

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: A69/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED

DATE: 20/05/20 SIGNATURE:

In the matter between:

LESIBA EPHRAIM MALOTSA

FRANS MAKHAFOLA

ALFRED LESIBA MAGONGOA

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

GAISA AJ

INTRODUCTION:

- [1] The three appellants were charged together in the Mahwelereng Regional Court, Limpopo Province, with one count of contravention of Section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act, No 32 of 2007, read together with the provisions of Section 51(1) Part 1 of Schedule 2 of the Criminal Law Amendment Act, No 105 of 1997.
- [2] The state alleged that the appellants unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting their penises into her vagina without her consent.
- [3] All the appellants were legally represented throughout the trial and pleaded not guilty to the charges proffered against them.
- [4] At the end of the trial all three appellants were convicted, on 17 October 2017, and sentenced to life imprisonment on 4 December 2017.
- [5] The appellants appeal to this court against both the conviction and the sentence.

FACTUAL BACKGROUND IN SUMMARY:

- [6] The court *a quo* was essentially faced with two issues for determination, namely: (1) whether the act of sexual penetration between the first two appellants and the complainant was consensual; and (2) whether the third appellant in fact engaged in a non-consensual sexual act as alleged by the state.
- [7] The court heard the evidence of three state witnesses: the complainant; the complainant's father-in-law; and Dr Manisa James Makhubo. All the state witnesses testified under oath.
- [8] For the defence, the court heard the evidence of all three appellants, who testified under oath and did not call any further witnesses.
- [9] A J88 form (a report on a medico-legal examination by a health care practitioner) was submitted and accepted as Exhibit A before the court *a quo*.
- [10] The complainant painted a picture of what happened to her on the morning of 16 September 2016. She gave a step-by-step account of the events and seemed consistent during cross-examination. She related that she had been attending a funeral at Ledwaba's homestead, a neighbour one street away from her homestead in her village, until the early hours of the morning, when she decided to go home alone.

- [11] Her path was illuminated by lights from the next-door neighbour's homestead and three men, the appellants, emerged from behind her.
- [12] The appellants attacked her in front of her homestead. The third appellant closed her mouth from behind and caused her to bend forward and fall on the ground. The other two appellants held her by her legs and undressed her while she was on the ground; all three appellants took turns penetrating her vaginally with their penises without using condoms. She sustained injuries including on her hands and legs.
- [13] The complainant's father-in-law heard some noises next to his window. He woke up and saw one person running away and others in front of the house. The complainant entered the house running and informed him that her attackers wanted to kill her.
- [14] The complainant testified that all the accused are well known to her as neighbours and she used to relate well with all of them prior to the incident.
- [15] The court *a quo* established that the noise which her father-in-law heard was of the appellants attacking the complainant. He testified that it was clear that there was a struggle she was trying to escape from.
- [16] Dr Makhubo testified that he had examined the complainant and observed injuries on her hands and legs, and some abrasions on the knee.

- [17] The doctor made it clear that it was highly unlikely that the abrasions arose from an accidental fall. They were most likely caused by being forced to the ground and moved against it.
- [18] The court *a quo* found all three state witnesses to be credible and reliable.
- [19] In the defence's case, the first and second appellants did not dispute that they had sexual intercourse with the complainant at the place and on the date mentioned in the charge sheet (although not at the same time). For these appellants, the question of consent is therefore preeminent. The third appellant provided a bare denial, denying ever having had sexual intercourse with the complainant.
- [20] The complainant is a single witness to her sexual assault. No other person saw that assault. As such, the court *a quo* had regard to the cautionary rules applicable when assessing this type of evidence (as per Section 208 of the Criminal Procedure Act 51 of 1977). The court *a quo* was also clearly aware of the fact that it could only convict on the evidence of a single witness if such evidence was satisfactory in every material respect, (as per *S v Artman en Ander* 1968 (3) SA 339 (A)).
- [21] The court *a quo* correctly referred to *S v Sauls and Others* 1981 (3) SA 172 (A) 180e (albeit it incorrectly noted the page number as 140), where it was

said that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

[22] In S v Webber 1971 (3) SA 754 (A), it was decided that the evidence of a single witness should be approached with caution and that such evidence ought not necessarily to be rejected merely because the single witness happens to have an interest in the matter or bias against the accused. The correct approach is to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.

