



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH-WEST DIVISION, MAHIKENG)

CASE NO.: CA 02/2023

IN THE APPEAL OF:

LEBOGANG NYOKA

APELLANT

and

THE STATE

RESPONDENT

ORDER

The following order is hereby made:

- (i) the Appellant's appeal against his conviction in respect of **counts two, six, seven and ten** is upheld and replaced with the following order: *"The Appellant is acquitted of the charges contained in **counts two, six, seven and ten** of the indictment as these counts constitutes a duplication of charges against the Appellant, if read with the contents of **counts one, five and nine** in respect of which counts the Appellant's conviction remain";*

- (ii) the Appellant's appeal against his conviction in respect of **counts one, three, five, eight and nine** are dismissed;
- (iii) the Appellant's appeal against his sentence in respect of **counts one and two** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count one** of the indictment the Appellant is sentenced to life imprisonment"*;
- (iv) the Appellant's appeal against his sentence in respect of **counts five, six and seven** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count five** the Appellant is sentenced to life imprisonment"*;
- (v) the Appellant's appeal against his sentence in respect of **count nine and count ten** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count nine** of the indictment the Appellant is sentenced to life imprisonment"*;
- (vi) the Appellant's appeal against his sentence in respect of **counts three and count eight** of the indictment is dismissed and the sentences on these counts as imposed by the trial court are confirmed and shall remain as ordered by the trial court;
- (vii) In terms of section 280 of the Criminal Procedure Act, Act 51 of 1977, it is directed that the sentences imposed in respect of **counts one, three, five, eight and nine** shall all run concurrently, the cumulative effect of the said sentences being that **the Appellant is effectively sentenced to life imprisonment.**

JUDGMENT

CORAM: LAUBSCHER AJ et MORRIS AJ:

LAUBSCHER AJ:

THIS APPEAL AND THE RELEVANT BACKGROUND

1. This appeal is against both the conviction and sentence of the Appellant as adjudicated and imposed by the trial court, being the Regional Court, for the Regional Division of the North-West, held at Taung on 30 August 2022.
2. The trial court convicted the Appellant on the following counts:
 - 2.1. Count one: that the Appellant is guilty of the offence of housebreaking with the intent to rape in that on or about 14 September 2014 and at or near Phatsima section Pampierstad in the Regional Division of North-West, the Appellant unlawfully and intentionally, broke into and entered the residential house of GKM with intent to rape in contravention of section 3 of the Criminal Law (Sexual offences and related matters) Amendment Act, Act 32 of 2007 and contravened section 3 of the Criminal Law (Sexual offences and related matters) Amendment Act, Act 32 of 2007 by wrongfully and intentionally committed an act of sexual penetration with a female person to wit, GKM (40) years old, by inserting his penis into her vagina without her consent. In this count the

indictment made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 (hereafter "the Criminal Law Amendment Act").

- 2.2. Count two: that the Appellant is guilty of the crime of rape in that on or about 14 September 2014 and at or near Pampierstad in the Regional Division of North-West, the Appellant unlawfully and intentionally committed an act of sexual penetration with a female person to wit, GKM (40 years), by inserting his penis into her vagina without her consent. As with count one, the indictment made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.
- 2.3. Count three: that the Appellant is guilty of the crime of assault with intent to do grievous bodily harm, in that on or about 14 September 2014 and at or near Phatsima section Pampierstad in the District Regional Division of North-West, the Appellant unlawfully and intentionally assaulted GKM by hitting her with a knobkierie with the intent of causing her grievous bodily harm.
- 2.4. Count four: that the Appellant is guilty of theft in that on or about the 14 September 2014 and at near Phatsima section Pampierstad in the Regional Division North-West, the Appellant unlawfully and

intentionally stole 1 DVD Player valued at R1200.00 being the property of or in the lawful possession of GKM.

2.5. Count five: that the Appellant is guilty of the offence of housebreaking with the intent to rape in that on or about 23 September 2014 and at or near Pampierstad in the Regional Division of North-West the Appellant unlawfully and intentionally, broke into and entered the Residential House of HKS with intent to rape in contravention of section 3 of the Criminal Law Act (Sexual offences and related matters) Amendment Act, Act 32 of 2007 and contravened section 3 of the Criminal Law (Sexual offences and related matters) Amendment Act, Act 32 of 2007 by wrongfully and intentionally committing an act of sexual penetration with a female person, HKS (69 years old) by inserting his penis into her vagina without her consent. In this count the indictment also made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.

2.6. Count six: that the Appellant is guilty of the offence of rape in that on or about 23 September 2014 and at or near Pampierstad in the Regional Division of North-West, the Appellant unlawfully and intentionally committed an act of sexual penetration with a female person, HKS (69 years old), by inserting his penis into her vagina without consent. This count also made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.

- 2.7. Count seven: that the Appellant is guilty of the offence of rape in that on or about 23 September 2014 and at or near Pampierstad in the Regional Division of North-West, the Appellant unlawfully and intentionally committed an act of sexual penetration with a female person, HKS (69 years old), by inserting his penis into her vagina without consent. This count similarly made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.
- 2.8. Count eight: that the Appellant is guilty of theft in that on or about 14 September 2014 and at near Phatsima section Pampierstad in the Regional Division Northwest, the Appellant unlawfully and intentionally stole 1Laptop computer valued at R5000.00 being the property of in the lawful possession of HKS.
- 2.9. Count nine: that the Appellant is guilty of the offence of rape in that on or about 23 September 2014 and at or near Pampierstad in the Regional Division of North-West, the Appellant unlawfully and intentionally committed an act of sexual penetration with a female person, RS (09 years old) by inserting his penis into her vagina without consent. This count also made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.

- 2.10. Count ten: that the Appellant is guilty of the offence of rape in that on or about 23 September 2014 and at or near Pampierstad in the Regional Division of Northwest, the said Appellant unlawfully and intentionally committed an act of sexual penetration with a female person, RS (9 years old) by inserting his penis into her vagina without consent. Again, this count made specific reference to section 51, read with Schedule 2 of the Criminal Law Amendment Act.
3. Counts: (i) one and two (ii) five, six and seven and (iii) nine and ten are three sets of multiple charges of rape in respect of the same victim and allegedly perpetrated by the Appellant on the same day: counts one and two are in respect of GKM (the 40 year old female), counts five, six and seven are in respect of HKS (the 69 year old female) and counts nine and ten are in respect of RS (the nine year old female child).
4. The charge sheet has clearly been prepared in this manner in order to allow for the invoking of the provisions of section 51(1) read with Part 1 of Schedule 2 ("rape" as per paragraph (a)(i) of Part 1) of the Criminal Law Amendment Act, Act 105 of 1997 (hereafter "the Criminal Law Amendment Act"), and thus to trigger the prescribed minimum sentence of life imprisonment.
5. The multiplicity of charges for rape ((i) counts one and two in respect of GKM, (ii) five, six and seven in respect of HKS and (iii) counts nine and ten in respect of RS) and the correct manner in which same stand to be dealt with in this

matter are of importance and stand to be addressed by this Court. In this regard the following:

- 5.1. The Court (Opperman J and Ismail J concurring) in the matter of Molaza v S¹ and dealing with multiple counts of rape perpetrated by the same accused against the same victim, at para 104 stated that: *"In my view, two counts of rape are not required to trigger the operation of the minimum sentencing regime as suggested by the Mahlase dictum. What is required, are two acts of rape. This is so as Part 1 of Schedule 2 in relevant parts reads, and commences with the word 'rape' in the singular, as follows: '**Rape...**(a) when committed – (i) in circumstances where the victim was raped **more than once** whether by the accused or by any co-perpetrator or accomplice...(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) **by a person** who has been convicted of **two or more offences of rape** or compelled rape, but has not yet been sentenced in respect of such convictions'."*
- 5.2. The Court proceeded to state in para 106 of the above referred to judgment: *"The difference is perhaps academic, because the result will be the same: life imprisonment. But conceptually there is a difference. Item (a)(i) envisages a single count and item (a)(iii) envisages multiple counts."*

¹ [2020] 4 All SA 167 (GJ) (31 July 2020).

