

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG**

CASE NO: CA23/2019

In the appeal of:

CONFIDENCE POGISHO

Appellant

and

THE STATE

Respondent

Coram: Titus AJ et Zwiegelaar AJ

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 29 January 2026.

ORDER

On appeal from the Regional Division of North West, Mmabatho (Regional Magistrate Ms Leshomo sitting as the trial court).

- [i] The appeal against both conviction and sentence is dismissed.

JUDGMENT

TITUS AJ

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The Appellant was charged in the Regional Court, Mmabatho, with rape in that the accused contravened Section 3, read with Sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007¹ ('the CLAA') read with Sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 ('the

¹ Act No. 105 of 1997.

CPA'), further read with section 51 Schedule 2 Part 1 of the CLAA , as amended, as well as Section 92(2) and 94 of the CPA.

[2] The State alleged that, on 11 October 2015, near Tshidilamolomo, in this Court's area of jurisdiction, the Appellant unlawfully and intentionally committed an act of sexual penetration of the complainant, a female aged 24 years, by inserting his penis into her vagina without her consent. The State further alleged that Section 51, Schedule 2 Part 1 of the CLAA is applicable as the Appellant penetrated the victim more than once.

[3] The Appellant enjoyed legal representation in the court *a quo* and pleaded not guilty.

[4] On 3 July 2017, the Appellant was convicted of rape and sentenced on 26 July 2017 to life imprisonment. Further, in terms of section 103 of Act 60 of 2000 ('the Firearms Control Act') the Appellant was declared unfit to possess a firearm.

GROUND FOR APPEAL

[5] The appeal lies against conviction and sentence and against the trial court's direction in terms of the Firearms Control Act. The Appellant is presently incarcerated.

[6] The Appellant contends:

“AD CONVICTION

1. In convicting the Appellant the Court erred in making the following findings:
 - 1.1. That the State proved the guilt of the Appellant beyond a reasonable doubt;
 - 1.2. That there are no improbabilities in the State’s version;
 - 1.3. That the State witness gave evidence in a satisfactory manner;
 - 1.4. That the evidence of State witnesses can be criticized on matters of detail only, whereas the evidence was contradictory in material respect;
 - 1.5. That certain evidence was proved or testified by the state witnesses.
2. In convicting the Appellant the Court erred in failing to:
 - 2.1. Property analyse or evaluate the evidence of the State witnesses;
 - 2.2. Property consider the improbabilities inherent in the State’s version.
3. In convicting the Appellant the Court erred in in the following respects:
 - 3.1. Rejecting the evidence of the Appellant as not being reasonably possibly true;
 - 3.2. Making no comment on the evidence tendered by the Appellant;
 - 3.3. Accepting the state evidence as being true in all material aspects.

AD SENTENCE

4. The learned Regional Magistrate erred in not finding that there are substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment.
5. The learned Magistrate failed to take or adequately take into account the following:
 - 5.1. Personal Circumstances

- 5.1.1. The Appellant is thirty six years old and therefore stands good chances of rehabilitation;
- 5.1.2. He (the Appellant) is blessed with three (3) children aged nine (09), six (06) and two (02) years respectively. Their mother is unemployed;
- 5.1.3. At the time of the arrest he (the Appellant) was running a tuck-shop. He was able to raise an amount of two thousand rand (R2000-00) per month;
- 5.1.4. Prior to his (the Appellant) arrest, his employment partner and three children were depending on him for financial support;
- 5.1.5. His (the Appellant) father is suffering from stroke and mother from hypertension and related diseases;
- 5.1.6. He (the Appellant) is responsible for taking care of the family live-stock as he is the only male amongst female siblings;
- 5.1.7. Both the Appellant and the Complainant have mended the fence and are now on speaking terms;
- 5.1.8. He (the Appellant) has three (3) previous convictions and one (1) of robbery." (*sic*)

[7] It is trite that a court of appeal should be slow in interfering with the findings of a trial court unless the appeal court finds that the trial court's findings of fact and credibility are vitiated by irregularity, or unless 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 lies².

CONVICTION

[8] The trial court correctly applied the test for proof beyond a reasonable doubt. The evidence of the State witnesses, assessed in its entirety, was coherent and consistent on material aspects. Minor discrepancies were immaterial and did not undermine the overall reliability of the State's case.

[9] The improbabilities alleged by the Appellant are speculative and are not supported by the record. The trial court was entitled to accept the State's version as credible and probable.

[10] The trial court made sound credibility findings in respect of the State witnesses, which are borne out by the record, particularly in regard to the evidence of Mr Marumolo. Their evidence was not contradictory in any material respect, and the criticisms advanced by the Appellant relate to peripheral details.

