

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A05/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

DAVID KEDIBONE SELEBEGO

FIRST APPELLANT

RASEMATE PETER MASINGI

SECOND APPELLANT

AND

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The two appellants were arraigned in the Regional Court Mahwelereng on one count rape read with the provisions of section 51 (1) and Schedule 2 of the Criminal Law Amendment Act¹ (CLAA). The appellants were subsequently convicted as charged and sentenced to life imprisonment. The appellants are appealing against both conviction and sentence in terms of section 309 (1) (a) of the Criminal Procedure Act² (CPA) wherein they are having automatic right of appeal.
- [2] During trial in the court a quo the State led the evidence of the following witnesses. The first witness was Mapitso Victoria Ramohale the professional nurse who examined the complainant after the alleged rape. She testified that after examining the complainant she completed the J88. Her conclusions as recorded on the J88 was that there were no physical injuries seen to exclude violence behaviour, vaginal and anal penetration. Under cross examination the witness stated that even though the appellant had told her that she did not change her clothes or bathed after the alleged incident, she looked clean and her clothes were not dusty.
- [3] The State second witness was Dikobe Jacobus Phukubje the police officer who attended to the complainant ten months after the incident. He testified that he was in the company of constable Mukebe when he attended the complainant. On arrival at the complainant's homestead, the witness asked the complainant the name of the investigating officer and she told him that it was sergeant Langa. The witness phoned sergeant Langa who told him that he has been in search of two suspects in the alleged rape case, and that the case has been hanged as he could not find the suspects. Sergeant Langa further told him

¹ 105 of 1997

² 51 of 1977

that one of the suspect was the second appellant. The witness and constable Mukebe proceeded to the second appellant's homestead where they arrested him.

[4] Katimone Regina Malete was the third witness to testify for the State. She testified that she is residing at Mmotong village in Polokwane. On 17th December 2016 she went to attend a funeral at Mahwelereng in Mokopane. Around 21h00, she and the complainant who is her sibling, went to a shop to buy airtime. When they arrive at the shop a certain boy walked passed them. As the complainant was about to enter the shop that boy who had walked passed them, came back and dragged the complainant. The witness became scared and she went to go and call her cousin who was staying not far from the shop. When she and her cousin came back to the shop, they did not know which direction the complaint and that boy had taken. The witness and her cousin went back to the funeral to report the incident. From there a search was conducted but they could not find the complainant. The complainant made a call back around 4h00 in the early hours of the following day. They then phoned the complainant and she told them that she was next to a school called Hans something. The witness saw the complainant after the complainant was back from the clinic. She did not talk to the complainant as she looked emotional.

[5] The witness was cross examined by counsel for the first appellant and she stated that she did not know which cell phone did the complainant use to make a call back. The witness further stated that her phone was in possession of the complainant and that it did not have airtime. The witness also stated that after she parted ways with the complainant they tried to

contact her on several occasions, but she was not answering the phones. The witness stated that the said boy did not drag the complainant in a violent manner, but that he had hugged her.

[6] Under cross examination by counsel for the second appellant the witness stated that when the complainant came back from the clinic, she was crying. When it was pointed to the witness that in her police statement she had stated that when the complainant came back from hospital for examination, she told her that an unknown man took her away and raped her, the witness responded by stating that the complainant had told her that she was raped, but that the complainant did not give her the full details of the incident.

[7] The State called Johanna Malete as its fourth witness. She testified that the complainant is her niece. That on 18th December 2016 in the early hours of the morning, she, Helen and Maria were requested to go and fetch the complainant at Chris Hani School. On arrival at the school they found the complainant seated on a rock and crying. They took the complainant to the clinic. On arrival at the clinic, they were referred to Voortrekker Hospital. At the hospital they were referred to the police station. Throughout their journey, the complainant did not speak to her. The witness stated that she heard from Aubrey and Maria when they were requested to go and fetch the complainant that the complainant was raped. The witness was not cross examined.

