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

CASE No: A 34/2018

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES

DATE: 3/03/2026

SIGNATURE: PILLAY AJ

THABANG DERRICK MAKHAFOLA

1ST APPELLANT

RAYMOND PONANA LEKALAKALA

2ND APPELLANT

V

THE STATE

RESPONDENT

Delivered 03 March 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **03 March 2026** at 10:00 am.

Date heard 05 December 2025

Coram Pillay AJ et Mashifane AJ

JUDGMENT

PILLAY AJ:

INTRODUCTION:

[1] The Appellants were convicted in the Mokopane Regional Court on 25 May 2015 of C/S 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (Rape), read with the provisions of Section 51(1) part 1 of Schedule 2 of the Criminal Law Amendment Act². The Appellants were sentenced to life imprisonment on 25 May 2015.

[2] The appellants were legally represented throughout the proceedings. They were entitled to an automatic right of appeal in terms of Section 309(1)(a) of the Criminal Procedure Act³ flowing from being sentenced to life imprisonment, in terms of the Criminal Law Amendment Act. Before this Court, both parties argued the appeal.

[3] The appellants raised various grounds of appeal as contained in the notice of appeal, and heads of argument, which can be highlighted as follows;

AD CONVICTION:

[3.1] The Court erred in finding that the state had successfully proved the guilt of the appellants beyond any reasonable doubt. The following shortcomings in respect of the complainant's evidence were highlighted

[3.1.1] The incident took place in the bushes and it was around 3AM in the early hours of the morning with only the moon as the source of light.

[3.1.2] To show that she was unable to account for everything that happened, she did not know who had sexual intercourse with her, at what stage of the incident.

[3.1.3] She kept referring to Mr Mashwahle (First Appellant) who was accused 2 at the trial stage, as the person who stabbed her from the right side, yet at the time she was on top of someone, with another boy kissing her.

¹ Act 32 of 2007 as amended

² Act 105 of 1997 as amended

³ Act 51 of 1977as amended

[3.2] The Court further erred in finding that the complainant identified the appellants as the perpetrators of this offence and that the evidence of the complainant should have been treated with caution which was not done.

[3.3] This Court was requested to reject the evidence of the complainant in respect of the roles played by the appellants due to the fact, that she said it herself, that her face was covered with a hat.

[3.4] The Court erred in finding that the appellants intentionally had sexual intercourse with the complainant, in light of the fact that the appellants sent their family to the complainant's place to return her things and apologise, despite the fact, that she did not know them. That is not an act of someone who wilfully attacked the complainant.

[3.5] The Court erred in finding that the version of the appellants were not reasonably possibly true.

AD SENTENCE:

[4] An effective life term of imprisonment was harsh and disproportionate under the circumstances of this case in that:

[4.1] It was out of proportion to the totality of the accepted facts in mitigation of sentence.

[4.2] The Court erred by not attaching due weight to the personal circumstances of both appellants when considered cumulatively amounted to substantial and compelling factors, warranting a deviation from imposing the prescribed minimum sentence of life imprisonment.

[4.3] The Court erred in not considering the personal circumstances of the appellant who both were relatively young and first offenders and by not considering the influence of the co- perpetrators on the appellants. Moreover, they sent their family members to return the items of the complainant and apologised. They initiated all this realizing what they did and this showed remorse.

[5] It is a trite principle that the findings of fact of the trial Court, are presumed to be correct unless there are demonstrable and material misdirection on its part.

Those findings will only be disregarded if the recorded evidence shows them to be clearly wrong. In the same vein, the credibility findings of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong⁴.

[6] Regard was had to the case of **S v Francis**⁵ with specific reference to the powers of an appeal Court when considering the fact findings of the Court *a quo*,

"the powers of the Court of appeal to interfere with the findings of fact of a trial Court are limited⁶ in the absence of any misdirection the trial Court's conclusions including the acceptance of a witness evidence is presumed to be correct. To succeed on appeal, the appellant must therefore convince the Court of appeal, on adequate grounds that the trial Court was wrong in accepting the witness evidence, a reasonable doubt will not suffice to justify interference with its findings, bearing in mind the advantage which a trial Court has of seeing, hearing, appraising a witness. It is only in exceptional cases that the Court of appeal will be entitled to interfere with trial Court evaluation of oral testimony⁷."

[7] The appellants pleaded not guilty and exercised their right to remain silent. The respondent led evidence of witnesses who testified under oath with the use of a language practitioner, concerning the incident. The evidence briefly summarised was as follows.