- 5.3. In the matter of Tshemego v S² this Division specifically addressed and dealt with the issue of the multiplicity of charges of rape in circumstances much similar to those in this matter.
- 5.4. In the Tshemego matter the accused was charged with “...(8) counts of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘the SORMA’) read with the sections 1, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61, further read with the provisions of Section 94, 256 and 261 of the CPA, further read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (‘the CLAA’). The state averred that the appellant unlawfully and intentionally committed repeated acts of sexual penetration with both victims by inserting his penis into their vaginas without their consent and by further inflicting grievous bodily harm on them.”
- 5.5. The accused in the Tshemego matter raped the victims “...interchangeably repeatedly while stabbing and piercing them with a sharp object. This constituted eight (8) counts of rape in the view of the state.”

²

(CA30/2023) [2024] ZANWHC 308 (19 December 2024)

- 5.6. The trial court proceeded to convict the accused on all eight counts of rape. The appeal court did not leave this conviction intact and the following quotation from the Tshemego matter in paragraphs 18 to 20 thereof are of importance and the principles as stated therein stand to be applied in this matter as well:

"[18] The serious misdirection by court the quo on conviction is best illustrated with reference to what this Court said in Ntandani v S (CA61/23) [2024] ZANWHC 243 (18 September 2024), in respect of multiple counts of rape:

'[9] It is indisputable that the appellant had committed more than one act of sexual penetration on MMM, within the purview of section 51(1) read with Part I of Schedule 2 of the CLAA. The prosecutor elected to charge the appellant with two separate counts of rape. As part of our legal landscape, the National Prosecuting Authority is enjoined with an unfettered discretion on the charges to be preferred against an accused. The prosecutorial discretion on the constitution of the charges is the domain of the National Prosecuting Authority. It is akin to the delivery of a verdict which is the exclusive territory of the court. It is, however, the duty of a court to prevent a duplication of convictions brought about by an impermissible splitting of charges by the prosecution.

[10] In Lesang Samuel Modise v S, Case No: CA 44/2021, NWHC, delivered on 07 March 2022, the Full Bench postulated as follows:

'[15] The formulation of the charge by the State in respect of counts 2 and 3 and the terminology used by the court a quo in sentencing the appellant on counts 2 and 3, is problematic. The court a quo found that counts 2 and 3 emanate from the same incident and ordered that the two counts be taken as one for sentence. The appellant should not have been charged separately on counts 2 and 3, but with one count of rape. In S v Maxabaniso 2015 (2) SACR 553 (ECP), an analogous matter to the present appeal, which are apposite, Plasket J said the following:

'[4] The issues that arise for determination are: (a) Whether the appellant was adequately warned of the applicable provisions of the Criminal Law Amendment Act 105 of 1997 relating to the relevant applicable prescribed minimum sentence; (b) whether he ought to have been charged with two counts of rape, rather than one count; (c) whether the evidence establishes that he raped the complainant more than once; and (d) whether the magistrate misdirected himself in respect of the sentence he imposed.

[20] It was argued by Mr Renaud, who appeared for the appellant, that he was charged with one count of rape and that the state, if it wanted the sentence of life imprisonment to apply, ought to have charged him with two counts of rape.

[21] I am aware of cases in which an accused has been charged with more than one count of rape involving the same victim. S v M and S v Senyolo are cases in point. In both cases the accused

had raped the same victim once on two different occasions, a few months apart in the former, and 15 days apart in the latter. Both accused were charged with two counts of rape and, in both, the court held that a prescribed sentence of life imprisonment applied because the accused had raped the same victim more than once. In S v M Satchwell J sentenced the accused to 'one term of life imprisonment in respect of both counts one and two'. In S v Senyolo, however, Van Eeden AJ, having found substantial and compelling circumstances to be present, set aside the sentence of life imprisonment imposed by the trial court and replaced it with a sentence of 10 years' imprisonment in respect of each count.

...

*[24] There are occasions when a person accused of raping a victim more than once in the course of a single encounter is charged with more than one count of rape. **It appears to be practice in this division, however, to charge such an accused with one count of rape. In my view, in the normal course, that is the correct way to charge such an accused.** It avoids potential difficulties highlighted by the sentences imposed in S v M and S v Senyolo, namely whether (in the absence of other factors dealt with in part 1 of sch 2) each count attracts a potential life sentence, or whether the first rape attracts a 10-year minimum sentence while the second attracts a life sentence, or whether both counts have to be taken together for purposes of sentence.*

[25] In my view the legislature envisaged an accused being charged with one count of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item (a)(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): Even when the prescribed minimum sentence for a rape is 10 years' imprisonment, courts have common-law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances."

(my emphasis)

[11] As was alluded to in Modise and Maxabaniso, the present appeal demonstrates the conundrum that an appellate court is faced with when an accused is charged with two counts rather than one count, in circumstances where the victim was raped more than once. The Regional Magistrate took counts 2 and 3 together for the purposes of sentence and imposed life imprisonment.

[12] In DPP, Free State v Mashune (675/17) [2018] ZASCA 60 (18 May 2018), Rogers AJA, in albeit in a different context, but equally applicable in the present appeal, postulated as follows:

"[10] Strictly speaking, each count in the present case involved two distinct offences, namely (a) housebreaking with intent to commit rape; and (b) rape (S v Zamisa 1990 (1) SACR 22 (N) at 23d-e.) However, since the indictment was framed as if each housebreaking and the ensuing rape constituted a single offence, and since the contrary was not argued, I shall approach the case as if the respondent was convicted of two offences, not four. This is what the court a quo did."

[13] There is clearly an impermissible splitting of charges. The effect of any prejudice was ameliorated by the Regional Magistrate imposing a cumulative life sentence on counts 2 and 3. It, however, remains a salutary practice as evinced in Modise and Maxabaniso, that in circumstances analogous to the present matter, that the prosecution avoids an impermissible splitting of charges, and that judicial officers remain alive to avoiding a consequent duplication of convictions.'

[19] The conviction of the appellant on the eight (8) counts of contravening section 3 of SORMA undoubtedly impugns the principle of duplication of convictions. The appellant should have been convicted on counts 1 and 5, of two (2) counts of contravening

section 3 of SORMA read with section 51(1) and Part I of Schedule 2 of the CLAA, which provides the following jurisdictional facts:

"Rape -

(a) when committed -

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice:..

(c) Involving the infliction of grievous bodily harm."

[20] The appellant should have been acquitted on counts 2 to 4 and 6 to 8. To this extent, the appeal against conviction on counts 2 to 4 and 6 to 8 is upheld."

