

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

Case No.: **A155/2021**

Reportable	Yes/No
Of Interest to other Judges	Yes/No
Circulate to Magistrates:	Yes/No

In the matter between:

MOSIUWA MATTHEWS MPHUTHI

First Appellant

JAN MOFOKENG

Second Appellant

and

THE STATE

Respondent

CORAM: OPPERMAN J et SNELLENBURG, AJ

HEARD: 9 MAY 2022

JUDGMENT BY: SNELLENBURG, AJ

This judgment was handed down electronically by circulation to the parties' legal representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 19 August 2022 at 15h00.

[1] The first and second appellants (accused one and two *a quo*), together with Mr. Fusi Samuel Motaung (Mr. Fusi Motaung), were charged with one count of assault with the intent to do grievous bodily harm (assault GBH). In addition, the first and second appellants were also charged with one count of kidnapping and one count of rape (in contravention of s 3 of Act 32 of 2007 and read with s 51(1) Part I of Schedule 2 of Act 105 of 1997) originating from the same events. On 28 August 2020 the Regional Court, Bethlehem convicted the appellants and Mr. Fusi Motaung on all the charges proffered against them. Relevant for these proceedings are the fact that the appellants were each sentenced to 24 months for the assault GBH; 2 years for kidnapping and life imprisonment in terms of the provisions of s 276(1) of Act 51 of 1977 for the rape.

[2] Since a sentence of life imprisonment was imposed on count 3, the appellants have an automatic right of appeal. This appeal gives effect to that right. The appeal is directed against both the conviction on the three counts as well as the sentences which the court *a quo* imposed.

[3] The state case established the following:

3.1 On 3 March 2019 the complainant, her boyfriend Moeketsi Andries Motaung (Mr. Moeketsi Motaung) and a friend Motlalepula Solomon Mosia (Mr. Mosia) attended a tavern in Bohlokong, Bethlehem. They spent the evening at the tavern in each other's presence.

3.2 The appellants and Mr. Fusi Motaung were also present at the tavern. They were known to the complainant, Mr. Moeketsi Motaung and Mr. Mosia. The complainant, Mr. Moeketsi Motaung and Mr. Mosia sat at a table separately from the appellants and didn't consume any of their alcohol.

3.3 The complainant and her two companions left the tavern in the early morning hours of 4 March 2019 to make their way home. As they were making their way from the premises of the tavern, the complainant was assaulted by the appellants and Mr. Fusi Motaung. The appellants told the complainant, Mr. Moeketsi Motaung and Mr. Mosia during the assault, in crude terms, that they were assaulting the complainant because she had consumed R120 of their alcohol.

3.4 According to Mr. Mosia, he and Mr. Fusi Motaung left the scene during what may be termed to be the initial assault. The appellants went on to force the complainant to accompany them to the second appellant's home. This they did by dragging her against her will. The complainant resisted throughout and was subjected to further assaults at the hands of the first and second appellants to enforce their will on her. When they arrived at the second appellant's home, the latter opened the door, and the first appellant forced the complainant into the house.

3.5 Mr. Moeketsi Motaung, who is physically challenged, notwithstanding valiant attempts, was not able to prevent the assault or the appellants from taking the complainant against her will to the second appellant's home.

3.6 The appellants smoked dagga and thereafter took turns to rape the complainant. In the meantime, Mr. Moeketsi Motaung made his way to the police station, where he was told to wait until a police vehicle became available.

3.7 The complainant was allowed to leave the second appellant's home later that morning after sunrise. The complainant went to Ms. Mamoqebelo

Motlokoa's (the first report) home where she informed Ms. Motlokoa that she had been assaulted by the appellants and Mr. Fusi Motaung and raped by the first and second appellants. When the complainant arrived at Ms. Motlokoa's home, her face was swollen and she could not 'open her eyes'. A while later, Mr. Moeketsi arrived at Ms. Motlokoa's place with the police.