[23] Ultimately, having heard all of the evidence of the state and defence, the court *a quo* found that the complainant's evidence was clear and satisfactory in all material respects. She was a witness who could and should be believed. Her evidence was corroborated by the her father-in-law, who had left her at Ledwaba's funeral.

[24] The court *a quo* found that the fact that her father-in-law was awoken by noise and looked out to see what was happening was consistent with the complainant's evidence that she was under attack and further that "*if the noise was not amiss he could not have woken up under the circumstances*".

[25] The court *a quo* also found that despite the credibility of the state witnesses, it was not entitled to convict the accused unless it was satisfied beyond reasonable doubt that the version of the state witnesses was true.

[26] The court *a quo* correctly considered *S v Chabalala*,¹ where it was held that:

"The correct approach is to weigh up all the elements which point to 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 weighs so heavily against the state as to exclude any reasonable doubt about the accused's guilt."

[27] It is trite that the accused (the appellants before this court) have no onus on them to prove their innocence.

[28] The court *a quo* found the versions of the first and third appellants to be riddled with contradictions and inconsistencies.

[29] It found that it was common cause that the appellants and the complainant knew each other well as co-villagers and neighbours. It also found that it was not in dispute that: (a) the complainant and the accused knew each other; (b) the complainant and the accused attended Ledwaba's funeral; and that (c) the first

¹ 2003 (3) SACR 134 (SCA)

and second appellants had sexual intercourse with the complainant. What was in dispute in regard to the first and second appellants was the issue of consent.

- [30] The court found that it was improbable that the complainant had engaged in an act of consensual intercourse with the appellants given the nature of her injuries specified on the J88 form. It did not find that she fell accidentally at the gate.
- [31] Based on their contradictions and inconsistencies, the court *a quo* held that the first and third appellants were tailoring their evidence to suit the questions posed to them. It found them to be extremely poor witnesses. The appellants further alleged that the claimant was drunk, and this, according to them, explained why she had had sexual intercourse with them.
- [32] The definitions offered in the Criminal Law Sexual Offenses and Related Matters Amendment Act of 2007 state that consent means "*voluntary or un-coerced agreement*". This Act further describes circumstances in which a person cannot be in a position to give a voluntary or un-coerced agreement. That is when at the time of the commission of such an act the person was asleep, unconscious or in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that the consciousness or judgement of the person is adversely affected.

[33] The court *a quo* found that the defence wanted the court to hold that the complainant was so drunk that she was not capable of acting normally. But if this were so, then she could not have provided her consent.

[34] Regardless, the court *a quo* found that the complainant was in fact not drunk at the time.

[35] It considered the case of S v Shackell,² where it was stated that:

"A court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[36] Based on the totality of the evidence placed before it, the court found that the appellants' version could not reasonably be held to be true or probably true. It found therefore that there was no consent.

[37] Regarding the third accused, the court found that his bare denial could not be believed – all three had planned to follow the complainant, had attacked her, and had sexual intercourse with her without her consent and without using condoms.

² [2001] 4 All SA 279 (SCA) at page 288, para E–F

[38] In **Booyesen v The State**³ the SCA held that:

"[20] The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and AIDS pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects. It is not clear ex facie the medical report (J88) whether or not this precaution was taken with regard to this young girl. No evidence was led in this regard."

[39] Rape is defined in Section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act of 2007 in the following terms: *"Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without the consent of B, is guilty of the offence of rape."*

[40] Sexual penetration is defined in Section 1 of the above Act as:

"sexual penetration" includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*

³ (268/10) [2010] ZASCA 162 (1 December 2010).

(c) the genital organs of an animal, into or beyond the mouth of another person,
and "sexually penetrates" has a corresponding meaning.

- [41] The court *a quo* found that the complainant's vagina was sexually penetrated by the appellants without her consent on the date and place mentioned in the charge sheet and in the manner she described and that the state had proved its case beyond reasonable doubt. It consequently found the appellants guilty of rape.

