

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no A129/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

MOTSEKI ISRAEL PHAHLAMETSING

Appellant

and

THE STATE

Respondent

CORUM: JP DAFFUE et S NAIDOO JJ

HEARD ON: 17 JULY 2023

JUDGMENT BY: DAFFUE J

DELIVERED ON: 28 JULY 2023

ORDER

On appeal from: The Regional Court sitting at Wesselsbron:

1. The appeal against conviction on count 4 (rape of a minor child) and the sentence of life imprisonment is dismissed.

2. The conviction and sentence of the court *a quo* are confirmed.

JUDGMENT

INTRODUCTION

[1] The appellant was convicted on 15 June 2022 in the Regional Court held at Wesselsbron (the court *a quo*) in respect of the six counts he faced, to wit:

- a. Count 1: housebreaking with intent to commit a crime unknown to the State;
- b. Count 2: assault with intention to do grievous bodily harm;
- c. Count 3: kidnapping;
- d. Count 4: rape of a minor girl;
- e. Count 5: robbery with aggravating circumstances; and
- f. Count 6: rape.

On the same day he was sentenced to life imprisonment on count 4 and to sentences ranging from three to fifteen years' imprisonment in respect of the other counts.

[2] The appellant filed a non-sensical notice of appeal in respect of his convictions and sentences¹ without having obtained leave to appeal from either the court *a quo*, or this court. However, he has an automatic right of appeal in respect of count 4 insofar as he was sentenced to life imprisonment.² There is no appeal before us in respect of the other five counts and I do not intend to consider those

¹ Record: vol 3 pp 650/1.

² Section 309(1)(a) read with s 309B(1)(a) of the Criminal Procedure Act 51 of 1977 as amended.

convictions and sentences. However, the evidence led in respect of counts 1 to 3 overlaps with the evidence on count 4 and this will be taken into consideration. Furthermore, some of the evidence in respect of count 5 – the robbery – is relevant to the evidence relating to counts 1 to 4 and will be dealt with during my evaluation of the evidence.

THE GROUNDS OF APPEAL.

[3] No grounds of appeal have been raised in the notice of appeal, but Mr Van der Merwe on behalf of the appellant relied on the following submissions:

Ad conviction:

The court *a quo* erred in:

- a. finding that the complainants were credible witnesses;
- b. drawing a negative inference of the appellant's version and not making a credibility finding in his favour;
- c. finding that the State had proven its case beyond reasonable doubt.

Ad sentence:

The sentence is inappropriate for the following reasons:

- a. it is shockingly inappropriate and induces a sense of shock;
- b. the severity of the offence was over-emphasised at the cost of the personal circumstances of the appellant;

- c. the court *a quo* erred in finding that there were no compelling and substantial circumstances in order to deviate from the minimum sentence of life imprisonment.

THE CONVICTION IN RESPECT OF COUNT 4: EVALUATION OF THE EVIDENCE

[4] Mr Van der Merwe appeared for the appellant. He, being an experienced lawyer, could not point out any misdirection committed by the court *a quo* and eventually conceded that he acted on instructions in submitting that the court *a quo* erred in finding that the State had proven its case beyond reasonable doubt. Great value is placed on the objectivity of Mr Van der Merwe. I am satisfied that the court *a quo* did not commit any misdirection. Therefore, I shall briefly deal with the following evidence in support of my conclusion that the appeal in respect of the conviction should be dismissed.

[5] During the afternoon of 5 April 2020 two separate incidents occurred soon after each other at different locations in Wesselsbron. In the first instance a robbery occurred at about 15h30 at the shop of Mr Cassim. His girlfriend, Ms Chaka was the complainant in the robbery charge. Her iPhone and other items were taken during the robbery. The appellant was identified as the perpetrator by both these persons who testified for the State. The appellant was known to both Mr Cassim and Ms Chaka. According to Ms Chaka the appellant used to visit her parental home in the past. He conceded that he and Ms Chaka's younger brother were friends and attended the same church at a stage. These two witnesses testified that the appellant was armed with a firearm and a hammer. The appellant fled when another member of the public arrived at the scene. A charge was laid with the South African Police Service (SAPS). Sgt Maretele of the SAPS, stationed at Wesselsbron, visited the appellant's premises the next day. He found an iPhone which was handed to him by the appellant, as well as a hammer that was lying on the floor. That same day Ms Chaka identified the iPhone as her property. She also identified the appellant, who was shown to her whilst sitting in a SAPS van, as the perpetrator.

