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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S 38/2016

Heard on: 08/08/2022

Delivered on: 21/10/2022

Reportable Yes/No
Circulate to Judges Yes/No
Circulate to Magistrate Yes/No
Circulate to Regional Magistrate Yes/No

MADYAVANHU, CLIFFORD

FIRST APPELLANT

MRHASHULA, ZAMAXOLO

SECOND APPELLANT

Geswind, BRUCE

THIRD APPELLANT

and

THE STATE

RESPONDENT

Coram: Nxumalo, J et Kgopa, AJ et Stanton, AJ

JUDGMENT

Per Kgopa AJ

INTRODUCTION

1. The appellants were convicted and sentenced on 19 September 2019 in the Gariep Circuit Court, sitting in Upington, Northern Cape on charges of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 *i.e.* rape;¹ robbery with aggravating circumstances² and murder.³ Counts 1 and 3 were read with section 51(1) of the Criminal Law Amendment Act 105 of 1997; while count 2 was read with section 51(2) thereof.⁴

2. Section 3 of Act 32 of 2007, expressly stipulates that any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without the latter's consent, is guilty of the offence of rape. Section 51 (1) and (2), severally stipulates as follows, in turn:

“51 Minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in:

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

¹ Count 1.

² Count 2.

³ Count 3.

⁴ *Ibid.*

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of—

(i) a first offender. to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;

(c) Part IV of Schedule 2, in the case of—

(i) a first offender. to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and

(d) Part V of Schedule 2, in case of –

(i) a first offender, to imprisonment for a period of not less than 3 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 5 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment of a period not less than 7 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection by more than five years.”

THE IMPUGNED CONVICTION AND SENTENCE

3. The appellants were convicted on all counts and subsequently sentenced to life imprisonment, on counts 1 (rape) and 3 (murder); and a period of 10 years, on count 2 (robbery). All sentences were ordered to run concurrently. Thereafter, the appellants lodged an application for leave to appeal against conviction, which was granted by the trial court on the 20 August 2020. The appeal is directed against the appellants' convictions and resultant sentences of life imprisonment.

4. They maintained their innocence and averred that at all material times hereto, they were at their respective homes and therefore could not have been together in one place to commit the crimes they are convicted of. They also maintain that the trial court erred in accepting and finding the evidence on their identity and other evidence reliable. They contended that, regard being had to the facts and circumstances of this case, there were material contradictions in the state's evidence. That the main witness on their identity, one J [...] D [...], actually lied or perjured himself in his police statements and in court such that his evidence should not have been accepted by the trial court to convict them.

5. It is good to remember that contradictions in and of themselves, if they be such do not inevitably lead to the rejection of a witness's evidence. As Nicholas J observed in **S v Oosthuizen** 1982 (3) SA 571 (T) at 576 B – C, they may simply be indicative of an error. At 576 G – H of the same judgment, the learned Judge stated that:

“It is not every error made by a witness that affects their credibility, in each case, the trier of fact has to make an evaluation, taking into account such factors as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”⁵

6. With regard to the impugned sentence, they contended that the trial court erred in not finding substantial and compelling circumstances when sentencing them to life imprisonment. They contended the sentence imposed was shockingly harsh and inappropriate. They vied that their convictions and sentence fell to be set aside.

BRIEF STATEMENT OF THE RELEVANT FACTS

7. The incidents apparently took place on the 12 July 2015, in the early hours of the morning, in Pabalello location, behind the stadium in a hole-like, rocky and bushy area in Upington. On that day, the body of the deceased, one Ms Stefanie Daries, was discovered. She was found half naked with only a red top pulled up her upper body; her legs spread apart; and her hands tied together with pantyhose. She had no shoes on and her blue jean-pants covered her face. She had suffered a wound to the head, another to the right and close to the front or the forehead, with traces of blood on it.

8. There were no arrests relating to the incident between 2015 and 2018. The Investigating Officer, Warrant Officer Venter attached to the murder unit of the South African Police in Upington, testified that it was a hard case to crack. That members of the community of Pabalello generally did not want to get involved and feared for their lives or physical security if they came forward. Consequently, the arrest of the accused were only effected after a certain witness, one Mr J [...] D [...], made a statement identifying the perpetrators as the three appellants.

BRIEF OVERVIEW OF THE RELEVANT EVIDENCE

Doctor Isaacs

⁵ Tshiki v The State (358/2019) [2020] ZASCA 92 (18 August 2020 at para 65)

9. Doctor Isaacs, the pathologist who testified on behalf of the State, testified that he conducted a post mortem on the body of the deceased on the 14 July 2015. In court, he was showed the pictures taken of the scene and the deceased as found or discovered. He opined that with her position where found with hands above her head and stretched out and legs spread open, the possibility was she was dragged to the scene or was held in that position prior her death and remained so after her passing.

