Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: A125/2021

In the matter between:

THABO SAM MOTHIBEDI **APPELLANT**

And

THE STATE
RESPONDENT

CORAM: **NAIDOO, J *et* CHESIWE, J**

HEARD ON: 28 FEBRUARY 2022

JUDGMENT BY: **CHESIWE, J**

DELIVERED ON: 28 APRIL 2022

[1] The Appellant and his co-accused were tried in the Regional Court, Bloemfontein, on two counts, Count 1, being a charge of Rape and Count 2, a charge of Robbery with Aggravating Circumstances. He was, on 24 May 2017 convicted as charged and sentenced to life imprisonment on Count 1 (Rape) and on Count 2, ten (10) years direct imprisonment for Robbery with Aggravating Circumstances. The Appellant's enjoys an automatic right of appeal in respect of the sentence of life imprisonment. The appeal lies against his conviction and sentence.

[2] The Notice of Appeal was filed only on 2 August 2021. The Appellant applied for condonation for such late filing and attached an affidavit from his legal representative, explaining that the Appellant instructed the Bloemfontein Legal Aid Office on 1 August 2019 to assist him with his appeal. He applied for a transcript of proceedings and received it, on 24 June 2021, hence the delay in filing the Notice of Appeal. It is not clear when an application was made for the transcript of proceedings. The Appellant also does not explain why he instructed the Legal Aid office only on 1 August 2021, when he was convicted on 24 May 2017. In spite of this, there was no objection from the state to condonation being granted. The Appellant has been in custody since 2017 and I am of the view that no prejudice can be suffered by the state if condonation was to be granted. In any event, I am of the view that it would be in the interests of justice to condone the late filing of the Notice of Appeal, and such condonation is, accordingly, granted.

[3] The Appellant's grounds of appeal in summary are, that the Trial Court erred in finding that the State witnesses testified

satisfactorily; that the State had proved its case beyond reasonable doubt; that the Court erred in failing to properly analyse and evaluate the evidence of the State witnesses; that it erred in placing to much weight on the contradiction between the *viva voce* evidence of the Appellant and the instructions put during cross-examination. In respect of sentence, the Appellant alleges that the sentence imposed is shockingly inappropriate and the court erred in not finding substantial and compelling circumstances exist to deviate from the prescribed sentence.

[4] The background of this matter according to the transcribed record briefly is that, on the 20 March 2011, the Complainant, (V S), K L (Complainant in Count two and boyfriend to V S) and L B (Complainant's friend) were walking from a tavern in Peter Swarts on route to their respective homes. A group of men followed them and, when they ran, the men started to chase them. The group split into two. One group chased the Complainant and the other group chased K L. L B managed to getaway. The group that chased the Complainant caught up with her. She was dragged to a nearby veld, where she was repeatedly raped by the men that were present. She was unable to tell the Trial Court who raped her first as she closed her eyes during this incident. After the rape, the group left her as she heard one of the perpetrators say the Complainant was dead. She was unable to identify any of these perpetrators, except that she knew accused 1 (one of the Appellant's co-accused) from primary school, but could not identify him at the scene.

[5] The other group had caught up with K L. He was hit on the head with an unknown object. He was robbed of his Nike shoes

(referred to as “tekkies”) and a cap. He saw how the Complainant was pinned to the ground by the group of boys, but he could not help her. He also ran away.

[6] During oral argument before us, Counsel for the Appellant, Ms Abrahams, submitted that the Complainant was a single witness and could not identify the perpetrators and that she was intoxicated, though the intoxication levels were not determined at the Trial Court. She submitted that the State witnesses that placed the Appellant on the scene were unreliable. She further submitted that the intercourse was consensual and that the conviction should be set aside.

[7] Adv. Ontong, on behalf of the Respondent in oral argument, disputed that the sex was consensual, as the Complainant was pinned to the ground. He indicated that even if alcohol was a factor, the Complainant at the Trial Court gave clear and detailed evidence and that Mabaqa, even if he implicated himself, he gave clear evidence. Counsel submitted that the Appellant was involved in gang rape and should not be regarded as a youth. He concluded that the Appellant's leave to appeal his conviction and sentence must not succeed and that it be dismissed.