[8] The complainant testified as the fifth witness for the State. She testified that on 17th December 2016 she was sent to the Indian shop to go and buy airtime. When she went to the shop she was in the company of Regina Malete the third State witness. They arrived at the Indian shop at 21h00. Upon arrival at the shop, a certain boy (first appellant) who was wearing a scot shirt came to

her and grabbed her on her hand and neck. The first appellant started walking with her away from the shop. At a certain corner the complainant asked what was the problem with the first appellant, and the first appellant responded by telling her that the previous day the complainant consumed his money and also took his cell phone. The first appellant told the complainant that they are going to a certain homestead where they were going to enquire whether the complainant was the exact person or not.

[9] On arrival at that homestead they did not enter the premises, and when the complainant asked why they were not entering, the first appellant told her to shut up. The first appellant asked the complainant what she was having in her possession, and the complainant told the first appellant that she was having cell phones and cash for the airtime. The first appellant told the complainant to put the cell phones on the rock of which she did, and also handed cash to him. The first appellant instructed the complainant to undress the jacket she was wearing, and she did that and gave the jacket to the first appellant. The first appellant took that jacket and put it on. The complainant further stated that she complied with the requests as the first appellant was assaulting her with open hands on her face.

[10] After putting on the jacket they started walking. As they were walking, another cell phone rang from her. The first appellant assaulted the complainant once with an open hand and asked her why she did not tell him that she was having 3 cell phones, and she told the first appellant that she was not aware of that. The first appellant told the complainant to take off all her clothes, and she complied. The first appellant told the complainant to lie on the ground and after lying on the ground, the first appellant inserted his penis into her vagina

and raped her without using a condom. He did not ejaculate and he ordered the complainant to put on her clothes. After putting on the clothes, the first appellant told the complainant that they were going to his friend's place. The complainant begged the first appellant to take her back where he had picked her, and the first appellant told the complainant that they were going to his friend's homestead as the place where they were, was not safe. The complainant started crying and told the first appellant that she did not have parents and that all her family members have passed away. The complainant asked the first appellant why he was treating her like that and that she was going to report him. The first appellant became scared and he gave her back all her cell phones including her jacket. By then the first appellant was shivering and he told the complainant that he did not know where they were going to end up and that he was not going to let go something beautiful. The complainant asked the first appellant to give her back the airtime money, and the first appellant told her that he was going to use that money to buy beer.

- [11] They started walking, and as they were walking, they saw people coming from behind them. The first appellant held the complainant by her hand and they started running. As they were running, the first appellant told the complainant that the place where they were, was dangerous. When the first appellant and the complainant looked back, they saw the three people who were walking behind them running towards them. The first appellant and the complainant went to the homestead of the first appellant's friend (second appellant). As there were Apollo lights, she was able to identify the first appellant as the person who had grabbed her at the Indian shop. The complainant further stated that the first appellant did not propose to her, and that night it was for the first time she sees him, and she was not her girlfriend.

[12] On arrival at the homestead of the second appellant, they found the sibling of the second appellant. The first appellant told the sibling of the second appellant that she was her girlfriend. The complainant responded by telling the sibling of the second appellant that she was not his girlfriend, and the first appellant told her to keep quiet as he was not talking to her. After that the first appellant violently requested the complainant to give him her jacket as he wanted to go and buy beer, and she complied. The first appellant left and the complainant remained with the sibling of the second appellant.

[13] In the absence of the first appellant, the complainant told the sibling of the second appellant that the first appellant had taken her from a certain place where she was sent to buy airtime and raped her. The complainant requested the sibling of the second appellant to assist her. The sibling of the second appellant told her that he will not be able to assist her, and that the least he can do was to give her a room. The complainant stayed in the room until the first appellant came back.

[14] On his return, the first appellant requested the complainant's cell phone of which she complied. The first appellant phoned the second appellant and asked him about his whereabouts. Later the second appellant arrived and came in the room she was with the first appellant. In the presence of the second appellant, the first appellant forced the complainant to take off all her clothes by threatening to strike her with a beer bottle. She took off all her clothes and as she was lying on the ground, the first appellant inserted his penis into her vagina and raped her without using a condom. According to the complainant, there was electricity light in the room and that the second appellant was sitting on the bed whilst the first appellant was raping her.