10. According to Doctor Isaac's autopsy report, the chief autopsy findings were as follows: (a) degloving lacerative wound on the forehead; (b) Four limb stellate lacerative wound of 10 cm of the right temporofrontal area, with underlying depressed skull fracture; (c) lacerative wound of 10 cm at the back of the head on the right; (d) lacerative wound of 5 cm of the occipital area, with underlying depressed skull fracture; (e) bruise of the inside of the lower lip opposite the lower two incisor teeth; (f) ten linear superficial scratches of the back and buttocks; (g) circumferential superficial lacerations at the vaginal entrance in the positions 1,3,5,7 and 10 o' clock, with associated bruising; and subarachnoid bleeding of the left temporal, left frontal and right frontal areas. With regard to the vaginal injuries, the Doctor testified that same were indicative of forceful sexual penetration or sexual assault. The cause of death was recorded as blunt trauma to the head whilst the manner of death as homicide or unnatural death.

11. It can be deduced from the evidence of the doctor, that the deceased was not only murdered but was also forcefully sexually penetrated, the latter being indicative of non-consensual sexual intercourse.

Ms M [....] F [....]

12. According to Ms F [....] the deceased, her cousin, was staying at Grootdrink informal settlement. Ms F [....] testified about the alleged incidents of the night of Saturday 11 July 2015 going into the early morning of Sunday 12 July. According to her, on the former date she, the deceased and others went out for drinks at one tavern called Vuyo's. On the night in question, the deceased was wearing a black

jacket, a red long sleeve top, blue jeans and black boots. The latter had a shiny object or something. She testified that Vuyo's tavern is situated somewhere in Pabalello, Upington and that they arrived at the said tavern at approximately 20h00. On this occasion, it was her second visit to this tavern and for the deceased, her first. She denied, ever being in the company of one J [...] 1, as testified by one Mr J [...] D [...] for the State, during the trial.

13. According to her, neither she nor anyone in her company paid any attention to the deceased's whereabouts or interactions, whilst they drank and danced in the said tavern. Sometime before midnight, the deceased handed her the jacket she was wearing and went on to mingle in the tavern and return to the dance floor. She testified that, at all material times hereto, when the deceased was on the dance floor, she had no sight of her. They left the tavern at approximately 01h00, the following morning, after having looked for her, to no avail.

14. On Monday 13 July, she and others heard of a dead body found somewhere in the area. They (she and the deceased's sister) went to the police station to make inquiries about the deceased and were taken to the forensics department of SAPS, where they found the deceased's body.

15. I must interpose to point out here that, whilst it was argued for the appellants that Mr D [...] contradicted this witness with regard to the presence of J [...] 1, which this witness denied was there, I do not find this a material contradiction. It is so since, after all has been said and done, the incontrovertible fact is that the deceased and Mr D [...] and others, were at all material times hereto, prior to the incident, in attendance at Vuyo's tavern.

Mr R [...] M [...] 1

16. According to Mr M [...] 1, one afternoon in 2017, whilst in the company of one B [...] whom he referred to as "Skurwe" they were walking towards a certain bridge in the area. The first appellant, there and then followed. They only knew the first appellant as a local hairdresser specialising in dread-locks hairstyle. The appellant also did one uncle Kallie's "dreads" who live in their street.

17. He testified that whilst the first appellant also at some point in time in the past also wore dread-locks, his head was bald on this particular day. Mister M [...] 1 also testified that the first appellant, there and then told them that they⁶ murdered someone at the “Gaaitjie”. B [...] asked when and with whom he committed the said murder because he, B [...], resided at the “Gaaitjie” but that they have never heard of such. The first appellant responded that he was not referring to the “Gaaitjie”, i.e. the informal settlement area, but to “the gaatjie” behind the Pabalello stadium, which is the only stadium in Pabalello. The first appellant however did not respond to the question as to with whom was he when he committed the alleged murder.

18. Mr M [...] 1 also testified as follows. He knew D [...] as they worked together at the said tavern. He and others in the neighbourhood had previously heard from Mr D [...] that a murder had occurred at the said stadium. That, after the foregoing conversation, they (i.e. he, B [...] and the first appellant) then accompanied the first appellant to the police station so as to report the said matter. When they got to the police station, the police sent them away saying that the first appellant was crazy and demanded to know why they must believe a crazy person. They left without the police assisting them. The investigating officer thereafter contacted him in 2018 and he made a statement regarding the foregoing encounter with first appellant.

Mr B [...] H [...]