[6] Also on 5 April 2020, at approximately 17h00, two 15-year old children, to wit K[...] M[...] (K[...]) and R[...] M[...] (R[...]) were approached by a man whilst walking in the street close to a church. He was not wearing shoes and was in possession of an iPhone. This man hit K[...] several times over the head with a hammer which he initially carried in his waistband. The perpetrator, he being the accused in the court *a quo* and appellant before us, was well-known to K[...]. The appellant instructed R[...] to take off K[...]’s shoelaces where after he tied K[...]’s hands and feet therewith. Although K[...] did not testify about this, R[...] testified that the appellant used the hammer to break the padlock in order to allow entry to the church where after he directed R[...] to assist him in dragging K[...] into the church. Inside the church the appellant instructed R[...] to undress and when K[...] objected, he was hit again several times with the hammer, this time on the forehead. K[...] became unconscious. He bled profusely and R[...] thought at a stage that he might have been killed. K[...] came by eventually and noticed the appellant raping R[...]. At that stage she was lying down, facing upwards and the appellant was on top of her. At a stage the appellant came to him and trampled on his neck, where after he went back to R[...] and had sexual intercourse with her for a second time. It is not necessary to deal with the gory details of the evidence in this regard any further, save to state that the appellant eventually instructed R[...] to have sexual intercourse with K[...]. According to K[...] he merely pretended to have sexual intercourse, which version differs from that of R[...] who testified that they in fact had sexual intercourse. Hereafter, according to K[...], the appellant had sexual intercourse with R[...] for a third time.

[7] According to R[...], she was raped by appellant who not only inserted his penis into vagina, but later also into her anus. Although K[...] referred to three episodes of rape, he did not testify about penile-anal penetration. However, R[...]’s version is corroborated by medical evidence as will be shown.

[8] The appellant put on K[...]’s jeans and shoes and took R[...]’s cellphone before leaving the scene. After sometime the two children also left the church premises. In my view differences could be expected, bearing in mind the time lapse of two years from the incident to the time that they testified, the circumstances that prevailed and the trauma caused to the children. R[...] testified that the appellant

used the hammer to break the padlock which was used to lock the church in order to allow them entry into the premises. As mentioned, K[...] did not testify about this. They also differ pertaining to whether or not the sexual intercourse occurred between them. The court *a quo* was well aware of the differences, but regarded same as not material. R[...] also positively identified the appellant, specifically referring to tattoos on his body as well as his one foot, although he was not previously known to her.

[9] R[...] was medically examined during the morning of 6 April 2022, that is the next day. Fresh tears were detected in both her vagina and anus. The medical practitioner who did the examination concluded that R[...] was subjected to forceful penile-vaginal as well as penile-anal penetration. The J88, completed after the medico-legal examination, was handed in by agreement as Exhibit B.

[10] There can be no doubt about the identity of the perpetrator. The incident took place during the day at about 17h00. K[...] had known the appellant for many years. K[...]’s prior knowledge of the appellant was not contested; furthermore, this was conceded by the appellant on the basis that K[...] possibly knew him well as he was well-known in the township. The incident did not take place in a fleeting moment, but over a considerable period of time. The appellant was armed with a hammer which he used to subdue K[...]. The version of Mr Cassim and Ms Chaka, who were robbed that same afternoon, corroborates that of the two children pertaining to the appellant’s possession of a hammer. A hammer was also found in the appellant’s possession the next day. He admitted this, although he mentioned that it was found in his toolbox and not on the floor as testified by the Sergeant. The appellant was in possession of an iPhone when he confronted the two children a short while after the robbery. According to the accepted evidence Ms Chaka had been robbed of her iPhone earlier that afternoon.

[11] The appellant’s version is a total denial. He testified that he was at home, building a dog kennel with his father. This version was for the first time put to R[...] when she testified on 2 March 2022. It transpired during the evidence of the father that he could not recall the exact date on which they were building the dog kennel. In

any event, he was uncertain about the appellant's movements after about 17h00 that day. The alibi evidence did not support the appellant's version.

[12] Although the appellant would have been within his rights to remain silent upon arrest and thereafter, it cannot be a neutral factor that he failed to disclose his alibi to both Ms Chaka and K[...], two persons who knew him well and could not be mistaken about the identity of the perpetrator. They testified on 26 January 2022 and 23 February 2022 respectively; therefore, before the evidence of R[...] was tendered on 2 March 2022. As mentioned, the appellant relied on his alibi defence for the first time during the testimony of R[...]. It is trite that in order to argue that a witness should not be believed, the other side's version should be put to such witness to enable him/her to deal therewith. It was not put to Mr Cassim, Ms Chaka and K[...] that they were mistaken pertaining to the identity of the perpetrator as the appellant at the time was at home in the company of his father.