[8] On the 18 March 2012 at Mosetane Village in the Regional Division of Limpopo, the complainant A[...] N[...] and her boyfriend William Letswalo were at China City tavern, where they had spent the evening. On their way home, they were chased by four men, her boyfriend managed to escape being chased by two of the four men and the other two chased, grabbed and assaulted her. She tried to scream and was stabbed with a knife. The other two men thereafter returned, and the four carried her into the bushes where her pants and shoes were removed and she was made to lie on the ground with her face being covered by a type of hat.

⁴ See *S v Hadebe & others* 1998 (1) SACR 422 (SCA) p 645E - 6461

⁵ 1991 (1) SACR 198(A)

⁶ *R v Dhlumayo and Another* 1948(2) SA 677 (A)

⁷ *S v Robinson and Others* 1968(1) SA 666 (A) at 675 G – H).

[9] She testified concerning being penetrated by the four perpetrators and the various positions she was placed in during this encounter. She indicated that all four of the men sexually penetrated her, vaginally and anally. She indicated that there were multiple penetrations, and at some point, she was instructed to sit on top of the one perpetrator, who penetrated her in this position, instructing her to shake, and at this stage another perpetrator removed the hat and started kissing her. It was at this stage that she was stabbed by another perpetrator. She was warned not to look at their faces as they accused her of knowing them, and therefore they threatened to kill her if she looked at them. She was also told that once they were finished sexually penetrating her, they were going to kill her.

[10] She was released after they finished, but her shoes and cellular phone were kept by the perpetrators. She went home and reported the incident to her boyfriend and mother who accompanied her to the hospital, where she was medically examined and treated. Samples were obtained for DNA analysis and she was discharged. The ID Parade where the appellants were pointed out by the complainant was handed in by consent, the content admitted. Her boyfriend and mother testified concerning the circumstances of the incident and their role in-respect of same.

[11] The J88 medical examination form depicted the injuries sustained and the resultant DNA results confirmed that the two appellants had sexually penetrated the complainant on the night in question. She denied the appellant's version of being afraid of Tonic Kekana and that they were forced to grab and hold her and were forced to have sexual intercourse with her. She indicated that all perpetrators were actively involved and that the first appellant stabbed her at the time she was being kissed. She was certain it was him because his name was mentioned as the one who stabbed her.

[12] The complainant confirmed she did not know the identity of the four perpetrators, however the parents of the two appellants, had come to her home after the incident and returned her shoes and cellular phone, apologizing for their behaviour and seeking her forgiveness. The police were contacted and these items

were handed to the police and recorded as exhibits in the SAP 13 Register and eventually returned to her after some time. She denied the appellants version of being forced to sexually penetrate her. She maintained that there was an opportunity for the appellants to run away from the scene when Tonic Kekana was absent chasing her boyfriend. She maintained that they were actively involved in her attack, including hitting her, stabbing her and penetrating her. The J88 and DNA report corroborated her version concerning the incident and the injuries she sustained, due to the attack on her by the appellants.

[13] That in brief was the evidence for the State and the State closed their case.

[14] The first appellant testified and indicated that on the date in question he was in the company of the second appellant when they met Phila (Tonic Kekana), who was in possession of a knife pulling a girl. They were instructed to hold the girl and because he was afraid, he agreed to accompany Phila (Tonic Kekana).

[15] When they arrived at the bushes the second appellant was forced to have sexual intercourse with this girl and when the second appellant refused Phila (Tonic Kekana) stabbed him. Thereafter the second appellant agreed to have sexual intercourse with the girl. After the second appellant was finished, he was forced to have sexual intercourse with this girl, because of the fear in him he also had sexual intercourse with this girl. Thereafter they fled the scene. He had no knowledge of his family going to the complainant's homestead with her shoes and cell phone. He had no knowledge of the circumstances as alleged by the state concerning the four men attacking the complainant and her boyfriend and being in possession of a knife.

[16] During cross - examination, he conceded that altogether there were four men and the girl, who he conceded was the complainant. He was unable to identify the unknown man who according to him was just walking around the scene. He could not explain why he did not flee on meeting Phila (Tonic Kekana.) and this unknown person. In his evidence this unknown person was now holding the girl whilst Phila (Tonic Kekana) was holding the knife. When confronted concerning his fear and having had an erection to sexually penetrate the complainant, he indicated that

seeing a woman's private part was sufficient to cause him to have an erection, regardless of his fear.

[17] He indicated he did not report the incident due to his fear of Phila (Tonic Kekana). According to his evidence the second appellant was first to sexually penetrate the complainant and thereafter he sexually penetrated the complainant. Once he was finished, they were made to leave and were not present to see what happened to the complainant. According to him he was forced, by being tripped to the ground and he was instructed to sit there, until he was forced to stand up and have sex with that girl and he complied because he was frightened.

