



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)

CASE NO: CA52/2015

Held at MMABATHO on this the 18th day of AUGUST 2023
BEFORE the Honourable Madam Justice DJAJE DJP and Honourable Madam Justice
DIBETSO-BODIBE AJ

In the matter between:

PAUL MABENA

1st Appellant

GREGORY KGABO

2nd Appellant

TSHEPO MALULEKA

3rd Appellant

and

THE STATE

Respondent



HAVING READ ALL documents filed of record and having heard ADV M KEKANA on behalf
of the Appellant and ADV M D MOEKETSI on behalf of the Respondent;

IT IS ORDERED

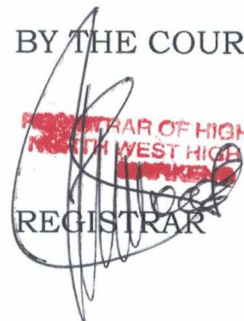
1. THAT: Judgment reserved.

THEREAFTER on this the 13th day JUNE 2024

IT IS ORDERED

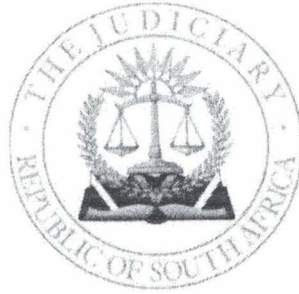
1. THAT: Condonation for the late filing of the noting and re-enrolment of the appeal is granted.
2. THAT: The appeal against the sentence of life imprisonment for rape is dismissed.

BY THE COURT


REGISTRAR OF HIGH COURT
NORTH WEST HIGH COURT
MAHIKENG
REGISTRAR

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG
Private Bag X2010, Mmabatho 2735
2024 -06- 14
NWD-HW-001
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: CA52/2015
: H155/10

In the matter between:

PAUL MABENA

FIRST APPELLANT

GREGORY KGABO

SECOND APPELLANT

TSHEPO MALULEKA

THIRD APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] *“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator, and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our court to punish rapists very severely.”¹*
- [2] The Appellants appeared before the Regional Court held at Ga-Rankuwa where they were charged as follows:
- [2.1] Count 1: Contravention of Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, Rape,
- [2.2] Count 2: Robbery with aggravating circumstances, and
- [2.3] Count 3: Possession of a firearm.
- [3] The Appellants pleaded guilty on all the three counts and were convicted as charged. They were each sentenced to life imprisonment for rape, seven (7) years imprisonment for robbery with aggravating circumstances and two (2) years imprisonment for possession of firearm, the sentences in count 2 and 3 running concurrently with the life imprisonment sentence. The Appellants are now appealing against the sentence of life imprisonment, exercising their automatic right of appeal in terms of Section

¹ S v Ncheche (A1261/04) [2005] ZAGPHC 21 (23 February 2005) at para 35

309(1)(a)² of the Criminal Procedure Act 51 of 1977 ("the CPA"). The Appellants have also applied for condonation for the late filing of noting and re-enrolment of the appeal.

BACKGROUND

- [4] This appeal had initially been filed around October 2014, almost a year after sentencing of the Appellants. On February 2016, the appeal was removed from the roll, the reason being that the trial record was incomplete. Between February 2016 and 11 May 2023 when the appeal was re-enrolled, nothing was done to correct the record. The inaudible parts of the record are still as is. Both the legal representatives for the Appellants and the State contended that it will be in the interests of administration of justice if the appeal is heard. The inaudible parts of the record appear at the pleading stage when responses of the legal representatives were not captured. The mitigation address for the First and Third Appellants was also not captured and in this regard the Court has been requested to take into consideration the pre-sentencing reports of the Appellants.
- [5] This is an untenable situation. It is irresponsible, contrary to the proper administration of justice and has a potential to intrude on the Appellants' right to a fair trial. On appeal, the record of the proceedings in the trial court is of cardinal importance, the record forming the whole basis of the rehearing by the court of appeal. "If

² Section 309 – (Appeal from lower court by person convicted) subsection (1)(a) thereof provides that any person convicted of any offence by any lower court (including any person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under Section 51 of the Criminal Law Amendment Act, 1977 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of Section 309B.

the record is inadequate for a proper consideration of the appeal, it will as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect recordal of everything that was said at the trial..."³

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

[7] *"Where adjudication of an appeal on an imperfect record will not prejudice the appellants their convictions need to be set aside, on the basis of an error or commission in the record or improper reconstruction process."*⁴

[8] As to the defects in record under consideration, I am satisfied that the inaudible parts of the record did not form part of the significant parts of the convictions and sentence with the result that the judgement is simply incomprehensible.

