



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: A402/2019**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.  
DATE: 12 JANUARY 2021  
SIGNATURE [REDACTED]

In the matter between:

**DANIEL MASUKU**

First Appellant

**AYANDA MNISI**

Second Appellant

and

**THE STATE**

Respondent

---

**J U D G M E N T**

---

*This appeal has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J****[1] Introduction**

This is the judgment in a criminal appeal against both the convictions and the sentences imposed on the two appellants. They were both convicted of the rape of a 21 year old female complainant and the second appellant was also convicted of kidnapping the complainant. A third accused (accused no 1 in the court a quo), who was also convicted of kidnapping and rape of the complainant, was not before us as an appellant. The sentences for the kidnapping were 5 years imprisonment and for the rapes, life imprisonment.

**[2] The accusations against the accused, including the appellants**

The version of the complainant and the defences thereto, as summarised by the learned magistrate, are briefly the following:

- 2.1 All three of the accused were independently legally represented and pleaded not guilty.
- 2.2 The defence of accused no 1 to the charge of rape was consent and the defences of the appellants, who were accused numbers two and three, were alibis.
- 2.3 The complainant was, at the time of the incidents in question, undergoing training as a traditional healer. After the complainant and her trainer had attended a ceremony on the day in question, they were on their way home when they were dropped off by someone who had offered them a lift, close to a certain tavern. It was after dusk. The reason for this point of drop-off, was that the trainer had reason to believe her brother might be at this tavern. As the complaint was, due to her status as trainee traditional healer,

precluded from entering the tavern, she waited outside while her trainer went inside. Upon the trainer's return from the inside of the tavern a short while later she found the complainant in the company of accused no 1 and the second appellant, who she knew. She then requested the second appellant to look after her trainee, the complainant, whilst she continued looking for her brother inside the tavern. Upon her later emergence from the tavern, the complainant was nowhere to be found and neither were any of the accused.

2.4 In the interim, accused no 1 and the second appellant, armed with a knife and a firearm respectively, had taken the complainant under threat of violence to a certain shack where accused no 1 had forceful intercourse with her while the second appellant waited outside.

2.5 Thereafter the two men took the complainant to a second tavern where they met up with the first appellant. The three of them then took the complainant to the first appellant's home. There, the complainant testified "*the guy with the gun raped me first, after him the owner of the room raped me*".

2.6 Accused no 1 then took the complainant to his home, where she was raped again while the said accused's brother was also present. The brother was a youngster who at some stage told the complainant not to cry.

### [3] Evaluation

3.1 It is immediately clear from the above that the evening's events involved multiple logistics: first the one tavern, then a shack, then a second tavern, then the first appellant's home and then to the first accused's home.

3.2 The above resulted in some discrepancies between the various descriptions given by the complainant, upon which the appellants pounced for purposes



of their appeal. In my view, these discrepancies were minor and to be expected from the array of occurrences. The three main facts, namely the initial abduction, the two locations of where the rapes took place and indeed, the occurrences of rape, by all the accused, were not disturbed by either the discrepancies or cross-examination.

- 3.3 The fact that the complainant was the victim of violent intercourse, was corroborated by the report of the medical practitioner who examined the complainant the next day. Swelling around the remnants of the hymen was noted with fresh tears, as well as lacerations of her perineum and bleeding from her cervix were observed, all “consistent with trauma of a blunt object such as an erect penis” (in the words of the medical practitioner).
- 3.4 The medical examination followed on the report of the rapes to the police. This, in turn, occurred after the complainant had, the morning after the incidents, returned to where she and her trainer had been living at the time. There, the complainant not only told the trainer what had happened, but also telephoned her mother to tell her of the ordeal. Although the “medieval hue-and-cry rule” has been removed as a legal impediment as part of “*sexist gender norms ... woven into the very fabric of rape law in the form of iniquitous obstacles to prosecution*” (S v Tshabalala and Another 2020 (5) SA 1 (CC) at [80] and [81]), the complainant has, at the first instance after the event, reported the crimes and sought help.
- 3.5 A further consequence of the help sought from the authorities came in the form of a police officer, Constable Podile. After having laid the charge against accused no 1, being the only one of the perpetrators whose identity and place of residence were known to the complainant, she accompanied Constable Podile to the home of accused no 1. Upon his arrest, he indicated

that the first appellant had also been present during the incident. Thereupon Constable Podile proceeded to the home of the second appellant. After having questioned him, Constable Podile brought him to the police car where the complainant was, who then identified him as one of the perpetrators. Acting on the complainant's complaint that she was raped by three men, Constable Podile's questioning of those already arrested led him to the home of the first appellant. There the first appellant was arrested and four used condoms found on the floor of his room were secured into evidence.

