

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



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A74/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
Date: 4 August 2023

In the matter between:

PHALADI: TEBHO PAULOS

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ALLY AJ

- [1] The Appellant was arraigned in the Regional Court, Randfontein on two counts of the contravention of Section 3 of the Criminal Law and Sexual Offences and Related Matters Amendment Act 32 of 2007 both read with the provisions of Section 51(1) and part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- [2] The Appellant pleaded not guilty and was ultimately found guilty as charged and sentenced to life imprisonment on both Counts with the sentence on Count 2 ordered to run concurrently with the sentence on Count 1. Furthermore, the Appellant was found *ex lege* unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000.
- [3] This matter serves before this Court as an automatic appeal in terms of Section 309(1), the Appellant having been sentenced to life imprisonment. Accordingly, the appeal relates to conviction and sentence.
- [4] The Appellant was represented in this Appeal by Adv. Musekwa and the State by Adv. MM Maleleka.
- [5] At the outset the Appellant applied for condonation for the late filing of his heads of argument. After hearing Counsel for the Appellant and the State not having opposed the application, the Court granted condonation in the interests of justice.
- [6] Whilst the sequence in respect of the charges against the Appellant were dealt with differently in the Court *a quo*, I intend following the logical sequence in respect of the different charges.
- [7] In respect of Count 1 the State led the evidence of the victim, Ms Z M, who testified that whilst she was in bed, she felt a person was behind her and she assumed that this person was her boyfriend. It soon turned out that it was not her boyfriend because as she testified, this person had a black plastic over his face. She further testified that this person was a male person.
- [8] This male person and her started 'struggling' or as she put it started 'wrestling'. This person choked her and told her to stop screaming otherwise he was going to kill her.

- [9] Ms M testified that she asked this person what he wanted to take and he stated that he wanted to have sex with her. This person also stated that “*if I love my boyfriend and also what I was carrying in my belly – are you going to give me what I want, then I can go.*”¹ At the time she had on her pyjamas and this person ordered her to undress. She then testified that this person raped her by putting his penis in her vagina without her consent. This person pulled out his penis after he ejaculated. At the time, this person did not use a condom when he penetrated her with his penis.
- [10] This person then told her to wash herself in the bath and she did so by washing her vagina. He then wanted to repeat the act of having sex and ordered her to face the wall. He then had sex with her again without her consent. When he was finished, he ordered her to wash herself again.
- [11] During the time of being raped, Ms M did not indicate that she knew the person that raped her but in further testimony, she said a certain Tebogo, came knocking on the door after she was raped and asked her for a tap.
- [12] On being questioned by the Court as to who Tebogo was, as she had previously only mentioned that a person had raped her, she indicated that it was Tebogo that raped her as she recognised him from his voice. She also pointed out the Appellant as being Tebogo who raped her.
- [13] Ms M also testified that after she had given the Appellant the tap and he had finished drinking water, the Appellant returned the tap and left through a ‘short cut’ and on his way he met his wife and they both came to her shack.
- [14] The Appellant’s wife asked if she was fine to which she answered that she was raped by an intruder. The Appellant’s wife, Mamoketi, then asked if she had telephoned her boyfriend, whom she referred to as Nico and she said no. Nico was phoned and, on his arrival, he wanted to know whether she had telephoned the police to which she answered no.
- [15] Ms M testified that she was fetched by the police and she made a statement. She was also medically examined and a swab was taken from her vagina.

¹ Record: paginated page 65 lines 4-6

- [16] The second witness to be called in respect of Count 1 was Mr Samuel Tswayedl, Ms M's boyfriend. His testimony was to the effect that he had gone out with friends and was later contacted to come home and, on his arrival, he found Ms M crying. He was then told that she was raped and he enquired whether the police were contacted and on hearing no, contacted the police who fetched Ms M.
- [17] Mr Tswayedl further testified that after Ms M returned from the hospital, she told him that his cousin, the Appellant had raped her. He wanted to know why she did not tell him earlier and she said she was afraid. He testified that he was angry and fought with the Appellant. The community intervened during the fight.
- [18] The third witness in respect of Count 1 was Sergeant Nkosi of the South African Police Services who was called to testify in respect of the chain of evidence. She testified that she was the person that fetched Ms M from her house on 13 December 2015 and took her to the Doctor for examination. She further testified that after the Doctor examined Ms M, she took the sexual evidence collection kit and booked it in at SAP 13 on the morning of 14 December 2023.
- [19] Sergeant Nkosi testified that the evidence collection kit had a seal number 14D7AA1792 and was placed in a bag with another seal number PA4002434549. She further testified that the bag was not tampered with and entered on the SAP 13 as 421.
- [20] The next witness to testify in respect of Count 1 was Sergeant Mpiko. She testified that at the time of the incident she was stationed at the Family Violence, Child Protection and Sexual Offences Unit situated at Krugersdorp.
- [21] Sergeant Mpiko testified that on 17 December 2015 she collected the evidence collection kit with seal number 14D7AA1792 and seal number PA4002434549 from the SAP 13 to take to the Forensic Science Laboratory in Pretoria. She also confirmed that the seal was not tampered with.
- [22] The next witness to testify was Sergeant Mosoba who was stationed at the Family Violence, Child Protection and Sexual Offences Unit in Krugersdorp.

