

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
29 August 2024	
DATE	SIGNATURE

CASE NUMBER: A264/2018

In the matter between:

DANSTER JOHANNES PAPIKI

Appellant

and

THE STATE

Respondent

Coram: ISMAIL J, DOSIO J and MATHUNZI AJ

Heard: 26 August 2024

Delivered: 29 August 2024

ORDER

The appeal is dismissed in respect to the sentences imposed.

JUDGMENT

DOSIO J:

Introduction

[1] This is a full court criminal appeal whereby the appellant seeks to set aside the sentences imposed.

[2] The appellant was arraigned in the High Court sitting in Johannesburg, on the following charges:

- (a) Count one – Kidnapping.
- (b) Count two - Unlawful possession of a firearm, alternatively, possession of an imitation of a firearm with intent to commit an offence.
- (c) Count three – Rape.
- (d) Count four - Robbery with aggravating circumstances as defined in s1 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977').
- (e) Count five – Kidnapping
- (f) Count six - Assault with intent to do grievous bodily harm
- (g) Count seven – Rape
- (h) Count eight – Robbery with aggravating circumstances as defined in s1 of Act 51 of 1977.
- (i) Count nine - Attempted rape.
- (j) Count ten – Attempted murder

[3] The appellant was legally represented and he pleaded not guilty to all counts. On 2 February 2017 the appellant was convicted of all the counts with the exception of count two.

[4] The record of proceeding records that eleven counts were put to the appellant at the start of the trial. ¹However, at the Judgment stage, the Court a quo stated that there were ten counts.² It is accepted that there were in fact ten counts.

[5] Count one to four relates to an incident that occurred on 31 May 2015. Counts five to eight relate to an incident that occurred on 1 June 2015. Counts nine to ten relate to an incident that occurred on 2 October 2015.

[6] On 3 July 2017 the appellant was sentenced as follows:

- (a) Count 1: Five years imprisonment.
- (b) Count 3: Life imprisonment.
- (c) Count 4: 15 years imprisonment.
- (d) Count 5: Five years imprisonment.
- (e) Count 6: five years imprisonment.
- (f) Count 7: life imprisonment.
- (g) Count 8: 15 years imprisonment.
- (h) Count 9: 12 years imprisonment.
- (i) Count 10: 8 years imprisonment.

[7] The sentences were ordered to run concurrently, with the result that the appellant received an effective life imprisonment sentence. Leave to appeal the conviction and sentence was granted by the Court a quo. The appellant is only appealing the sentences imposed.

[8] The recording of previous convictions and the evidence on sentence was not transcribed, however, the Court a quo did set out the appellant's personal circumstances as well as his previous conviction in the judgment on sentence.

[9] In the matter of *S v Chabedi*,³ the Supreme Court of Appeal stated that the record must be adequate for proper consideration of the appeal. It does not need to be a perfect recording of everything that was said at the trial.

¹ Record, Vol 1: page 2, line 15-16

² Record, Vol 5: page 370, line 19-20

³ *S v Chabedi* 2005 (1) SACR 415 SCA

[10] For purposes of this judgment, this Court finds there is adequate information from the Court a quo's summary of the appellant's personal circumstances for this Court to adequately deal with the appeal against sentence.

Ad sentence

[11] It is trite that in an appeal against sentence, the Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.⁴

[12] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[13] In the matter of *S v Malgas*,⁵ the Supreme Court of Appeal stated that:
 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[14] The Supreme Court of Appeal in the matter of *Malgas*⁶ further stated that:
 'if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'⁷

[15] In the matter of *S v Dodo*,⁸ the Constitutional Court held that:
 'To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality

⁴ see *S v Hewitt* 2017 (1) SACR 309 (SCA) at para 8 and *S v Lungisa* 2021 (1) SACR 510 (GNP)

⁵ *S v Malgas* 2001 (1) SACR 496 SCA

⁶ *Ibid*

⁷ *Ibid* para i

⁸ *S v Dodo* 2001 (1) SACR 594 (CC)

between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.’⁹

[16] In the case of *S v Pillay*¹⁰ the Appellate Division, (as it then was), held that: ‘..the essential inquiry in an appeal against sentence, ...is...whether the court in imposing it, exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.’¹¹

[17] In *S v Salzwedel and other*,¹² the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate¹³

[18] The following aggravating factors are present, namely:

- (a) The appellant never pleaded guilty. He maintained his innocence, causing this trial to be protracted over a considerable amount of time.
- (b) As regards the complainant on counts one to four, namely M[...] R[...] T[...], his version is that the complainant had consensual intercourse with him. On the contrary, it is clear that the appellant put a stone in her vagina and misrepresented to her that he was a traditional healer. He then told her to enter a stream and inserted muti in her vagina causing her to black out. The medical J88 report shows that she had bruising to the fossa navicularis at positions 5 and 6 o’clock and the perineum was bruised at 6 o’clock. After raping this complainant, he robbed her of her clothes and cell phone.
- (c) As regards the complainant on counts five to eight, namely M[...] R[...], the appellant’s version was that he proposed love to the complainant and then had consensual intercourse with her. It is clear that the contrary is true. This complainant experienced an extremely traumatic event. After being

⁹ Ibid para 38

¹⁰ *S v Pillay* 1977 (4) SA 531 (A)

¹¹ Ibid page 535 E-G

¹² *S v Salzwedel and other* 1999 (2) SACR 586 (SCA)

¹³ Ibid page 588 a-b

kidnapped, the appellant pointed a knife at her and threatened to kill her if she did not go into the stream. This happened on 1 June 2015 at 18h45. It is clear it was winter and that it must have been very cold. She refused to go into the water and he then hit her with a beer bottle on her left eye. He undressed and started beating her with a belt all over her body. He then raped her by penetrating her vagina with his penis. After the appellant raped her in her vagina he made the complainant lie on her tummy and he raped her by penetrating her anus with his penis. He also threatened to take out her teeth as he stated that she was so beautiful that he did not want other men to look at her and that he wanted her to be his girlfriend.