[18] The second appellant confirmed that he sexually penetrated the complainant, but he indicated he was forced to do so. He confirmed being in the company of the first appellant and that they were consuming alcohol at China City and that they were drunk when they were walking to the residence of the Aunty of the first appellant. They came across two boys, one in possession of a knife and the other dragging a girl. He identified Tonic Kekana as the person who stopped them and instructed them to grab the complainant. For fear of the knife, he and the first appellant grabbed the complainant on either side and following the instructions dragged her to the bushes.

[19] Whilst in the bushes the complainant was tripped, her clothing removed by an unknown male person in the company of Tonic Kekana. Thereafter he was instructed to have sexual intercourse with the complainant. He refused and was subsequently stabbed on his shoulder. He indicated that he was unable to have an erection, which was when he was instructed to kiss the complainant and she was made to touch his private parts until he got an erection. He asked Tonic Kekana whether he should penetrate the complainant without a condom to which he was instructed to penetrate her without it which he did until he finished. After he was done the first appellant also sexually penetrated the complainant, and thereafter the first appellant and him ran away. The stab wound was not a bad one requiring medical attention as he was able to sleep.

[20] He denied being present when the complainant was initially accosted and her boyfriend chased away. He denied that any of his family members went to the complainant's home to apologise returning her belongings. According to him her clothing was still there with Tonic Kekana when they were chased away.

[21] The second appellant indicated during cross - examination that he tried to tell the police what had happened, but they refused to listen to him and instead assaulted him. He described Tonic Kekana as walking behind them pushing them to the bushes and the unknown person as being responsible for removing the clothing of the complainant. When confronted with the aspect that the First appellant did not testify to being pushed or seeing the complainant having her clothing removed, he indicated that it was how he observed the situation. He confirmed the presence of Tonic Kekana as being the person with the knife threatening him and the first appellant to have sexual intercourse with the complainant.

[22] He indicated that it was Tonic Kekana who brought the police to his house and identified him and the complainant was in the company of the police at this stage and he was the one who took them to the first appellant's home. It was put to him that this version was never put to the complainant that she was present when they were arrested and prior to the Identity Parade which he conceded. He disputed that any family member of his had gone and apologised to the complainant and returned her cellular phone and shoes.

[23] That was in brief the first and second appellant's evidence and they closed their case.

[24] The Court *a quo* found that the evidence of the complainant was supported by the medical evidence, justifying the allegation of being sexually penetrated on that night in question. The Court *a quo* was satisfied that the appellants admitted to the sexual penetration of the complainant, however, had raised the defence of being forced to participate, in the commission of the offence by Tonic Kekana. The Court *a quo* was satisfied that the complainant identified the appellants, as the perpetrators in the company of Tonic Kekana and had participated with him in the commission of the offence. The Court *a quo* further found that both the appellant's versions were

improbable and rejected it, and based on the totality of the evidence, convicted the appellants of the offence charged.

[25] The appellants were subsequently sentenced, and the appeal was directed against both conviction and sentence in respect of both appellants. This Court must determine whether in the light of the evidence adduced at trial, the guilt of both appellants was established beyond reasonable doubt. If it is found that the appellants were properly convicted, whether the sentence meted out to the appellants was appropriate.

[26] The onus rests on the state to prove its case beyond a reasonable doubt. There is no onus on the appellant. In the case of **S v JACKSON**⁸, the Court said:

"the burden is on the state to prove the guilt of an accused beyond a reasonable doubt, no more or no less."

[27] This Court must consider the totality of the evidence led, considering the probabilities and improbabilities of the respective versions as well as the credibility of the witnesses. In evaluating evidence regard was had to the case of **S v Chabalala**⁹, the Honourable Judge Hefer AJA said:

"to weigh up all the elements which point towards the guilt of the Accused 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 about the accused's guilt."

[28] The appellants admitted that they were present and had committed the acts of sexual penetration on the complainant but alleged that they had participated due to being forced and for fear of the other perpetrator Tonic Kekana. It is this crisp issue that needed ventilation in the Court *a quo* and in the Appeal Court.

⁸ 1988[1] SACR 470 at 476 e-f

⁹ 2003(1) SACR 134 (SCA) at paragraph 15

[29] From the accepted evidence, the complainant was a single witness, and the provisions of Section 208 of the Criminal Procedure Act¹⁰ were applicable. The complainant was clear with details as to how the incident unfolded. Her evidence was straightforward and reliable in respect of the location and circumstances surrounding her being sexually penetrated by the two appellants. This was not in dispute by the appellants, except for their willingness to participate.