[15] After the first appellant had finished raping the complainant, the second appellant immediately took off his trouser and inserted his penis into complainant's vagina and also raped her. The complainant pleaded with the appellants to let her go, but the first appellant fell asleep on the floor. When the first appellant was sleeping, the second appellant tried to assist the complainant to escape. As the second appellant was trying to open the door, the first appellant woke up and asked the second appellant what he was trying to do. The first appellant pleaded with the complainant to come back and sleep of which she complied as she could not go anywhere. She slept on the floor, and as the first appellant was sleeping, the second appellant again tried to assist the complainant to escape. As the second appellant was opening the door, the first appellant woke up and called the complainant to come back of which she complied.

[16] In the early hours of the following day, the first appellant told the complainant that he was escorting her out of that homestead. On the way they arrived at some bushes where the first appellant told the complainant that he wanted to have sexual intercourse with her for the last time. The first appellant ordered the complainant to take off her trouser and panty, and she complied. The first appellant inserted his penis into her vagina and had sexual intercourse with her. After the first appellant finished having sex with her, he pointed to her a certain road as the road which she must take back to the homestead she had visited. She took that road until she saw a school named Chris Hani. She then stopped at that school and made a call back to her father and told him where she was. Her uncle in the company of her wife and another old lady unknown to her came to fetch her. They took her to the hospital where she was examined.

[17] Under cross examination by counsel for the first appellant the complainant stated that the first appellant had raped her four times and ejaculated once. She further stated that DNA test were taken from her, but she was never informed of the outcome of the tests. It was put to the complainant that the DNA tests results came negative, and the complainant in response stated that the first appellant did have sexual intercourse with her. It was put to the complainant that on 16th December 2016 the first appellant was at the same funeral with her and he requested some scones from the complainant which she gave him. The complainant denied offering the first appellant some scones. She also denied that the first appellant had asked her to give him her cell phone numbers. She also denied that she and first appellant had an appointment to meet on Saturday the 17th December 2016 at 20h00. The complainant denied that at the spaza shop the first appellant had requested her to accompany him to the second appellant's homestead.

[18] The complainant stated that she was taken to the second appellant's homestead by force. When the complainant was asked why she did not escape when the first appellant had left her with the second appellant's sibling, she stated that Mokopane is not a safe area and she did not want to a risk upon another risk. It was put to the complainant that she and the first appellant slept on the floor together with their clothes on, and did not have sexual intercourse, and that they woke up at 5h00 in the morning wherein the first appellant accompanied her home. The complainant denied that and stated that the first appellant had accompanied her up to the middle of the bushes where he left her and told her that she will see where to go. When it was put to the complainant that in the J88 it is recorded that she told the nurse who examined her at the hospital that the first appellant had threatened

her with a knife, she responded by stating that the first appellant did not threaten her with a knife but with a bottle, and that what first appellant had said was that he will stab her on her vagina with a knife. It was further put to the complainant that the J88 does not mention being attacked by the second person, she stated that she told the nurse everything, or she might have forgotten about the second person.

[19] Under cross examination by counsel for the second appellant the complainant stated that she could not scream for help at the spaza shop as the first appellant was also throttling her after grabbing her. The complainant stated that the first appellant had assaulted her with open hands and that she did not sustain any injuries. When asked why she stated that the second appellant's sibling was scared of the first appellant, she stated that she saw the manner in which he had reacted when she asked him to assist her. The complainant stated that when the first appellant ordered her to undress, the second appellant had reprimanded the first appellant not to do that. The complainant stated that the second appellant penetrated her once without using a condom. The complainant denied that she agreed with the first appellant when the first appellant introduced her to the second appellant as his girlfriend.

