

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

CASE NO: A33/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 29/01/2026

SIGNATURE:

In the matter between:

DIPONGPONG JOHANNES MOKWENA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an appeal against both the conviction and sentence by the court *a quo*, with leave from the High Court Polokwane, on petition granted on the 21st of June 2024. The Appellant was convicted in the Regional Court Division of Limpopo held at Nebo on 3 December 2020 on one count of contravening the provisions of Section 3, read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act, 32 of 2007 read with the provisions of Sections 92(2), 94, 256, 257 and 281 of the Criminal Procedure Act, 51 of 1997, as amended and further read with the provisions of Section 51(2) of Act 105 of 1997 - Rape, in that on or about 5 October

2017 and at or near Mogorwane in the Regional Division of Limpopo the Appellant did unlawfully and intentionally commit an act of sexual penetration with the Complainant, aged 34 years, a female person, without her consent.

[2] The Appellant was sentenced by the court a quo on the 25th of February 2021 to 10 (ten) years imprisonment. The Appellant was legally represented at all material times of the trial by Adv. Nkogatse.

[3] The Appellant's grounds of appeal in respect of the conviction are as per the Notice of Appeal, and will not be repeated herein. I do however wish to pause and state that although the petition was granted against both conviction and sentence and further from the Appellant's and the State's Heads of Argument the Appeal lies against both conviction and sentence, the Notice of Appeal only provides for grounds against the conviction only.

[4] The Appellant made a statement in terms of Section 115 of the Criminal Procedure Act, 51 of 1977 as amended. In terms of the statement, the Appellant denied having raped the complainant and denied having unlawfully and intentionally committed an act of sexual penetration to the complainant in this matter on 5 October 2017.

[5] The Appellant went on to state that on the date of the alleged offence, he was travelling with one Sello Phaahla who is a traditional healer. They were from Schoonoord where they were supposed to consult with another traditional healer in respect of an ongoing chieftaincy dispute in their area. They were also supposed to meet and consult with other royal elders. On the way to Schoonoord, Selle Phaahla indicated to the Appellant that when they get to Jane Furse, they should go and consult with another traditional healer, Mr. Mashaba, whom he said he knows and trusts. Selle Phaahla allegedly told the Appellant that they should drive to Jane Furse Hospital as Mr. Mashaba's place of business was just next to the hospital gate.

[6] The Appellant stated further that when they arrived at the hospital, Sello Phaahla told him to wait in the motor vehicle as he will go and inquire if the traditional healer is available to help them. After about 30 minutes, Sello Phaahla

came back and said to the Appellant that they should wait a little longer. About five minutes later, he said they should wait a little longer. About a further five minutes later, he said they should abandon the idea of consulting with Mr. Mashaba and because the Appellant trusted Mr. Selle, he acceded to his suggestion and they left.

[7] As they were leaving, they saw the Complainant standing on the side of the road, hitch hiking. Sello Phaahla requested the Appellant to give her a lift as he knew the Complainant. The Complainant informed them that she was going to Ngwanamatlang Village. The Appellant stated that he informed her that they were going to Ga-Phaahla Village which is in the opposite direction from Ngwanamatlang. Sello Phaahla then said that it should not be a problem and they can go with the Complainant to drop him off at home first and then the Appellant can go and drop off the Complainant. The Complainant agreed and said she did not have any problem and was not in any hurry.

[8] The Appellant stated that after they dropped off Sello Phaahla, he told the Complainant to move to the front of the vehicle and sit next to him in the front seat. As they were driving, he asked the Complainant about her plans for the afternoon. She responded by saying she didn't have any plans. He then suggested that they go to his place to have a cold drink and to get to know each other. She agreed. According to the Appellant his home village is on the way to where the Complainant stayed.

[9] The Appellant further stated that when they got to his house, he parked the motor vehicle on the side of the house. They remained in the vehicle for about 15 minutes - they were just talking. They then started kissing. The Complainant then made suggestive actions that they should have sex. The Appellant stated that he was surprised, as they just met each other and were still parked outside the house. The Complainant took the Appellant's hand and put it on her private parts. This made it clear to the Appellant that the Complainant was determined to have sexual intercourse there and then. The Complainant also massaged his private parts as she held his hand on her private parts. The Complainant asked the Appellant if he had condoms.

[10] According to the Appellant, everything was happening too fast and he said that he was not in a position to have sex at that time as he was going through a period of doing "*ditaelo*". He then suggested that they should stop kissing. The Complainant then insisted that the Appellant take her home immediately as she was no longer interested. He agreed to take her home and did so.