DETERMINATION BY THIS COURT: CONVICTION

- [42] The test for permissible interference by a court of appeal with a trial court's factual finding imposes a high threshold. In S v Francis,⁴ Smalberger JA explained it as follows:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. Accused no 5's complaint is that the trial court failed to evaluate D's evidence properly. It is not suggested that the court misdirected itself in any respect. In the absence of any misdirection the trial court's conclusion, including its acceptance of D's evidence is presumed to be correct. In order to succeed on appeal, accused no 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D's evidence – reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with the trial court's evaluation of oral testimony."

⁴ 1991 (1) SACR 198 (A) at 204c - e

- [43] In the face of the overwhelming evidence against the appellants and the manner in which the court *a quo* dealt with that evidence, I find that the conclusion of the court *a quo* is fully borne out by the record and I can therefore see no misdirection on the part of the court *a quo*'s assessment of the evidence and the factual findings.

SENTENCING:

- [44] The court *a quo* found that the first and third appellants had no previous convictions. The second appellant had two previous convictions, namely (a) assault with intent to do grievous bodily harm, for which he was sentenced on 28 February 2008; and (b) theft, sentenced on 16 October 2010.
- [45] For the purpose of the appeal on sentencing, it is necessary to address the two main issues appearing from the notice to appeal and the heads of argument filed on behalf of the appellants: (1) whether or not, with regard to the minimum prescribed sentence, there were substantial and compelling circumstances which ought to have moved the court *a quo* to deviate from the minimum sentence and impose a sentence of less than life imprisonment, and (2) in any event, whether the sentence imposed by the court *a quo* was appropriate and in accordance with justice and equity. We address these issues in what follows.

Paying money so that the case does not see its day in court:

[46] The appellants are appealing against the conviction and sentencing by the court *a quo* because they believe that the court *a quo* did them an injustice. It is disturbing that at times those who come to court seeking justice are not themselves prepared to afford that justice to others.

[47] The court *a quo* heard how the appellants attempted to bribe the complainant and her husband, offering them money not to bring the matter to court and to justice.

[48] It is unfortunate that in the present day, many coldly believe that every man has a price. Yet in the words of Ellen G White:

*"The greatest want of the world is the want of men – men who will not be bought or sold; men who in their inmost souls are true and honest; men who do not fear to call sin by its right name; men whose conscience is as true to duty as the needle to the pole; men who will stand for the right though the heavens fall."*⁵

[49] The complainant and her husband refused to be bought. Instead they brought the matter to be heard fairly and lawfully so that justice could be done.

⁵ *Thoughts on the Business of Life*, <https://www.forbes.com/quotes/2632/>, accessed on 15 May 2020

Sentencing is clearly the most difficult part of criminal proceedings:

- [50] It "*is widely accepted that sentencing is a particularly difficult part of the criminal justice process*".⁶
- [51] In **Fredericks v S**,⁷ the court held that sentencing is the *most* difficult part of criminal proceedings. It involves a careful and dispassionate consideration balancing the gravity of the offence, the interests of society, the personal circumstances of the offender, and also the interests of the victim.⁸
- [52] *Shongwe JA*, in **Fredericks supra**, stated that the purpose of sentencing is to deter would-be offenders, punish the actual offender and prevent the re-occurrence of the crime.⁹
- [53] There is no doubt that any sentence pronounced by a court will leave a legacy. Whatever the sentence, somebody somewhere is likely to be unhappy with the outcome.

⁶ SS Terblanche in 2013 (76) THRHR at page 95 to 97

⁷ 2012 (1) SACR 298 (SCA)

⁸ *Fredericks supra* at para [8]

⁹ *Fredericks supra* at para [8]

When may the court of appeal interfere?

- [54] In **S v Kgosimore**,¹⁰ Scott JA said the following with respect to an appeal court's powers to interfere with an imposed sentence:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so."

- [55] In **S v Tafeni**,¹¹ it was held that a court of appeal is in any event able to interfere with the court *a quo*'s sentence if it finds substantial and compelling circumstances even where there is no material misdirection or failure by the court *a quo* to exercise discretion.