AD CONVICTION

[8] The court *a quo* correctly found that testimony of the Complainant before it, is corroborated by the medical evidence with the of the J88, which showed extensive abrasions on the face and neck, though no genital injuries were sustained. The medical report concludes that the absence of genital injuries does not exclude penetration. The DNA results, that is Exhibit “D” further corroborate

the Complainant's evidence of the rape, as the Appellant is linked through DNA. I pause to mention that one of the state witnesses, Neo Simon Mabaqa, was also involved in this incident and himself had raped the Complainant. He had already been convicted and sentenced for the offence at the time that he testified in this matter.

[9] The issue of identity of the Appellant was properly and thoroughly dealt with by the Trial Court, with reference to the *locus classicus* of **S v Mthethwa.**[1] The Trial Court took into consideration the evidence of Mabaqa,[2] as well as the Complainant, K L and L B. Identification is often the central question in a trial and an identity parade acts as a safety mechanism. The dangers of dock identification are compounded when witnesses are asked to point out an accused in court. In **S v Tandwa** [3], the court said:

> "Dock identification… may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification it carries little weight 'taken on its own it is suspect'. The reason is apparent: (T) here is clearly a danger that a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender."

[10] Therefore, in my view, the Trial Court correctly made a finding that the State witnesses were honest and reliable in that they did not implicate the Appellant and were honest enough to indicate that they could not identify the Appellant. Had it not been for Mabaqa and the DNA result that linked the Appellant, the Trial Court would have had difficulty in resolving the issue of identification.

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[1] S v Mthetwa 1972 (3) SA 766 (A) at 768A.
[2] See S v Hlapezula and Others 1965 (4) SA 439 (A) d-e, concerning evidence of an accomplice.
[3] S v Tandwa and Others 2008 (1) SACR 613 SCA. See also *S v Moti* 1998 (2) SACR 245 (SCA) and *S v Maradu* 1994 (2) SACR 410 (W) at 413I-414A

Therefore, the Trial Court correctly analysed the evidence relating to the identification of the Appellant.

[11] The Trial Court regarded the evidence of the Complainant, as a single witness with caution,[4] on the offence of rape. According to the transcribed record, the Complainant was subjected to lengthy cross-examination. The Trial Court took into account all the evidence of the witnesses as well as the evidence of the co-accused, that is Mabaqa. The Appellant's version of consensual sex was disputed by the Complainant and Mabaqa. Even if there was consensual sex, the Appellant could not explain the injuries sustained by the Complainant nor why the Complainant went to the police station naked when she went to report the rape incident.[5] To the extent that Mabaqa's evidence corroborated that of the Complainant that the Appellant had pinned down the Complainant during the rape, Mabaqa was already serving a lengthy term of imprisonment and had nothing to gain by implicating the Appellant. The Trial Court correctly dealt with the evidence of the Complainant as a single witness as well as the evidence of Mabaqa.

[12] In respect of Count 2, the Trial Court evaluated and analysed the evidence of K L and L B correctly. Their evidence corroborates and further corroborates with that of Mabaqa, as he confirmed that they robbed K L of his tekkies and that accused 3 was found in possession of these tekkies. This aspect needs no further analysis. I am satisfied that the Trial Court found the evidence of the State's witnesses to be satisfactory in all aspects of count two.

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[4] See S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G.
[5] Page 23 lines 16 – 18 of the transcribed record.

[13] The Trial Court correctly evaluated evidence of the Complainant, as well as the evidence of the other State witnesses in that it was truthful and honest, when it made its findings, whereas, the Appellant and his co-accused contradicted each other materially. The Appellant in cross-examination attempted to disassociate himself with the rape by alleging that he was unaware that the co-accused had consensual sex with the Complainant. In this regard, the Trial Court stated in its judgement at 330:

> "What Accused 1 and 2 wants me to believe is they had sexual intercourse with her at the tavern, when she left she was raped by another group of men. This would be absolutely nonsensical and bizarre for anyone to belief (sic). She should have experienced extreme bad luck on that day to have consensual sexual intercourse with two males and later on be raped by a group of men."[6]

[14] It is trite that an Appeal Court will only tamper with the Trial Court's findings if it is shown that the findings made by the Trial Court were wrong. It was not submitted by Counsel on behalf of the Appellant that the Trial Court misdirected itself in any of the facts. Furthermore, when consideration is given to all inconsistencies and improbabilities, there is no reason to doubt the correctness of the credibility findings made by the Trial Court. I am satisfied that the Trial Court was correct in holding that the State proved its case beyond reasonable doubt. Furthermore, the Trial Court correctly found the Appellant to be an untruthful witness and correctly rejected his version as false beyond reasonable doubt. In my view, the Trial Court correctly convicted the Appellant and there is no reason to tamper with the Trial Court's findings on the conviction.