He testified that that he obtained a buccal sample from the Appellant whilst the Appellant was at Randfontein Court Cells. He testified further that he was accompanied by Constable Magwai during the obtaining of the buccal sample.

- [23] The buccal sample was obtained with the consent of the Appellant and sealed with seal number 11DBAE3220 inside a forensic bag with seal number PA4000020270532 and this bag was also sealed. The forensic bag was handed in and confirmed in the SAP13.
- [24] The collection of the buccal sample was captured on a document and handed in as Exhibit "F" and the SAP 13 was handed in as Exhibit "G"
- [25] The following witness to testify in respect of Count 1 was Warrant Officer Van Tonder who was stationed at the Family Violence, Child Protection and Sexual Offences Unit in Krugersdorp and was a Sergeant during 2015. She testified that she collected the forensic bag with seal number PA4000020270532 on 23 December 2015 and transported it to Pretoria. She handed the forensic bag over at the Forensic Science Laboratory in Pretoria and received a receipt for it. This information was then entered in on the SAP 13 on her return from Pretoria.
- [26] Warrant Officer Van Tonder confirmed the information relating to her on the SAP 13 handed into Court previously as Exhibit "G" in column 6 thereof.
- [27] The State then called Sergeant Au who testified in relation to an adult sexual assault kit with serial number 15D1AA6423 with the pack serial number being PAD001770575 which was collected and handed in on the SAP 13. That was the extent of his role.
- [28] The State thereafter called Constable Magwai who was stationed at the Family Violence, Child Protection and Sexual Offences Unit in Krugersdorp. His testimony centred around the collection of a buccal sample from the Appellant on 14 September 2016 with the consent of the Appellant who signed the buccal collection form. Constable Magwai confirmed that Sergeant Mosoba had co-signed the buccal collection form with serial number 11DBAD9333TF.

- [29] The buccal sample was collected from the Appellant at Randfontein Court Cells and handed in in on the SAP 13.
- [30] The State then called Warrant Officer Strooh whose testimony centred around the taking of the buccal sample with serial number 11DBAD93333 to the Forensic Science Laboratory in Pretoria. She confirmed that the buccal sample was handed in at the Forensic Science Laboratory and it was not tampered with.
- [31] The State called Sergeant Ramokgadi who confirmed that he transported the sexual assault kit with serial number 15D1AA6423 with the pack serial number being PAD001770575 to the Forensic Science Laboratory in Pretoria and same had not been tampered with.
- [32] The State the called Warrant Officer Makapan from the Forensic Science Laboratory in Pretoria who examined the sexual assault kits of the complainants and the buccal samples of the Appellant. Her evidence confirmed that the buccal samples taken were a match to the sexual assault kit in respect of the two complainants.
- [33] In respect of Count 2, the State called the complainant, Keitumetse Judith Phika. The complainant testified that she had gone to look for her boyfriend, Mike at the tavern unsuccessfully. Whilst walking, she telephoned Mike who indicated that he was loading people in town.
- [34] It was not long after she had spoken to Mike that a man came up from behind and grabbed her. She tried to fight him off to no avail. He throttled her and she lost, as she put it, 'power'. This man then told her he was going to take her to the graveyard and rape her. At the graveyard he started assaulting her and ordered her to undress which she refused. He then undressed her himself. He then raped her through her vagina and penetrated her through her anus.
- [35] When this man was finished, he told the complainant that she must go to the car because they are going to Carltonville. The complainant resisted and this man grabbed at her at her back and they returned to the graveyard. She was then raped again and the complainant indicated that all in all she was raped

at least four times at the graveyard. As she explained it, she was raped three times outside the graveyard and one time inside the graveyard.