19. Mr H [...], for his own part, testified as follows. He knew the first appellant as “Tshepo” and that he was from Zimbabwe. That he knows him because he and the appellant used to smoke drugs together. That this notwithstanding, he and the first appellant were not friends. He only approached him as and when he needed smoking “utensils”, to share same. One day, whilst he and Mr M [...] 1 were sitting under a certain local bridge, the first appellant came running from behind calling out to them. When he reached them, they asked him what he wanted from them.

⁶ Apparently the first appellant and some other person(s).

20. In response to the foregoing, the first appellant then informed them that he had raped someone at the “Hole”. He then asked them for “something to smoke”, i.e. *tik*, before he could tell them the whole story. Thereupon they allowed the first appellant some *tik* to smoke. The first appellant thereafter told them that he had raped someone behind the stadium. He then requested them to assist him return to Zimbabwe. He also mentioned that if they do not believe him they should ask one “*Flenters*” whose real name is the abovementioned J [...] D [...].

21. Mr H [...] thereafter went to Blikkies to drop some money. Having done that, they then went looking for Mr D [...] so as to go and report what the first appellant had said to them to the police, but did not find him. They then proceeded to the police station. On arrival at the police station, they met two police officers, i.e. one Mr Jordaan and another, to whom they related the first appellant’s said story. Nevertheless, the said police officers sent them away. He testified that Mr D [...] had told them of the same incident the day after it had happened, but they did not take him seriously.

22. It can be deduced from the foregoing that the two witnesses somewhat differ on what the first appellant is alleged to have claimed had happened during the alleged rape and/or murder, during their said encounter. According to Mr M [...] 1, the first appellant claimed that he and some other person or persons murdered someone behind the stadium. Mr H [...] , on the other hand, testified that the first appellant claimed to have raped someone at the said scene. That is the only difference in their evidence but they testified the same at all material times hereto on all other aspects and circumstances pertaining to their encounter with the first appellant.

23. I do not find the said difference to be a material contradiction. The incontrovertible fact, I repeat, is that the deceased was killed and raped. The uncontested post mortem findings of Dr Isaacs states that much. The first appellant, for his own part, denied that any meeting between him and the two witnesses ever occurred. He also denied ever accompanying the said witnesses to the police station or them being dismissed by the said police.

Messrs Jordaan and Mnyaka

24. The two police officers, Messrs Jordaan and Mnyaka testified in the defence case. They “naturally” denied the evidence of Messrs. M [...] 1 and H [...] . Mr Mnyaka did not want to engage or respond when the state put to him that the only reason why they denied any encounter with the trio was in order to save their jobs.

Ms M [...] 2 S [...]

25. Ms M [...] 2 S [...] testified that she and her husband were friends with the third appellant, whom they referred to as “*Broertjie*”. She also testified that she knew the second appellant. She further testified she also knew the first appellant because they were not staying far from each other in Pabalello.

26. One Thursday night, the third appellant or “*Broertjie*” arrived at their home to request something to smoke from her husband. At all material times hereto, one Stefanie was also in their company. The third appellant and Stefanie were regulars at her house. The third appellant had in his possession a pair of black boots with a shiny thing more or less where the boot ends, which he said he was selling in order to raise some money for a “smoke”. She then asked the third appellant, where he got the said boots from and he responded that he had picked them up somewhere in town.

27. According to her, it was the first time she ever saw the third appellant selling anything in her presence. She furthermore testified that Stefanie took the boots and gave the third appellant something. She also recalled that that same night one Mr Geswind also came to her home in the company of his mother to fetch some dishes from her.

28. The next evening when the third appellant returned he inquired from her as to what she had heard or knew about the murder that transpired behind the stadium. She asked him why he was concerned about the said murder and he responded that it was because one “*Stonga*” (the second appellant herein) together with others, had chased him away from a girl (presumably the deceased) with stones and knives. He

said he knew the deceased as being from Grootdrink informal settlement or “Garries”. She testified that at all material times hereto, the third appellant appeared to be nervous when talking about the said incident.

29. Whilst the witness differed with Mr Geswind on whether he was there with his mother or not and the exact time the evening they were there, if at all, I do not see any material contradiction as argued by appellants, with regard to the material events pertaining to this specific day. The fact that Mr Geswind was at the witness’s place is just one of those collateral incidents that the witness had experienced that reminded her of the meeting and discussions with the third appellant with regard to the sale of the black boots.

Mr B [....] 1 P [....] G [....]

30. Mr B [....] 1 P [....] G [....] testified that he knew Ms S [....] who he referred to as “Witmeid”. He recalled that he went to Ms S [....]’s house one night or early evening in July to fetch certain crockery or dishes from her. There, he found Ms S [....], her husband, one Jan and his uncle, the third appellant and one other lady. He however testified that he was not accompanied by his mother.