[4] The appellants admitted being in the presence of the complainant and spending the night with the complainant, but denied assaulting the complainant, kidnapping her, or raping her. It is appropriate to consider the appellants' version.

[5] In summary, the appellants' version was that the complainant, although she was in the company of Mr. Moeketsi Motaung and Mr. Mosia, requested to join them at the tavern where she consumed alcohol which were bought by the first appellant. When the tavern closed, they, the appellants and Mr. Fusi Motaung as well as the complainant agreed to continue drinking at the second appellant's house. The second appellant left the tavern before the first appellant and complainant. The first appellant testified that whilst they were outside the tavern, he noticed that the complainant was bleeding from her mouth. When asked what had happened, the complainant replied that Mr. Fusi Motaung had slapped her through the face and caused the injury to her mouth. He did not witness this incident. The complainant accompanied the first appellant of her own accord and Mr. Moeketsi Motaung walked with them. The second appellant was waiting for them at the front gate of his house. When the first appellant, the complainant and Mr. Moeketsi Motaung arrived, Mr. Moeketsi Motaung was invited to join them, but he declined. Because he was disturbing the neighbours ('making noise') they requested him to leave. Once inside the second appellant's house the three of them, the appellants and complainant continued to drink beer. The first appellant and complainant were both seated on crates and the second appellant sat on his bed. The television and a heater were on. The second appellant smoked some dagga whilst they were drinking and at some point, they all fell asleep; the first appellant and complainant where they were seated on crates and the second appellant on his bed. They woke later after daybreak and left the house.

[6] Mr. Fusi Motaung admitted in terms of ss115 read with 220 of the Criminal Procedure Act 51 of 1977 that he assaulted the complainant with an open hand to reprimand her after she had accidentally hit the first appellant with a beer bottle. He elected not to testify.

[7] Regarding the conviction, the appellants contend that the court below erred in (a) 'not evaluating the evidence of the state witnesses properly'; (b) concluding that their guilt was proved beyond a reasonable doubt despite the contradictions in the state's case; and (c) by rejecting their versions as opposed to finding that their versions were reasonably possibly true.

[8] The advantages of the trial court to observe witnesses in court is well established. Although a court of appeal is not hamstrung by the findings of the court *a quo*, lest the appellant's appeal become illusionary, a court of appeal will not lightly interfere with credibility findings. Naturally the court *a quo*'s observations and findings must be borne out by the record of proceedings. *S v Heslop* 2007 (4) SA 38 (SCA) para 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) paras 77– 80.

[9] The three contradictions the appellants rely on to impugn the complainant's credibility, all relate to the initial assault on the complainant outside the tavern. The contradictions, paraphrased, are set out in the heads of argument on behalf of the appellants to be following:

9.1 The complainant never testified that she was urinating when she was accosted by the first appellant. According to the complainant the first appellant was the first person to slap her in the face. She did not mention the first appellant kicking her. Mr. Moeketsi Motaung, the second state witness, however testified that he heard the complainant saying: 'Why are you kicking me?'. The aforesaid witness also testified that the complainant was behind the vehicle when the assault started.

9.2 The complainant testified that the second appellant was also present when the first appellant assaulted her. Mr. Mosia, the third state witness, however testified that the second appellant was standing at a distance when the commotion was ongoing.

9.3 According to Mr. Mosia, the second appellant did nothing to the complainant in his presence. It was however the complainant's testimony that the first appellant assaulted her, thereafter the second appellant and thereafter Mr. Fusi Motaung.

[10] The judgment accounts for all the evidence, including the aforesaid contradictions in the evidence of the witnesses on behalf of the state. *S v Doorewaard and Another* 2021 (1) SACR 235 (SCA); *S v Trainor* 2003 (1) SACR 35 (SCA) ([2003] 1 All SA 435; [2002] ZASCA 125) para 9 and *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E – H. Insofar as the appellants contend that the court did not properly evaluate the evidence of the state witnesses, the argument cannot be sustained.