[11] The following day, Selle Phaahla phoned the Appellant and informed him that the police are looking for him in connection with a rape case against him. The Appellant went the following day to the police station accompanied by Selle Phaahla. The Appellant was shocked and surprised to find out that the Complainant was a girlfriend to Selle Phaahla. According to the Appellant this charge against him is just all part of a plot in the chieftaincy dispute they have. The Appellant reiterated that he did not unlawfully and intentionally commit an act of sexual penetration to the Complainant in this matter on the 5th of October 2027, nor any other date.

[12] The State called Selle Phaahla as their first witness. In examination in chief, Mr. Phaahla corroborated what the Appellant stated in his Section 115 Statement in as far as it related to Selle Phaahla and what happened during his presence. There is not much in dispute. However, under cross-examination, Mr. Phaahla started to contradict himself materially in respect of whether the Appellant knew the Complainant prior to the incident, whether the Appellant knew that the Complainant was his girlfriend and whether the Complainant was in fact still his girlfriend or not. Mr. Phaahla even testified about a vision he had that he and the Appellant are going to be arrested, before the police even called or he spoke to the Appellant. In this court's view, Mr. Phaahla's evidence has to be treated with caution and taken with a pinch of salt. From the record of the proceedings, it seems as if Mr. Phaahla was indeed not a very reliable witness and had something to hide. He interchanged his versions as he was asked during cross-examination.

[13] The State called its second witness, the Complainant, K[...] J[...], a 38 year old female at the time of the proceedings. She confirmed that she boarded the vehicle of the Appellant after Mr. Phaahla offered her a lift. She further confirmed that she did not know the driver of the vehicle (the Appellant) and it was her first time to meet him. The Complainant further testified that there was indeed an agreement that they

would drop off Mr. Phaahla first and then her. She also testified that the Appellant requested her to come and sit in the front passenger seat after they dropped off Mr. Phaahla off.

[14] According to the second state witness, she was approximately 14 weeks pregnant at the time. It was not her first pregnancy. She had, had six pregnancies at the time. The second state witness testified that the Appellant parked the vehicle next to a house inside an unfinished garage. He went inside the house and came back after about 10 minutes. He then got on top of her inside the motor vehicle on the front passenger seat and took off her pants (Short white pants) and tore her panties off. There was a struggle between her and the Appellant which lasted for approximately 20 minutes. He held her down with his one hand on her chest and the other hand he used to put on a condom. He then forced himself into her and raped her. After he raped her, he took her home.

[15] Under cross-examination, the second state witness contradicted herself materially in numerous aspects for example whether the first state witness was her boyfriend or ex-boyfriend, her last date of sexual intercourse being June and then again September. According to the second state witness, the Appellant was using a condom, but according to the J88, no condom was used. Further, the second state witness contradicted herself in the recollection of how the rape unfolded, as well as the injuries sustained. According to the J88 no condom was used and the only injuries sustained was a tear on the right perianal area of approximately 2cm long - there was no active bleeding and furthermore a tear on the vulva on the left which was also approximately 2cm long.

[16] In the J88 it was also stated as follows under conclusions:-

"No evidence of penetration."

[17] The second state witness was a single witness in as far as the rape incident is concerned and her evidence must be approached with caution. In this court's view, the second state witness's evidence is quite riddled with questions and improbabilities. If the second state witness was 14 weeks pregnant penetration by

the Appellant on the front seat of a very small vehicle whilst he was on top would have been extremely difficult. Furthermore, it is highly unlikely that the second state witness would not have sustained any injuries after according to her a struggle ensued which lasted approximately 20 minutes on the front passenger seat of the vehicle. The several contradictions in her evidence in respect of simple facts bring doubt as to whether the rape did indeed take place as described by her or at all.

[18] The State called its third witness, Dr. Netshisaulo. Dr. Netshisaulo is the medical doctor who did the examination of the second state witness and completed the J88. According to Dr. Netshisaulo, the Complainant's clothes were clean. According to the information given to the doctor, the last consensual sexual intercourse the second state witness had was during June 2017, yet the second state witness stated in her evidence it was September. The doctor also stated that a condom was not used, but later on stated that she was referring to previous sexual encounters. The doctor also clarified that the entry "No evidence of penetration" referred to anal penetration. There was no bruising. There was also a white milky discharge. The doctor could not really assist the court except what was written in the J88 and during questioning of the doctor it was evident that a lot of information was not written down.

[19] The State then closed its case. The Defense brought an application in terms of Section 174 of the Criminal Procedure Act, 51 of 1977. The Section 174 application was dismissed.