31. Of significance in this regard is the fact that, after all had been said and done, this witness placed the third appellant, his uncle, another lady and Ms S [....] together at Ms S [....]’s house on the day he went to collect the said dishes and crockery.

Warrant Officer Jacob Venter

32. Warrant Officer Pieter Jacob Venter testified that he specialises in the investigation of murder cases. He testified that on 12 July 2015, a murder was reported to have occurred at a certain hole behind the stadium in Pabalello. He immediately attended the scene, where he found other police officers and some members of the public. The investigations he conducted led him to J D [....], M S [....] and others. He also testified that there was reference to a Stefanie but that she could not assist as she was always under the influence of drugs. He never recovered the boots which were said to have been sold to Stefanie. Investigations went on until

2018, when Mr J [...] D [...] ultimately made a second statement and on the strength of which the three appellants were arrested. Thereafter, he went back to make follow-ups with other witnesses.

33. He further testified that in his experience, in Pabalello, people feared to get involved and give information on matters such as this. That the said murder was the only one that had happened there at the back of the stadium in Pabalello in 2015 and that it was “*opspraakwekkend*” or a sensation or something startling for the community. Had there been any other murders in the area or similar incidents that were investigated by his colleagues, he would have known about them.

Mr W [...] T [...] C [...] T [...] 1

34. Mr W [...] T [...] C [...] T [...] 1 testified about the lighting around the stadium. At all material times hereto, he was under the employ of Dawid Kruiper Municipality and Pabalello fell under the jurisdiction of the said municipality. He testified that he was employed in the electricity department as an electrician for the past 18 years and was responsible for all street lights. At the time of testifying, he had already been occupying the position of superintendent for four years. During his testimony, photos of the scene of the incident and from where J [...] D [...] had said he was watching the Appellants and the deceased with regard to the visibility in the area, were shown to him. He testified that, at all material times hereto, there were mast lights in the area. The one situate in Pom Pom street was thirty meters high; with maximum strength lights illuminating 180 metres plus burning at 400 watts. The other light was forty meters high burning at a thousand/1000 watts and the illumination could go up to a distance of two hundred and fifty meters. These lights were erected and have since been operating for fifteen years, almost uninterruptedly.

Inspection *in loco*

35. The record shows that an inspection *in loco* was held by the Court *a quo* at the spot from where Mr J [...] D [...] was observing everything from to enable the Court to follow his oral evidence. The trial Court found that the distance in meters

may be further than J [...] D [...]’s estimate of 20 – 25 meters and that it could have been approximately some 60 – 100 meters away.

36. Despite the distance that was clarified during the inspection *in loco*, if one has regard to the evidence of Mr T [...] 1 that the mast lights were at all material times hereto working, then J [...] D [...] was watching the incident unfold from and in a well-illuminated area. The third appellant also corroborated the evidence on the lighting around the stadium and the streets in the vicinity.

Mr J [...] D [...] (also known as “Flenters”)

37. Mr D [...] testified that he was working at Vuyo’s tavern as a security guard. He testified that his duties *inter alia* included searching patrons upon entry of the tavern and ensuring that everything and everyone were safe in the tavern. He also did cleaning duty.

38. He described the set-up at the said tavern as having two gates. The first one as one enters the premises and second one situate where he searched patrons before they entered the tavern and moved towards the dance floor area. He testified that he would usually stand at the second gate to observe what was going on inside the tavern. The operating hours of the tavern were from 21h00 until between 01h00 and 03h00 in the morning.

39. On 11 July 2015, before going to work, he went *via* a place he referred to as “Gun-a-Gun’s house” to have a smoke. He testified that dagga is sold at the said house. He also testified that he specifically smoked drugs, “tik” on the said occasion and that he did so before 20h00 or soon thereafter. Whilst there at Gun-a-gun house, he saw the first and third appellants in possession of a home-made axe and overheard the first appellant saying to the third appellant that he would give him the axe in return for the third appellant buying or giving him two bags of “tik” (drugs).

40. He further testified as follows. He knew the third appellant as “Boraks” as he grew up in front of him. He and his aunt lived diagonally opposite the third appellant’s place of residence. He knew the first appellant as a hairdresser specialising in

dreadlocks. The first appellant also used to attend to his sister's hair. He also knew the second appellant as "*Stonga*", with whom he used to smoke "*tik*" and/or drugs.

41. He furthermore testified as follows. The deceased together with friends entered the tavern. It was the first time he saw the deceased at the tavern. At all material times hereto, he observed that the deceased had a multi-coloured braided hair-style and wore black suede boots on her feet. The deceased and friends went onto the dance floor.