[11] The court *a quo* appropriately collated and considered the contradictions between the state witnesses during the evaluation of the evidence. Contradictions *per se* do not necessarily lead to the rejection of a witness' evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility. In each case the trier of fact must make an evaluation taking into account *inter alia* the 'nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

S v Mkohle 1990 (1) SACR 95 (A) at 98f – g and *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B – C and 576G – H.

[12] A critical analysis of all the evidence establishes that these contradictions were not material. It must be borne in mind that the assault was unexpected and understandably the witnesses testified to the matters as each of them observed and experienced it. As stated above, the evidence establishes that the assault on the

complainant by the appellants did not come to an end at the tavern, they continued to assault the complainant, who continued to struggle to get away from them, to enforce their will on her whilst making their way to the second appellant's home. In short, the complainant was the victim of a brutal and callous attack. She recounted the attack on her outside the tavern as best she could.

[13] The court below held, correctly in my view, that the contradictions did not render the state witnesses' evidence unreliable. The state witnesses were found to be honest and credible witnesses, notwithstanding the shortcomings in their evidence. The findings are borne out by the record.

[14] The court *a quo* was certainly mindful of the cautionary rule pertaining to the evidence of the complainant as a single witness to the rape, namely that in order to convict the first and second appellants on the single evidence of a competent witness, the evidence must be substantially satisfactory in every material respect or there must be corroboration for the evidence. The said corroboration need not necessarily link the accused to the crime. *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA) at 171b – c; *S v Heslop* 2007 (4) SA 38 (SCA) para 12. By corroboration is meant other evidence which supports the evidence of the witness and which renders the evidence of the accused less probable on the issues in dispute. *S v Heslop*, supra; *S v Gentle* 2005 (1) SACR 420 (SCA) at 430j – 431a.

[15] The court concluded that the complainant's evidence surpassed the required standard for a single witness. Her version of the rape was clear and cohesive. I agree with the observations and findings. In addition, the complainant's evidence of how she was forced to make her way with the appellants was corroborated in all material respects by the evidence of Mr. Moeketsi. The injuries to her face the next morning as recalled by Ms. Motlokoa, the first report, was not challenged in cross-examination on behalf of the appellants. In fact, Ms. Motlokoa's evidence in its entirety was not challenged.

[16] The court approached the first and second appellants' testimony objectively and, in the end, rejected it quite correctly in my view. Their version can quite simply not be reasonably possibly true when all evidence is considered.

[17] The appellants admit spending the evening with the complainant. On their versions the complainant joined them at the tavern, consumed alcohol with them, left with the first appellant and spent an uneventful evening at the second appellant's house in their company. The only physical altercation involving the complainant according to the first appellant, would be a slap to the face at the hands of Mr. Fusi Motaung. The only injury to the complainant according to the first appellant, was bleeding from her mouth which she cleaned up at his request before they went to the second appellant's home. Save that this version is not reconcilable with the assault described by the complainant, Mr. Moeketsi Motaung and Mr. Mosia, it also does not account for the complainant's facial injuries as described by Ms. Motlokoa who saw the complainant when she arrived at her house at approximately six o'clock. Ms. Motlokoa's evidence was corroborated by Mr. Moeketsi Motaung. The evidence reveals that the complainant took a severe beating, *inter alia*, to her face, far removed from only her mouth bleeding from a single slap as described by the first appellant.

[18] In addition, the first and second appellants contradicted each other, and the statements made to state witnesses on their behalf. The fact of the matter is that when these contradictions are evaluated, they are of some moment; they are material. I focus on some of the more prominent issues in this regard.