CONDONATION

[9] The Appellants first seek condonation for the late filing of noting and re-enrolment of the appeal as a result of the administrative delays and mis-happenings alluded to above. The application for condonation is duly accompanied by affidavits from Appellants.

³ S v Chabedi (497/04) [2005] ZASCA5 (3 March 2005) at para [5]

⁴ Schoombee and Another v S (CTT 154/16) [2016] ZACC 50 (15 December 2016) at para [29]

[10] *"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court directions. Of great significance, the explanation must be reasonable enough to excuse the default."*⁵

[10] *"In Bertie Van Zyl this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interest-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both requires, an applicant's prospects of success and the importance of the issue to be determined are relevant factors."*⁶

[11] The application for condonation is not opposed by the Respondents, and having taken into consideration the fact that the appellants have been in custody for more than a decade and thus constrained from exercising their desires to appeal the matter without any hurdles, I am of the view that it will be in the interests of justice that condonation for the late filing and prosecution of the appeal be granted.

GROUND OF APPEAL

[12] The grounds of appeal are set out in the Notice of Appeal as follows:

⁵ Grootboom v National Prosecuting Authority and Another (CCT 08/13) [2013] ZACC 37 (21 October 2013) at para [23]

⁶ Ferris and Another v Firststrand Bank Limited and Another (CCT 52/13) [2013] ZACC 46 (12 December 2013) at par [10]

AD SENTENCE

1. The honourable trial court erred in downplaying the influence of alcohol and drugs in the commission of the offences.
2. The honourable trial court erred in finding that there are no substantial and compelling circumstances allowing it to impose a sentence less than the prescribed minimum sentence.
3. The honourable trial court over emphasized the seriousness of the offence without balancing that with the personal circumstances of the appellants and the circumstances under which the offence was committed.
4. The honourable trial court misdirected itself when it held that ordinary mitigating circumstances should not be confused with substantial and compelling circumstances
5. The honourable trial court failed to do a proportionality test as required and imposed the prescribed sentence mechanically which is contrary to legal authority.

[13] *“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute*

*the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, and appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling", or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."*⁷

- [14] Regarding the grounds of the appeal and in particular the ground of appeal that the trial court misdirected itself when it held that ordinary mitigating circumstances should not be confused with substantial and compelling circumstances, from the record of the proceedings, this is what the trial court said:

"I am aware of mitigating circumstances. But what we should be careful of as court officials is that we should not mix issues.

⁷ S v Malgas (117/2000) [2001] ZASCA 30 (19 March 2001) at para [12] (Malgas)

Ordinarily mitigating circumstances should not be confused with substantial and compelling reasons. If you say I was intoxicated, if you say that I have a child, if you say that I am employed, is that a compelling reason or circumstances or is it mitigating circumstances. At some stage we say these are mitigating circumstances but when it comes to a possibility of life imprisonment then we are saying mitigating circumstances must also serve as substantial and compelling circumstances which cannot be the situation. There should be a line drawn."

- [15] Perhaps what the trial court said is better explained by the Supreme Court of Appeal as follows:

*"In cases of serious crimes 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 question 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."*⁸

- [16] In casu, the personal circumstances of the appellants were correctly placed before the court *a quo* so that it could assess the appropriate sentence it would impose on the Appellants. The court *a quo* had to decide whether such personal circumstances or any other relevant factors constituted substantial and compelling circumstances that would have enabled it to deviate from imposing the prescribed sentence in accordance with the provisions of

⁸ Vilakazi v The State (576/07) [2008] ZASCA 87 (2 September 2008)

Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”) which provides that, if the regional court or the High Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence of life imprisonment, it may impose such lesser sentence.