- [56] In terms of the applicable legislation (Act 105 of 1997), a court may only impose a lesser sentence if it is satisfied that there are substantial and compelling

¹⁰ 1999 (2) SACR 238 (SCA)

¹¹ 2016 (2) SACR 720 (WCC) at 723

circumstances which justify the imposition of a lesser sentence. In **S v Malgas** it was stated, *inter alia*, that the very fact that this amending legislation has been enacted indicates it was no longer to be “*business as usual*” when sentencing for the commission of the specified crimes.¹²

- [57] The approach in **S v Malgas** was endorsed by the Constitutional Court in **S v Dodo**.¹³ The SCA, in **S v Vilikazi**,¹⁴ explained that particular factors, whether aggravating or mitigating, should not be taken individually or in isolation as substantial and compelling circumstances, but must be viewed cumulatively. In the end, the minimum sentence will be imposed, unless a court finds, by considering all relevant issues, that there are indeed substantial and compelling circumstances within the parameters of Section 51(3)(a) to justify the imposition of a lesser sentence, or where the sentence by a court *a quo* is clearly not a just sentence.

The Triad of Zinn and the four principles of punishment:

- [58] *Terblanche* wrote that:

“Our law attempts to ease the sentencing process through the establishment of general principles. These principles are trite. They consist of the Triad of Zinn,¹⁵ as augmented by the four so-called purposes of punishment. These principles are

¹² *S v Malgas supra* para [7]

¹³ 2001 (3) SA 382 (CC)

¹⁴ 2009 (1) SACR 552 (SCA)

¹⁵ *S v Zinn* 1969 (2) SA 537 (A) at 540G – H (“Zinn”)

so trite that attempts to check whether they are still relevant today are very rare indeed. Often the courts, even to the highest level, will do nothing other than quote a few well-established sources." (Own underlining)

- [59] The most important principle at the imposition of sentence is the so-called Triad of Zinn. In Zinn it was held:

*"What has to be considered is the triad consisting of the crime, the offender and the interests of society."*¹⁶

- [60] The dictum in Zinn has become settled law.¹⁷ Sometimes it is also said that punishment must *"be blended with a measure of mercy"*.¹⁸

- [61] In **Hiemstra's Criminal Procedure**,¹⁹ it is explained that *"[b]lending does not mean that the Court first determines an appropriate sentence and then reduces it for the sake of mercy. Mercy infuses the assessment of the three Zinn considerations, it is not an independent fourth element"*.

- [62] The four aims of punishment, which are as important as the triad – deterrent, prevention, reform, and retribution – were succinctly expressed in **R v Swanepoel**,²⁰ as follows:

¹⁶ Zinn *supra* at 540G

¹⁷ See S v V 1972 (3) SA 611 (A) at 614D; S v Rabie 1975 (4) SA 855 (A) at 862G; S v Khumalo 1984 (3) SA 327 (A) at 331H – 332F; S v Pieters 1987 (3) SA 717 (A) at 738F

¹⁸ S v Kumalo 1973 (3) SA 697 (A) at 698; S v Sparks 1972 (3) SA 396 (A) at 410A

¹⁹ Hiemstra's Criminal Procedure by Victor Gustav Hiemstra, Albert Kruger 2008, at page 28-5

²⁰ 1945 AD 444 at 454 para 4

"The aim of punishment therefore is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishment, therefore, and such a mode of inflicting them, ought to be chosen as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal."

[63] The record shows that the court *a quo* aimed "at achieving... retribution, prevention, deterrence and reformation" and continued to explain and analyse these concepts in relation to the crime for which the appellants were convicted.

[64] The court *a quo* stated that:

"Having said that, of importance to this Court is that the end, justice must be seen to have been done. The probation officer testified to the effect that the victim was affected, and her sense of life has been affected. It is bad gentlemen, to be raped by one person, and to be raped by more than two persons, that is very serious."

[65] The court *a quo* was explicitly mindful of balancing the seriousness of the offence with the interests of society, the personal circumstances of those involved and the interests of the victim.

[66] It concluded that the appellants had attacked a vulnerable victim in a heinous manner – someone who was helpless and at their mercy – and that they furthermore displayed no remorse. The gravity of the crime, it held, should be reflected through the sentence.