42. At around past ten, being a while after his arrival at work, he saw all three appellants entering the tavern. They proceeded to buy beers for themselves and the deceased and friends. After a while, the appellants went out. He overheard them discussing how the deceased and friends were not going to get away with drinking their beers for free. They thereafter went back into the tavern. After approximately fifteen minutes the deceased complained to him that the first appellant was bothering her.

43. Towards closing time, he observed the deceased looking for her friends. He could also observe that she was intoxicated. He tried to stop her from leaving and told her to wait for him to take her to the police given her condition. This notwithstanding, she did not listen to him and left the tavern. He also called her but she waved him off and kept on walking. At this time, the first appellant called her but she waved him off and kept walking. He, the first appellant, remained standing outside where the second and third appellants joined him. He overheard a conversation between the three on who was to follow the deceased. Thereafter, the first appellant followed the deceased by walking in her direction – across the park.

44. Thereafter, the witness went inside the tavern to ask the owner to close early so he could follow the deceased as he was concerned for her safety. After closing the tavern, which took a while, he went looking for the deceased in the vicinity. He searched around the park to no avail. Thereafter, he searched for her in and around the streets in the vicinity, also to no avail. Thereafter he went searching in the direction of the stadium.

45. On his arrival in the vicinity, he stopped at a distance of, as the information from the inspection *in loco* indicated, about 100 meters. He testified that the distance was closer, at about 20 – 25. From there, he saw the deceased reach a corner of the stadium. He also testified that at all material times hereto, there was a floodlight in the area where he was which illuminated in the direction and spot where the deceased was.

46. He further testified that he waited in a dark spot at a distance from where he could observe the appellants and the deceased's movements. According to him, he had to keep moving as and when they moved to keep them within his sight. He then saw the first appellant grab the deceased from behind around her neck. He also saw the second and third appellants joining the former in assisting him to pull the deceased to a darker area. He got a little closer and saw the second appellant picking up a big stone, which he hurled at the deceased. He then saw the second appellant pulling the deceased by her hair whilst the third pulled her by her t-shirt. They then took her further into the dark to behind the stadium and out of his sight.

47. He furthermore testified that he was so scared from what he had just witnessed that he had to go and sit in Gun-a-Gun's street until day break. He was shocked by what he had seen as he thought they were just going to rob the deceased and then leave her. Thereafter, he went to Gun-a-Gun's house whereat he found the first appellant fast asleep, his head next to a bloodied axe. This axe, according to this witness, resembled the one he had seen the previous day in possession of the first appellant.

48. Approximately fifteen minutes later, the second appellant arrived at the said house wearing a pair of black jeans and sneakers both of which he could observe had some spats of blood in front. He then left Gun-a-Gun's house through the back, where he saw the third appellant in the company of a lady he does not know. Thereafter, he informed his aunt of the incident.

49. Seven days later he made a statement to the police regarding the incident. He also made a second statement on 26 May 2018. In this regard, he testified that the reason why he did not tell everything to the police in his former statement, is

because at that time he was fearing for his life. He testified that he was afraid of the appellants because he knew that they were gangsters. He was also fearful because the second appellant's friends had threatened him that if he told the police everything, he would be killed. Of significance is that he did not give any details regarding the perpetrators' identities or their description. He was alone and did not have parents.

50. In 2018 when he made the second statement, the Investigating Officer came to him and asked him to tell the whole truth. By then, he had not seen the appellants around. He then told the whole truth. That on the night in question when he witnessed the incident, the first appellant followed the deceased, grabbed her by the neck from behind and threw her to the ground, immediately whereafter, the second and third appellants joined the latter. That he did not know how and when the appellants were arrested after he made the latter statement.

51. During cross-examination he maintained as follows. That whilst at this place called Gun-a-Gun, the two people he saw quarrelling over the homemade axe were actually the first and second appellants, whilst the third appellant was on the other side of the house. That he got confused with the numbers of the accused in court. That the reason why he paid particular attention to the deceased that particular night was because he was seeing her for the first time at the said tavern. That after the second appellant had hit the deceased with a stone, all the appellants dragged her to the hole, behind the stadium. That he thereafter could not see what happened as that part of the area was dark. That at all material times hereto, he saw the three appellants with the deceased.

52. He conceded that it was the first time for him to mention in cross-examination that the first appellant at all material times hereto, had a dreadlock hairstyle and that the others' hair was cut. He also indicated that at all material times hereto, he recognised the appellants from their gaits and clothing. In particular, he recalled the following with regard to what each of the appellants were wearing: the first appellant was wearing a pair of black All-Star boot sneakers and a black hoodie jersey; the second appellant was wearing a blue jacket and a pair of white All-Star boot sneakers and the third appellant, for his own part, was wearing a blue jeans jacket.

