



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: AR369/2022**

In the matter of:

**ZAKHELE NDLOVU**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**ORDER**

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**On appeal from:** Greytown Regional Court (Magistrate Masikane presiding):

1. The appeal against conviction and sentence is dismissed
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**JUDGMENT**

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**PIETERSEN AJ (MLABA J concurring):**

**Introduction**

[1] The appellant was convicted in the Regional Court, Greytown, on two counts of sexual assault as well as kidnapping and rape. The appellant was sentenced to five and seven years' imprisonment in respect of the two counts of sexual assault, five years' imprisonment on the count of kidnapping, and life imprisonment on the count of rape. The appellant successfully applied for leave to appeal against both

conviction and sentence in respect of the sexual assault and kidnapping charges and exercised his automatic right of appeal to this court in respect of the count of rape.

### **Conviction**

[2] It is common cause that at some point in time, the appellant and the complainant were engaged to be married in terms of customary law. The complainant's aunt introduced her to the appellant for the first time during December 2017. At the time, the complainant was a 17 year old scholar. The proposed marriage was subsequently arranged between the appellant and the complainant's step-mother. It is further common cause that the complainant initially agreed to marry the appellant but that she subsequently changed her mind and declined the marriage.

[3] The appellant had already paid part of the agreed lobola to the complainant's family and spoiled the complainant with gifts before the complainant refused to marry the appellant. The complainant testified that she felt that the appellant, who was 57 years of age at the time, was too old and the complainant also had a boyfriend. The result was that the complainant refused to continue with the proposed marriage to the appellant.

[4] The complainant testified that the appellant sexually assaulted her on two occasions. The first incident occurred during February 2018 at the appellant's rented house in Greytown where the appellant tried to have sexual intercourse with her. The complainant refused and managed to successfully resist the appellant.

[5] The second incident occurred shortly thereafter on the way to the complainant's home from Greytown, when the appellant parked his vehicle inside a forest in the middle of the night and again tried to have sexual intercourse with the complainant. The complainant again successfully resisted the appellant's attempts.

[6] The complainant testified that after the two incidents of sexual assault she went back to school in Empangeni. Some months later, during the June/July 2018 school holidays, the complainant was in her hometown of Muden and walking home from church in the company of a friend. The appellant, with the assistance of two

men, proceeded to find the complainant and physically removed her from the company of her friend and placed her in the back seat of a waiting vehicle. The appellant was seated in the front passenger seat and the two men who had grabbed the complainant, sat at the back with the complainant between them, effectively preventing her from escaping.

[7] After the kidnapping of the complainant, she was taken by the appellant and the two men to the appellant's home at Ntembisweni. It was common cause that on the night of their arrival, no sexual intercourse took place because the complainant was in her menstrual period. The complainant testified that when her menstrual period was over, the appellant had sexual intercourse with her on several occasions and against her will. The appellant had used physical violence to overcome her resistance. The appellant testified however that the sexual intercourse was consensual, and claimed that he was in fact raped by the complainant as he was forced at times to have sexual intercourse with her against his will.

[8] The complainant testified that she was unable to escape from the house as the doors were locked and the windows had burglar bars. The complainant said that she was kept in this house against her will for a period of 10 days. During this time, the appellant would leave for work every morning and she would remain alone at the appellant's house. She did not see any neighbours and was unable to leave the house in order to seek assistance. Eventually, on the last day, the complainant screamed out the windows which alerted the neighbours, who then called the police. It was common cause that upon their arrival, the police forcefully opened the door to the house and found the complainant handcuffed to a table.

[9] When the complainant was rescued by the police, she was taken to a medical practitioner who examined her and found injuries to her vagina that were consistent with her having recently been penetrated.

[10] The appellant submitted that the State had failed to prove beyond reasonable doubt that he had kidnapped and raped the complainant, or committed any acts of sexual violence against the complainant. The appellant had pleaded not guilty on all four counts.

[11] It was the appellant's case that he chose the complainant to be his wife and he then proceeded to take part in the customary ceremony and paid the agreed lobola. The appellant then regarded the marriage to have been complete and expected the complainant to move in with him as she was now his wife.

[12] The appellant denied that he sexually assaulted, kidnapped and raped the complainant. The appellant denied that he sexually assaulted the complainant on two occasions and testified that he merely fetched the complainant from her home according to his cultural norms and took her to his rented house in Greytown as they were married. The appellant denied that he at any stage raped the complainant and maintained that all sexual intercourse was consensual. The appellant further testified that he expected the complainant to resist his men when they removed her from the company of her friend in Muden, as it is part of the appellant's culture for a bride to feign resistance. The appellant also denied that the complainant was kept at his house in Ntebisweni against her will. The appellant submitted that there were no burglar bars in front of the windows and that it was the decision of the complainant to stay with him as her return would bring shame to her family as they were married in terms of customary law.

[13] When the matter was heard in the court *a quo* during 2021 and 2022, the complainant was already an adult. However, at the time of the offences being committed, the complainant was 17 years of age.

[14] In argument before us, the principal issue was whether the court *a quo* was correct in its findings that the complainant had not consented to the acts of sexual penetration, that the complainant was sexually assaulted, and that she had been taken to the appellant's home against her will. Mr Leppan, who appeared on behalf of the appellant, submitted that the complainant's evidence was riddled with inconsistencies and that the court should not accept her evidence, especially considering that she was a single witness in respect of the counts of sexual assault and rape.