- [67] But it said it would not lose sight of the necessity for mercy when considering what a just sentence would be. Part of the exercise of this mercy was to treat the accused as first-time offenders.
- [68] Be this as it may, the court *a quo* was mindful that current applicable legislation enjoins an increased standard of severity to which courts are bound to give effect in sentencing. The circumstances and gravity of the rape, the court held, therefore justified imposing the minimum prescribed sentence.
- [69] Regarding the alternative sentences which may have been considered by the court *a quo*, the social worker testifying before court lent support to this stance by stating that other sentences would not be appropriate for the gang-rape which had been committed. The prescribed minimum sentence would act as a deterrent for the accused and future offenders, and this was important given the prevalence of gang-rape in Ga-Magongwa Village and surrounding areas.
- [70] Having found no compelling and substantial reasons to justify a departure from the prescribed minimum sentence, the court *a quo* imposed the sentence of life imprisonment on all three appellants.

Mitigating circumstances:

- [71] In mitigation, the appellants impressed on the court *a quo* two main issues. I deal with these next. They are: (a) that the court must be mindful that when the

appellants raped the complainant, they had consumed some alcohol; and (b) that the court must be merciful towards the appellants.

Alcohol:

- [72] The defence declared that the appellants were drunk and that the court *a quo* should take this into consideration. It failed to lead further evidence demonstrating whether or not the appellants were highly intoxicated at the time of the commission of the rape, or to what extent they were intoxicated at all. This failure makes it difficult for this court to determine whether such drinking constitutes any substantial and compelling circumstances, and (in conjunction with the consideration of the remaining relevant factors) its impact on imposing an appropriate and just sentence.
- [73] Without expressing any views (for or against the consumption of liquor), the fact is that the effects of the intake of alcohol on an accused person have been considered in prior cases when imposing sentence. To do this properly requires the evaluation in every case of the particular facts relating to the alcohol consumption – not only a consideration in cases where the appellant reaches a certain degree of intoxication.
- [74] *Wessels J* (as he then was) stated in **Fowle v Rex**,²¹ that:

²¹ 1906 TS 505 at 511

"It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree of punishment has been recognised in almost every system of jurisprudence. In the Digest, (48, 19, 11), we find the distinctions drawn between the punishment of a sober man and of a man who had been drinking; and Matthaeus says: Ebrius aliquo mitius puniri debet quia non proposito sed impetu delinquit. Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened."

[75] In **S v Ndhlovu**²² the (then) Appeal Court stated that:

"Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do."

[76] In **S v Sigwahla**,²³ the court stated that:

"Furthermore, in regard to the latter, the Court took into account against him his evidence that he was unaffected by the liquor. This seems to me an imperative approach, for it overlooks the human tendency to deny the consumption of liquor or to deny or be unaware of the effects of its consumption. It seems to me probable that the liquor in question did play some part in the appellant's lawless conduct that evening. In considering the relevance of intoxicating liquor to extenuating circumstances the approach of a trial Court should be one of perceptive

²² 1965 (4) SA 692 (A) at 695C - D

²³ 1967 (4) SA 566 (A) at 5781B - D

understanding of the accused's human frailties, balancing them against the evil of his deed."

[77] However, in the matter of **S v Booyesen**,²⁴ the SCA found that there is an onus on the appellant to show that he acted as a result of the alcohol.²⁵ In the present matter the defence failed to discharge this onus. It simply stated that the court *a quo* should take the fact that the appellants had consumed alcohol into account.

[78] In the **Guide to Sentencing in South Africa**, Terblanche sets out that:

"7.3.9 Liquor and drugs

The intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. The reason for this is that '[liquor] can arouse sense and inhibit sensibilities', which may diminish the responsibility of the offender. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished."

[79] In a matter similar to the present one, **Mpongoshe v S**,²⁶ Lowe J, in the Eastern Cape Division, Grahamstown, held that:

"[26] As to intoxication as a relevant sentencing factor the learned Judge effectively dismissed this completely on the basis that this was an opportunistic

²⁴ 1990 (1) SACR 331 (A)

²⁵ Booyesen *supra* at 333D – E

²⁶ (CA&R211/2018) [2019] ZAECGHC 104 (9 September 2019)

contrived defence of criminal incapacity. Crucially having correctly noted the above, the learned Judge continued as follows:

'Whilst it is so that there was evidence that you consumed alcohol and that it affected your faculties to a limited extent, in my view it did not make any appreciable difference to your moral reprehensibility.'"

[80] Even if I am wrong on this, the evidence of the third appellant was that he was drunk but was in a position to differentiate between right and wrong.

[81] Neither the court *a quo* nor this court is able, without much more, to come to the aid of the appellants and find that they were so intoxicated that the intoxication actually impaired their mental faculties to the extent that their blameworthiness can be regarded as diminished.