He did not see other persons wearing similar clothing at any stage on the night of the incident.

53. The following was put to him in cross-examination that the appellants believed they were at their respective homes. They also put to him that he had only learned the first appellant's name, Tshepo, after the incident. The witness responded by saying that it was not so.

The First Appellant

54. The first appellant, for his own part in sum testified as follows. That, whilst as a hairdresser he specialised in turning clients' hairstyles into dreadlocks in Pabalello, at all material times hereto, he never wore dreadlocks. That he never confessed to anyone around 2017, regarding the incident. He denied ever referring Messrs M [...] 1 or H [...] to J [...] D [...], to corroborate his alleged confession to them.

55. During cross-examination, he maintained as follows. That he started-off as a hairdresser in 2016. That Mr D [...] and Mr M [...] 1 knew he was a hairdresser because they saw him attending to clients' hair from time to time. That he could not dispute it that J [...] D [...] knew he was not originally from Upington. That whilst he always told all his clients that he was not originally from Upington, he could neither recall having told J [...] D [...]’s sister nor confirm or deny her acquaintance. That whilst he had seen B [...] H [...] from time to time around Pabalello, he never smoked anything with him.

56. He also maintained that he never told Mr H [...] that he was originally from Zimbabwe. In response to Mr D [...]’s evidence, with regard to his involvement in the incident, he maintained as follows. That, at all material times hereto, he was home and therefore could not have been seen with anyone else. He knew “Gun-a-Gun.” She was selling dagga but he did not know if she also sold drugs. That he was also known as “Tshepo” in Pabalello. He denied, that he was ever at the said tavern or had followed the deceased. He however admitted that indeed, there were floodlights around the area where the incident had taken place in 2015.

The Second Appellant

57. The second appellant, in turn, in the main testified as follows. He has been residing in Upington since 1995. He is originally from the Eastern Cape Province. He knew J [...] D [...] by sight only since 2008. As far as his relationship with Mr D [...] is concerned he testified that there was no bad blood between them. That whilst he did not have a clear recollection of the specific date in 2015 in relation to the case, he at all material times hereto must have been at home and nowhere else. He specifically denied ever being at Vuyo's tavern that specific night or throwing any stone at the deceased.

58. He also denied ever having been in the company of any of the other appellants, at all material times hereto. He admitted he is known as "*Stonga*". He denied an incident regarding an axe taking place at Gun-a-Gun between him and the first appellant, as alleged by Mr D [...]. Whilst he admitted that he used to smoke "*tik*" between 2014 and 2017, he denied ever doing so at Gun-a-Gun's place. He also denied ever visiting Vuyo's tavern in 2015. He also testified that he did not recall if drugs were sold at Gun-a-Gun.

59. He admitted he knew the third appellant because he was friends with his younger brother. Whilst he also admitted that one is able to see what is happening around the stadium in Pabalello, because of the flood lights, he flatly denied that Mr D [...] ever saw him hurl anything at the deceased, simply because, at all material times hereto he was never at the said scene. He also denied that his jeans or sneakers ever had blood spats on them as alleged by Mr D [...].

The Third Appellant

60. The third appellant, for his own part, testified as follows. He was residing in Pabalello. He admitted to his nicknames being "*Broertjie*" and "*Boraks*." That whilst the second appellant was well known to him, the first appellant was not. That he knew nothing about the charges proffered against him by the State. He however admitted being a regular patron at Ms M [...] 2 S [...] 's place during July 2015,

because he went there during weekends; as well as being friends with Ms S [...] 's husband.

61. He however denied Ms S [...] 's testimony regarding him and contended that she must have decided to deliberately mislead the court. Whilst he admitted that at the time of the trial, that there were flood lights in the area that illuminated it at night, he could however, not recall whether same were already installed in 2015.

62. He testified that whilst Mr D [...] might know all three of them, he only knew him by sight. He testified that he would have been home most evenings or nights during 2015 as he likes watching "soapies". He however could not recall if he was at home on this fateful night, but flatly denied ever being at the scene or the said tavern.

EVALUATION

63. It is so that Mr D [...] was the only identity witness that put the appellants and the deceased together at the tavern and at the stadium, whereafter the deceased was discovered dead.

64. It was argued on behalf of the appellants that, Mr D [...] 's evidence cannot be relied on as he was under the influence of drugs (i.e. "*tik*") on the night in question and gave two contradictory statements to the police with regard the identity of the perpetrators i.e. in his first police statement, the identity of the alleged perpetrator(s) was unknown to him.