- 3.6 The complainant's trainer also testified and corroborated all aspects of her evidence at which she was present, that is, the training as a traditional healer, the stopping at the first tavern, the presence of the first accused and the second appellant as well as the complaints after the incidents and the telephone call to the complainant's mother.
- 3.7 The first accused testified that he knew the complainant and on the evening in question, he had met her inside the tavern. They both left late and went to his home. He went to the main house to get food from his father which he offered the complainant, but which she refused. His younger brother was watching TV, laying under some blankets. The complainant removed her clothes and joined the younger brother while he, accused no 1, smoked dagga and then fell asleep. He explained his plea explanation of consent as having referred to "sleeping together", but denied sexual intercourse. In cross-examination he changed his version and included both appellants in the evening's sequence of events. He confirmed that the complainant had been taken by the second appellant, of whom the complainant was fearful, to the first appellant's home, where he had intercourse with her. According to accused no 1, that is when the first appellant locked the door with all



three accused and the complainant inside and told the complainant that all three wanted to have intercourse with her. According to accused no 1, he declined. The remainder of chronology thereafter, as related by accused no 1 was so riddled with changed versions that it became difficult to follow on the record, let alone repeat it in any sensible fashion. His common intent of wanting to have intercourse with the complainant is perhaps best displayed by his following words: *"However, on my side, your Worship, I did not get a chance, your worship, because I thought that when I arrive at my place, I will not find anyone. So unfortunately, Your Worship, my brother was there. Because I thought that when we arrive at my place, that is when I will get a chance, your worship, to sleep with her"*. This explanation was given as part of the defence of alleged consent. His further explanation as to why to he gave a false version to his attorney (and to the court in chief examination) was that he had been "coached" by the two appellants as follows: *"Your worship, I did ask them and they said, you know what, just stick to your story in saying you took her to your place and we will have the witness, that is now Thabiso, he will testify that I did not sleep or did not have sexual intercourse with her and then all of us will be released from detention or custody"*. When confronted with the fact that even this explanation did not accord with his plea explanation of consensual intercourse, accused no 1 answered *"... that version, however it was not true"*. At the end of his evidence, after consulting with his attorney, it was decided between the two of them, not to call the proposed witness Thabiso.

- 3.8 The first appellant also testified. His version was that he did not know the appellant. He had been drinking all day from 12h00 until about closing time at the second tavern mentioned in the sequence of events, whereafter he had gone straight home. At some earlier stage however, when the

second appellant had arrived at the tavern after having attended church, he loaned the second appellant a pair of nail clippers to which was attached to his home keys. The keys were returned to him at closing time after the second appellant had gone to take off his church uniform. His explanation about condoms found at his place, which he initially denied in his evidence in chief, was that only one was found and that was one which he had used the previous day with his girlfriend and which he had left in his room. No other witnesses were called by the first appellant.

3.9 The second appellant also testified. He denied all knowledge of the incidents in question and alleged that accused no 1, being the youngest of the three accused, was the one who got him arrested. He said that this was not the first time this happened. The year before, “... *I was appearing in this court on a charge of murder, he was the one that got us arrested ... it is not the first time accused number 1 gets me arrested, he has done it before in different cases*”. According to him, a condom was also removed from his bedroom during his arrest. His explanation about using the first appellant’s nail clipper was that he did not frequent taverns but, peeping into the tavern from the outside, he saw the nail clipper “hanging on the accused’s person” and that is why he went into the tavern. No other witnesses were called by the second appellant.