Mercy:

[82] There can be no doubt, in my view, that in the light of the appellants' conduct, not only through their rape of the complainant, but also through their attempts at paying off the complainant and her husband, and the fact that they did not show any remorse for what they had done, they did not exercise the same mercy towards the complainant that they sought from the court *a quo*, and now seek from this court. My view is supported by the pre-sentencing reports, the evidence of the social worker and the testimony of the appellants on record.

- [83] The social worker testified that the appellants do not acknowledge *"the wrongfulness"* of their actions.
- [84] Mercy is preceded by, or requires, repentance or remorse. Repentance is preceded by or requires an acknowledgment of wrongdoing. In a nutshell, repentance or remorse is the necessary condition for mercy or forgiveness.
- [85] The conduct of these men has revealed that they do not see others as deserving of good – they are neither repentant nor remorseful. Consequently, they do not value doing good unto others; their drive is selfish, and the self is their idol. They have no regard for justice and mercy for others, and as such they have perpetuated avarice and strife. Self-gratification has blinded them to the fact that justice and mercy are the foundations of the very law they wish to benefit from.
- [86] It goes without saying that justice and mercy are the controlling powers that must be nurtured for the good of all. Our values and laws as a people are to be continually uplifted by discouraging that behavior that seeks to separate and misapply justice and mercy. It often happens that due to a lack of appreciation of the two concepts and their application, some may wish to separate and abuse these concepts. It is the duty of our courts to guard against this.
- [87] As the rainbow in the cloud results from the union of sunshine and shower, so the justice system hopefully represents the union of mercy and justice. The justice system must be holistic to achieve its intended purpose, which is to rehabilitate

all those affected by it. The sun brings benefits to the earth and so does the rain. In the absence of either, there is no rainbow. Here the same principle applies – in the absence of mercy, there is no justice, and vice versa. Mercy and justice are inseparable twins; mercy does not set justice aside.

- [88] In the present matter mercy and justice were trampled upon. Never was a family, the very fabric of our society, treated in so inhuman a manner as was the complainant and her husband. The effects of the violation of mercy and justice upon them can never be fully felt nor understood by third parties. The appellants certainly did not appreciate their suffering. This is evident from the behavior of the appellants at trial in the court *a quo* and thereafter, including their attempt to buy the silence and complicity of the complainant and her husband. They seem to have no appreciation of the consequences of their actions on the complainant and her husband – physically, mentally, or emotionally. What the appellants did was evil.
- [89] Ubuntu is expressed in justice no less than in mercy. Justice is the foundation of all human relations, and the fruit of its love. It has often been the purpose of evil minds to divorce mercy from truth and justice, and this is often driven by the motive of escaping unpleasant consequences.
- [90] Mercy and justice cannot be divorced. Evil minds may imagine that in the separation of mercy and justice, a court could be expected only to show mercy, thereby absolving wrongdoers of the consequences of their actions. This thinking

is misplaced – it lacks an appreciation for the unity of justice. Mercy and justice work hand in hand. There would be no need for mercy if there was no wrongdoing. Justice calls the wrongdoer to account and that account ought to be dealt with in a just and merciful manner.

Remorse as a mitigating factor:

[91] In **S v Matyityi**,²⁷ the Supreme Court of Appeal, dealing with remorse as a mitigating factor, made the following statement:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate into genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist, cannot be determined. After all, before a court can find that an accused persons is genuinely remorseful, it need to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

²⁷ 2011 (1) SACR 40 (SCA)

[92] In the present matter, the importance of remorse, or indeed the lack of such remorse, is to help establish the appellants' propensity for rehabilitation, to which an acceptance that they acted in error – and had the conscience to realise their error and act remorsefully thereafter – is most important. Without such acceptance, the prospect of the crime being successfully addressed and of rehabilitation taking place are lessened, as in the present case. This is relevant to an assessment of mitigation (not aggravation) of sentence.

[93] In the present matter the appellants expressed no remorse whatsoever and gave no explanation, thus failing to take the court *a quo* into their confidence.

[94] In **Mpongoshe v S**, *Lowe J*, observing that the appellant did not show any remorse held:

"[39] That Appellant is effectively a first offender in this matter, pales into insignificance and is of little moment in consideration of the penalty he must sustain."