5.7. One need not say more, the principles expressed by the court in the Tshemego matter are clear and stand to be followed. In this matter the above referred to principles find application in respect of:

5.7.1. count two, which comprise a splitting of the rape charge as per count one, in respect of GKM;

5.7.2. counts six and seven, which comprise a splitting of the rape charge as per count five, in respect of HKS; and

5.7.3. count ten, which comprise a splitting of the rape charge as per count nine, in respect of GKM.

6. In respect of counts one, two, five, six, seven, nine and ten, the contents of these counts as set out in the charge sheet expressly refer to the provisions of section 51 read with Schedule 2 of the Criminal Law Amendment Act. It was accordingly at all times known to the Appellant and his defence that the Respondent was relying on the provision of section 51 read with Schedule 2 of the Criminal Law Amendment Act in respect of the said charges.
7. The Appellant pleaded not guilty to all the counts levelled against him and elected to give no plea explanation.
8. The matter proceeded to trial. The trial court found the Appellant guilty on all the counts levelled against him, except for count four.
9. The trial court sentenced the Appellant as follows :
 - 11.1 count one and count two together: life imprisonment;

- 11.2 count three: five years imprisonment, which is to run concurrent with the sentence in counts one and count two;
- 11.3 count five and six together: life imprisonment;
- 11.4 count seven: life imprisonment;
- 11.5 count eight: three years imprisonment, which is to run concurrent with the sentence in counts five and six;
- 11.6 count nine: life imprisonment;
- 11.7 count ten: life imprisonment; and
- 11.8 the Appellant was also declared unfit to possess a firearm in terms of the provisions of section 103(1) of the Firearms Control Act, Act 60 of 2000.

- 10. From the contents of the record in this appeal, it is evident that the trial court in imposing the sentences of life imprisonment in respect of counts one, two, five, six, seven, nine and ten did so in terms of the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act.
- 11. In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act, the Appellant is entitled to an automatic right of appeal once the trial court has

imposed a sentence of life imprisonment. This appeal accordingly comes before this Court by virtue of the automatic right of appeal.

12. The Respondent is opposing the Appellant's appeal and the Respondent delivered heads of argument in this appeal, the contents of which assisted this Court in the adjudication of the appeal.
13. The Appellant elected not to deliver heads of argument in the appeal.
14. The Appellant in this appeal was represented by Adv Nyoka, and the Respondent was represented by Adv Phetlhu of the office of the Director of Public Prosecutions.

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL AGAINST CONVICTION:

15. It is important to have regard to and set out the following principles which a court of appeal must observe and apply when an appeal is adjudicated:

- 15.1. In the matter of R v Dhlumayo and Another³ the Appeal Court (as it was then known) stated:

"The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity

³ 1948 (2) SA 677 (A) at 705.

of observing the demeanour, but also their appearances and whole personality. This should not be overlooked”.

15.2. In the matter of A M and Another v MEC Health, Western Cape⁴ the court referred to the matter of ST v CT⁵ and reiterated the following “trite principles” as reaffirmed by the Constitutional Court: *“In Makate v Vodacom (Pty) Ltd⁶ the Constitutional Court, reaffirmed the trite principles outlined in Dhlumayo, quoting the following dictum of Lord Wright in Powell and Wife v Streatham Nursing Home”: ‘Not having seen the witnesses puts the appellant judges in a permanent position of disadvantage against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the Higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case’.*

15.3. A court of appeal can only reject the trial court’s assessment of the evidence if the court of appeal is convinced that the trial court’s assessment of the evidence was wrong. If the appeal court is in doubt, the trial court’s judgment must remain in place.⁷

⁴ 2021 (3) SA 337 (SCA) at para [8].

⁵ 2018 (5) SA 479 (SCA) para [26].

⁶ 2016 (4) SA 121 (CC).

⁷ S v Robinson 1968 (1) SA 666 (A) at 675 H.

- 15.4. The appeal court must be careful in making decisions, which are purely based on paper and representations in court without the presence of the parties in the actual case.⁸
- 15.5. The above referred to principles were stated in a similar vein in the matter of S v Kebana⁹ as follows:
- "It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings".*
- 15.6. In Khoza v S¹⁰ it was confirmed that a "...court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong."
- 15.7. Ponnann JA in the matter of S v Monyane and Others¹¹ confirmed the following regarding the powers of a court of appeal:

⁸ Bernert v ABSA Bank Ltd 2011 (3) SA 92 CC at para [106].

⁹ S v Kebana [2010] 1 All SA 310 (SCA) para [12].

¹⁰ (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16].

¹¹ 2001 (1) SACR 543 (SCA) at para 15 and also see S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A.

“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f).”

16. In dealing with the Appellant's appeal against conviction this Court's must have regard to the following principles and methods of assessing the evidence before the trial court:

- 18.1 It is trite that the onus of proof rests with the Respondent to prove the guilt of the Appellant beyond reasonable doubt. In the matter of Robinson and Others v S¹² the court stated the following in this regard:

“It is clear from the record that there are two conflicting versions on how the events unfolded on the day in question. The versions are completely different from each other. The second question which needed to have been considered by the trial court was whether on the totality of the evidence it can be said that the State had proved its case beyond any reasonable doubt. It is trite that in criminal cases the onus rests on the State to prove its case against the

¹²

(AR18/2017) [2018] ZAKZPHC 22 (25 May 2018) at para [11].

Appellant beyond reasonable doubt. In S v Van der Meyden¹³ the test is set out as follows: 'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the Appellant beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example R v Difford 1937 AD 370 at 373 and 383).''

- 18.2 If the Appellant's version is only reasonably possibly true, he or she would be entitled to an acquittal. The Supreme Court of Appeal in the matter of Shackle v S¹⁴ stated:

"The court does not have to be convinced that every detail of an Appellant's version is true. If the Appellant's version is reasonably possibly true, in substance, the court must decide the matter on acceptance of that version. Of course, it is permissible to test the Appellant'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 that it will be so improbable that it cannot be reasonably possibly true".

- 18.3 In the matter of S v Munyai¹⁵ the court stated:

¹³ 1999 (1) SACR 447 (W) at 448 F-G.

¹⁴ 2001 (1) SACR 279 (SCA) at 288 E-F.

¹⁵ 1988 (4) SA 712 at 915 G.

"A court must investigate the defense case with the view of discerning whether it is demonstrable false or inherently so improbable as to be rejected as false".

18.4 The Supreme Court of Appeal in the matter of S v Chabalala¹⁶ stated:

"The correct approach is to weigh up all the elements which points towards the guilt of the Appellant 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 in favour of the State as to exclude any reasonable doubt to the Appellant's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

18.5 In the matter of S v Sithole and Others¹⁷ it was succinctly stated:

¹⁶ 2003 (1) SACR 134 (SCA) at page 140 A-B.

¹⁷ 1999 (1) SACR 585 W at 590.

"There is only one test in a criminal case and that is whether the evidence establishes the guilt of the Appellant beyond reasonable doubt. The corollary is that the Appellant is entitled to an acquittal if there is a reasonable possibility that there is an innocent explanation which he has proffered might be true".

18.6 In S v Molaza¹⁸ the court stated and confirmed the following test:

"The proper test is that an Appellant is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored."

¹⁸

Supra at para [45].

- 18.7 Addressing the concept of “reasonable doubt” the Appeal Court (as it was then known) in the matter of R v Mlambo¹⁹ started:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an Appellant. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that the Appellant has committed the crime charged. He must in other words, be morally certain of the guilt of the Appellant. An Appellant's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with, or outweighed by the proved facts of the case."