18.1 The appellants testified that the second appellant left the tavern before the first appellant and the complainant did, and that they met up with him afterwards when they arrived at his house where he was waiting for them at the gate to the premises. Apart from the complainant's and Mr. Moeketsi Motaung's evidence, Mr. Mosia also testified that the second appellant was outside the tavern during the initial assault. Mr. Mosia's evidence in this regard was not challenged during cross-examination. The second appellant instead sought to confirm his

evidence to the effect that he, the second appellant, did not assault the complainant in Mr. Mosia's presence.

18.2 It was put to the state witnesses that the complainant approached the three accused persons and a certain Vusile at the tavern with the request to join them and consume their alcohol. According to the first appellant he explained to his companions, including the second appellant, that although he paid for the alcohol, it belonged to all of them. He also informed his companions that he did not have any objection to the complainant joining them, whereafter the complainant was allowed to join them. The second appellant however testified that he was playing table pool at the tavern and was not present when the complainant approached 'the first appellant'. He testified that he did not hear the discussion between the first appellant and the complainant and did not see in whose company she arrived at the tavern. The second appellant testified that the first appellant informed him that the complainant would join them.

18.3 It was put to the complainant that 'Pule' (Mr. Mosia) would have said that he 'was going to stab' the first appellant because 'he wants to take' the complainant. The complainant testified that she did not hear Mr. Mosia saying this. Significantly, this was never canvassed during cross-examination when Mr. Mosia testified nor did either appellant refer to this issue during their evidence in chief.

18.4 The first and second appellants' evidence also contradicted their plea explanation in terms of s115 of the Criminal Procedure Act. According to the plea explanation, the first appellant would have expressed himself, before the complainant joined them, by saying that they (he and his company, which includes the second appellant on his version) did not want any trouble, because they saw that she was with two other 'guys', one who may be her boyfriend, upon which the complainant supposedly said that her boyfriend was not amongst the two 'guys'. The aforesaid was put to the complainant who denied this version. Neither the first nor the second appellant testified to this effect.

18.5 Mr. Mosia testified that Mr. Fusi Motaung told him that 'it is not our intention to do that (referring to the assault on the complainant), but it was according to the intentions of accused 2 (the second appellant)'. I may add that it is not entirely clear when exactly these gentlemen left the scene. This testimony of Mr. Mosia was however not challenged.

[19] The state produced evidence by means of which such a high degree of probability was raised that the ordinary reasonable man, after mature consideration, would come to the conclusion that there exists no reasonable doubt that the appellants committed the crimes charged. *R v Mlambo* 1957 (4) SA 727 (A) at 738A.

[20] The challenge to the conviction of the appellants on the charges proffered by the state is without merit.

[21] As far as the sentences imposed are concerned, the appellants contend that the court below erred in the following respects: (a) concluding that life imprisonment is the only *appropriate* sentence; (b) failing to properly take the appellants' personal circumstances into consideration; (c) overemphasising the element of retribution whilst failing to accord sufficient consideration to the element of mercy; (d) overemphasising the appellants' lack of remorse; (e) failing to take into account that the rape of which the appellants were convicted did not fall within the category of the 'worst cases of rape'; and (f) concluding that there were no substantial and compelling circumstances which would justify deviation from the prescribed minimum sentence.

[22] Sentencing is pre-eminently a matter for the trial court's discretion. In *S v Malgas* 2001 (1) SACR 469 (SCA) para 12¹ the court held as follows:

'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.

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30).

Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. ...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the 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.'

[23] In *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8 Maya, DP said:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

(Emphasis in original text and the footnotes are omitted.)

[24] The appellants elected not to testify in mitigation during the sentencing stage as they were entitled to do. Their personal circumstances were put on record by their legal representative. The court *a quo* duly took these personal circumstances into consideration. These were as follows:

24.1 The first appellant was 35 years of age at the time. He was married but separated from his wife since 2014. He is father to one daughter who was 13 years of age during the sentencing phase. The daughter resides with her mother at the parental home. The first appellant was a carpenter at the time of his arrest. He earned approximately R3000.00 to R3500.00 per month. He was in custody, awaiting trial since 3 March 2019. His highest level of education is grade 10 as he left school during his grade 11 year.

