

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A37/2024

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
G.C MULLER	
DATE 16/3/26	SIGNATURE..... [REDACTED]

In the matter between:

MILTON RAMATSAMA MOGAJANE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MULLER J:

[1] The appellant was sentenced to life imprisonment on 30 March 2016 in the regional court sitting at Nebo for raping a young, twenty year old, woman and ten years

imprisonment for kidnapping her. It was ordered that the sentences run concurrently.¹ The appellant was legally represented throughout the trial. He exercised his right to appeal against the sentences imposed only on 14 October 2024. An application for condonation for the late filing of the notice of appeal is unopposed. There are prospects of success. Condonation is therefore granted. Hence the appeal before us.

[2] It is necessary to refer to the charge-sheet in respect of the rape which was put to the appellant and the explanation given to the appellant in respect of the applicability of section 51(1) at the commencement of the trial since the learned regional magistrate applied section 51(1) of Act 105 of 1997 to imposed life imprisonment. The rape charge put by the prosecutor reads as follows:

"Count 2 is rape. That is contravening of section 3, read with section 1, section 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act 32 of 2007, read with section 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 and further read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 in that upon or about the date of 28 October 2012 at or near Phokwane in the regional Division of Limpopo the accused did unlawfully and intentionally commit *an act*² of sexual penetration with the complainant, to wit, MDM,³ 20 years old by penetration of his genital organs into or beyond the genital organs of the complainant without consent."⁴

[3] The appellant was also informed that despite the allegation in the charge sheet that the complainant was 20 years of age at the time, that the minimum sentence of life imprisonment may be imposed if the evidence shows, and it is found, that she was under the age of 16 years. It was explained that should it be found that the rape falls under

¹ Such an order is strictly speaking unnecessary because section 39(2)((a)(i)) of Act 111 of 1998 provides that any determined sentence of imprisonment imposed shall run concurrently with a life sentence. See *S v Mashava* 2014 (1) SACR 541 (SCA) par 7.

² My emphasis.

³ The particulars of the complainant are omitted for purpose of the judgment.

⁴ The allegations as put to the appellant accord with the averments contained in the charge sheet.

section 51(2)(b) of Act 105 of 1997 and if he is a first offender he might be sentenced to 10 years imprisonment. It was also explained that the court may deviate from the prescribed sentence if there are substantial and compelling circumstances present. The appellant indicated that he understood the explanation.

[4] It is noteworthy that the charge-sheet contains no averment why section 51(1) is applicable to the rape charge. The learned magistrate did not request the prosecutor to inform the court as to the reason for making section 51(1) applicable to the charge.

[5] The appellant was required to plead after the explanation given to him. He pleaded guilty to both offences. A statement in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977⁵ was handed in. The appellant admitted in his plea that he had a conversation with the complainant. He produced a screwdriver and threatened her with it. He instructed her to follow him and threatened her with assault. He assaulted her with open hands when he tried to convince her not to terminate their relationship. He instructed her to undress and had intercourse with her after he instilled fear in her. After the intercourse she requested permission to go home. He refused. She ran towards two women who were collecting firewood. She was unsuccessful to escape. He then had intercourse with her again. He admitted that he assaulted the complainant before having intercourse with her and that his actions were unlawful.

The magistrate in his judgment noted:

"So he is found guilty on count 1 of kidnapping, and also guilty on count of rape."

[6] The prosecution for purpose of imposing an appropriate sentence presented evidence of a pre-sentence report as well as a victim impact report and finally, with consent, handed in an affidavit in terms of section 212(4) of the CPA of Dr ML Mogaru who examined the

⁵ Hereinafter called "the CPA".

complainant on 29 October 2012 and who recorded his findings in a J88 medical report.

The following conclusion appears in the report:

"23 year old was assaulted by an ex-boyfriend. Sustained multiple bruises at the back and left forearm and right forearm. Sustained a scratch occipital area. Was assaulted with a sharp object."

[7] No injuries to the genitals of the complainant were recorded. The injuries observed and noted in the medical report J 88 are not described as grievous bodily injuries. It bears notice that the appellant in his section 112(2) statement did not admit that he inflicted grievous bodily injuries. Moreover, the magistrate also failed to draw the attention of the appellant to the fact that the infliction of grievous bodily injury may attract a life sentence, prior to the charge being put to the appellant.

