IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)

Case No.: A30/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

[redacted]

07 March 2025
DATE

SIGNATURE

In the matter between:

WITNESS S NGOMANE **APPELLANT**

and

THE STATE **RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by publication on SAFLII. The date and time for hand-down is deemed to be 10:00 on 07 March 2025.

JUDGMENT

MOLELEKI AJ

[1] This is an appeal against conviction and sentence. The appellant, Mr. Witness Solly Ngomane, was convicted and sentenced by the Mbombela Regional Court on one count of assault with intent to do grievous bodily harm and one count of rape, read

with the provisions of the criminal law Amendment Act, 105 of 1997. Sentences were imposed as follows: 7 years imprisonment for the count of assault with intent to cause grievous bodily harm and life imprisonment in respect of the count of rape. The appellant has an automatic right of appeal in terms of section 309 of the criminal procedure Act, 51 of 1977 read with sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013.

Condonation

[2] The appellant failed to prosecute his appeal timeously. He has therefore filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application.

[3] The appellant's Notice to appeal is late by one year and ten months. The explanation advanced by the appellant for the late prosecution of the appeal is that, the Notice of appeal was served on the clerk of the Regional Court within 14 days from the date of sentence. However, the Notice was erroneously not served on the Registrar of the High Court as well as the Director of Public Prosecutions. This was an oversight by the Legal Aid office. Four months later when an enquiry was made regarding the progress of the appeal, the appellant was informed that the transcripts of the proceedings were not available yet to enable the hearing of the appeal. In January 2024 another Legal Aid practitioner was assigned. The Notice of Appeal was only served in December 2024.

[4] It is trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default[1].

[5] Factors which are usually considered in an application of this nature include the degree of non-compliance, the explanation therefore, the importance of the case, the prospects of success, the respondent's interest in the finality of the judgment, the

[1] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014(2) SA 68 (CC) par 23.

convenience of this court and the avoidance of unnecessary delay in the administration of justice[2].

[6] The application for condonation is not opposed by the respondent. There seems to be no prejudice to the respondent. The issues raised by the appellant are important for his rights to have finality in the matter without unnecessary delay. The appellant's explanation is accepted. Good cause has been shown for condonation to be granted. Accordingly, condonation for the late filing of the appeal is granted.

Factual Background

[7] The evidence for the State was that, the complainant and the appellant were in a romantic relationship which terminated in March 2018. The complainant entered another relationship with someone else. On 25 May 2018 the complainant left her parental house at around 23h00 for an appointment she had with her new boyfriend. The appellant unceremoniously emerged and asked the complainant where she was going. An altercation ensued between them. The complainant fell to the ground and the appellant climbed on top of her and choked her. Whilst she was screaming and gasping for air, her tongue was sticking out. The appellant bit the tip of her tongue off. He then led her to an abandoned house where he choked her again and instructed her to undress of her clothing and raped her. The appellant instructed her to wash herself in a stream, where after he forced her to drink a concoction of herbal medicine. He left with her to his parental home. The appellant dispossessed her of the cellphone and a pair of shoes. He ultimately accompanied her home.

[8] Upon her arrival home, she went to her mother's bedroom and switched the light on. She was trying to explain to her mother of what had transpired but was unable to speak due to the injury on the tongue. She wrote on a piece of paper indicating that the injuries were inflicted by the appellant. The complainant's mother accompanied the complainant back to the bush where the assault took place in search of the tip of the tongue, which they recovered. She was taken to the clinic where she was given a referral to go to the hospital. When the complainant's mother approached the police station to lay charges, she was informed by the police officers that the complainant

[2] Federated Employers Fire and General Insurance Co. Ltd & Another v McKenzie 1969(3) SA 360 (A) at 362F-G.

should personally lay charges. It was therefore, only upon her discharge from hospital, that the complainant lay charges and reported for the first time that the appellant also raped her and dispossessed her of her cellphone and shoes.

[9] The version of the appellant was that he was still in a relationship with the complainant when the assault took place. He stated that he found the complainant and another man having sexual intercourse in public. He confronted them and the man ran away. An argument ensued between him and the complainant. He slapped the complainant with an open hand on the left cheek. When the complainant tried to run away, he caused her to trip up. The complainant fell to the ground face down. This is what led to the complainant biting her tongue off. Thereafter he left. The appellant denied ever choking, assaulting or raping the complainant.