- 18.8 In the matter of S v Munyai²⁰ the court stated that the above referred to approach was confirmed by the Supreme Court of Appeal in the matter of S v Phallo and Others²¹ referring to it as a “classic decision”. The SCA went on to state that the approach of our law as represented by the said judgment corresponds with that

¹⁹ 1957 (4) SA 727 (A) at 738 A-C.

²⁰ 1988 (4) SA 712 at 915 G.

²¹ (1999) (2) SACR 558 (SCA) at 562g to 563e.

adopted and stated by the English Courts. Olivier JA in the SCA went on to quote from Miller v Minister of Pensions [1937] 2 All EL 272 (KB) wherein the following was stated:

"The evidence must reach the same degree of cogency as required in a criminal case before an Appellant person is found guilty. That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man to leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

- 18.9 The above referred to measurement must be applied by having regard to the general principle in evaluating evidence in a criminal case. This principle was stated in the matter of S v van der Meyden²² to which reference was already made in a quote above, as follows:

"The onus of proof in a criminal case is discharged by the State. If the evidence establishes the guilt of the Appellant beyond

²²

Supra at 448 F-H.

reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspective. In order to convict, the evidence must establish the guilt of the Appellant beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other ... in whatever the form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the Appellant in isolation in order to determine whether there is proof beyond reasonable doubt and so too, it does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

- 18.10 The evaluation of evidence in a criminal trial comprises of the evaluation of the "mosaic of evidence as whole" as aptly stated in the matter of Khumalo v S ²³ as follows:

²³ (723/2020) [2022] ZASCA 39 (4 April 2022) at para [19] and also see R v Blom 1939 AD 188 at 202, Cornick and Another v S 2007 (2) SACR 115 (SCA) at para 42, S v Van den Meyden supra at 449d-e, cited with approval in S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-f.

"Considering all the circumstances of this case, I am of the view that the evidence tendered by the State weighs so heavily as to exclude any reasonable doubt about the applicant's guilt. Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant's innocence. The inescapable inference is that the applicant was the aggressor on the night of the incident; that he shot at the complainant, chased him into a yard, fired more shots at the complainant and then robbed him of his money."

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL AGAINST SENTENCE:

17. First and foremost, in the adjudication of an appeal against sentence this Court must have regard to the general and overarching principles which have been laid down in this regard by the Supreme Court of Appeal. These are the following:

19.1 An appeal court must be loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others²⁴ stated that:

²⁴ 1920 AD 56 at 57.

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

19.2 In S v Barnard²⁵ the Supreme Court of Appeal stated: "A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

19.3 The above quoted phrase succinctly states the general and overarching principle which must be adopted by this Court in the adjudication of appeals in respect of sentence and hence in this appeal as well.

19.4 In S v Hewitt,²⁶ Maya DP held that: "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely

²⁵ 2004 (1) SACR 191 (SCA) at para [9].

²⁶ 2017 (1) SACR 309 (SCA).

*because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."*²⁷

19.5 In S v Bogaards,²⁸ Khampepe J in the Constitutional Court held the following, that:

"It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

²⁷ At paragraph [8].

²⁸ 2013 (1) SACR 1 (CC) at para [41].

- 19.6 An appeal court must be loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others²⁹ stated that:
18. Consequently, the court in the present matter can only interfere with the sentence where the trial court's exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.
19. This principle was also echoed by and phrased by Du Toit³⁰ as follows: *"The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it."*³¹
20. The trial court "...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same."³² A court of appeal will not interfere

²⁹ 1920 AD 56 at 57.

³⁰ Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

³¹ Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).

³² Gqika v S (CA&R 112/2021) [2022] ZAECHGHC 15 (1 March 2022) at para [20].

lightly with the trial court's exercise of its discretion.³³ In S v Singh³⁴ Tshiqi JA held that: *"The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate."*

21. In the matter of Chitumbura and Another v S³⁵ the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal matter of S v Kgosimore³⁶ and stated the following: *"Regard may be had also to the judgment of Scott, JA in S v Kgosimore, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it."*
22. The court in the matter of Yose and Another v S³⁷, in paragraphs 20 to 27, provides a summary of the relevant factors regarding the *"test on appeal in relation to sentence"* and the court also dealt with the application of the provisions of section 51 of the Criminal Law Amendment Act and the prescribed minimum sentences in terms thereof:

³³ See S v Rommer 2011 (2) SACR 153 (SCA), S v Hewitt 2017 (1) SACR 309 (SCA) and S v Livanle 2020 (2) SACR 451 (SCA).

³⁴ 2016 (2) SACR 443 at para [23].

³⁵ (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

³⁶ 1999(2) SACR 238 (SCA).

³⁷ 2022 (2) SACR 603 (WCC).

- “20. *The test on appeal in relation to sentence is ‘whether the trial court misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court that it so marked that it can properly be described as shockingly, startling or disturbingly inappropriate’ (S v Van de Venter 2011 (1) SACR 238 (SCA) at para [14]).*
21. *Sentencing is about achieving the right balance between the crime, the offender and the interests of the community (S v Zinn 1969 (2) SA 537 (A) at 540G-H). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others (see S v Banda 1991 (2) SA 352 (BG) at 355A).*
22. *The question is essentially whether, on a consideration of the particular facts of the case, the sentence imposed is proportionate to the offence, with reference to the nature of the offence, the interests of society and the circumstances of the offender.*
23. *In S v Pillay 1977 (4) SA 531 (A) at 535E-F the Appellate Division (as it then was) held that the word “misdirection” simply means an error committed by the court in determining or applying the facts for*

assessing the appropriate sentence. As the essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court that imposed 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. The misdirection 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. Such a misdirection is usually and conveniently termed one that vitiates the court's discretion on sentence.

24. *In the present matter the appellants, broadly, contend as follows:*

- a. *The regional magistrate erred in insufficiently taking into account their personal circumstances, and that they were relatively young at the time of the commission of the offences.*
- b. *The regional magistrate erred in not sufficiently taking into account the fact that the appellants were first offenders.*
- c. *The regional magistrate erred in not taking into account the time spent in custody prior to the finalisation of the trial.*
- d. *The appellants did not indicate in their heads of argument what they regarded as an appropriate*

sentence in the circumstances. Counsel, upon being questioned in this respect, submitted that a period of 20 years would be appropriate.

26. *In the present matter the prescribed minimum sentence for the rape of a person more than once by the Appellant, and for the rape of a person under the age of 16 years, is life imprisonment. Section 51(1) is peremptory, and gives no discretion to a Court to deviate therefrom in the absence of substantial and compelling circumstances indicating that a lesser sentence is warranted.*

27. *In S v Malgas 2001 (1) SACR 469 (SCA) at para [25] the Court provided guidelines to be followed in determining whether substantial and compelling circumstances exist to justify the departure from the prescribed sentence. The Court stated, inter alia, that:*

- a. *Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes.*
- b. *Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question*

are therefore required to elicit a severe, standardised and consistent response from the courts.

- c. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.*
- d. All factors traditionally taken into account in sentencing continue to play a role. None is excluded at the outset from consideration in the sentencing process.*
- e. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as would cumulatively justify a departure from the standardised response that the legislature has ordained."*

THE EVIDENCE BEFORE THE TRIAL COURT

23. Having regard to the above set out principles, this Court must accordingly proceed to consider the contents of the evidence adduced on behalf of both the Respondent and the Appellant during the trial.