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[6] Page 330 lines 3 – 10 of the transcribed record.

AD SENTENCE

[15] Regarding sentence, it is trite that a court with appellate jurisdiction has limited powers to interfere with the sentence imposed by the Trial Court. The sentencing discretion lies with the Trial Court. Its sentence will only be interfered with on appeal if the discretion in question was not exercised judicially and properly,[7] or if there is a disparity between the sentence imposed and the one that ought to have been imposed.[8]

[16] It is indeed so that the first principle is that the sentencing court should not readily depart, for flimsy reasons, from the prescribed minimum sentence ordained as an ordinarily appropriate punishment. The prescribed minimum sentence of life imprisonment is the harshest sentence a court can impose on an offender. It is the ultimate punishment in our Criminal Law system. The sentencing court always has that choice dictated by the peculiar circumstances of a particular case. To say that the court has no choice, boils down to some kind of neglect to exercise the sentencing discretion judicially and constitutes a material misdirection.[9]

[17] Rape is a repulsive crime. It is an invasion of the most private and intimate zone of a woman and strikes at the core of her person and dignity.[10] In **S v Chapman**[11] the court called it a “humiliating degrading and brutal invasion of privacy and the violation of a person's dignity”. In paragraph 4 it went on further to said that:

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[7] S v Rabie 1975 (4) SA 855 (A)

[8] S v Malgas 2001 (1) SACR 469 (SCA).

[9] Ibid footnote 8.

[10] S v Vilakazi (567/02) [2008] 87; [2008] 40 ALL SA 396 (SCA); 2009 (1) SACR 552 (SCA) (2012) (6) SA 353 (SCA) (3 September 2008).

[11] (345/96) [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 ALL SA 277 (A); (22 May 1997).

> "Women in this country 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 fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[18] Ms Abrahams submitted that the Trial Court did not take into consideration the personal circumstances of the Appellant, including his youthfulness. Adv. Ontong on the other hand submitted that the offence the Appellant was convicted of, warrants the prescribed minimum sentence that the court with appellate jurisdiction should not depart from.

[19] Upon careful consideration of the personal circumstances of the Appellant, I see nothing exceptional nor does his youthfulness play any role for this court to interfere with the sentence imposed by the Trial Court. The aggravating fact of this matter is that it was a gang rape.

[20] In light of the above, I am therefore not persuaded that the sentence imposed is shockingly inappropriate and harsh. The appeal against conviction and sentence ought to be dismissed. The court *a quo* had ordered the sentence in count 2 to run concurrently with the sentence in count 1. In delivering his reasons for his judgment, the Magistrate confirmed his judgment and stated in further reasons that his order that the 10 (ten) year sentence is to run concurrently with that of life imprisonment ought to be set aside as this aspect is governed by section 39 of the Correctional Services Act 111 of 1998 and that the order is contrary to that section. He correctly pointed out that this aspect was decisively

dealt with by the Supreme Court of Appeal in *S v Mashava 2014(1) SACR 541*, where the court held that

> "Section 39(2) of the Correctional Services Act 111 of 1998 is clear. Any determinate sentence of incarceration, imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical."

[21] Accordingly, I make the following order:

1. The Appeal against conviction and sentence is dismissed.
2. The order of the court *a quo* that the sentences in respect of counts 1 and 2 should run concurrently, is set aside; and replaced with the following:
   "Count 1: Life imprisonment.
   Count 2: 10 years imprisonment."

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S. CHESIWE, J

I CONCUR

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S. NAIDOO, J

On behalf of Appellant:	Ms V Abrahams
Instructed by:	Legal Aid South Africa
	BLOEMFONTEIN

On behalf of Respondent:	Adv. EB Ontong
Instructed by:	Director of Public Prosecutions
	BLOEMFONTEIN