Grounds of Appeal

Conviction

[10] The appeal on conviction is founded on the following grounds:

1. The trial Court erred in finding that the State proved its case beyond reasonable doubt
2. The trail court erred in finding the appellant guilty of rape as defined in section 51(1) Part I of Schedule 2, that is, rape involving the infliction of serious bodily harm.
3. The trial court misdirected itself in that it returned a verdict which constitutes a duplication of convictions and which resulted in a duplication of punishment, in that, the facts relied on to sustain a conviction of assault with intent to cause grievous bodily harm, is the same set of facts relied on to find that the rape involves infliction of grievous bodily harm.

Evidence of the state witnesses

[11] In this appeal, the appellant's contention is that the Magistrate erred in finding that the State proved its case beyond reasonable doubt.

[12] A court of appeal should be slow in interfering with the findings of a trial court unless if the appeal court finds that the trial court's findings of fact and credibility are vitiated by irregularity, or unless also that an examination of the record reveals that those findings are patently wrong. The trial court's finding of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and it is in the best position to determine where the truth lies[3].

[13] The findings of the Regional Court Magistrate were as follows: The complainant made a good impression to the court; her evidence was related to the court with sufficient clarity and cogency; her version was thoroughly tested against the probabilities and improbabilities and that it was chronological and detailed. Even though she testified years after the incident, her recollection of the events was clear. The Regional Court Magistrate found that the complainant's version was probable in respect of the fact that she was no longer in a relationship with the appellant; that she was going to meet her new boyfriend at around 23h00 and had no reason to be dishonest about the time. On the other hand, the appellant's reasons for disputing the time she encountered the complainant is obvious in that he wanted to keep the duration of his interaction with the complainant to the bare minimal. The Regional Magistrate found the appellant's version that the complainant was engaged in sexual intercourse in public, at around 5 in the morning to be improbable and rejected it. The discrepancies in the evidence of the State was dealt with and were found to have been immaterial. Further that, the complainant and her mother did not attempt to exaggerate their evidence. The complainant's mother was honest enough to admit that the complainant had not reported the rape to her.

The delayed First Report

[3] *S v Jackson* 1998(1) SACR 470 (SCA).

[14] Regard was had by the Regional Magistrate to the trauma the complainant had been through. She was physically not able to communicate immediately after the incident. When she consulted with doctor Mnisi he was asking her questions and she responded by using gestures. The focus, from the moment she entered her mother's bedroom when she arrived home until she was seen by the doctor, was on the obvious injuries, which was the severed tongue. The Regional Magistrate found that to expect a full report under such circumstances would have been unreasonable.

[15] There are two sections of the General Law (Sexual Offences and Related matters) Amendment Act[4] which require scrutiny. They are sections 58 and 59, which read as follows:

'**58 Evidence of previous consistent statements**

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statement.

59 Evidence of delay in reporting

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[16] The court in *S.J v S* [5] stated that the failure of a complainant to report a rape as soon as possible cannot be the benchmark for determining whether the complainant has been raped. Studies have shown, and common-sense dictates, that people differ in their responses to traumatic events, and are inclined to display individualised emotional responses to these, particularly when the experience is an embarrassing and shameful one which involves an assault on the bodily integrity of the victim. A report of this nature would ordinarily involve descriptions of private and intimate parts

[4] Act 32 of 2007.
[5] (CA&R 26/21) [2022] ZAECBHC 34 (6 December 2022) par 40.

of the body. Some people are encouraged to be quite at ease doing this. For others, it is simply taboo.

[17] The fact that the complainant was unable to talk; that she was responding to what doctor Mnisi was asking her, by using gestures, and that the pain persisted even when she consulted with Sister Ngubeni almost two weeks after the incident is not in dispute. Nor, did the appellant challenge her emotional status on appeal. The complainant's mother, doctor Mnisi and sister Ngubeni testified about the complainant's condition.

[18] There is no time limit for reporting a rape. In *Monageng*[6] the court held that, It has been firmly established in a number of studies on the impact of violence, including rape, against women that victims display individualised emotional responses to the assault[7] Some of the immediate effects are frozen fright or cognitive dissociation, shock, numbness and disbelief[8]. It is therefore not unusual for a victim to present a façade of normality.