(e) The medical report concerning M[...] R[...] depicts that the posterior fourchette was abraded and bruised at 5 and 7 o'clock. The hymen also had a fresh tear at 7 o'clock and the anus had a tear at 12 o'clock. The doctor who examined this complainant found multiple bruises on her left eye, both breasts, abdomen, left upper thigh, right lower and upper back, left hip, left upper arm and left index finger.

(f) As regards the complainant on counts nine and ten, namely B[...] M[...], the appellant's version is that he merely wanted to hug the complainant, but she started screaming and removed her clothing. On the contrary, it appears that the appellant wanted to have sex with the complainant, and she refused. He then threatened to beat her up if she did not enter the stream. He smeared a green substance on her body which made her skin sore and itchy. After undressing himself, he tried to penetrate her vagina, but the complainant held his penis preventing him from doing so. The appellant then choked her on her neck and pushed her face down into the water as if to drown her.

(g) The appellant has a previous conviction of rape from 2007 where he was sentenced to thirteen years' imprisonment. It is clear he was incarcerated for a crime of rape which did not help him to rehabilitate. He was released on 20 August 2014 and whilst on parole, he continued with his actions to rape helpless and defenceless victims.

(h) The appellant acted with callous and cruel indifference towards all three of these innocent victims, showing no mercy or sympathy for any of them.

(i) It is clear that these incidents have traumatised all three victims and that the appellant has shown no remorse for his actions. As a result, the appellant's previous conviction for rape as well as the lack of remorse for the crimes committed in casu, depicts that he has a propensity to rape.

[19] The personal circumstances of the appellant are the following;

- (a) He was 39 years old.
- (b) He lost his father when he was eight years old but his mother was still alive.
- (c) He had four children aged 18, 14 and twins aged 12 years old.
- (d) Prior to his arrest he was a carpenter who earned approximately R8,000.00 per month.

[20] In terms of s51(3)(a) of The Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997')

'a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence...'

[21] Counsel for the respondent requested that this Court consider his personal circumstances as substantial and compelling.

[22] In the matter of *S v Vilakazi*,¹⁴ the Supreme Court of Appeal stated that: 'The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. 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, whether or not he is in employment, are in themselves largely immaterial to what that period should

¹⁴ *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)

be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided.'¹⁵[my emphasis]

[23] Count three is a charge of rape in respect to R[...] M[...] T[...]. It is clear that she was 27 years old when this incident happened. Due to the fact that there is no proof that she was raped more than once, the offence falls under the ambit of part III of schedule 2 and a minimum sentence of ten years imprisonment is applicable. The Court a quo imposed life imprisonment. Had this incident of rape committed on 31 May 2015, been an isolated incident, this Court would have interfered and set it aside, however, this is not a once-off event. The next day, namely 1 June 2015, the appellant brutally raped the complainant, M[...] R[...]. In addition, the appellant has a previous conviction of rape where he was sentenced to thirteen years imprisonment. He is clearly a serial rapist who is an extreme danger to the community. As a result, we do not find it justifiable to interfere with the sentence of life imprisonment imposed on count three. In fact, there are such aggravating circumstances in respect to count three that they warrant a higher sentence than a minimum of ten years to be imposed. Even if this Court had set aside the term of life imprisonment imposed on count three it would have had no effect, as a term of life imprisonment was justifiably imposed on count seven.

[24] As regards count seven, the complainant, M[...] R[...] was twenty years old when she was raped. The appellant was charged with one count of rape and was sentenced to life imprisonment. It is clear that the first vaginal rape and the second anal rape were not one continuous offence and that the complainant was raped more than once. The prescribed sentence of life imprisonment, in the absence of substantial and compelling circumstances was correctly imposed on count seven.¹⁶

[25] This Court finds no misdirection on the part of the Court a quo. The sentences imposed do not induce a sense of shock and neither are they out of proportion to the gravity of the offences committed. The Court a quo was correct in finding that notwithstanding that the appellant was thirty-nine years old, that the

¹⁵ Ibid para 58

¹⁶ See *Maxabaniso v S* (CA&R388/2014) [2015] ZAECHGHC 60; 2015 (2) SACR 553 (ECG) (5 May 2015) para 33)

factors surrounding the rape of these complainants, as well as the previous conviction of rape justified the imposition of a term of life imprisonment.

[26] In the result, having considered all the relevant factors and the purpose of punishment we consider the sentences imposed as an appropriate sentence.

[27] In the premises, we make the following order;

(a) The appeal is dismissed in respect to the sentences imposed.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

M.H.E ISMAIL
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

A. MATHUNZI
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 29 August 2024.

APPEARANCES

ON BEHALF OF THE APPELLANT:

Adv. E Guarneri

Instructed by Legal Aid SA

ON BEHALF OF THE RESPONDENT:

Adv. P Marasela

Instructed by Office of the National
Director of Public Prosecutions.