24. During the trial of the matter the Respondent adduced the evidence of the following witnesses:

- 24.1. GKM (the complainant on count 1 to 4);
- 24.2. Moses Legogang Tesho;
- 24.3. HKS (the complainant on count 5 to 8);
- 24.4. RS (the complainant on count 9 and 10);
- 24.5. Emily Lulama Montsiwa;
- 24.6. Sidwell Dastile;
- 24.7. Jacob Johannes Nortje;
- 24.8. Artisan George Nkloe;
- 24.9. Michael Baton;
- 24.10. Kesikang Vincent Lehihi;
- 24.11. Tanya Fourie;
- 24.12. Olebogeng Moilwa

25. It is important to note that the Appellant elected not to testify in his own defence. To remain silent is of course the Appellant's right but that being said the dictum of the Constitutional Court, in the matter of S v Boesak³⁸, the following was held pertaining to an accused person's right to remain silent: *"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in*

³⁸ 2001 (1) SA 912 (CC) at para 24.

evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following: 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"

26. Numerous exhibits were also admitted into evidence during the trial. Most notably all the chain evidence regarding the taking, securing, analysing and outcome of forensic evidence. It is important to note that the Appellant did not

object to or challenge the admission of the DNA evidence during the trial. The relevance of this will become evident later. As will also be evident hereinbelow, the forensic DNA evidence in this matter played a critical role in the trial court proceedings.

27. Counts 1 to 4 of the indictment relates to the complainant GKM, a woman who was 40 years old at the time of the commissioning of the crimes in the indictment. Count 5 to 8 of the indictment relates to the complainant HKS, a woman who was 69 years old at the time of the commissioning of the crimes in the indictment. Count 9 and 10 of the indictment relates to the complainant RS, a female child who was 9 years old at the time of the commissioning of the crimes in the indictment.
28. The following is a brief summary of the testimony adduced by the Respondent before the trial Court:
 - 28.1. The victim GKM testified that during the early hours on 15 September 2014 and whilst she was asleep in her house she heard a noise inside the house, and she armed herself with a stick. It was dark inside the house. There was a perpetrator in the house. The perpetrator accosted her, grabbed the stick from her and hit her on the left side of her head with the stick.
 - 28.2. The perpetrator pushed her into a bed in a room in the house (not her bedroom) and proceeded to rape her by being on top of her.

The perpetrator then dismounted her, turned her around and raped her again from behind and ejaculated. She lost consciousness.

- 28.3. After she regained consciousness, she went outside and ran to her neighbours where she reported that she has been raped. The perpetrator left his cap at her place, and she gave that cap to the police officer who attended the scene.
- 28.4. GKM sustained serious injuries on her right eye and to the left side of her head from the assault with the stick. She lost her sight in her right eye. She could not identify the perpetrator who attacked and raped her. Her DVD player was also stolen.
- 28.5. She was examined by a doctor at the Taung Hospital where swabs were taken from her private parts and her underwear was also bagged and retained.
- 28.6. Lebogang Teshe testified that at about 03:00 on 15 September GKM arrived at his place crying. She had a head injury, and she reported that she had been raped by an unknown person.
- 28.7. The victim HKS testified that she is 69 years old and on the night of the 23 September 2014, herself and RS, her granddaughter, were in their house, they put the lights off and went to sleep. HKS was awakened by hearing RS saying, "I am dying". Now the lights were on in the house and HKS went to RS's room where she

encountered a man wearing a balaclava, having a knife on his hand threatening to kill her.

- 28.8. The perpetrator caused her to lie on her stomach and cover RS with a blanket. He then raped her. The perpetrator then also raped RS in her presence. After raping RS, the perpetrator raped HKS again. The perpetrator stole a laptop and HKS's purse, containing R30.
- 28.9. After the perpetrator left RS went to her uncles' (Tebogo and Bafana) room outside the house and reported the incident to them.
- 28.10. The police took HKS and RS to the police station and then to the hospital in Hartswater. At the hospital in Hartswater HKS and RS were examined and their underwear were retained.
- 28.11. RS, who was nine years old at the time of the incident, testified through the services of an intermediary that on the night in question she went to sleep. Whilst she was sleeping, she felt her mouth being blocked and she tried to scream. Her mouth was blocked by a man who threatened to kill her with a knife.
- 28.12. Her grandmother HKS then came into the room. The perpetrator was wearing a balaclava, and she saw how he proceeded to rape her grandmother.

- 28.13. After the perpetrator raped her grandmother, he also raped her. When he finished raping her, he again raped her grandmother. The perpetrator then returned to her and put his penis in her anus, again raping her.
- 28.14. Neither HKS, nor RS could identify the perpetrator. RS also confirmed that she was examined at the Hartswater Hospital.
- 28.15. Emily Lulama Montsiwa testified that she is a police constable and on 24 September 2014 she took HKS and RS, two rape victims to be examined by a medical doctor. She secured two crime kits which contained evidence taken from the two victims (D1 and D7). D1 is an evidence collection of adult sexual kit with serial number PAD000475952 and D7 is a paediatric sexual kit number PAD000658066.
- 28.16. This witness handed the two crime kits to the investigating officer Sergeant Dastile. Sergeant Dastile testified that he received the two crime kits from Constable Montsiwa and they were marked D1 and D7 and he proceeded to book the crime kits into the SAP13 storeroom, where from Sergeant Fourie would dispatch them to the forensic laboratory.
- 28.17. Warrant Officer Jacob Johannes Nortje testified that he is a police officer with 31 years' experience and is attached to the child protection and sexual violence unit. On 9 October 2014 he took the

Appellant to a medical doctor in order to obtain blood samples from the Applicant. The Applicant was in the custody of the SAPS in Pampierstad for being already arrested on another unrelated case. Nortje was requested by the trial court to specifically confirm this fact.³⁹ During the cross examination of Nortje it was not disputed that the Appellant was under arrest at the time when the blood sample was taken from him.

- 28.18. The sample containing the Appellant's specimen had the number 06D4AB4201. He handed the sample kit to Sargeant Sehako who was the investigating officer in Pampierstad CAS 65/09/2014 (the docket of the rape crime committed against HKS and RS).
- 28.19. At the time when the sample was taken the Appellant did not object to the sample being taken and in fact signed the following consent form for the taking of the sample, which reads: *"I understand that I give consent for the collection of reference sample. The obtained DNA profile of the collection sample may be stored in a confidential forensic data DNA database. All information submitted will be treated as highly confidential and for sole purpose of criminal investigation."*
- 28.20. The Appellant did not object to this document being handed into evidence, nor did the Appellant object to admissibility into evidence

³⁹

See the provisions of section 37(2) of the Criminal Procedure Act, Act 51 of 1977.

of any of the DNA evidence (or its resultant consequences) obtained during the taking of the blood sample from him.

28.21. Artisan George Nkloe testified that he is employed by the SAPS and he has 32 years' experience. On 15 September 2014 he was on duty when he was informed about a rape case and that the victim was at the police station. The victim was GKM and the docket number of the case was CAS39/9/2014. After interviewing her he took her to the Taung Hospital to be examined by the doctor.

28.22. The doctor handed him the crime kit with evidence obtained from GKM and he booked the crime kit into the SAP13 holding facility. He also later booked the crime kit out of the SAP 13 facility and handed it to Sergeant Fourie, who took it to forensic for analysis.