3.10 The learned magistrate found the complainant, her trainer and the police officer to be credible witnesses. Apart from the fact that a court of appeal should recognize that the trial court had the opportunity to observe the demeanour of witnesses when testifying and was “steeped in the atmosphere of the trial” (R v Dhlumayo and Another 1948 (2) SA 677(A)), a reading of the record indicate that these witnesses had testified in clear and direct fashion, made concessions when reasonably they should have



done and corroborated each other where areas of their evidence overlapped. The acceptance of their evidence was clearly correct and proper.

3.11 Once this evidence is accepted, as in this case it must, then, when contrasted with the multiplicity of contradictions, inherent and unexplained improbabilities of the accuseds' versions, including that of the appellants, the finding that the accuseds' denials cannot be accepted as being true, was a correct one by the court a quo.

3.12 It was not necessary to consider whether the various accused had acted with a common intention that night as the court a quo has found them individually guilty as follows: *"The court therefore finds that accused 1 and 3 both had intercourse with the complainant twice as she testified and accused 2 had forceful intercourse with her at least once. She was also forcefully taken from Betty's tavern by accused 1 and 3 to different locations ... having regard to the evidence before the court, perhaps accused 2 (the first appellant) was not aware of the fact that accused 1 and 3 had taken the complainant without her consent ... . In respect of count number 1, we will give accused 2 the benefit of the doubt"*.

3.13 On a conspectus of all the evidence, as per S v Van Aswegen 2001 (2) SACR (SCA) and S v Mbuli 2003 (1) SACR 97 (SCA), the findings of the learned magistrate appear to be correct and the convictions in the court a quo must stand.

[4] Ad Sentence

4.1 As aforesaid, the two appellants were sentenced to life imprisonment each in respect of the charges of multiple rape.



- 4.2 From the record, it is clear that the learned magistrate properly considered all the required principles applicable to sentencing before a conclusion was reached. Pre-sentencing reports were also obtained and considered.
- 4.3 In relation to the personal circumstances of the two appellants, the following were noted: The first appellant was 40 years of age at the time of sentencing, he had been raised by his mother until the age of 13 and had thereafter stayed at “Kids Home” for 3 years. He had completed Grade 10. From this, it appears that he had a difficult upbringing. However, he was not a first offender. He had committed rape on 27 October 2000 for which he was found guilty on 22 December 2004 and sentenced to 20 years imprisonment. After having served some 8 years, he was released on parole on 3 December 2012, which was to be supervised until 11 March 2023. The rapes in question in this appeal took place on 17 July 2016, that is 4 years into the parole period. The magistrate observed that the first appellant’s mother was “totally devastated and heartbroken due to the fact that [he] has now committed a similar offence for the second time”.
- 4.4 In relation to the second appellant, who was 25 years at the time, it was observed that he dropped out of school in Grade 10 and was a father of two at the time. He denied a previous conviction contained in a SAP 69 form and the State elected not to prove the conviction. He was taken as a first offender. It appeared further that he had been in custody, awaiting conclusion of the trial, for 2 ½ years. He was the one who had actively participated in the kidnapping of the complainant for purposes of raping her, which he did.
- 4.5 When balancing the personal interests of the appellants, the seriousness of the crimes and the interests of society, the learned magistrate correctly

pointed out that, unfortunately gender based crimes has reached epidemic proportions. The magnitude and extent of crimes such as the ones forming the subject matter of this appeal has been repeatedly expounded on by our courts. See: S v Matyityi 2011 (1) SACR 40 (SCA); Masiya v Director Public Prosecutions, Pretoria 2007 (5) SA 30 (CC). To this must be added the comment made in the first appellant's pre-sentencing report, namely that the crime of rape is not attributed to one's socio-economic status, but more to do with domination, selfishness and inflection of pain on a victim without considering the repercussions.