[30] She confirmed identifying the two appellants, first on leaving the China City, and later at the scene of the incident. She indicated that amidst her face being covered initially, she was able to see them, because of the light of the moon, which had illuminated the vicinity, and at the time when the hat was removed so that the one perpetrator could kiss her. The Court *a quo* found that the witness, was truthful concerning the circumstances in which she found herself, on the night in question. This Court appreciated that the evidence of the witness was tested concerning the multiple penetrations and holistically 'her evidence was consistent and found to be accepted by the Court *a quo* as reliable.

[31] The Court *a quo* accepted the State's version concerning the recovery of the complainant's cell phone as well as her shoes. These exhibits were left at the scene, brought to her home by the family of the two appellants and subsequently handed in at the Police. This evidence was put to the complainant as their version concerning their unwillingness to be involved, however during their testimony their versions changed and they now denied having family take back the complainant's belongings and further according to them, they alleged leaving the scene first, leaving the complainant with her belongings, behind with Tonic Kekana and the unknown person.

[32] The State's version concerning the sequence of events before and following the incident with specific reference to the complainant's boyfriend and her mother were not disputed by the appellants. The appellants put to the complainant in cross examination that they were present when the complainant's boyfriend ran away. The complainant's mother and boyfriend corroborated her concerning what transpired

¹⁰ Act 51 of 1977as amended

before and after the incident and the Court *a quo* found them to be honest and reliable witnesses, concerning the sequence of events before her attack and her condition on returning home after the incident. This Court aligns itself with those findings.

[33] The appellants did not challenge the Section 212 affidavit in respect of the DNA, due to their version being that of being forced to have sexual intercourse with the complainant without their consent as well as without her consent. The appellant's version concerning the sexual penetration, was that she was lying on her back when she was penetrated, however they failed to explain the presence of their DNA with specific reference to her injuries on and in her anus.

[34] This Court was satisfied that the complainant's testimony identifying them as the perpetrators, the role they played on the night in question, coupled with the medical evidence verifying her physical injuries, gave credence to her allegation of being assaulted physically and sexually by the appellants who were unknown to her, but whose DNA located in her vagina and anus placed them as persons who perpetrated this attack on her on the day in question. Her evidence concerning the incident was that of being sexually penetrated multiple times by the perpetrators in various positions. Her evidence concerning being strangled, beaten and stabbed whilst being sexually penetrated by those four men was verified by the medical evidence. The safeguards in respect of single witness evidence was overcome by the independent corroboration of her boyfriend, concerning the circumstances before the incident and also by the appellants concerning their presence and participation in her assault, amidst their version of being unwilling participants.

[35] When considering both the appellant's versions, regard was had to the case of **Shackell v S 2001 (4) ALL SA 279 (SCA)** Brand AJA stated the following:

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

[36] The appellants unfortunately, were exceptionally poor witnesses. Their version of events of the evening tryst with the complainant appeared unrealistic and far-fetched especially when their version was disputed in totality. The allegation of being forced to sexually penetrate the complainant on account of being threatened by Tonic Kekana was far from the truth with specific reference to the second appellant Mr Lekalakala, being stabbed by Tonic Kekana to force him to sexually penetrate the complainant, against her will. His version of having to kiss the complainant and having his penis touched by the complainant to be aroused was new evidence, which was not seen by the first appellant, who was present and not put to the complainant during cross examination of her evidence. It was also only when he testified that it came to light that he had no parents and that no one from his family had approached the complainant to apologise and return her belongings a version which was put to the complainant under cross - examination.

[37] Moreover, the fear experienced by the first appellant Mr Makhafola after observing his friend being stabbed was also without merit, justifying them to have committed the acts of sexual penetration on the complainant, against her will. He was also a poor witness who sought to lay blame on Tonic Kekana as being the source of their involvement in the incident. His version that they were allowed to have sexual intercourse with the complainant first, because Tonic Kekana wanted them to be like him was nonsensical. He also now in his evidence disassociated himself from the shoes and cell phone as not having occurred. On his version, they left first leaving the complainant behind.

[35] Their evidence when tested during cross examination was shown to be seriously lacking and untruthful. It was such that their versions were so false that it had to be rejected beyond reasonable doubt and their defence of being forced to participate had no merit resulting in the Court *a quo* having to dismiss this version as false and subsequently convicting the appellants. This Court aligned itself with those findings. The grounds raised by the appellants are also without merit based on the accepted evidence and the poor quality of the appellant's versions.

The appeal on conviction stands to fail.