28.23. Tanya Fourie testified that she is a police officer and that she handed the evidence collected in the GKM case under CAS 39/09/2014 and CAS 65/09/2014 to Sergeant Mohilwa for him to take it to the forensic unit in Cape Town. She testified that 27 September she handed the crime kit in CAS65/9/2014 with seal bag number PAD00475958 to Mohilwa, to take those samples to forensics at Cape Town. She testified that the crime kit in CAS39/9/2014 and with the seal bag number D4C8456AB also was handed to Mohilwa, to deliver same to forensics.

- 28.24. Warrant Officer Michelle Baard testified that she is a member of the SAPS employed at the Forensic Science based in Platteklouf. She has qualifications and experience in interpreting DNA results and reporting on same. She said she is the one who analysed and made the report in the sample in CAS39/9/2014 and on CAS65/9/2014. She described the procedure on receipt of sample from police station and that they are allocated a unique number when they arrive at the forensic laboratory. The unique number for CAS39/9/2014 (the CAS number of the GKM Case) is 185712/14 and for CAS65/9/2014 (the CAS number of the HKS and RS case) it is 192442/14.
- 28.25. She testified that the Appellant's DNA profile (obtained from the blood sample provided by the Appellant as referred to above and with number the number 06D4AB4201 MX) is matched with the DNA found:
- 28.25.1. in the cap which the perpetrator left behind at GKM's house and which was secured by the SAPS with seal PA4000880055 (see the evidence of Sergeant Lehihi below), after GKM's rape of GKM;
- 28.25.2. in the DNA sample taken from GKM's vulva to the extent of *"....the most conservative occurrence for all possible contributors to the mixture DNA result for the vulva swap 13DAA1186 ("GM")*

[Pampierstad CAS 39/09/14] is 1 person in every 230 000 people...";

28.25.3. in the DNA sample taken from GKM's underwear to the extent that "...the most conservative occurrence for this DNA result is 1 person in 660 billion in every people...";

28.25.4. in the DNA sample taken from RS's underwear to the extent that "...the most conservative occurrence for this DNA result is 1 person in 660 billion in every people..."

28.26. The affidavit and the forensic DNA report compiled by this witness was handed in as Exhibit "I" before the trial court. It forms part of the record before this Court.

28.27. Kesikang Vincent Lehihi testified that he is a police officer holding the rank of Warrant Officer and that he compiled the photo-album in the in Pampierstad CAS 39/09/2014 (the matter of GKM) which handed into evidence as Exhibit "R" and which inter alia shows the injuries sustained by GKM. This witness also compiled a photo album in the Pampierstad CAS 65/09/2014 (the docket of the rape crime committed against HKS and RS) matter which was handed into evidence as Exhibit "Q". This witness sealed the cap left

behind by the perpetrator with seal PA4000880055 in exhibit bag PA4000880054.

- 28.28. Wageng Mohilwa testified that he is a member of SAPS for the past 17 years, with the rank of a Sergeant. He testified that the crime kits which he received from Tanya Fourie in CAS65/9/2014 with seal bag number PAD00475958 and in CAS39/9/2014 and with the seal bag number D4C8456AB was and remained in his custody until he delivered it to the forensic laboratory in Platteklouf, Cape Town.
29. The Respondent then closed its case, and the Appellant launched an application in terms of the provisions of section 174 of the Criminal Procedure Act which application was dismissed by the trial court.
30. During the section 174 proceedings it was argued on behalf of the Appellant that the blood sample evidence was "unconstitutionally" obtained from the Appellant and as such should be excluded. This line of defence was however not taken during the course of the trial when the witnesses Nortje or Baard testified about the obtaining of the blood sample from the Appellant, its analysis and the outcome of the analysis. The admission of Baard's report was not objected to or contested by the Appellant when same was admitted into evidence.
31. If the defence was of the view that the blood sample evidence was inadmissible due to the fact that same have been obtained in an

“unconstitutional” or other objectionable manner, notwithstanding the clear provisions of section 37(2) of the Criminal Procedure Act,⁴⁰ then the defence should have challenged the admissibility of the evidence relating to same. This was not done..

32. As stated, the trial court proceeded to dismiss the Appellant’s application in terms of section 174 of the Criminal Procedure Act. After the dismissal of the Appellant application in terms of the provisions of section 174 of the Criminal Procedure Act, the Appellant elected to close his case without adducing any evidence.
33. The trial Court after having granted an opportunity to the respective parties to address the court proceeded with its judgment in the matter. The trial court duly, in the view of this Court, analysed all the evidence before the court and came to the conclusion that the conspectus of evidence before the court proved the guilt of the Appellant beyond reasonable doubt in respect of all the counts in the indictment except for count four.
34. As is evident from the summary of the evidence above, a common denominator in all three incidences of rape and the two incidences of housebreaking is that none of the complainants could identify the perpetrator who raped them or broke into their houses, however the trial court has

⁴⁰ Reference can also be made to the contents of section 225(2) of the Criminal Procedure Act, Act 51 of 1977.

correctly found that forensic DNA evidence linked the Appellant to all the rape and housebreaking crimes in question.

35. There is no reason for this court of appeal to disturb the judgment of the trial court in respect of the conviction of the Appellant in respect of the merits of the matter, save to correct the misdirection of the trial in as far as the multiple convictions of the Appellant on the multiplicity and duplicated rape charges are concerned.
36. Having regard to the authorities referred to above, the Appellant should have been acquitted on counts two, six, seven and ten. To this extent, the Appellant's appeal against his conviction on counts two, six, seven and ten is upheld. The conviction of the Appellant by the trial court in respect of counts one, three, five, eight and nine remains undisturbed.
37. The trial court then proceeded to sentence. In respect of sentence the trial court:
 - 37.1. comprehensively dealt with the trite "*triad of Zinn*", being the triad of the crime, the offender, and the interests of society, as enunciated in S v Zinn⁴¹;
 - 37.2. found that irrespective of the contents of a pre-sentence report compiled by the social worker Tebogo Mosang, that there are no

⁴¹ 1969 (2) SA 537 (A) at 540G to H.

“substantial and compelling circumstances” present to allow for a deviation from the prescribed maximum sentence of life imprisonment, as prescribed in terms of in section 51(1) read with Part 1 of Schedule 2 (“rape” as per paragraph (a)(i) of Part 1) of the Criminal Law Amendment Act;

37.3. found that GKM sustained serious injuries during the rape to her and that she had been raped twice, as such the trial court invoked the minimum sentence of life imprisonment as per the above referred to statutory provisions in respect of count one and count two;

37.4. also imposed the minimum sentence of life imprisonment as prescribed by the above referred to provisions in respect of counts five and six, count seven, count nine and count ten.

38. The Respondent could not prove any previous convictions against the Appellant. However, in the testimony of the social worker, Tebogo Mosang, which was adduced prior to sentence it was stated by her under oath that the Appellant *“...has been detained since 2014 as he has other offences in which he was given custodial sentence...”*. The report of the social worker proceeded to list numerous previous offences of which the Appellant was convicted. The contents of the report of the social worker in respect of the Appellant’s previous convictions were challenged in cross examination on behalf of the Appellant. The position regarding the Appellant’s previous

convictions is not clear to this Court and as such it is taken that no previous convictions were proven.