[20] April Tenga testified as the State's sixth witness. He testified that he is a police officer and also an official photographer and draughtsman. He testified about the pictures that he took from the scene at a house where the alleged rape took place. He testified that the scene was pointed to him by the complainant. The witness was cross examined by counsel for the first appellant and he stated that the complainant never pointed to her the big rock as the scene where she was also allegedly raped.

- [21] Shimane Masingi testified as the State's seventh and last witness. He testified that on 17th December 2016 he was sleeping in the backroom when his brother's friend came with a certain lady (complainant). His brother's friend is the first appellant and his brother is the second appellant. The first appellant introduced the complainant to him as his girlfriend. The first appellant told the witness that he wanted the second appellant to assist him by giving him his (second appellant) key to the second appellant's room as it was late. The first appellant left him in his room with the complainant. After the first appellant had left the room, the complainant started crying and she told him that the first appellant had forced her to have sexual intercourse with him. The witness asked the complainant what kind of assistance he could offer to her, and the complainant said there was nothing he (witness) could do since she was not familiar with the place, and that she was willing to sleep at that place, but that the witness should not allow the first appellant to leave with her.
- [22] The first appellant came back with the key to the second appellant's room and asked the witness to assist him to open the room of the second appellant. As they were struggling to open the room, the second appellant arrived and opened his room. The first appellant fetched the complainant from the witness's room and went with her to the second appellant's room. The witness told the second appellant that the complainant had told him that the first appellant had forced her to have sexual intercourse with him. As the witness was explaining to the second appellant, the complainant interjected him and told him that he was lying. The second appellant told the witness not involve himself in matters that did not concern him. The witness went to his room and slept. When he woke up in the morning, the complainant was no longer there, and he did not know what had happened to her. The complainant came back

to their homestead around 15h00 in the company of police officers. On arrival the police officers asked him about the whereabouts of the second appellant and he told them that he last saw him the previous night. The police officers started taking photographs of the room.

[23] During cross examination by counsel for the first appellant the witness stated that when the complainant disputed the report he was giving to the second appellant, she said she was in a relationship with the first appellant, and that made him to look as if he was lying, and he decided to go and sleep.

[24] When cross examined by counsel for the second appellant, the witness stated that after the first appellant had left him with the complainant, he had offered to open the door for the complainant to leave the room but she refused saying that she did not know the place. The witness further stated that as on that date he was sick and it was late in the evening, he did not know how to assist the complainant. The witness also stated that after the first appellant had left him with the complainant, the complainant was having cell phones but did not think of phoning her relatives as at that stage all that she wanted was for her to be accommodated so that she can be able to sleep with them. That concluded the State's evidence and it closed its case.

[25] The first appellant took the witness stand and testified under oath. He testified that on Saturday the 17th December 2016 he was with the complainant. He further stated that he had met the complainant the previous Friday at a funeral at night around 24h00. When he saw the complainant that night, he asked her for tea and scones, which she did bring them. He asked the complainant to give him her cell phone numbers of which she complied. The complainant told

the first appellant that she was still busy and that the first appellant should phone her the following day around 20h00.

[26] The following day around 20h00 when he was at the Indian shop, he phoned the complainant and the complainant came to the shop in the company of another lady. The other lady entered the shop and he remained with the complainant outside the shop. When the lady who had entered the shop came back, that lady told the complainant that she was leaving, and the complainant told her to leave and that she will follow her. The first appellant requested the complainant to leave with him and she agreed. They went to the second appellant's homestead as first appellant was also not staying around that area.

[27] On arrival at the second appellant's homestead, they found the second appellant's sibling who told him that he did not know the whereabouts of the second appellant. He borrowed the complainant's cell phone and phoned the second appellant. The second appellant told him where he was and that he can come to collect the key for his room. He left the complainant with the second appellant's sibling and went to fetch the key for the room from the second appellant. When he came back he was unable to open the second appellant's room, and the second appellant's sibling refused to assist him to open it. He phoned the second appellant and by then the second appellant was already on his way back home.