- [36] When he was finished with the complainant, he helped put on her clothing and told her to leave. When she told him that she does not know the way, he explained to her how to find her way and she went home.
- [37] At home she found Mike, her boyfriend and told him about her ordeal. Mike then took her to the police station where she made a statement. After her statement was taken, she was then taken to Leratong Hospital where she was examined. She was also provided with pills and told to take them regularly.
- [38] The complainant recalled that the rape started around 22H00 on 12 February 2016 and she got home at around 03H00 on 13 February 2016.
- [39] The complainant testified that she sustained bruises during the rape but they were not serious.
- [40] The State then called Mike, Michael Molabisi, the boyfriend of the complainant in Count 2. Mike corroborated the testimony of the complainant relating to the time she arrived at home and that he took her to the police station. The complainant was then taken to Leratong Hospital.
- [41] The cross-examination of the state witnesses in respect of Count 1 and Count 2 centred around the fact that it was not the Appellant that raped the complainants and in respect of the chain of evidence witnesses the cross-examination centred around the fact that the Appellant stated that he did not consent to his buccal sample being taken and that it was not his buccal sample.
- [42] The Appellant testified in his own defence. In respect of Count 1, the Appellant testified that he was not the person that raped the complainant and stated that it was not possible because the complainant was in a relationship with his 'brother', Nico. He explained that at the time that the complainant stated she was raped he was asleep at Mpai's house, in the children's room. Mpai is his cousin.

- [43] The Appellant stated that he woke up the next morning at about 03H00 and he left without alerting his cousin. On arrival at home, he was about to sleep when his 'wife' told him that there was a commotion in the yard and she thereafter accompanied him to Nico's yard where the complainant explained that she was raped but did not indicate who did it.
- [44] The Appellant also confirmed the testimony of Nico to the effect that the police were called although the Appellant testified that he telephoned the police and Nico grabbed the phone from him and spoke to the police.
- [45] The Appellant also confirmed that when the complainant returned from the police, Nico came after him and assaulted him with a spade. He had a cut on his hand and the family intervened. The Appellant testified that he was arrested about two days later after the complainant had returned from the police.
- [46] When the Appellant was asked how his semen was found in the body of the complainant, he stated that he does not know because he never had sexual intercourse with the complainant. The gist of the Appellant's testimony in relation to Count 1 is that he was not the rapist and he was asleep at his cousin's place when the complainant was raped.
- [47] The Appellant's testimony in relation to Count 2 is that he never knew the complainant and at the time of the rape, he had left for the North West on 15 January 2016 and only returned three months later. He therefore stated that he could not have raped the complainant because she was raped on 13 February 2016 when he was in the North West.
- [48] It is opportune to indicate that the defence of the Appellant was one of an alibi in respect of both Counts preferred against him, although this defence was not made known to the Court *a quo* and the time of pleading to the charges.
- [49] The Appellant raised the following grounds of appeal as can be gleaned from his Counsel's Heads of Argument. To paraphrase the grounds, the following was raised:

49.1. the Court erred in rejecting the version of the Appellant as false;

49.2. the Court erred in placing reliance on the evidence of a single witness in respect of both counts of rape;

49.3. the Court misdirected itself in law by concluding that there were multiple rapes in respect of both counts.

49.4. the Court erred in concluding that the State proved beyond reasonable doubt that the DNA evidence is conclusive and can be relied upon as evidence against the Appellant.

[50] It is trite that an Appeal Court is loath to overturn a trial Court's findings of fact, unless they are shown to be vitiated by a material misdirection or are shown by the record to be wrong².

[51] The Appellant raises the issue of the two complainants being single witnesses to their rapes and that the Court *a quo* did not give due consideration to the cautionary rule in respect of single witness testimony.

[52] Now Section 208 of the Criminal Procedure Act³ provides guidance in this regard:

"An accused may be convicted of any offence on the single evidence of any competent witness"

[53] In evaluating the evidence, the presiding Magistrate warned himself of the dangers of convicting an accused based on single witness testimony⁴.

[54] I am satisfied that the Court *a quo* gave due consideration to the principles regarding single witness testimony and in fact went further to deal with the other evidence implicating the Appellant. This other evidence was the DNA evidence directly implicating the Appellant.