[13] The court *a quo* was aware of the importance to deal appropriately with the appellant's reliance on the alibi defence. The correct approach is to consider the alibi evidence in the light of the totality of the evidence in the case and the trial court's impressions of the witnesses, bearing in mind that no onus rests on the accused, but that the State must prove beyond reasonable doubt that the accused has committed the crime.³ The versions of the identifying witnesses must not only be credible, but also reliable.⁴

[14] The court *a quo* was of the view that both children were good witnesses who made a good impression on the court, that they appeared to be honest witnesses and that their evidence appeared to be reliable. There is no reason to interfere with these factual and credibility findings as well as the evaluation of the evidence. Also as mentioned, Mr Van der Merwe could not point out any material misdirection by the court *a quo*. Therefore, the factual findings are presumed to be correct and could only be disregarded if the recorded evidence showed them to be clearly wrong.⁵

³ *R v Hlongwane* 1959 (3) SA 337 (A) at p 341A.

⁴ *S v Nango* 1990 (2) SACR 450 (A) at 455g, relying on the oft-quoted dictum in *S v Mthetwa* 1972 (3) SA 766 (A) at 786A-C.

⁵ See *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645.

[15] I agree with Adv Lencoe on behalf of the State that the evidence against the appellant was overwhelming. R[...] was materially corroborated by her boyfriend, K[...], as well as the gynaecological and anal examination recorded in the J88. I am satisfied that the appeal against the conviction on count 4 should be dismissed.

SHOULD THIS COURT INTERFERE WITH THE IMPOSED SENTENCE OF LIFE IMPRISONMENT?

[16] This is yet again a case where a minor girl child has been raped. This country is in a crisis. I have spoken out many times in sentencing accused persons about the warfare upon our women and children.⁶ It is perhaps again necessary to quote what Mathopo AJ, writing for a unanimous Constitutional Court bench, stated in *S v Tshabalala and Another*⁷:

‘[1] The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.

[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this

⁶ See *inter alia Mnguni v S* (A173/2020) [2021] ZAFSHC 323 (29 November 2021).

⁷ 2020 (2) SACR 38 (CC) paras 1 and 63.

misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.’

[17] In *Mnguni v State*⁸ I commented as follows:

‘[58] We had to adjudicate three criminal appeals on the same day, all three relating to rape. In the other two cases two minor females, 10 and 6 years old respectively, were the victims. Our court rolls, in particular those of the Regional Courts, are stacked with rape cases. The women and children in this country are not safe and they remain extremely vulnerable. Several women’s organisations voice their concerns on a regular basis, but to no avail. ...’

In the same paragraph I referred to a letter dated 22 November 2021 of the President of the country, Mr Ramaphosa, wherein he referred to the scourge of rape offences and provided statistics of gender-based violence.

[18] The following principles should be applied in sentencing accused persons convicted of serious crimes as stated by the Supreme Court of Appeal in *S v Kekana*⁹:

‘[39] Due to the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the appellant should be accorded a smaller role. His personal circumstances similarly have to bow to the interests of society. As pointed out in *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396; [2008] ZASCA 87) para 58, in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Without doubt, this is one of those cases.

[40] ...

⁸ *Ibid* para 58.

⁹ 2019 (1) SACR 1 (SCA) at paras 39 to 42.

[41] In *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185; [1997] ZASCA 7) at 519c – e this court pointed out that, given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. Harms JA went on to explain, with reference to *S v Nkwanyana and Others* 1990 (4) SA 735 (A) at 749C – D, that in other instances retribution may even be decisive. See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c – e; *S v Swart* 2004 (2) SACR 370 (SCA) paras 11 – 12; *S v Govender and Others* 2004 (2) SACR 381 (SCA) para 32.

[42] The upshot of all these authorities is that, whatever the appellant's complimentary personal circumstances and his prospects of rehabilitation, those pale into insignificance when weighed against the aggravating factors. In all the circumstances, I am of the view that life imprisonment on each of the murder counts is the only appropriate sentence.'

[19] The court *a quo* did not commit any misdirection in sentencing the appellant. It correctly held that no substantial and compelling circumstances existed in order to deviate from the prescribed minimum sentence of life imprisonment. The appeal against sentence should therefore be dismissed.

ORDER

[20] The following order is issued:

1. The appeal against conviction on count 4 (rape of a minor child) and the sentence of life imprisonment is dismissed.
2. The conviction and sentence of the court *a quo* are confirmed.

JP DAFFUE J

I concur

S NAIDOO J

Attorney for the Appellant: Mr PL van der Merwe
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

Counsel for the Respondent: Adv M Lencoe
Director of Public Prosecutions
BLOEMFONTEIN