[28] The second appellant arrived and opened the door of his room. After the room was opened the first appellant went to fetch the complainant from the room of the second appellant's sibling. On arrival with the complainant, the second appellant told them that he had heard from his sibling that the first appellant

had raped the complainant. The complainant disputed that and told the second appellant that she was in a relationship with the first appellant. The first appellant asked the second appellant as to how they were going to sleep as he was with the complainant. The second appellant went to go and check the two roomed house and found that his sister was sleeping in that house. The first appellant and the complainant slept on the floor whilst the second appellant slept on his bed. According to the first appellant, as they were three in the room, there was nothing he could do, and he and the complainant just slept without doing anything.

[29] In the morning he accompanied the complainant to her relative's home. The complainant looked scared and was asking what she was going to tell the people she was visiting, and as a visitor how are they going to perceive him. The first appellant suggested to the complainant that she must tell the people she had visited that she had slept at a friend's place. When they arrive at Chris Hani School, the complainant told the first appellant to turn back, of which he did. The first appellant denied raping, assaulting, threatening and taking R30.00 from the complainant. He stated that he slept with the complainant with their clothes on. The first appellant further stated that as he was accompanying the complainant, she kept on saying that she did not know what she was going to tell those people he had visited because she did not sleep at the place she was supposed to have slept.

[30] The first appellant was cross examined and he conceded that at the funeral it was the first time he sees the complainant. The first appellant conceded that he was aware that the complainant was a stranger and did not know the area. When asked why he did not accompany the complainant up to the place she

had visited, the first appellant stated that the complainant had refused and that when they reach Chris Hani School, the complainant sat on a rock and told him to go back. The first appellant also conceded that after he had parted ways with the complainant at Chris Hani School, he never phoned her, and that he did that as he did not have airtime. That concluded the evidence of the first appellant and he closed his case.

[31] The second appellant took the witness stand and testified under oath. He testified that on 17th December 2016 around 1h00 in the early hours of the morning he was at the neighbour's party. Whilst at the party he received a call back from the first appellant and he phoned him back. He told the first appellant where he was. The first appellant came to the party and found the second appellant consuming alcohol. The first appellant told the second appellant that he wanted a key to his room as he wanted to sleep and that he was in the company of a lady. He gave the first appellant the key to his room and the first appellant left.

[32] After the first appellant had left, the second appellant also left and went to his wife's homestead. On arrival at his wife's homestead the second appellant did not find his wife. The second appellant decided to go to his own homestead. On his way back home, the second appellant got a call back from the first appellant. When the second appellant called back, the first appellant told him that he was unable to open the door to his (second appellant) room. The second appellant told the first appellant that he did not find his wife and he was coming back home.

[33] On arrival at his homestead the second appellant opened his room which the first appellant was unable to open. After opening the room, the first appellant

asked the second appellant how they were going to sleep. The second appellant told the first appellant that he will use the two roomed RDP house. The second appellant went to the room of his sibling to go and fetch the keys of the two roomed house. The second appellant's sibling told him that their sister was back and was sleeping in the two roomed house. The second appellant went back to the first appellant and told him that his sister was back. The second appellant told the first appellant that as it was late at night they can all sleep in the same room, but that the first appellant was not going to do anything. The second appellant gave the first appellant and the complainant blankets and they prepared the place to sleep on the floor.

[34] The second appellant sat a chair and drank two beers which he had brought from the party, whilst the first appellant and the complainant slept on the floor. As he was tired, he felt asleep whilst sitting on the chair. When he woke up in the morning the first appellant and the complainant were no longer there. He climbed onto his bed and slept. When the second appellant woke up from the bed he asked his sibling to clean his room and he left for work. On Monday whilst at work, the second appellant received a call back from his sibling. When the second appellant phoned back, his sibling told him that the police were at their homestead looking for the second appellant as the lady who was with the first appellant the previous night had been raped. The second appellant was surprised by the news.