[19] In *S v Cornick and Another*[9] the convictions were upheld where the complainant laid charges 19 years after the event. The delay was fully explained, and the complainant had been found to have been a credible witness.

[20] Reporting of a rape is not an exact science. It is an accepted principle that in sexual offences cases that the complainant is expected to make a report at the earliest convenience. However, failure to report 'timeously' or even not at all, does not mean a person was not raped. The circumstances will determine the meaning of 'timeously' *B C v S* [10].

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[6] [2008] ZASCA 129 (01 October 2008*)* at par 23
[7] S Bollen et al '*Violence Against Women in Metropolitan South Africa: A study on impact and service delivery*' Institute for Security Studies (1999) Monograph No 41.
[8] S Ullman & R A Knight 'Women's Resistance Strategies to Different Rapist Types' (1995) 22 No 3 *Criminal Justice & Behaviour* 263, 280; S Katz & M A Mazur *Understanding the Rape Victim: A Synthesis of Research Findings* (1979) 172, 173. M Symonds 'Victims of Violence: Psychological effects and after-effects' (1975) 35 (1) *American Journal of Psychoanalysis* 19 - 726, 22.
[9] 2007(2) SACR 115 (SCA).
[10] (A8/2020) [2020] ZAFSHC 180 (30 October 2020).

[21] From the facts in the present case, clearly, the complainant had been seriously injured. The Regional Court Magistrate was correct in finding that the focus was on the obvious injury, that is, the severed tongue. Consequently, no adverse inference can be drawn from the delay in reporting the rape.

[22] There is no reason why the Regional Magistrate should be faulted for accepting the truthfulness and credibility of the evidence by the State witnesses.

Rape Conviction

[23] The appellant does not challenge the conviction on assault with intent to cause grievous bodily harm. However, he implored this court to revisit the sentence in the count of rape, should the appeal on conviction fail.

[24] He contends that the Regional Court Magistrate erred in convicting him of rape as it cannot be found that the assault is linked to the rape which, according to the complainant took place at a different location, that is, at an abandoned house, some fifteen minutes away from where the assault took place. This, according to the appellant, is an indication that a new intention to commit a different offence had been formed.

[25] Essentially, the appellant contends that there was a duplication of convictions and therefore a duplication of punishment. Further that, the rape did not involve the infliction of grievous bodily harm as provided in section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act[11] Therefore, he should not have been sentenced to life imprisonment but to 10 years imprisonment, which was the applicable sentencing regime at the time of the commission of the offence.

[26] In *S v BM*[12] the Court remarked as follows regarding duplication of convictions: 'It has been a rule of practice in our criminal courts since at least 1887 that 'where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences". The test is whether, taking a common-sense view of matters in the light of fairness to the accused,

[11] Act 105 of 1997.
[12] [2013] ZASCA 160; 2014 (2) SACR 23 (SCA) para 3

a single offence or more than one has been committed. The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment.'

[27] If the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences. *R v Gordon*[13]. If there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realise this intent, there is only one offence. See *R v Sibuyi*[14].

[28] There must be emphasis on the fact that the Criminal Law Amendment Act does not create new offences, but a sentencing regime. Where a rape was committed and there was assault with intent to cause grievous bodily harm, that is aggravating for sentencing purposes. It does not, however, create the crime of rape with intent to do grievous bodily harm. It is for this reason that, sentencing jurisdiction must not be confused with the elements of a crime. The provisions of the Criminal Law Amendment Act are therefore relevant for sentencing.

[29] The facts of this case show that two separate offences were committed. The Supreme Court of Appeal in *Mthanti v S*[15] pointed out that, Part I of Schedule 2 of the Criminal Law Amendment Act, which prescribes the minimum sentence of life imprisonment for rape offences 'involving the infliction of grievous bodily harm', must be understood within the context of the rampant levels of sexual offences in this country. The purpose is to ensure that appropriate punishment is imposed for violent conduct that is designed to induce submission to sexual intercourse, given that rape, on its own, is a violent, degrading act.

[30] In this case, the appellant chocked the complainant and bit her tongue off to subdue her, so that he could rape her. He had to lead her to an abandoned house away from the street where he accosted her to avoid being seen by members of the public.