[8] The magistrate when determining an appropriate sentence held that:

"In circumstances the offence is listed in Part 1 of Schedule 2 of the Act which prescribed a life imprisonment because you raped the complainant more than once and according to the J88 attached hereto as EXHIBIT E she even sustained injuries, has inflicted grievous bodily harm on her.

She sustained abrasions on both arms in front and on her back and also a scratch on top of her head where a screwdriver was used. A screwdriver is also a dangerous weapon as defined in Section 1 of the dangerous Weapons Act 15/2013."

[9] It was observed in *S v Mponda*:⁶

"It is contrary to the basic concept of a fair trial that an accused person charged with one count of a particular offence is confronted with evidence in respect of a number of incidents and is thereafter sentenced as if he or she had been convicted on multiple counts. Having regard to the lack of legal sophistication of most accused persons and to the, regrettably all too frequently discernable lack of experience and limited skills of many of the persons appointed by the Legal

⁶ 2007 (2) SACR 245 (C) par 12.

Aid Board to represent accused persons in the criminal courts, particularly in the magistrates' courts..."

[10] The appellant was charged with and pleaded guilty to a single act of rape. If it was intended by the prosecution to charge the appellant for rape committed on diverse occasions in a single count that much must be alleged in the charge-sheet as required by section 94 of the CPA. The mere reference to section 94 in the heading of the charge sheet without making any of the required allegations with regard to rape on more than one occasion, is meaningless.

[11] The prosecution is bound to the charge, as formulated. An accused person cannot be convicted of having committed more than one offence of rape when he is charged of having committed a single offence. The learned magistrate misdirected himself. It needs no emphasis that a conviction under the sentencing provisions applicable in terms of Act 105 of 1997, that if an offender convicted of raping his victim more than once or if the offender is convicted of inflicting grievous bodily harm when the victim is raped, is liable to be sentenced to life imprisonment. The appellant was not convicted of either.

[12] The learned magistrate misdirected himself, not only in respect of imposing life imprisonment for raping the complainant twice, but he also misdirected himself in respect of his finding that grievous bodily harm had been inflicted by the appellant. In *Director of Public Prosecutions Gauteng Division Pretoria v Moabi*⁷ the court referred with approval to the concurring judgment of Hoexter JA in *R v Jacobs*⁸ with regard to the infliction of grievous bodily harm:

"The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries *and the intention of the accused is irrelevant in answering that question.*"

⁷ 2017 (2) SACR 384 (SCA) par 13.

⁸ 1961 (1) SA 475 (A) 478A.

In the majority judgement Van Winsen AJA, in deciding whether or not grievous bodily harm was inflicted, said:

"In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the jury would, in my opinion, be entitled to have regard to the whole complex of objective factors involved in the accused's assault upon the deceased. It could take into consideration the shock which would inevitably result to the deceased by reason of the fact that the accused directed two blows at his face with a knife. It could have regard to the wounds resulting from the stabs in the face, their number, nature and seriousness, as well as to the two blows directed to the accused's stomach, their severity and the results which flowed from their infliction."

[13] In the present matter, the medical evidence indicates that the complainant sustained abrasions on both arms in front and on her back and also a scratch mark on top of her head. Having regard to nature, position and extent of the injuries none of the injuries as described by the medical practitioner can be regarded as infliction of grievous bodily harm in respect of a charge of rape for purposes of Part 1 of Schedule 2 read with section 51(1) of Act 105 of 1997. Section 51(1) of Act 105 Of 1997 provides:

"Notwithstanding any other law, but subject to subsections (3 and (6), a regional court or a High Court shall sentence a person it has **convicted** of an offence referred to in Part I of Schedule 2 to imprisonment for life."⁹

Part I of Schedule 2 states:

"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;

....

⁹ My emphasis.

(b)...

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

[14] It needs no emphasis that an offender convicted under the sentencing provisions applicable in terms of Act 105 of 1997, of raping his victim more than once, or if convicted of inflicting grievous bodily harm whilst raping his victim, is liable to be sentenced to life imprisonment.