[35] The second appellant phoned the police and was told that the complainant had opened a charge of rape against him and the first appellant. The second appellant told the police that he had no knowledge of the charge. The second appellant told the police that the person who came with the complainant was

the first appellant and the second appellant further told the police where the first appellant stays. The first appellant was arrested the next day which was on a Tuesday. The second appellant was arrested after ten months as he was working in Witbank. The second appellant denied that the complainant was raped by anyone as he had told the first appellant that nobody was going to engage in any sexual activities in the room they were sleeping in. The second appellant denied that the complainant was threatened with a beer bottle in his presence. The second appellant also denied that he had assisted the complainant in trying to escape. The second appellant denied that his sibling had told him that the complainant reported to him that the first appellant had raped her, and that if she had reported that to him, he would not have allowed the first appellant and the complainant to sleep in his room.

[36] The second appellant was cross examined and he stated that when his sibling informed him that the police were looking for him for alleged rape, he took it lightly as he knew that he was not involved in the allegations levelled against him. The second appellant denied that why it took him ten months to hand himself to the police was that he was in hiding, but that he was in Witbank and did not have money to come back to Mokopane. That concluded the evidence of the second appellant and he closed his case.

[37] The appellants have automatic right of appeal since they were sentenced to life imprisonment by the Regional Court. The appellants' appeal is directed against both conviction and sentence. What this court must determine is whether in the light of the evidence adduced at trial, the guilt of the appellants was established beyond reasonable doubt. Should this court find that the guilt

of the appellants was established beyond reasonable doubt, it must determine whether the sentence imposed on the appellants was appropriate.

[38] It is trite that the prosecution must prove its case against the appellants beyond reasonable doubt. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. An accused is not compelled to testify, but once he elects to testify, what the court must determine is whether the version presented by the accused is reasonably possibly true.

[39] The correct approach to the evaluation of evidence in a criminal case was formulated in **S v Chabalala**³ where the court said:

“The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex port facto determination and a trial court (and counsel) should avoid the temptation to laten onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...”

[40] Both appellants do not dispute that on the day of the incident they were in the company of the complainant and further the appellants do not deny that they

³ 2003 (1) SACR 134 (SCA) at para 15

both slept in the same room with the complainant on 17th December 2016. There is also uncontested evidence that the second appellant joined the first appellant and the complainant when they were already at the second appellant's homestead. What the two appellants dispute is having sexual intercourse with the complainant.

[41] The evidence of the complainant in relation to the alleged rape is that of a single witness. It is trite that a court must apply the cautionary rule on the evidence of a single witness. Further the evidence of a single witness should be clear and satisfactory. (See **S v Saul & Others**⁴).

[42] According to the complainant, by the time they arrived at the second appellant homestead, the first appellant had already assaulted and raped her. On arrival at the second appellant's homestead they found the second appellant's sibling and the first appellant introduced the complainant to the second appellant's sibling as his girlfriend. When the complainant tried to dispute that she was the first appellant's girlfriend, the first appellant told her to keep quiet as he was not talking to her. After the first appellant had left the complainant in the company of the second appellant's sibling, the complainant told the second appellant's sibling that she was not the first appellant's girlfriend and further that the first appellant had raped her. The second appellant's sibling had corroborated the complainant's version that indeed after the first appellant had left him and the complainant, the complainant told him that the first appellant had raped her. The second appellant's sibling even went further to state that when the complainant told her that she was raped by the first appellant, she was also crying. In my view, the first appellant when he told the complainant to

⁴ 1981 (3) SA 172 (A)

keep quite, he wanted to suppress her from telling the truth. The first appellant also testified that he was confronted by the second appellant about the alleged rape, even though the second appellant has disputed that. The second appellant by disputing that it was reported to him by his sibling that the first appellant had raped the complainant, contradicts the version of his sibling and that of the first appellant. It was not put to the first appellant that his version was not correct on that aspect and it therefore remained unchallenged, and the first appellant has also been corroborated by the second appellant's sibling on that aspect. The second appellant would not have known about the complainant being raped if that was not reported to him by his sibling. This further corroborates the complainant's version that she had reported to the second appellant's sibling that she was raped by the first appellant.