[20] The Defense called the Appellant as their first witness. The Appellant testified that they never entered the garage. The garage was still in the process of being built and he parked the motor vehicle next to a wall. It was a Tata Indica motor vehicle. The Appellant further testified that he never entered the house. He remained seated with her in the vehicle. He never alighted. He was in the driver's seat and she in the passenger's seat. The Appellant also testified that it is not possible that they could have had a struggle inside the vehicle for approximately 20 minutes as the vehicle is a very small model and there simply is not enough space in the front. The Appellant further denied ever having had sexual intercourse with the Complainant, having undressed her and having had a condom with him or wearing one.

[21] Most of the Appellant's evidence was consistent with his Section 115 plea explanation. He did not materially contradict himself in any manner.

[22] The Defense called a second witness, Mr. Mahlaba. Mr. Mahlaba testified that the Appellant is his neighbour in Mogoerane. He testified that the Appellant came home driving his vehicle. He had a passenger who was wearing something white at the top as he only saw her top part of her body. The Appellant parked the vehicle at the side of the wall. That was on his side. He waved a hand to Mr. Mahlaba. Mr. Mahlaba also responded by waving back. According to Mr. Mahlaba, he was seated on the stoep area of his house. This was between 14h00 and 15h00 the afternoon. The person seated in the car with the Appellant was wearing big earrings. He saw them kissing each other and laughing. Mr. Mahlaba testified that from where he was seated to where the Appellant was sitting with the Complainant in the vehicle was approximately twenty meters.

[23] Mr. Mahlaba further testified that neither the Appellant, nor the other person ever alighted from the vehicle. He did not know the person the Appellant was with. Mr. Mahlaba confirmed that during the year 2017, the Appellant's garage was still under construction and was not completed yet. The Appellant did not enter into the garage. Mr. Mahlaba further confirmed that the Appellant never alighted from his vehicle and never entered the house, they remained seated in the car. They were there for approximately 10 minutes and then drove off. According to Mr. Mahlaba, he was seated on the steep from the moment the Appellant arrived there until when they drove off, he never moved from the steep area. Mr. Mahlaba further testified that they did not remain parked there for more than 10 minutes and there was never any struggle between them. Mr. Mahlaba also testified that there were many people moving in the area as learners were returning from school and there was a Spaza Shop next to their houses.

[24] The Defense called one further witness, Mr. Mahlaba. Mr. Mahlaba did not add much value to the Defense case and this court will not deal with his evidence herein.

[25] If the totality of the evidence is considered regarding the issue of rape, there is doubt whether the Appellant is guilty of the charge of rape and whether he was correctly convicted.

[26] In **S v Hadebe and Others 1997 (2) SACR 641 (SCA)** at page 645 it was held that when considering a matter on appeal, the appeal court, in the absence of any demonstrable and material misdirection by the trial court, presumes that the findings of fact made by the trial court are correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[27] In this court's view, the court *a quo* erred in material respect and/or misdirected itself in the evaluation of the evidence and/or the weight to be accorded to the said evidence. The State's case is riddled with improbabilities such as the fact that the first state witness was the boyfriend or ex-boyfriend to the Complainant, yet he allowed the Appellant to drop him off first and then the Complainant. Secondly, the fact that the Complainant was 14 weeks pregnant and a struggle ensued on the front passenger seat of a small Tata Indica without the Complainant having sustained any injuries or bruises. It is also highly improbable that the Appellant managed to rape the Complainant whilst being on top of her on the front passenger seat whilst she was 14 weeks' pregnant.

[28] Furthermore, the State's witnesses contradicted themselves in various aspects whilst the Defense witnesses did not. One cannot help to wonder whether there isn't perhaps truth in the submissions made by the Appellant that indeed this whole thing was a plot against him.

[29] The trial court with the evidence presented before it could not have come to a finding that the State managed to prove its case beyond reasonable doubt, in fact there is more doubt than not.

[30] The Appellant must be given the benefit of the doubt and therefore the appeal against conviction should succeed. In this court's view, the conviction is to be set aside and by that the sentence as well.

[31] Accordingly, this court therefore makes the following order:-

1. The appeal against both conviction and sentence is upheld.
2. The conviction and sentence is set aside.
3. The matter is referred back to the National Prosecuting Authority for further action if any.

M. NAUDÉ-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I AGREE:

J. STRÖH
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON: 19 SEPTEMBER 2025

JUDGMENT DELIVERED ON: 29 JANUARY 2026

For the Appellant: Mrs. R. Scott
Instructed by: Legal Aid SA
Polokwane Justice Centre
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For the Respondent: Adv. R. Mulaudzi
Instructed by: The Director of Public Prosecutions,
Limpopo Division, Polokwane