matter for the discretion of the Court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include, whether the reasoning of the trial Court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of Appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the Court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."*

[42] Applying the principles set out in S v Zinn[16] I had regard to the evidence tendered in mitigation and in aggravation of sentence. Ms Seruwa testified that she compiled a probation officers report on behalf of the appellant. She placed on record his family background and that he was an orphan from a young age with 4 siblings. He was 23 years old born on the 12 October 1993. He left school in grade 11. He resided in Groblersdal where he rented in 2013 till 2018. The accommodation is one room consisting of a kitchen, bathroom and dining room. He lived there with his girlfriend and child but since his incarceration she has relocated to Jane Furse as she was not in a position to continue paying the rent.

[43] He was supporting his family financially with his temporary employment as a brick layer and at PG Glass. He was in a good physical and mental state and only consumed alcohol intermittently. According to the appellant the complainant was his girlfriend and that they were under the influence of alcohol at the time of the incident and she had agreed to have unprotected sexual intercourse with him. He was shocked to be arrested for rape.

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[15] ***1999 (2) SACR 238 (SCA)*** *at paragraph 10*

[16] *1969 (2) SA 537 (A) at 540G*

[44] He alleged that he did not have a good relationship with her sister and that they had conflict at the tavern and she could have influenced the complainant to open the case as a way of revenge. He has no previous convictions. The appellant indicated that he was remorseful and if afforded the opportunity he could return to work at PG Glass. Ms Seruwa was adamant that life imprisonment was too harsh a punishment and that the appellant was capable of rehabilitation.

[45] The complainant's mother testified in aggravation of sentence that the complainant had to repeat the grade flowing from the incident. She received counselling and is slowly recovering. Her child did not know the identity of her rapist and it was an issue to communicate this situation to anyone. The witness sought that the appellant be sent to prison for 20 years.

[46] The appellant requested the Court a quo to deviate from imposing life imprisonment as the appellant was a first offender. He had one child. He was gainfully employed. He was remorseful and requested the Court be merciful. He was in custody since his conviction.

[47] The state argued the seriousness of the offence the victim impact report and societies need for deterring punishment. He argued that life imprisonment was prescribed for the specified offence and that the complainant suffered emotionally flowing from the offence.

[48] The Court a quo considered all the applicable legislation, the principles as laid out in State v Malgas[17] and found substantial and compelling factors were present and warranting for the Court to be merciful. In considering all the relevant factors, the Court a quo was satisfied that the applicable term of life imprisonment rendered the prescribed sentence unjust in that it was disproportionate to the offence, the appellant and the needs of society. To impose the prescribed term would result in an injustice being done and as such the sentencing Court was entitled to impose a lesser

[13] 2001 (1) SACR 469 (SCA)

sentence. The court *a quo* could therefore not be faulted for imposing the sentence of twenty years' imprisonment on the appellant.

The appeal on sentence also stands to fail.

[49] In the result the following order is made

49.1 The Appeal on both the conviction and sentence is dismissed.

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**PILLAY AJ**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**LIMPOPO DIVISION POLOKWANE**

**MULLER J**

[50] I agree with the conclusion reached and the order proposed.

[51] However, I am constrained to add a few remarks in connection with the manner the application for leave to appeal was handled by the court below.

[52] The appellant was sentenced on 20 September 2018. It appears from the record that the appellant launched an application for condonation and leave to appeal in person from the correctional centre in Barberton on 11 December 2018 (There is no date stamp from the magistrate's court on the application). The appellant appeared before court on 2 October 2019 whereafter the application for leave to appeal was postponed on numerous, 7 occasions until 1 February 2022 when the application was dismissed.

[53] The appellant had to be transported from Barberton to Groblersdal and back at a considerable security risk not to mention the costs involved for him to attend court.

[54] Applications of this nature should be dealt with promptly to enable an appellant if successful or unsuccessful to exercise his/her rights.

[55] A period of almost 2 years that has lapsed since he first appealed on 2 October 2019. It is deplorable that the application took so long to be dealt with. Magistrates must deal with these applications promptly.

**MULLER J**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES:**

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| **HEARD ON:** | 17 MARCH 2023 |
| **JUDGMENT DELIVERED ON:** | MAY 2023 |
| **FOR THE PLAINTIFF:** | ADV. SHASHAI |
| **INSTRUCTED BY:** | MAKGOBA RAMAWELA ATT INC.<br>POLOKWANE |
| **FOR THE DEFENDANT:** | ADV. MJ LEGODI |
| **INSTRUCTED BY:** | DPP<br>POLOKWANE |