- [17] In my opinion, and from the reading of the said extract of the record as alluded to under paragraph 14 above, the trial court was in the process of assessing whether the weight of the mitigating and aggravating factors were such that it may deviate from imposing the ordained sentence if it was satisfied that such substantial and compelling circumstances existed.
- [18] The meaning of substantial and compelling circumstances is not defined, the reason being that when sentencing an offender, a court has to evaluate all the evidence including the mitigating and aggravating factors to decide whether substantial and compelling circumstances exist. There is no requirement that the circumstances considered must be special or exceptional. The normal circumstances usually considered by the sentencing court as part of the process of arriving at an appropriate sentence should be taken into account to see if they cumulatively constitute substantial and compelling circumstances. Broadly speaking, these involve a consideration and balancing of the nature and the seriousness of the crimes, the personal circumstances of the accused and the interest of the society. The nature and seriousness of the crime of rape and society’s disgust at its prevalence, requires little amplification. Rape involves a horrific invasion of the dignity and security of the person of the victim.

- [19] The Appellants pleaded guilty and the facts relevant to the plea of guilty are as set out in their respective statements in terms of Section 112(2) of the CPA. On 27 June 2010, the Appellants were travelling in a taxi (Toyota Venture) driven by the 2nd Appellant. They were traveling from Winterveldt to Mmotla Village. On their way and at Mabopane petrol station, the Appellants met the Complainant who was looking for a taxi to Soshanguve. The Appellants well knowing that they were not going to Soshanguve lied to the Complainant who then boarded the taxi after being assured that it was heading to the direction of her destination. Once the taxi was in motion the 3rd Appellant produced a firearm and all the Appellants took turns to rape her and thereafter took off with the items that were in her possession.
- [20] The Appellants took advantage of a woman who wanted to use public transport, a taxi, to her destination. They preyed on the Complainant to execute their wicked deeds.
- [21] The Magistrate sentenced the Appellants to life imprisonment for rape on the basis that the minimum sentencing provisions in Section 5(1) of the CLAA applied as rape took place in circumstances where the Complainant was raped more than once.
- [22] The Legislature has, in its minimum sentencing legislation, acknowledged this form of rape as particularly serious in that it is one of the crimes for which life imprisonment is demanded. Section 51(1) of the CLAA is prefaced by the words: 'Discretionary minimum sentences.' Section 51(1) provides:

"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 of life.”

- [23] Part I of Schedule 2 of the CLAA provides, inter alia, that a regional court or High Court shall have jurisdiction to impose life imprisonment on an offender who is convicted of:

“Rape as contemplated in Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 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...”*

- [24] *“... Sentencing has rightly been described as “a lonely and onerous task” For those who must shoulder that responsibility in society’s name, to have to impose a statutorily decreed sentence which is manifestly unjust in the particular circumstances of the case is a monstrous thing.”⁹*

- [25] *“What stands out quite clearly is that the courts are a good freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However in doing so, they are to respect, and not merely pay lip service to, the legislature’s view, that the prescribed periods of imprisonment are to be taken to be*

⁹ Malgas ibid at para [1]

ordinarily appropriate when crimes of this specified kind are committed.”¹⁰

CONCLUSION

[26] The sentencing court did not, in my view, impose a sentence which is disproportionate to the offender, the crime and society. The sentence of imprisonment is justified by the peculiar facts of this case. Accordingly, there is therefore no reason to interfere with the life imprisonment sentence for rape imposed by the court a quo.

ORDER

[27] In the premises, the following order is granted.

[27.1] Condonation for the late filing of the noting and re-enrolment of the appeal is granted.

[27.2] The appeal against the sentence of life imprisonment for rape is dismissed.



O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

¹⁰ Malgas ibid at para [25]

I agree


J.T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING:

18 August 2023

DATE OF JUDGEMENT:

13 June 2024

APPEARANCES

FOR THE APPELLANT:

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INSTRUCTED BY:

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FOR THE RESPONDENT:

Adv M.D. Moeketsi

INSTRUCTED BY:

**The Director of Public
Prosecutions**