- [43] The court is mindful of the evidence of the second appellant's sibling and that of the first appellant that when the second appellant confronted the first appellant about the alleged rape, the complainant refuted that and stated that she was the first appellant's girlfriend. It was late at night, there is evidence that the first appellant had already assaulted the complainant before they arrived at the second appellant's homestead and also when the complainant tried to correct the first appellant that she was not her girlfriend, she was told to keep quite. The first appellant had already installed fear in the complainant, the first and second appellants were friends, whilst the second appellant's sibling has failed to assist the complainant in the absence of the first appellant as he was not feeling well that day. It was useless for the complainant to offer any resistance and try to put the record straight. In my view, the complainant cannot be criticized for having changed his story to say she was the first

appellant's girlfriend. She did that as a result of the circumstances she was in and the fear installed in her, and did that in order to protect herself from the first appellant who had already presented himself to the complainant as a violent person..

[44] The complainant can also not be criticized for not escaping whilst the first appellant went to fetch the key from the second appellant. Already the first appellant had told the complainant that the area was dangerous, not safe and when they were walking to the second appellant's homestead, they were chased by unknown people. She could not risk and try to escape whilst she was not familiar with the area, and that area was dangerous and not safe. The complainant was in possession of three cell phones, but she at no stage contacted the people she had visited come to her rescue. The complainant testified that she did not know the area. Even if she had called her relatives to come to her rescue, she would not have been able to direct them where she was. In the morning when the complainant did a call back she was able to direct her relatives where she was as a result of the school which she was able to identify.

[45] With regard to the second appellant, I agree with the court a quo's finding that it was strange for the second appellant to have slept in the same room with the first appellant and the complainant whilst his sibling was sleeping alone in his room. According to the version of the second appellant, the first appellant had already told him that he was in the company of a lady, and the second appellant first told the first appellant that he will sleep in the two bedroomed house. By telling the first appellant that he will sleep in two bedroomed house, he knew and understood what the first appellant intended to do with the

complainant. When the second appellant found that the two bedroomed house was no longer available, he could have given the first appellant and the complainant space to do whatever they intended to do as he had an alternative to sleep with his sibling. In my view, the version of the second appellant that he had told the first appellant that the three of them were going to sleep in the same room and that the first appellant and the complainant must not do anything, is not reasonably possibly true. The second appellant knew the intention of the first appellant and he had associated himself with it.

[46] The court a quo in rejecting the appellants' versions, had also made credibility findings against them. The appellants in this appeal have not demonstrated that the court a quo was wrong on the credibility and factual findings which it had made against them. It is in exceptional cases where a court of appeal will interfere with the trial's evaluation of evidence as the trial court has the advantage of seeing, hearing and appraising a witness. (**See S v Francis**⁵). The appellants in the case at hand have failed to convince this court on adequate grounds that the court a quo was wrong in accepting the evidence of the witnesses for the State.

[47] There are parts of the evidence of the State witnesses that are not satisfactory, but there is no evidence that witnesses have deliberately conspired to falsely implicate the appellants. The court a quo had taken the evidence presented before it in its totality and holistically, and have also taken into consideration the absence of the DNA tests results and its impact on the case. Whilst DNA found deposited in the vagina of the victim will put to rest any doubt as to penetration, and also as to who the perpetrator was, that is

⁵ 1991 (1) SACR 198 (A)

not the only way to prove penetration and identity of the perpetrator. In the case at hand, the issue of identity was never placed in dispute. In fact, both appellants have placed themselves on the scene, and only disputed penetrating the complainant. The court a quo can therefore not be faulted in its evaluation of the evidence presented before it. The appeal against conviction on both appellants has to fail.

[48] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. At appeal in which interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (**See S v Romer**⁶).

[49] The appellants were charged with rape falling under section 51(1) Part I of Schedule 2 of the CLAA in that the complainant was raped by more than one person and more than once. Ordinarily the trial court was compelled to impose life imprisonment unless it finds that substantial and compelling circumstances exists which justify the deviation from the prescribed minimum sentences.