² S v Naidoo & Others 2003 (1) SACR 347 SCA @ para 26

³ 51 of 1977

⁴ Record: page 510: lines 20 – 25 and page 511: lines 1-4

- [55] The Court *a quo* dealt in detail with the chain of evidence for the reason that the Appellant disputed that the buccal sample was his and that he consented to his buccal sample being taken.
- [56] Juxtaposed to the forensic DNA evidence, the Appellant's defence in respect of Count 1 is that he does not know how his semen was found on the body of the complainant and that he never had sexual intercourse with the complainant. Furthermore, the Appellant testified that he did not give consent for his buccal sample to be taken.
- [57] The Court *a quo* as stated above dealt extensively with the chain of evidence in both counts and came to the conclusion that the buccal samples from the Appellant were a match to the sexual assault kits in both counts. I cannot fault the reasoning of the presiding Magistrate in the Court *a quo* nor is there any misdirection that can be attributed to the findings made in respect of the forensic DNA evidence.
- [58] With regard to the consent of the Appellant for the buccal samples to be taken and whether he had signed the respective forms in relation to both counts, the presiding Magistrate in the Court *a quo* found that the signatures appearing on the buccal sample forms were those of the Appellant. Once again, I cannot fault the reasoning of the Court *a quo* in coming to the finding of the signature and I can find no misdirection that can be attributed to the presiding Magistrate in making this finding.
- [59] The next issue raised by the Appellant is that the presiding Magistrate in the Court *a quo* erred as a matter of law in finding that the Appellant committed multiple rapes in respect of both counts. In this regard the Court *a quo* dealt in detail with the evidence of the complainants and came to the conclusion that indeed in respect of Count 1 multiple rapes occurred because the evidence showed that the complainant in Count 1 was made to wash herself before the Appellant again raped her. Accordingly, in my view, the Court *a quo* applied the law correctly by finding that multiple rapes did exist in respect of Count 1.

- [60] In respect of Count 2, the Court *a quo* once again dealt with the evidence of the complainant that she was raped on separate occasions at the graveyard and was also sexually assaulted anally. I cannot fault this finding of the presiding Magistrate and I am of the considered view that the law has been correctly applied insofar as the principles to be applied when making a finding in respect of multiple rapes⁵.
- [61] Accordingly, it is my view that the appeal against his convictions on both counts must fail.
- [62] The next issue to be dealt with is the sentence of life imprisonment as imposed by the Court *a quo* which triggered the automatic appeal.
- [63] The Court *a quo*, in sentencing the Appellant took into account that he was charged with rape as read with Section 51(1) of the Criminal Law Amendment Act⁶. Section 51(1) read with Part 1 of Schedule 2 enjoins a Court, including the Court *a quo* to impose a sentence of life imprisonment in circumstances as pertains in the Appellant's case.
- [64] Section 51(3) of the Criminal Law Amendment Act, however, provides a Court with a discretion to impose a lesser sentence than life imprisonment where it is satisfied that 'substantial and compelling circumstances exist' for a lesser sentence.
- [65] The presiding Magistrate in the Court *a quo* was of the view that substantial and compelling circumstances did not exist in this case. The Appellant broadly speaking is of the view that the presiding Magistrate erred in this regard.
- [66] In considering an appropriate sentence in circumstances such as the present, the case of **S v Malgas** is enlightening and guides a Court in evaluating the evidence for or against the imposition of a minimum sentence in accordance with Section 51(1) of the Criminal Law Amendment Act:

⁵ S v Blaauw 1999 (2) SACR 295 (W) at 299 C

⁶ 105 of 1997

“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.”⁷

[67] Now in this case, the Appellant raises the point that the complainant in Count 1 did not suffer any injuries and no victim impact report was presented. This point fades into obscurity when one has regard to Section 51(3) (aA) (ii) of the Criminal Law Amendment Act:

“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:

... an apparent lack of physical injury to the complainant”

[68] In **S v Kgosimore⁸ 1999 (2) SACR 238 SCA** it was held that the approach of a Court of Appeal on sentence should be the following:

*“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 enquiry. (Cf **S v Pieters 1987 (3) SA 717 (A) at 727 G – I**). Either the discretion was properly and reasonable 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”.*

⁷ 2001 (3) All SA 220 (A) at 227 para 9

⁸ 1999 (2) SA 238 SCA at 241 para 10

[69] Taking the above principles into account, it is my considered view, that the presiding Magistrate in the Court *a quo* did not commit a misdirection in finding no substantial and compelling reasons. The Court *a quo* did take the personal circumstances of the Appellant in line with the trite triad principles of the criminal, the crime and the interest of society and applied them correctly in the circumstances of this case.

[70] Accordingly, it is my view that in this case, this Court, having found no misdirection on the part of the presiding Magistrate, is duty bound to uphold the sentence imposed in the Court *a quo* and the appeal against the sentences imposed in both counts must fail.

[71] In the result I propose the following Order:

- a). The appeal against the conviction of the Appellant in respect of Count 1 and Count 2 is dismissed;
- b). The appeal against the sentence imposed in respect of Count 1 and Count 2 is dismissed.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

I concur

W. KARAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down in Court and circulated electronically by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **11 August 2023**.

Date of hearing: 13 March 2023

Date of judgment: 11 August 2023

Appearances:

Counsel for the Appellant:

MS MUSEKWA

Instructed by:

Legal Aid South Africa

sindisah@legal-aid.co.za

Counsel for the Respondent:

Adv. M.M. MALELEKA

MMaleleka@npa.gov.za

Instructed by:

**OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS JOHANNESBURG**