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

HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Yes.
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED.

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DATE SIGNATURE

Case No: A169/2018

In the matter between:

BANELE NGWENYA Appellant

and

THE STATE Respondent

***Case summary*: Criminal Law – Appeal - against convictions on charges of assault with the intent to do grievous bodily harm, kidnapping and rape as contemplated in s 3 of the Criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) – and against sentence of 20 years' imprisonment, the court *a quo* having taken the three counts as one for the purposes of sentence.**
Convictions confirmed. Sentence set-aside and replaced with a sentence of six years' imprisonment on count 1 (assault with the intent to do grievous bodily harm), six years' imprisonment on count 2 (kidnapping) and imprisonment for life on count 3 (rape).
Section 51(1) read with s 51(3)(a) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 – Imprisonment for life is the mandatory minimum sentence where the conviction of rape is one contemplated in s 3 of the Act in circumstances where the victim was raped more than once whether by an accused or by any co-perpetrator and accomplice – the offence of rape still consists of sexual penetration of a non-consensual person, but 'sexual penetration' is defined as 'any act which causes penetration' – appellant's co-

accused also raped the victim, although he did not commit the act of penetration, and was convicted of rape as an accomplice.
Substantial and compelling circumstances, which justify the imposition of a lesser sentence than the mandatory minimum one of imprisonment for life, not showed to exist.

JUDGMENT

MEYER J (MDALANA-MAYISELA AJ concurring)

[1] Arising from an incident that occurred in the early hours of the morning on 4 April 2009 in Mofolo, Soweto, the appellant, Mr Banele Ngwenya, was convicted by the Regional Court, Protea (Regional Magistrate Mr D Mhango) on 1 November 2011, on charges of assaulting Ms S N with the intent to do her grievous bodily harm (count 1), of kidnapping her (count 2) and of raping her as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the SO Act) (count 3). The learned regional magistrate took all three counts as one for purposes of sentence and sentenced the appellant to imprisonment for a period of twenty years. He was one of four accused persons in the court *a quo*. It was found that the appellant's co-accused, Mr Ayanda Radebe (accused no. 4), participated in the offences committed against Ms N and he was convicted of kidnapping, assault with the intent to do grievous bodily harm and rape, as an accomplice, and sentenced to ten years' imprisonment. The appeal with leave of the regional magistrate is against the appellant's convictions and sentence.

[2] There are well-established principles governing the hearing of appeals against findings of fact. As was said by Marais JA in *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645, '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'. (Also see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204D-E.)

[3] Here, one looks in vain for any such misdirection nor does the recorded evidence show the factual findings to be clearly wrong. The learned regional magistrate demonstrably subjected the evidence to careful scrutiny and, although not

spelled out in the judgment, he approached the evidence of Ms N, who implicated the appellant in the commission of the offences in question, with the necessary caution that should be applied to evidence of identification (*S v Mthetwa* 1972 (3) SA 766 (A) 768A-C) and to that of a single witness (*S v Sauls and Others* 1981 (3) SA 172 (A) at 179G–180G).

[4] Ms N and her friend, Ms W, who also testified, had left a party in Mofolo, Soweto in the early hours of the morning on 4 April 2009. They went looking for Ms N's boyfriend, Mr T. They found him drinking at a tavern, called 'Number 5', and he then accompanied them home, because he wanted to fetch clothes that he had left at Ms N's home. While walking, they came across a group of young men, amongst whom was the appellant. He, according to Ms N, grabbed her and, accompanied by some of the other men in the group, physically forced her into the nearby park. Ms W was also grabbed by some of the other young men and dragged to the nearby school. Mr T left them and proceeded to Ms N's home where he fetched his clothes.

[5] The appellant, according to Ms N, assaulted her by grabbing her, hitting her with open hands many times on her body and by hitting her on the head with a beer bottle. He tripped her at a tree in the park, which caused her to fall, and he told the others to look for her cell phone because he would not rape her before it is found. The appellant's co-accused, Mr Radebe, was amongst the men looking for the phone. In the meantime, the appellant continued to assault Ms N and he lowered his trousers and forced her to suck his penis, without her consent. She was lying on her back while he was sitting on her chest. Someone arrived, saying 'what are you boys doing'! That is when Ms N grabbed the opportunity and bit the tip of the appellant's penis. He got up, 'screaming and crying'; his penis was bleeding and the blood came through on his trousers. He ran away.

[6] Returning from Ms N's home, Mr T testified that he had come across some of the men who were part of the group that Ms N, Ms W and he encountered earlier on. He heard Ms N screaming and saw the appellant approaching the group, unable to walk properly and 'saying he had been injured by this female person'. As the appellant was about to leave, two male persons got hold of him and a Metro Police car stopped.