[50] In **DPP Gauteng Division, Pretoria v Tsotetsi**⁷ Coppel AJA said:

“As held in *Malgas*, confirmed in *S v Dodo* and explained in *S v Vilakazi* even though ‘substantial and compelling factors need not be exceptional they must be truly convincing reasons, or weighty justification’ for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed.”

⁶ 2011 (2) SACR 153 (SCA) at paras 22 and 23)

⁷ 2017 (2) SACR 233 (SCA) at para 27

[51] A presentencing report was prepared for both appellants. With regard to the first appellant the probation officer testified that he was a first offender, aged 37, single, dropped out of school in grade 12 and he is a christian. It was further submitted that both parents of the first appellant have passed away, with his mother passing away whilst he was aged seven. The first appellant was raised by his father who was a single parent. Later the appellant was taken to be raised by his uncle in Gauteng. His uncle and wife raised him well. His father later got remarried and the first appellant moved back to stay with his father and step-mother. Whilst staying with his father and step-mother the first appellant felt neglected. The first appellant is having a seven years old minor child with his girlfriend. The first appellant is taking care of his mentally ill sister. The first appellant is in good health. At the time of his arrest, the first appellant was employed and earning between R1600.00 and R3600.00 per month. The probation officer testified that the first appellant did not take responsibility for the offence convicted of as he says that he was not guilty.

[52] With regard to the second appellant the probation officer testified that the second appellant does not know his father and his mother has passed away. The second appellant was raised by his mother who was terminally ill most of the time. The second appellant had played the role of a provider and protector of his mother and siblings from early age as he is the first born. The first appellant did not enjoy his childhood. His late mother was maltreated by her brothers and that led to second appellant being a victim of the family dispute. That when second appellant grew up he lacked basic things such clothes as his mother could not manage to provide for him and his siblings. The second appellant is having four minor children aged 14, 11, 7 and 4. The second appellant is suffering from a chronic illness. The second appellant is aged 39

and self-employed making R1800.00 per month. The second appellant does not take responsibility for the offence he has been convicted of as he says that he was not guilty.

[53] The two appellants have been convicted of a serious offence. 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 courts are under a duty to send a clear message to the accused, to other potential rapists and to the community that they are there and determined to protect the equality and freedom of all women and that they will not show mercy to those who seek to invade those rights. (**See S v Chapman**⁸).

[54] The two appellants did not show any slightest remorse and they continued to deny the offence despite the overwhelming evidence against them. Both appellants have raped the complainant without using a condom exposing her to infection of all kinds of diseases. The complainant was kept hostage for the entire night and when accompanied home, the first appellant left her in the middle of nowhere well knowing that the complainant was not well acquainted with the area. The appellants did not have any sympathy for the complainant that she came to attend a family bereavement and that is when the family need each other the most, but they chose to separate her from her family.

[55] In **S v Vilakazi**⁹ Nugent JA said:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are themselves

⁸ 1997 (3) SA 341 (SCA)

⁹ 2009 (1) SACR 552 at para 58

largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect."

[56] What the appellants have presented as substantial and compelling are in my view ordinary and not truly convincing reasons or weighty justification for deviating from the prescribed minimum sentences. The aggravating factors far outweigh the mitigating factors, and the court a quo will not be faulted for having found that there were no substantial and compelling reasons for justification to deviate from the prescribed minimum sentences. It follows that on sentence the appeal must also fail.

[57] In the result I make the following order:

57.1 The appeal against both conviction and sentence relating to both appellants is dismissed.

MF. KGANYAGO J

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

I AGREE

G MULLER J

JUDGE OF THE HIGH COURT OF SOUTH

**AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCE:

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Counsel for the Respondent : Adv.KG Sekhukhune

Instructed by : DPP Polokwane

Date of hearing : 26th February 2021

Date of Judgment : 26th April 2021