24.2 The second appellant was 35 years of age at the time, married and the father of two children respectively 10 and 16 years of age during the sentencing phase. Both children reside at his parental home as their mother passed away. The second appellant was self-employed as hawker selling various things including airtime and cigarettes at date of his arrest. He had an average monthly income of R4000.00. He was in custody awaiting trial since 3 March 2019. His highest level of education is grade 10 as he also left school during his grade 11 year.

[25] On behalf of the appellants it is contended that the court *a quo* failed to exercise its discretion properly, seeing that it should have found that there were substantial and compelling circumstances present. The argument postulates that the court *a quo* erred by not deviating from the prescribed minimum sentence in view of alleged substantial and compelling circumstances.

[26] When sentencing the appellants, the court *a quo* appropriately took into account the personal circumstances when balancing the relevant interests applicable. No factors appear from either the submissions before us or the record which can be said not to have been properly considered. The sentences are not shockingly inappropriate. Having regard to all the circumstances encountered in this matter, the minimum sentences imposed are manifestly fair and just. The court *a quo* balanced the appellants' personal circumstances against the other circumstances and quite correctly also against the interests of the community.

[27] In this matter life imprisonment on the count of rape is prescribed as minimum sentence. The sentencing court may only impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed.

[28] The trial court did not exercise its discretion improperly or unreasonably when imposing the sentence, nor did it commit any misdirection. As stated, no substantial or compelling reasons are present in this matter that would justify the imposition of a lesser sentence. In my view any lesser sentence than the prescribed minimum sentence of life imprisonment would be totally disproportionate and therefore not constitutionally compliant.

[29] The assault on and rape of the complainant was clearly premeditated. The appellants were not deterred by the pleas of either the complainant or Mr. Moeketsi Motaung to desist. The appellants assaulted and kidnapped the complainant to achieve their purpose. The complainant must live with the emotional scars and stigma of having been humiliated and violated for the rest of her life. Her dignity was taken from her in the most callous manner.

[30] In *S v Chapman* 1997 (2) SACR 3 (SCA) at p5 c-e Mahomed CJ² issued the following warning:

‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and

² *S v Chapman* 1997 (2) SACR 3 (SCA) (1997 (3) SA 341; [1997] 3 All SA 277; [1997] ZASCA 45.

tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

The appellant showed no respect for their rights. He prowled the streets and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage did he show the slightest remorse.

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

(Own emphasis added)

[31] In *Director of Public Prosecutions, Grahamstown v Peli* 2018 (2) SACR 1 (SCA) at para 11 Hughes, AJA remarked that:

'The curse in our society, of rape, is considered by the courts, and society alike, as deserving of severe punishment.'

[32] Twenty-five years after Mahomed CJ's warning, rape is still rampant in our society. To this end Phatshoane, AJA emphasised in *Director of Public Prosecutions, Free State v Mokati* 2022 (2) SACR 1 (SCA) at para 42:

'The crimes which impair the dignity of women and children, which violate their sexual autonomy and privacy rights, such as rape and other sexual offences, are rampant in our society. Society craves justice and looks to our courts to impose sentences commensurate with the crime and fit for the criminal.'

[33] Both appellants have previous convictions suggesting propensity to violence and, in the case of the first appellant, rape.

[34] In *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13³ Ponnann, JA states:

'Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. . . . In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.'

[35] The appellants showed no remorse for their conduct.

[36] There is no merit in the attack on the sentences imposed by the court *a quo*.

[37] As result, the appeal against the convictions and sentences is dismissed.

N. SNELLENBURG, AJ

I concur

M. OPPERMAN, J

³ *S v Matyityi* 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127).

On behalf of the appellants:

Instructed by:

Ms. V. Abrahams

Legal Aid SA, Bloemfontein

On behalf of the respondent:

Instructed by:

Adv. R. Hoffman

Director Public Prosecutions