[7] Ms Phumzile Mkwanaze, a Metro Police Officer employed by the Johannesburg Metro Police Department, testified that she had been on patrol duty in Moroka that night. At about 2.30 am she and a colleague were on their way to attend to an accident when they came across a group of people next to the road. Amongst them was a lady (Ms N) bruised in the face and with a little bit of blood on the mouth, who was crying and screaming. Ms N told them that she had been held up by a group of men, that the appellant had 'put his penis inside her mouth and that she bit his penis'. Ms Mkwanaze approached the appellant, who said to her that they 'must not speak to him, he is feeling pain . . . in his penis.' Ms Mkwanaze noticed a lot of blood coming through on his trousers at his penis, and he kept on complaining of pain. They arrested him and had to take him home to change his clothing because of the bleeding before they took him to the Moroka police station. Once they had arrived at the Moroka police station other police officers took him to a hospital because he still kept on complaining of pain and could not be placed in the cells in that condition.

[8] The investigating officer, Insp Arena Karibe, also testified that the Metro Police had brought the appellant and Ms N to the Moroka police station. The appellant kept on complaining about his penis being in pain. He also showed the investigating officer his penis, which was bandaged, and he requested to be taken to a hospital. Ms N later told Insp Karibe that the appellant had raped her by putting his penis into her mouth and that she had bitten it. She was given a J88 form and requested to go for a medical examination on the Monday. Ms N went to a medical clinic on Monday, 6 April 2009, where she was examined by a medical doctor, who recorded his findings on the J88 form, *inter alia* that she was five months pregnant at the time and that she had sustained injuries below the left eye, swelling of the left cheek, soft tissue injuries of the neck and left shoulder and swelling on the back of the head, as a result of 'blunt force'.

[9] The appellant testified that he and a friend, Siphiso Mbatha (who was accused no 2), had been to a tavern, Skomplus Tavern, on the night in question. They left the tavern at around 0.30 am and the two of them finally parted ways at Kwezi at around 2:00 am to go home. (The evidence of Mr Mbatha corroborates the account of the appellant to this point.) Walking alone, the appellant came across a red Volkswagen Golf car with three occupants when he got to a school. They

alighted from the car, pointed firearms at him and assaulted him, which caused an injury just above his left eye. Asking them why they were assaulting him, they said that he knew what he had done and one of the men suggested that they stop with the assault and rather take him to 'the place'. Arriving there, the appellant saw a woman who was 'crying and making a noise', saying that he had attempted to or had raped her. Traffic officers arrived and they were told that he had raped the woman. He denied that it was the Metro Police Officer, Ms Phumzile Mkwanaze, who arrived at the scene or that she had seen blood from his penis coming through onto his trousers. According to him, he had seen her for the first time in court. He also testified that the Metro Police Officer had found him bleeding from the wound which he had sustained above his left eye. He denied that his penis had been bitten by Ms N. He testified that he could not remember showing his penis to Insp Karibe and he denied that he had been taken for medical treatment of his penis.

[10] The evidence of Ms N is not only satisfactory in all material respects, but there is also corroboration. The evidence of Ms W corroborates her evidence about the three of them walking home, encountering a group of young men, Ms N being grabbed and dragged away by some of them, herself being grabbed and dragged away by others and the two of them telling each other of one another's ordeal when they were at the Moroka police station. Mr T's evidence also corroborates that of Ms N about the three of them walking home, encountering a group of young men at the park, the appellant being part of the group, Ms N being grabbed and dragged away, and Ms W also being grabbed and dragged away. Furthermore, his evidence that he had seen the appellant again after he had returned from Ms N's home, unable to walk properly and complaining that he had been injured by 'a female person', corroborates Ms N's evidence that she had bitten the appellant's penis. This evidence of Ms N is also corroborated by the observations of the Metro Police Officer, Ms Phumzile Mkwanaze, and of the investigating officer, Insp Arena Karibe: She noticed a lot of blood coming through on his trousers at his penis and he saw the appellant's penis wrapped in bandage. The medical evidence is also consistent with Ms N's evidence of the nature of the assault perpetrated on her.

[11] The learned regional magistrate can also not be faulted in considering Ms N's identification of the appellant as the man who deprived her of her freedom of movement, assaulted and raped her, to be reliable. Although it was dark and the

apollo light in that area did not work, it is clear that there was adequate visibility and opportunity for Ms N to identify her assailant, both as to time and situation. Ms N had no prior knowledge of the appellant, but they were in close proximity while he was assaulting her and when he inserted his penis into her mouth. She testified that she had been looking at him. She also identified him by the blood coming through on his trousers at his penis. Her identification of the appellant is also corroborated by the evidence Mr T, who knew the appellant prior to the incident and who identified him as having been part of the group of men he, Ms N and Ms W had encountered at the park and who he later on had seen again, unable to walk properly and complaining that he had been injured by 'a female person'.