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[13] 1909 EDC 254 at 268-269
[14] 1905 TS 170 (B C v S (A8/2020) [2020] ZAFSHC 180 (30 October 2020).
[15] (859/2022) [2024] ZASCA 15; 2024(1) SACR 335 (SCA) (8 February 2024).

[31] Consequently, the finding that the rape involved the infliction of grievous bodily harm, cannot be faulted. The appellant, therefore, fell to be sentenced as provided in section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act.

Sentence

[32] The appellant's grounds of appeal can be crystallized as follows:

1. That the trial court did not have jurisdiction to impose a sentence of life imprisonment. It misdirected itself and acted ultra vires its penal jurisdiction of 10 years imprisonment.

2. That the trial court erred in that the seriousness of the offence was over-emphasized at the expense of the personal circumstances of the appellant.

[33] The appellant is not challenging the sentence of 7 years imprisonment in respect of the count of assault with intent to cause grievous bodily harm.

[34] It is trite that sentencing is within the discretion of the trial court and that a court of appeal will not lightly interfere with the sentence imposed. The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by irregularity or misdirection or where there is a striking disparity between the sentence passed and that which this court would have imposed.[16] This court on appeal cannot simply *juxtapose* its views and opinions on sentence and then conclude that the sentence of the court *a quo* is inappropriate if it differs from what this court would have done. It is only when the trial court has exercised its discretion in an improper manner or misdirected itself that interference will be warranted.[17]

[35] The Regional Court Magistrate considered the traditional factors of the triad, such as the personal circumstance of the appellant, the nature and seriousness of the offences, the interest of the community; the impact the offences had and continues to have on the complainant.

[16] *Grobler v S* 2015 (2) SACR 210 (SCA) at para 5.
[17] *S v Rabie* 1975 (4) SA 855 (A). See also *S v Pieters* 1987 (3) SA 717 (A).

[36] The Criminal Law Amendment Act[18] was promulgated as a result of the public outcry and agitation at the prevalence of serious and violent crimes that were ever increasing and the effect such crimes had on the society as whole. This legislation is intended to be the firm voice of disapproval of the society in respect of the continued increase of these offences. The Act therefore prescribes a variety of mandatory minimum sentences in respect of a variety of such serious and violent crimes.

[37] Section 51(3) of the Act, confers a limited discretion upon the courts to depart from the prescribed minimum sentences, as it creates two preconditions namely:
(a) It must determine if substantial and compelling circumstances are present that justifies a departure from the prescribed sentence.
(b) The substantial and compelling circumstance(s) is to be placed on record.

[38] In S v Malgas[19], the Supreme Court of Appeal held:
"… In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may."

[39] The Regional Court Magistrate was apprised of the personal circumstances of the appellant, which included *inter alia* that he was a first offender and 27 years old; he is not married and has two minor children with different mothers; both children reside with their respective mothers and they are recipients of government social

[18] Act 105 of 1997
[19] S v Malgas 2001(1) SACR 469 (SCA) at par 8.

grant; the highest level of education is grade 8. At the time of sentencing his partner was expectant with their child. the time spent in custody before finalisation of the matter was also considered. However, the appellant was on bail throughout until his bail was cancelled due to his failure to appear in court.

[40] The complainant had decided to leave the appellant, but he could not bear to imagine her with someone else. He then resorted to violence. It is a well-known fact that intimate partner violence is the most common form of violence in this country. It is incumbent upon courts to impose appropriate sentences where violence is perpetrated against women in the context of their relationships.

[41] The appellant showed lack of consideration to the trauma, the emotional heartache and the permanent physical damage he has caused to the complainant. His conduct, the nature of offences and the degree of its seriousness should attract a harsher sentence.

[42] Notwithstanding his personal circumstances the Regional Court Magistrate correctly found that there are no substantial and compelling circumstances that justify deviation from the prescribed minimum sentence.

[43] Accordingly, life imprisonment in respect of the count of rape is appropriate. There was no misdirection in the Regional Magistrate's sentencing powers. It follows therefore that, the appeal on sentence stands to fail.

Order

[44] The following order is made:

a. The application for condonation for the late noting and prosecuting the appeal is granted.
b. The appeal is dismissed.
c. The conviction and sentence on both counts are confirmed.

[redacted]

M.R MOLELEKI AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

I agree and it is so ordered

[redacted]

JH ROELOFSE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

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Matter heard on 28 February 2025
Judgment delivered on 07 March 2025