39. The trial court accordingly proceeded to sentence the Appellant as set out in paragraph 11 above.

THE PRESCRIBED MINIMUM SENTENCE AND SENTENCING IN GENERAL

40. This Court has already alluded above to the application of the provisions of section 51 read with schedule 2 of the Criminal Law Amendment Act. Before the Court proceeds to deal with the sentences passed by the trial court, it is of important to have regard to the certain general principles in as far as the application of the provisions of section 51 of the Criminal Law Amendment Act is concerned.
41. The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner: *“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person [— (a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... to imprisonment for life.”*
42. The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part 1 of Schedule 2 is the part which deals with “rape”. This part reads as follows:

"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —

(a) when committed—

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
- (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*

(b) where the victim—

- (i) is a person under the age of 16 years;*
- (iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);*
- (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or*

(iii) *is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

(c) *involving the infliction of grievous bodily harm.”*

43. Once it has been established that a victim was raped as contemplated in Schedule 2, Part 1, the trial court is obliged in terms of section 51(1) of the Criminal Law Amendment Act to impose a sentence of life imprisonment, unless substantial and compelling circumstances exist to depart from the prescribed minimum sentence.⁴²

44. Section 51(3)(a) of the Criminal Law Amendment Act contains the above referred to redeeming provision and states the following: *“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 [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have*

⁴² See Du Toit, De Jager, Paizes, Skeen and Van der Merwe Commentary on the Criminal Procedure Act (2012) 28–14 to 28–16A, Snyman Criminal Law (2008) 368 to 369, Snyman Strafreg (2012) 382 to 384, S v Mofokeng 1999 (1) SACR 502 (WLD), S v GN 2010 (1) SACR 93 (TPD), S v Nkomo 2007 (2) SA 198 (SCA), S v Blaauw 1999 (2) SACR 295 (WLD), S v Vilakazi 2009 (1) SACR 552 (SCA), S v Mahomotsa 2002 (2) SACR 435 (SCA) and S v Mvamvu 2005 (1) SACR 54 (SCA).

jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.” (this Court’s emphasis)

45. Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase “*substantial and compelling circumstances*” by stating which facts shall not constitute “*substantial and compelling circumstances*”. This provision reads as following: “*When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant’s previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an Appellant person’s cultural or religious beliefs about rape; or (iv) any relationship between the Appellant.*”
46. Accordingly, one needs to turn to the content and interpretation which was given in the past by the courts to the phrase “...*substantial and compelling circumstances...*”.
47. In the matter of S v Malgas,⁴³ the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the imposition of prescribed minimum sentences :

⁴³ 2001 (1) SACR 469 (SCA).

“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, 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 were 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.

*Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, ‘a requirement to give reasons concentrates the mind, if it is*

fulfilled the resulting decision is much more likely to be soundly based - than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders..."⁴⁴

48. In the matter of S v GN,⁴⁵ Du Plessis J stated in respect of the Malgas judgment: "...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or

⁴⁴ At para [7] to [9].

⁴⁵ 2010 (1) SACR 93 (TPD).

would be “disproportionate to the crime, the criminal and the legitimate needs of society” ...”⁴⁶

49. The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an Appellant and even the fact that an Appellant person may be a first offender does not constitute “*substantial and compelling circumstances*” as contemplated in section 51(2) of the Criminal Law Amendment Act.
50. The SCA in the matter of Mthanti v The State⁴⁷ of which the facts, to a limited extent, resonate with the facts in this matter held:

“[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present when committing the crimes by far outweighed the mitigating factors. The high court was correct in considering that the appellant’s criminal conduct was not ‘fleeting and impetuous’; that it was ‘calculated and callous’, and that there was no reason to deviate from the prescribed minimum sentences.

[20] The only submission made on appeal was that the appellant’s mother died when he was 7 years old. The suggestion was that the appellant was troubled

⁴⁶ At para [6].

⁴⁷ (Case no 859/2022) [2024] ZASCA 15 (8 February 2024) at paras [19] to [21].

by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant's favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him 10 a 'good and warm upbringing' until he abandoned his post matric studies without telling them'. The court considered that the appellant was a first offender.

[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places at night. This he did repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences."

51. The above referred to case, as confirmed in the Malgas matter, affirms that certain mitigating factors from the Appellant's personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. In this

case, the trial court found that there were no substantial and compelling circumstances to deviate from the minimum prescribed sentence.

52. With regard to the offence of rape, which is disturbingly prevalent in our country, this Court deems it appropriate to make reference to the following:

52.1. The court in the matter of Vilakazi⁴⁸ held as follows: *"...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound."*

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2009 (1) SACR 552 (SCA) at para [21].

52.2. Most recently, in the matter of Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu⁴⁹ the Supreme Court of Appeal Stated: *"Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court,⁵⁰ aptly remarked 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 civilization. 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.'*

In similar vein Nugent JA, writing for a unanimous court⁵¹, in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the

⁴⁹ (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

⁵⁰ With reference to S v Chapman 1997 (3) SA 341 (SCA) at paras [3] to [4].

⁵¹ With reference to S v Vilakazi supra at para [1].

*most private and intimate zone of a woman and strikes at the core of her personhood and dignity.’*⁵²

52.3. In Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studie as Amici Curiae); Ntuli v S⁵² the Constitutional Court held that “...rape is not rare, unusual and deviant. It is structural and systemic...”;

52.4. In Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)⁵³ the Constitutional Court said the following of rape: “Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim’s dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in Chapman, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory.”

52.5. In recent times, this “...upwards trajectory...” referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.

⁵² 2020 (2) SACR 38 (CC) at para [67].

⁵³ 2007 (5) SA 30 (CC) at para [51].

- 52.6. In the matter of Director of Public Prosecutions, Grahamstown v T M the Court held that:⁵⁴ *“The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionately high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute.”*
53. In the matter of Modise v S⁵⁵, the Court held that: *“Against this background, the courts in this country must not shy away from its role to address and confront the fact that violence committed against woman and children must be condemned in the strongest terms, eradicated and the seriousness of this task must be reflected in the manner in which the courts address same. This must be done whilst striking a balance with the court’s compelling duty to ensure that the punishment fits the crime and, of course, the offender.”*

⁵⁴ (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15].

⁵⁵ (CA 64/2019) [2024] ZANWHC 116 (16 April 2024) at para 65.

54. In this matter, with reference to count nine and ten of the indictment, a child of nine years old was raped more than once by the Appellant. Again, with reference to the matter of Yose and Another v S the following was stated in paragraphs 33 to 36 of this matter by the court:

"33. *In Mudau v S 2013 (2) SACR 292 (SCA) at para [17] the Supreme Court of Appeal held as follows: 'It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'* (See also *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 345A-B.)

34. *This Court has consistently upheld sentences of life imprisonment or lengthy sentences in cases of the rape of children. In Konstabel v S [2020] ZAWCHC 75 (11 August 2020) the Appellant was convicted of rape over a period of two years of an 8-year-old child, the daughter of his partner with whom he was living. He was sentenced to life imprisonment, which was confirmed on appeal.*

35. *In Abrahams v S [2019] ZAWCHC 62 (23 May 2019) the Appellant was convicted of the rape of an 11-year-old girl and sentenced to life imprisonment. He was a security guard at a creche in close proximity to where the child lived. His sentence was confirmed on appeal.*
36. *Lastly, in Williams v S [2015] ZAWCHC 179 (27 November 2015) the Appellant was convicted of two counts of rape of a 14-year-old complainant. The Appellant was the complainant's grandmother's brother. He was sentenced to life imprisonment, which sentence was confirmed on appeal."*
55. In respect of sentencing in general, in the matter of Ndou v S⁵⁶ Shongwe JA stated that: *"Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence".*

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[2012] JOL 29522 (SCA) at para [14].