[12] The state case against the appellant is credible, reliable and overwhelming, and the regional magistrate correctly held that the appellant's exculpatory version, on the totality of the evidence, was not reasonably possibly true. In fact, it is palpably false. In grabbing and dragging Ms N into the park against her will, the appellant unlawfully and intentionally deprived her of her freedom of movement. By grabbing her, hitting her with open hands many times on her body, by hitting her with a beer bottle on the head and by tripping her, the appellant unlawfully and intentionally applied direct force to the person of Ms N. Furthermore, the ineluctable inference to be drawn is that the appellant had the required intent to do Ms N grievous bodily harm whether or not grievous bodily harm was in fact inflicted upon her, because it is simply the intention to do such harm that is required for a conviction of the crime of assault with intent to do grievous bodily harm. Hitting a person with a beer bottle on the head reveals such an intent. (See *LAWSA* Vol 6 First Reissue paras 288, 254 and 264.) The appellant unlawfully and intentionally committed an act of sexual penetration with Ms N, without her consent as contemplated in s 3 of the SO Act read with the definition of 'sexual penetration' in s 1, when he forced his penis into her mouth. He was, therefore, correctly convicted of kidnapping, assault with the intent to do grievous bodily harm and of rape.

[13] There are also well-established principles governing the hearing of appeals against sentence. In short, punishment is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly exercised: The test is whether the sentence is vitiated

by irregularity, material misdirection or disturbingly inappropriate. (*S v Rabie* 1975 4 SA 855 (A) at 857D-E; *S v Malgas* 2001 (2) SA 1222 (A) paras 12-13.)

[14] Although not stated in the judgment, the learned regional magistrate, for the purpose of sentence, seems to have considered that the kidnapping, assault and rape were closely connected or arose from the same incident; he took all three counts as one for the purpose of sentence and sentenced the appellant to imprisonment for a period of 20 years. However, unless the regional magistrate was satisfied that substantial and compelling circumstances existed, which justified the imposition of a lesser sentence, he was statutorily obliged to impose the prescribed minimum sentence of imprisonment for life for the appellant's conviction of rape, which is one contemplated in s 3 of the SO Act and committed in circumstances where the victim was raped more than once whether by an accused or by any co-perpetrator or accomplice. (Section 51(1) read with s 51(3)(a) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLA Act.)

[15] Ms N was raped more than once; she was raped by the appellant, who committed the act of penetration, and, amongst others, by Mr Radebe, who, although he did not commit the act of penetration, was also convicted of raping Ms N as an accomplice. Section 3 of the SO Act reads as follows:

'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'

And 'sexual penetration' is defined as including-

'. . . any act which causes penetration to any extent whatsoever by-

(a) The genital organs of one person into or beyond the genital organs, anus or mouth of another person; . . . '

As stated by SS Terblanche in *Guide to Sentencing in South Africa* Durban: Lexis Nexis (2007) para 3.4.6.3, the SO Act redefined rape and '[a]lthough the offence still consists of sexual penetration of a non-consensual person, "sexual penetration" is defined as "any act which causes penetration"'. The offence of rape can thus be committed by a person without that person committing the act of penetration. (See *S v Msomi* 2010 (2) SACR 173 (KZP); *S v HB* 2015 (1) SACR 77 (GP).

[16] The regional magistrate considered the particular circumstances of the case in the light of the well-known triad of factors relevant to sentencing; the crime, the offender and the interests of society. He took into account that the appellant was a

first offender; 26 years of age; unmarried and without any dependants; his educational attainment (grade 11 at secondary school); that he was unemployed; the time that he had spent in custody awaiting the finalisation of the trial (approximately two years and four months); the serious and horrendous nature of the offences of which he had been convicted; the degradation, and violation of the person of Ms N and of her rights; the prevalence of such crimes of violence against women in the court *a quo's* area of jurisdiction and in the country; and the community's interest in having the courts deal severely with offenders such as the appellant.

[17] In sentencing appellant and two of his co-accused, the regional magistrate said:

'. . . You see you are charged subject to minimum prescribed sentences. Where you commit gang rape the minimum prescribed sentence is life imprisonment. I am compelled to impose a sentence of life imprisonment unless I find substantial and compelling circumstances whereof (sic) I can deviate from imposing the minimum prescribed sentence. The principle underlying this prescribed minimum sentence is that a court should not deviate from imposing the prescribed minimum sentence of life imprisonment for flimsy reasons.