[15] Section 51(1) did not find application to the charge of rape since the appellant was neither convicted of raping his victim twice, (although he admitted having raped her twice) nor was he convicted of having inflicted grievous bodily harm. It was held in *Moeagi v S*:¹⁰

"... that s 51(2) is not a fall back provision for s 51(1) for the following reasons. First, each of the sections deals with specific offences with specific prescribed sentences. Section 51(1) provides for offences that fall under Part 1 of Schedule 2 and carries a mandatory minimum sentence upon conviction to life imprisonment. The offences include murder executed in the furtherance of a common purpose. On the other hand, s 51(2) provides for different offences referred to in Parts II, III and IV of Schedule 2 that carry a different set of mandatory minimum sentences. These offences include 'murder in circumstances other than those referred to in Part I.'"

[16] The same reasoning applies to the offence of rape. It follows, therefore, that section 51(2) cannot be applied as an alternative, if section 51(1) finds no application. The regional court could, as a result, not have exercised increased jurisdiction in terms of Act 105 of 1997.

[17] The prosecution presented evidence of a pre-sentence report. The appellant's family is from Phokane village in Sekhukune. Both his have parents passed away. He is the fifth born child in his family. The appellant, who is 37 years old, dropped out of school in grade 12 due to lack of academic interest. He is the father of two children who are 10 and 6 years

¹⁰ 1 All SA 301 (SCA) par 15.

old, respectively. The appellant does not maintain his children and does not have any meaningful relationship with them. the appellant enjoys good health and is a first offender.

[18] He was gainfully employed at an exploration company in Witbank but his contract expired. The probation officer suggested that a sentence of incarceration be imposed due to the seriousness of the offences.

[19] According to the victim impact report the complainant is the youngest of 9 children. The complainant was raised in a religious family where respect for other people was part of her upbringing. The complainant has since the incident lost weight. The complainant has undergone behavioural changes. The complainant is employed and has a child. She has difficulty to come to terms with what happened to her. She had a relationship which ended in failure. The complainant takes sleeping tablets to sleep at night.

[20] The court was addressed on whether there are substantial and compelling circumstances present to warrant a lesser sentence. The seriousness of the offences and deterrent effect of the sentence as well as the interest of the complainant were considered by the magistrate. It is hardly necessary for this court to point out that rape is a very serious offence. It is prevalent despite the imposition of minimum sentences. The appellant pleaded guilty and has apologized to the complainant and her family. The complainant sustained injuries to her forearms and back and on top of her head.

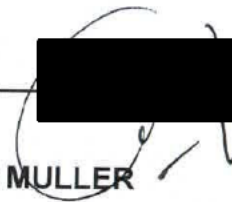
[20] The offences were premeditated. The appellant called her to the street from where she was taken against her will to the mountain where he raped her twice and assaulted her. On count 1, a sentence of ten years imprisonment was imposed, for kidnapping. The circumstances were not of such a grievous nature that a maximum sentence was called for in respect of the kidnapping charge.

A court of appeal will not lightly alter a determination of a sentence in the exercise of a discretion by the lower court. The court of appeal may interfere if the discrepancy between the sentence imposed and what the sentence ought to be, is so great that it can be inferred that the magistrate has acted improperly and misdirected himself.¹¹ An appropriate sentence is considered to be two years imprisonment on count 1 and ten years imprisonment on count 2 ante-dated to 30 June 2016.

ORDER

- 1. The appeal against the sentences imposed is upheld.**
- 2. The sentences in respect of count 1 and 2 are set aside and replaced with the following sentences.**
 - 2.1 Count 1. 2 years imprisonment.**
 - 2.2 Count 2. 10 years imprisonment.**
 - 2.3 The accused is declared unfit to possess a firearm.**
 - 2.4 The sentences are ante-dated to 30 June 2016 in terms of section 282 of Act 51 of 1977.**

¹¹ *S v Anderson* 1964 (3) SA 494 (A) 495G-H.



G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO, POLOKWANE

I, concur



M BRESLER

ACTING JUDGE OF THE HIGH COURT

LIMPOPO, POLOKWANE

APPEARANCES:

FOR THE APPELLANT : **MR M.P LEGODI**

INSTRUCTED BY : **LEGAL AID SA, POLOKWANE**

FOR THE RESPONDENT : **ADV S. MAWASHA**

INSTRUCTED : **NDPP, POLOKWANE**

DATE HEARD : **06 M ARCH 2026**

DATE DELIVERED : **16 MARCH 2026**