56. The imposition of life imprisonment is, however, the most severe sanction available to the court. It is imperative, therefore, that this Court must be satisfied that the sentence of life imprisonment is indeed proportionate. In S v Dodo⁵⁷ Ackermann J dealt with the “concept of proportionality” and stated the following:

“...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in S v Makwanyane. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence. ...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to

⁵⁷ 2001 (5) BCLR 423 (CC) at paras [37] and [38].

*ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."*⁵⁸

57. The principle of proportionality was also addressed in *Vilakazi v S*,⁵⁹ where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*, to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter by the trial court. It goes without saying that this Court is thus also compelled to consider if this was done by the trial court in this appeal.

⁵⁸ At paragraphs [37] and [38].

⁵⁹ [2008] 4 All SA 396 (SCA).

THE PERTINENT ISSUES IN THIS APPEAL IN RESPECT OF CONVICTION AND SENTENCE

58. A careful scrutiny of the evidence adduced by the Respondent during the trial as evident from the record indicates that the trial court was correct in finding that GKM has sustained severe injuries during the rape, but the trial court, in the view of this Court, erred in finding that GKM was raped more than once.
59. The evidence was that the Appellant pushed her into a bed in a room in the house (not her bedroom) and proceeded to rape her by being on top of her, he then dismounted her, turned her around and raped her again from behind and then ejaculated.
60. The authorities in this regard are clear. The court in S v Blaauw⁶⁰ stated that: *"Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraw his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the*

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1999 (2) SACR 295 (W) at 300A.

more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."

61. The above referred to quote from the matter of Blaauw was referred to with approval by the Supreme Court of Appeal in the matter of Tladi v S.⁶¹
62. The fact that the trial court was incorrect in respect of the question of whether GKM was raped more than once is academic because what the trial court correctly found and stated was that GKM has sustained severe injuries during the rape and as such the provisions of Schedule 2, Part 1, Rape as per section (c) apply in that the rape of GKM involved "... *the infliction of grievous bodily harm....*".
63. The position is different in the instance of the rape of HKS and RS. The relevant evidence is set out above and shows that: the rape of HKS was stopped, RS was then raped by the Appellant, who thereafter returned to raped HKS again. RS was raped both vaginally and anally. The rapes perpetrated upon HKS and RS are clear instances of rape being committed

⁶¹ 2013 (2) SACR 287 (SCA) at para 12

more than once if one has regard to the broad guidelines as described in S v Blaauw.

64. In S v Willemse⁶² Griffiths J stated the following regarding rape which is committed vaginally and anally upon the same victim by the same perpetrator: *"By doing so, in my view, the appellant formed a completely separate intent to rape the complainant in a manner which was different to that in which he had initially raped her and is a strong indication that this was a separate form of rape, even though it may have occurred reasonably close in time to the initial act."*⁶³
65. Having regard to the above referred to authorities, the trial court correctly found that HKS and RS were, on the proven facts, raped more than once and as such the invoking of in section 51(1) read with Part 1 of Schedule 2 ("rape" as per paragraph (a)(i) of Part 1) of the Criminal Law Amendment Act was justified, but not in respect of each of the separate and duplicated counts of rapes as per the indictment as imposed by the trial court.
66. In as far as HKS is concerned, the provisions of Schedule 2, Part 1, Rape as per section (b)(iA) also applied in that HKS is "...an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006)".

⁶² 2011 (2) SACR 531 (ECG) at para 18.

⁶³ Also see, S v Mavundla 2012 (1) SACR 548 (GNP) and S v Maxabaniso 2015 (2) SACR 55 (ECP).

67. This Court has already stated that the Appellant was wrongly convicted on the duplicated rape charges which comprise counts two, six, seven and ten and as such the concomitant sentences in respect of these charges equally stands to be overturned on appeal. It largely becomes academic as the sentence of life imprisonment in respect of counts one, five and nine remains intact.
68. Accordingly, this Court of appeal is compelled to partially intervene in the conviction of and sentences as imposed by the trial court to the extent as set out in the order of this Court recorded herein below.
69. As to imposition of life imprisonment because there were no substantial and compelling circumstances to have justified the imposition of a lesser sentence, this Court of appeal is satisfied that the trial court's approach and finding in respect of the redeeming provision was correct and there exists no reason for this Court to interfere with this finding made by the trial court. This conclusion is bolstered by a consideration of recent case law that deals with incidents of rape.⁶⁴

ORDER

The following orders are hereby made:

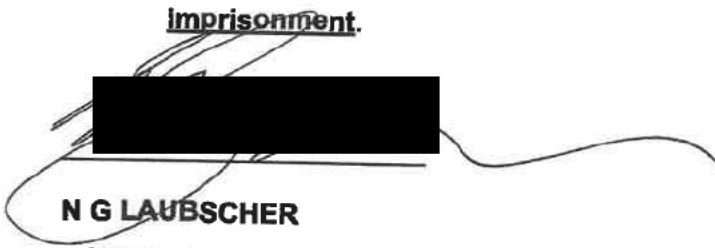
- (i) the Appellant's appeal against his conviction in respect of **counts two, six, seven and ten** is upheld and replaced with the following order: *"The Appellant*

⁶⁴ See, for example S v FM 2016 JDR 1564 (GP), S v Mgandela 2016 JDR 1748 (ECM), S v Redebe 2019 JDR 1257 (GP) and S v Daile 2021 JDR 1879 (GP) and Director of Public Prosecutions, Grahamstown v Mantashe supra at para [11] and [12].

*is acquitted of the charges contained in **counts two, six, seven and ten** of the indictment as these counts constitutes a duplication of charges against the Appellant, if read with the contents of **counts one, five and nine** in respect of which counts the Appellant's conviction remain";*

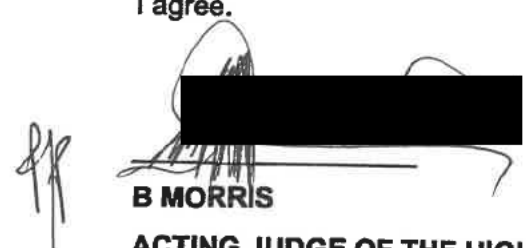
- (ii) the Appellant's appeal against his conviction in respect of **counts one, three, five, eight and nine** are dismissed;
- (iii) the Appellant's appeal against his sentence in respect of **counts one and two** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count one** of the indictment the Appellant is sentenced to life imprisonment";*
- (iv) the Appellant's appeal against his sentence in respect of **counts five, six and seven** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count five** the Appellant is sentenced to life imprisonment";*
- (v) the Appellant's appeal against his sentence in respect of **count nine and count ten** of the indictment against him, is upheld and replaced with the following sentence and order: *"On **count nine** of the indictment the Appellant is sentenced to life imprisonment";*
- (vi) the Appellant's appeal against his sentence in respect of **counts three and count eight** of the indictment is dismissed and the sentences on these counts as imposed by the trial court are confirmed and shall remain as ordered by the trial court;
- (vii) In terms of section 280 of the Criminal Procedure Act, Act 51 of 1977, it is directed that the sentences imposed in respect of **counts one, three, five, eight and nine** shall all run concurrently, the cumulative effect of the said

sentences being that the Appellant is effectively sentenced to life imprisonment.



N G LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG

I agree.



B MORRIS
ACTING JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG

DATE OF APPEAL: 18 JUNE 2024
DATE OF JUDGMENT: 19 FEBRUARY 2026

For the Appellant: Adv Nyoka

For the Respondent: Adv Phetlhu