65. Mister D [...] 's uncontested evidence is that he smoked *tik* earlier at around 20h00 before he start to work at 21h00. He worked at the tavern and executed his duties until he knocked off in the early hours of the morning. After work, the evidence is that, he went looking for the deceased and witnessed the deceased being assaulted; hurled with a stone by the second appellant and being dragged to somewhere behind the stadium by the appellants jointly. He was detailed in his observations from the time the deceased and appellants arrived at the tavern until

they left its vicinity and the incidents he observed thereafter in the vicinity of the stadium.

66. On the issue of being under the influence of drugs. It is apparent that even though he had smoked “tik” earlier, he was functional or sobered up considering the detailed observations he gave with regard to the presence of the appellants; the deceased and her friends at the tavern; as well the attack on the deceased and his own reaction to the attack until he gave statements to the police.

67. It is also so that Mr D [...] gave evidence and explained how and why he gave two different police statements. The main difference was on the identity of the persons that attacked and killed the deceased. He testified that at the time he made the first statement, he was fearful for his life and was also threatened by the second appellant’s friends. This evidence was not seriously or contested at all. The foregoing notwithstanding, he still made the second statement when the investigating officer came back to him for further investigation. He then felt safe to tell the whole truth because it was years after the incident coupled with the fact that he had not seen the perpetrators around anymore.

68. The evidence of Warrant Officer Venter as the investigating officer was that the community did not want to get involved in such matters out of fear for their lives. Investigations sent him back to Mr D [...] resulting in the 2018 statement that led to the arrest and trial of the appellants.

69. Messrs H [...] and M [...] 1 testified with regard to their encounter and content of conversation with the first appellant. Mrs S [...] , for her own part, also testified uncontroverted that she had two different encounters with the third appellant. First, how the third appellant sold the boots described in the trial evidence as belonging to the deceased and second, when he came to talk about the murder and how the second appellant and others took the deceased from him.

70. Mr B [...] 1 G [...] , for his own part, also placed the third appellant, being his uncle, himself and the S [...] couple together around the same day or period when the incidents as per evidence occurred. It is therefore not only the evidence of Mr D

[....] that was and could be considered, but a trail of events and evidence that linked the witness, Mr D [....] and the appellants with the incident.

71. In *Abdullah v S*⁷, the court found it understandable in the circumstances of the case where the witness made a statement to the police 19 days after the incident of murder that involved his deceased father after he had been assured by his uncle that he will be safe and could trust Colonel Kinnear in the SAPS, on the case. Mr J [....] D [....]'s explanation on the inconsistencies in his two police statements is then found to be plausible in the circumstances of the trial.

72. In the *Abdullah* case referred to above, the court when dealing with identification by a single witness who observed and identified the perpetrators in a short space of time, the court said:

*“The appellants contend that Mr Carelse did not have the opportunity to properly observe and identify the gunmen. Much was made of the fact that Mr Carelse only had between 2-4 seconds in which to observe the appellant. Had the appellant been a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction. The time necessary to recognise a known face as opposed to identifying a person for the first time, is different. It has been recognised by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.”*⁸

73. Mister D [....] spent a while observing the appellants and how they manhandled the deceased. He knew them before the date of the incident. He was able to describe their clothing and what each one did. He was also consistent on the other (encounters) with the appellants with specific reference to “Gun-a-Gun’s” place and Ms S [....]’s place before the incidents and after. It is trite law that an identifying

⁷ (134/2021) [2022] ZASCA 33 (31 March 2022)

⁸ Emphasis supplied.

witness's evidence should not only be honest but be truthful and reliable – *State v Mthetwa* 1972 (3) SA 768 A-C.

74. The appellants could not dispute that Mr D [...] knew them before the incident. The first appellant told the trial court how he also informed his clients that he was from Zimbabwe, which was an indication that Messrs H [...] and M [...] 1 also got the information on this from him. The third appellant, for his own part, in his conversation with Ms S [...] , placed himself together with one Stonga, the second appellant, and the fact that the latter and others took the deceased from him. He also, contrary to his alibi, said he sometimes walked about at night and confirmed that there were lights around the stadium illuminating the vicinity.

75. It is clear from the foregoing that Mr D [...]’s evidence on the identity of the appellants was correctly found credible and reliable by the trial court. The sum total of all pieces of the proven facts from the evidence of all witnesses called by the state proved that the appellants were with the deceased and are the ones who robbed, killed and raped her.

76. In *S v Schackell*⁹, the Supreme Court of Appeal at paragraph 30 held as follows that:

“It is trite principle that in criminal proceedings, the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough”.