[95] In **S v Vilikazi**,²⁸ the SCA held that:

"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 of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three,

²⁸ 2009 (1) SACR 552 (SCA) at para [25]

whether or not he is in employment, are in themselves largely immaterial to what the period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas said should be avoided."

DETERMINATION BY THE THIS COURT: SENTENCING:

[96] In the preamble, in *Tshabalala v S; Ntuli v S*²⁹, the Constitutional Court stated that:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[97] In the same matter, the Constitutional Court held that:

"[1] The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over

²⁹ 2020 (3) BCLR 307 (CC)

whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women."

[98] On the constitutional principles, the Constitutional Court stated:

"[60] The constitutional principles of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel inhumane and degrading way, should be afforded to the victims of sexual assault. It would be a sad day if courts were to countenance such an arbitrary distinction.

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

[73] Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side."

[99] The Constitutional Court quoted very alarming statistics:

[76] In 2018/19, the South African Police Service recorded 41 583 cases of rape, which is an increase from 40 035 cases of rape recorded in 2017/18. This indicates that approximately 114 cases of rape were recorded by the police each day in 2018/19. In 2003, it was also alleged that a woman was raped every 36 seconds in South Africa. This illustrates that rape is not rare, unusual and deviant. It is structural and systemic. Incidents of rape and the fear of rape are commonplace in the lives of women.

[78] Addressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our communities."

[100] The crime, rape, of which the appellants have been convicted must be placed in its proper context and be seen for what it really is without fluffing it up or sugar-coating it. Here the Constitutional Court held:

[77] The importance of the proper construction and characterisation of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims – the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural. We ought to heed the warning by Sachs J, albeit in the context of domestic violence that:

*'The ineffectiveness of the criminal justice system...sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little.'*³⁰

³⁰ Baloyi (Minister of Justice Intervening) 2000 (1) BCLR 86 (CC) at para 12

CONCLUSION:

- [101] The highest standards of strict and impartial justice should be afforded to all, even those whom we may view as undeserving. Although the misconduct and evil mind of the wrongdoer must be corrected, the law observed, and justice firmly respected, let the decision-maker mingle justice with mercy, for these should never be separated. What constitutes the proper application of the two ought not be determined from the subjective viewpoint of the wrongdoer, who will inevitably argue for mercy, but from an objective viewpoint comprehending the required balance.
- [102] In appealing to this court, the appellants subjectively expect that they can be afforded mercy and absolved of proper sanction for their wrongdoing. They know enough to know that mercy is foundational to our justice system but they arrogantly expect it to be applied in a way which would ultimately lead to a travesty of justice. It is truly said that one of the great challenges in life is "knowing enough to think you're right but not enough to know you're wrong".³¹
- [103] Ultimately, regarding the minimum prescribed sentence, I find, for the reasons set out above, that there are no substantial and compelling circumstances which ought to have moved the court *a quo* to deviate and impose a sentence of less than life imprisonment; and (2) that the sentence imposed by the court *a quo* was appropriate and in accordance with justice and equity.

³¹ Neil deGrasse Tyson, *twitter.com* (1 Feb 2017)

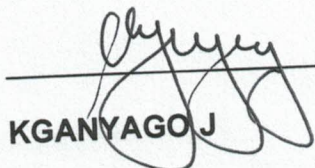
- [104] The court *a quo* correctly analysed and applied the factors relevant to aggravation and mitigation, as well as the appellants' personal circumstances.
- [105] All three appellants raped the complainant, and from the record it does not appear that they showed any appreciation or remorse for what they did to her.
- [106] There can be no doubt about the guilt of the appellants; their conviction and sentence are confirmed.
- [107] In the result, the appeals against all convictions and resulting sentences are dismissed.



GAISA AJ

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

I concur,



KGANYAGO J

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

APPEARENCES**FOR THE APPELLANTS****INSTRUCTED BY****FOR THE RESPONDENTS****INSTRUCTED BY****DATE OF HEARING****DATE OF JUDGMENT****: MR LM MANZINI****: LEGAL AID SA, POLOKWANE****: ADV N MOLEPO****: DPP POLOKWANE****: 6TH DECEMBER 2019****: 20/05/20**