[36] In respect of the Sentence, the appellants were convicted of C/S 3 Act 32 of 2007, read with Section 51(1) part 1 of schedule 2 Act 105 of 1997 as amended. The prescribed sentence was Life Imprisonment, unless the appellants were able to show the Court that substantial and compelling circumstances existed to warrant the Court imposing a different sentence.

[37] In **Kgosimore v the State**¹¹, the Court restated that;

"It is trite law that sentence is a matter for the discretion of the Court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include, whether the reasoning of the trial Court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of Appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the Court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

[38] Applying the principles set out in **S v Zinn**¹² this Court had regard to the evidence tendered in mitigation and in aggravation of sentence. The appellants argued that the Court *a quo* misdirected itself by not attaching sufficient weight to the mitigating circumstances of the appellants, to deviate from imposing life imprisonment.

[39] The first appellant Mr Makhafola was 19 years old at the time of the offence, single with a daughter of two years old. The child was currently staying with her

¹¹ 1999 (2) SACR 238 (SCA) at paragraph 10

¹² 1969 (2) SA 537 (A) at 540G

mother, who is the child's primary caregiver. The minor child was a recipient of a social grant. The first appellant was unemployed in good health physically and psychologically. He indicated that he had an ancestral calling and that was what motivated him to stop with his schooling.

[40] The second appellant Mr Lekalakala was 21 years old at the time of the offence, single and unemployed. He was a first offender in respect of this offence. They were in custody following their conviction. Both appellants in mitigation sought the Court *a quo* to appreciate that they were under the influence of alcohol and out of fear for Tonic Kekana that they had sexual intercourse with the complainant. Neither appellant showed remorse for their conduct or took responsibility for their role in the incident.

[41] On appeal it was argued that the sentence was harsh and disproportionate under the circumstances in this case. It was further argued that the appellants had sent their parents to apologise and returned the complainant's belongings which was an indication of remorse. This argument is without merit as the appellants claimed that they had not told anyone about what happened and that they did not send anyone to the complainant's residence.

[42] The respondent argued that the personal circumstances of the appellant were properly ventilated and cumulatively taken into consideration, by the trial Court. In aggravation of sentence the respondent highlighted that the complainant was sexually penetrated more than once. The incident had impacted the complainant, especially as no remorse was shown, as alluded to, by the defence raised. The Respondent sought that the Court should not deviate, from the prescribed minimum sentence.

[43] The Court *a quo* considered all the applicable legislation, the principles as laid out in ***State v Malgas***¹³, and found no substantial and compelling factors were present which warranted the Court to intervene with the applicable sentencing regime. In considering all the relevant factors, the Court *a quo* was satisfied that the

¹³ 2001 (1) SACR 469 (SCA)

applicable term of life imprisonment rendered the prescribed sentence just, in that it was not disproportionate to the offence, the appellants and the needs of society. To impose the prescribed term would not result, in an injustice being done, especially in light of there being no evidence to warrant a deviation from the prescribed sentence. The appellants in sentence sought the Court *a quo* to deviate based on them being under the influence of alcohol. This was a bold averment with no evidence verifying the extent of their intoxication and how this affected their behaviour and conduct. From cross - examination of the second appellant he indicated he had consumed alcohol but at the time of his alleged stabbing he was sober. Nothing turns on this averment and the Court *a quo* could therefore not be faulted as this aspect was appropriately ventilated during sentence and was raised without any evidence to justify same to be considered.

[44] The Supreme Court of Appeal in the case of ***The Director of Public Prosecutions, Grahamstown v Mantashe***¹⁴ stated that:

"The reality is that South Africa has five times the global average in violence against women.¹⁵ 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.¹⁶ 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 "

[45] As was highlighted in ***Malgas*** in instances where the prescribed term would not result in an injustice being done as there were no factors which cumulatively weighed in the appellants favour then the sentencing Court was obliged to impose

¹⁴ (131/2019) [2020] ZASCA 05 (12 March 2020) at para 15

¹⁵ N Sibanda-Moyo et al 'Violence Against Women in South Africa: A Country in Crisis' (2017) at 8

¹⁶ BMJ Global Health C Hsiao et al 'Violence against children in South Africa: the cost of inaction to the society and the economy' (2017).

the prescribed sentence. The Court *a quo* could therefore not be faulted for imposing the sentence of life imprisonment on the appellants.
The appeal on sentence also stands to fail.

ORDER:

[46] In the result the following order is made

[46.1] The Appeal on both the conviction and sentence is dismissed.

K.L. PILLAY AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I CONCUR,

R.S. MASHIFANE AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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