77. In *S v Francis* 1991 (1) SACR 198(A) at 198j – 199a it was held that:

“The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court’s conclusion, including its acceptance of a witness’ evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial

⁹ 2001 (4) SA 1 (SCA)

*court was wrong in accepting the witness evidence- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which the trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court' evaluation of oral testimony."*¹⁰

78. Therefore, the conclusion reached by the trial court that the identity of the appellants was proved beyond a reasonable doubt cannot be faulted. It is found that the trial court did not err in finding the appellants guilty on Murder, Rape and Robbery with aggravating circumstances.

79. It follows therefore that appeal against conviction must fail.

SENTENCE

80. The appellants were convicted of very serious offences. It is also apparent that counts 1 and 3, rape and murder fall within the ambit of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, for which life imprisonment is a prescribed sentence and the Robbery charge carried a prescribed minimum sentence of 15 years. The prescribed sentence could not be deviated from unless there were substantial and compelling circumstances.

81. It was submitted on behalf of the appellants that the sentence of life imprisonment imposed was shockingly inappropriate as the trial court did not consider the fact that they had spent 18 months in custody awaiting finalisation of the case and that the sentence of life leaves no room for rehabilitation.

82. The trial court considered the facts and circumstances of this case. That the deceased was brutally raped, robbed and murdered. She was found half naked with legs spread apart and did not find substantial and compelling circumstances to deviate from the prescribed sentence. To add to this, there was also evidence by the Investigating Officer that this was an "opspraakwekkende" or sensational murder.

¹⁰ Emphasis supplied.

83. Phatsoane AJA in *Director of Public Prosecutions, Free State v Mokati*¹¹, said the following:

“A sentence should be individualised to fit the crime, the criminal and the interest of society. A court should not shy away from imposing a sentence that accounts for all the triad on the basis that ‘it would be tantamount to breaking’ the accused.”

84. The Supreme Court of Appeal also held in *S v Vilakazi*¹², that, in cases of serious crimes, the personal circumstances recede into the background, once it becomes clear that the offence is deserving of a substantial period of imprisonment. The personal circumstances remain relevant though to assess whether the accused will offend again.

85. The deceased had the right to live as provided in section 11 of the Constitution of South Africa. Her child was only 4 years old when she was brutally murdered. She was also gainfully employed at Kentucky Fried Chicken, at the time of her death. At the time of the trial, the child was 8 years old and lived with the family of the deceased as the father was also deceased.

86. The first appellant was 29 years old at the time of the trial and originally from Zimbabwe. He resided in Upington since 2010. He was not married and had no children. He completed grade 8 or form 1 in Zimbabwe and was employed as boilermaker earning R1,500.00 per week. He had two previous convictions i.e. possession of dagga and being an illegal immigrant in the Republic.

87. The second appellant, for his own part was 37 years old, at the time. He lived in Pabalello, Upington. He was married with two children, aged 13 and 1, respectively. He passed standard 10 in school and did odd jobs in construction and earned R2,000.00 per month. He had previous convictions i.e. theft (1998); house breaking and theft (1999); possession of drugs (2001); house breaking and theft

¹¹ (Case no 440/2019) [2022] ZASCA 31 (25 March 2022) at para 53

¹² 2009 (1) SACR 552 (SCA) at paragraph 58

(2010); assault with intent to do grievous bodily harm (2010); two counts possession of drugs (2014 and 2015, respectively); and house breaking and theft (2016).

88. The third appellant, on the other hand was 42 year old, married man with five children aged 28, 27, 23, 21 and 9 years, respectively. He lived in Upington in Grootdrink. He testified that he has a technical certificate in construction and maintenance. At the time of his arrest, he was working as a builder earning R6,000.00 per month. He has previous convictions of theft (2014); possession of drugs (2015); assault and possession of drugs (2016).

CONCLUSION

89. I find the views held by the SCA in the cases stated above to find application in this matter. The trial court did not err in not finding substantial and compelling circumstances and the sentence imposed is found not shocking and inappropriate. I find no misdirection that warrant any interference by this court.

90. It follows that the appeal against sentence must fail.

ORDER

91. In the circumstances the following order is made:

The appeal is dismissed.

KGOPA AJ (SCRIBE)
ACTING JUDGE
HIGH COURT KIMBERLEY

I CONCUR.

NXUMALO APS
JUDGE
HIGH COURT KIMBERLEY

I CONCUR.

**STANTON A
ACTING JUDGE
HIGH COURT, KIMBERLEY**

On behalf of the Appellants: Mr H. Steynberg

On instruction of: Legal Aid SA

On behalf of the Respondent: Adv J. Rosenberg

On instruction of: The NDPP