[11] The argument advanced for the Appellant that the complainant's physical injuries do not indicate sexual assault is of no merit. The State's case does not rest solely on the presence of these injuries, but rather on the complainant's clear and

² *S v Jackson* 1998(1) SACR 470 (SCA).

consistent testimony, corroborated by witness evidence and the surrounding circumstances. The complainant's painful throat and scratch marks are relevant not as conclusive proof of sexual violation, but as physical evidence consistent with her account of being forcibly restrained and assaulted. When considered together with the complainant's evidence and the broader factual matrix, the injuries lend weight to the reliability of her version and cannot be dismissed as insignificant.

[12] Further, the submission that the complainant had other recent sexual partners, and that it was not the Appellant who penetrated her, cannot avail him in the light of the complainant's clear, consistent evidence that identifies the Appellant as the perpetrator.

[13] The reasoning of the trial court reflects a proper and balanced evaluation of the evidence. The court weighed the probabilities, considered the contradictions, and applied the correct legal principles.

[14] Having considered the grounds of appeal, this Court finds no misdirection in the trial court's reasoning or its evaluation of the evidence. The conviction is firmly supported by both the record and the law.

[15] This Court cannot fault the Regional Magistrate's judgment on conviction. The medico-legal evidence is consistent with the complainant's account of forceful sexual assault. By contrast, the Appellant's version is a simple bare denial. On the

facts, his account is so far removed from the general probabilities that it cannot reasonably be true.

[16] Viewed holistically, the Appellant's evidence was improbable and rightly rejected. This Court agrees with the trial court's conclusion. The Appellant has failed to persuade this Court to uphold his appeal against conviction.

SENTENCE

[17] It is trite that sentencing is inherently a balancing exercise where the sentencing court weighs aggravating factors on the one hand against mitigating considerations on the other. The greater the weight of aggravating factors, the more severe the sentence should be, and the less justification there is to depart from a prescribed minimum sentence. Conversely, where mitigating factors predominate, a more lenient sentence may be appropriate, and the court may be inclined to deviate from the prescribed minimum. Where the scales are evenly balanced, judicial discretion must be exercised with due regard to the fourfold considerations of the crime, the offender, the interests of the community, and the impact on the victim; tempered by such mercy³ as may be warranted by the circumstances. Where a minimum sentence is applicable, it must be imposed, and in such cases, an appellate court should be slow to interfere with the sentence imposed.

³ S v Rabie 1975 (4) SA 855 (A)

[18] This Court has carefully considered the sentence imposed by the Regional Magistrate. Her approach was holistic, taking into account the nature of the crime, the interests of the community, and the personal circumstances of the Appellant. The Regional Magistrate found the particular circumstances of the Appellant neither substantial nor compelling. The principles of prevention, retribution, rehabilitation, and deterrence are clearly reflected in her reasoning. She properly assessed whether the prescribed minimum sentence was proportionate to the offence. All relevant factors were duly weighed, established legal principles were applied, and consistency with precedent was maintained.

[19] The Regional Magistrate provided cogent justification for imposing the prescribed minimum sentence. The Appellant spurned previous opportunities for rehabilitation. In this case, the imposition of life imprisonment cannot be said to induce a sense of shock. Sexual violence against women constitutes a profound violation of their dignity, bodily integrity, and security, and, it is trite, the legislature has, respectfully, rightly ordained that, absent compelling circumstances, the prescribed minimum sentences must be imposed.

[20] In the present matter, the complainant was raped and assaulted in the street by the Appellant, her former partner, then abducted by him and held captive in his house, then repeatedly raped during the course of an evening. Such conduct reflects a sustained and calculated disregard for the victim's autonomy and humanity.

[21] In these circumstances, the Court cannot countenance deviation from the statutory minimum, for to do so would undermine both the deterrent and retributive purposes of the sentencing regime and fail to reflect the seriousness with which society views such egregious offences. This Court accordingly finds no irregularity or misdirection in the sentence imposed by the court *a quo*.

[22] The Court cannot find fault with the Regional Magistrate's judgment on conviction. The Appellant's appeal on his sentence of life imprisonment suffers the same fate. The Court is not persuaded that the grounds raised by the Appellant warrant any interference in the sentence imposed. The appeal must therefore fail.

[23] In the circumstances, the following order is made:

ORDER

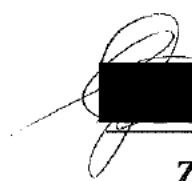
[i] The appeal against conviction and sentence is dismissed.




TITUS AJ

**ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION**

I concur,



ZWIEGELAAR AJ
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION

APPEARANCES:

For Appellant:

Mafikeng Justice Centre
MAHIKENG

For Respondent:

Adv Tlatsana
NDPP
MAHIKENG

Judgment Reserved: 11 April 2025

Judgment was delivered to the parties by email on 29 January 2026