- 4.6 The magistrate found that, due to the fact that the complainant was raped more than once, the minimum sentence of life imprisonment became the prescribed minimum sentence in terms of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997, in the absence of compelling and substantial circumstances. This section refers to offences listed in part 1 of schedule 2 of the said Act, the relevant part of which for purposes of this appeal refers to "*rape, when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or an accomplice*".
- 4.7 Much has also been said by our courts about life sentences and the imposition thereof as part of the minimum sentence-regime. See S v Malgas 2001 (2) SA 1222 (SCA), S v Abrahams 2002 (1) SACR 116 (SCA), S v Mahomotsa 2002 (2) SACR 435 (SCA) and S v Nkomo 2007 (2) SACR 198 (SCA).
- 4.8 In considering whether life sentences were appropriate in the circumstances, it is proper to have regard to the impact of the crimes on the victim. For this purpose a victim-impact report was obtained and



considered by the learned magistrate. The complainant was scarcely 21 years old at the time of the incident and had a 5 years old son. She was a trainee traditional healer at the time and although she subsequently completed her training, the incidents have left her feeling physically dirty, depressed and resorting to alcohol as a coping mechanism. As a result she has also twice attempted suicide, being only saved by the intervention of others. She had apparently been told by the appellants that they are used to being arrested for serious crimes and they would soon be free. As a result she developed a phobia for walking outside and alone. Her emotional impairment also impacted on her mother.

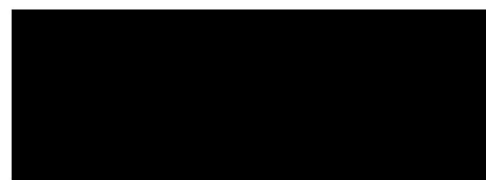
- 4.9 The complainant in this case is, distressingly, yet another victim of the crime so prevalent in our country which, more than 20 years already had been described as follows:

*‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurities which constantly diminishes the quality and enjoyment of their lives’. S v Chapman 1997 (3) SA 341 (SCA).*



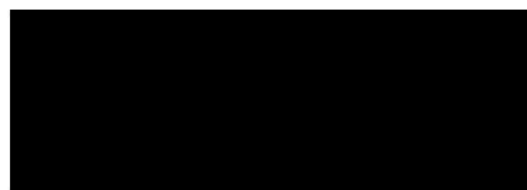
- 4.10 In S v Tshabalala (supra at [1]) the learned Constitutional Court Judge lamented “*for far too long rape had been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and, in so doing strip them of their rights to equality, human dignity and bodily integrity*”.
- 4.11 In my view, the learned magistrate correctly found no substantial and compelling circumstances, meriting a deviation from the prescribed minimum sentences. The magistrate gave the first appellant the benefit of what little doubt there was by considering that he raped the complainant only once. However, he was a re-offender of this heinous crime and the minimum prescribed sentence appears to be a fitting one in his case. The second appellant although without a previous conviction in similar vein, participated in the kidnapping and logistics of the evening with a view of facilitate multiple rapes of the complainant, in which he participated. He similarly had no qualms about destroying her emotional future and ripping from her, her rights to dignity and bodily integrity as described above
- 4.12 A court of appeal should further be mindful that sentencing is pre-eminently a matter for the discretion of the trial court. Once such discretion had been judicially, and properly exercised, a sentence should only be altered if it is “vitiating by irregularity or misdirection or is disturbing inappropriate”. See S v Rabie 1975 (1) SA 855 (A) at 857 E – F and S v Pillay 1977 (4) SA 531 (A) at 535 E – G. As already demonstrated, there was no irregularity or misdirection and the magistrate exercised his discretion judiciously. The sentences, including that of the second appellant, both in respect of the kidnapping and rape charges, are also not “disturbingly inappropriate” and I find no cause to interfere.

- [5] The order should be that the appeals are dismissed and the convictions and the sentences are confirmed.



N DAVIS  
Judge of the High Court  
Gauteng Division, Pretoria

I agree.



K PHAHLAMOHLAKA  
Acting Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 14 October 2020

Judgment delivered: 12 January 2021

#### APPEARANCES:

|                                |                                          |
|--------------------------------|------------------------------------------|
| For the First Appellant:       | Adv LA Van Wyk                           |
| Attorney for First Appellant:  | Legal Aid SA, Pretoria                   |
| For the Second Appellant:      | Adv JP Marais                            |
| Attorney for Second Appellant: | Legal Aid SA, Pretoria                   |
| For the Respondent:            | Adv JJ Kotzé                             |
| Attorney for Respondent:       | Director of Public Prosecution, Pretoria |