I have invited both your legal representatives to address the court with regard to compelling and substantial circumstances. I am at pains, if I may indicate, to understand what has been placed before me as substantial and compelling. The prosecutor argued that there are no compelling and substantial circumstances, more especially if one takes int account the manner in which you treated both victims. I therefore come to the conclusion that the only realistic form of punishment in this instance is a term of imprisonment. All factors taken into account you are sentences as follows. Accused 1 [the Appellant], starting with you, you are sentenced to 20 years imprisonment. . . . I have taken all counts as one for purposes of sentence. …"

[18] I am at a loss to understand how the regional magistrate could have imposed 20 years' imprisonment instead of the mandatory minimum sentence of a period of imprisonment for life for the appellant's conviction of rape, without finding that he was satisfied that substantial and compelling circumstances existed that justified the imposition of a lesser sentence, which he did not find, and, on all the factors relevant to sentencing cumulatively, could not find. In his own words, the raping of Ms N amounted to 'a gang rape' and especially 'if the manner in which' Ms N was 'treated' by her assailants are taken into account, the only appropriate sentence that he could have imposed was the mandatory sentence of imprisonment for life. The appellant

showed no respect for Ms N's rights nor did he at any stage show the slightest remorse. The imposition of a lesser sentence than the mandatory minimum sentence will in this instance diminish the horror of rape.

[19] As was said by Marais JA in *Malgas* at 235F-H, '[c]ourts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances' and '[u]nless 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'. Furthermore, 'the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it'. (At 1235J-1236A).

[20] The serious and horrendous nature of rape and violence against women cannot be over-emphasised. As was said by Mahomed CJ in *S v Chapman* 1997 (2) SACR 3 (SCA) at 5A-E (1997 (3) SA 341; [1997] 3 All SA 277):

'. . . 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 [See ss 10, 11 and 13 of the Constitution of the Republic of South Africa 200 of 1993 and ss 10, 12 and 14 of the Constitution of the Republic of South Africa Act 108 of 1996 – Eds.] *and to any defensible civilisation*.

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 insecurity which constantly diminishes the quality and enjoyment of their lives. . . .

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[21] Although the assault with the intent to do grievous bodily harm, the kidnapping and the rape were closely connected, the learned magistrate should have imposed separate sentences for the three convictions. The sentences pursuant to the convictions of kidnapping and assault with the intent to do grievous bodily harm, as a

matter of law, run concurrently with the sentence of imprisonment for life pursuant to the appellant's conviction of rape. An appropriate sentence, in all the circumstances, for the appellant's conviction of kidnapping, in my view, is one of imprisonment for six years, and for his conviction of assault with the intent to do grievous bodily harm, also imprisonment for six years.

[22] In the result the following order is made:

(a) The appeal against the appellant's convictions and sentence is dismissed.

(b) The appellant's convictions of assault with the intent to do grievous bodily harm (count 1), of kidnapping (count 2) and of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (count 3), are confirmed.

(c) The sentence of imprisonment for twenty years imposed upon the appellant pursuant to his convictions of assault with the intent to do grievous bodily harm (count 1), of kidnapping (count 2) and of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (count 3), is set aside and replaced with the following sentences:

(i) Accused no 1, Mr Banele Ngwenya, is sentenced to imprisonment for six years pursuant to his conviction of assault with the intent to do grievous bodily harm (count 1);

(ii) Accused no 1 is sentenced to imprisonment for six years pursuant to his conviction of kidnapping (count 2);

(iii) Accused no 1 is sentenced to imprisonment for life pursuant to his conviction of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (count 3).

(iv) The sentence of six years' imprisonment imposed pursuant to accused no 1's conviction on count 1 and the sentence of six years' imprisonment imposed pursuant to his conviction on count 2 are to run concurrently with his sentence of imprisonment for life imposed pursuant to his conviction on count 3 and he, therefore, is to serve an effective term of imprisonment for life.

(d) The sentences imposed upon the appellant by this court of appeal are antedated to 1 November 2011, which is the date on which the sentence of imprisonment for 20 years was imposed upon him by the court *a quo*.

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P.A. MEYER
JUDGE OF THE HIGH COURT

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M.D. MDALANA-MAYISELA
ACTING JUDGE OF THE HIGH COURT

Dates of hearing: 11 and 20 February 2019

Date of Judgment:	20 February 2019
Counsel for Appellant:	Adv SP Lekgothoane
Instructed by:	Legal Aid Board, Johannesburg Justice Centre
Counsel for Respondent:	Adv L Ngodwana
Instructed by:	Director of Public Prosecutions, Johannesburg