[15] The court *a quo* correctly found that the counts of sexual assault, kidnapping and rape rest on the evidence of a single witness and that the complainant's evidence therefore has to be viewed with caution and circumspection.<sup>1</sup> In *R v Nhlapo*<sup>2</sup> it was held that:

'... a cautionary rule of the kind mentioned may well be helpful as a guide to the right decision. It naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question whether the evidence of the [State] witness should be accepted as truthful and accurate.'

[16] In conclusion on the issue of a single witness, in *S v Sauls*<sup>3</sup> it was held that:

'... the exercise of caution must not be allowed to displace the exercise of common sense.'

[17] In assessing the evidence, the court *a quo* took into account that the complainant was 17 years old at the time of the incidents and remarked that there may have been some discrepancies in the complainant's evidence. However, it found that these discrepancies were not sufficient enough to reject the complainant's evidence in its totality. In this regard it was held in *S v Cwele*<sup>4</sup>:

'The State must therefore satisfy the court, "not that each separate fact is inconsistent with the innocence of the [appellants], but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence".'

[18] In assessing the evidence, the court *a quo* accepted that there may have been some errors in the complainant's evidence but it duly took into account that the complainant was a child with no biological parents, who was being introduced into a marriage by her aunt who also received payment of the lobola. The court *a quo* found that the marriage was arranged by the complainant's step-parents, her aunt and the pastor of the family's church. The complainant testified that she informed these adults that she no longer wanted to marry the appellant but they insisted that the marriage must proceed as a failure to marry would result in the lobola having to be returned.

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<sup>1</sup> *S v Sauls and others* 1981 (3) SA 172 (A) at 180; and *ZF v S* [2016] 1 All SA 296 (KZP) para 34.

<sup>2</sup> *R v Nhlapo* 1953 (1) PH H11 (A) at 17.

<sup>3</sup> *S v Sauls and others* 1981 (3) SA 172 (A).

<sup>4</sup> *S v Cwele and another* [2012] ZASCA 155; 2013 (1) SACR 478 (SCA) para 19.

[19] In any event, in respect of the count of rape, the complainant's evidence was corroborated by medical evidence. Dr Madi testified that the complainant was sexually violated and her injuries were depicted. This evidence was not challenged in cross-examination except for suggesting that the injuries are also consistent with acts of robust sexual conduct, which Dr Madi conceded could be possible.

[20] I agree with the court *a quo* that it is not necessary to dwell on whether the complainant and the appellant concluded a valid marriage in terms of customary law,<sup>5</sup> as the crux of the matter is whether the complainant consented to be taken away by the appellant and to have sexual intercourse.

[21] In dealing with the count of kidnapping, the court *a quo* had the benefit of hearing the evidence of another State witness, who saw the complainant being taken away by the appellant's men. The appellant conceded under cross-examination that the complainant resisted being taken away and the court *a quo* found, correctly in my view, that the complainant was taken against her will.

[22] When considering the two counts of sexual assault, the court *a quo* correctly found that it was common cause that the appellant fetched the complainant from her home and took her to his rented house in Greytown. Whilst the appellant disputed the sexual assault, the court *a quo* found that the appellant's denials raised further unanswered questions, such as, *inter alia*, why new clothes were bought for the complainant. The complainant may be criticised for not reporting the incidents of sexual assault to the police at the time but the court *a quo* pointed out that the complainant was still a child who was essentially forced into a marriage with the appellant by her step-mother, aunt and pastor despite the fact that the complainant had already informed them of her unwillingness to marry the appellant. The court *a quo* was therefore correct in accepting the complainant's version in respect of these counts.

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<sup>5</sup> It bears mentioning that the existence of a marital relationship or any other type of relationship is in any event not a valid defence in terms of section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[23] Mr Leppan submitted that there were a large number of inconsistencies in the complainant's evidence and that her evidence should be rejected in its totality. In this regard Mr Leppan relied on the complainant's initial denial that the appellant bought her new clothes, only to admit this later under cross-examination. Another example is the complainant contradicting herself under cross-examination when she said she had never been to Greytown. However, I agree with the court *a quo* that when considering the complainant's evidence in its totality, it is satisfactory in all material respects considering the complainant's age and circumstances at the time of the incidents.

[24] In so far as the court *a quo*'s findings of fact and credibility are concerned, a court of appeal will not ordinarily depart from such findings unless they are vitiated by irregularity or unless an examination of the evidence reveals that they are patently wrong. Ultimately, the trial court has the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.<sup>6</sup>

[25] I am unable to find any misdirection in the court *a quo*'s consideration of the facts and the conclusion that the State had proved the offences beyond reasonable doubt. In the result, the appeal against the convictions must fail.

### **Sentence**

[26] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In *S v Bogaards*<sup>7</sup> Khampepe J stated as follows:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.' (Footnotes omitted.)

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<sup>6</sup> *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 705–706; *S v Francis* 1991 (1) SACR 198 (A) at 204c–f; *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e–f.

<sup>7</sup> *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

[27] In *S v Malgas*<sup>8</sup> Marais JA held that when a court imposes a sentence in respect of an offence referred to in the Criminal Law Amendment Act 105 of 1997, it is no longer given a

‘. . . clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances.’

The emphasis, he held, was on ‘the objective gravity of the type of crime and the public’s need for effective sanctions against it’.

[28] The appellant’s conviction on the count of rape, where the complainant was raped more than once by the appellant, attracts the prescribed sentence of life imprisonment in the absence of substantial and compelling circumstances to justify a lesser sentence.<sup>9</sup>

[29] Mr Leppan argued that the sentence imposed by the court *a quo* was shockingly inappropriate and ought to be interfered with on this basis. To determine whether there is any substance in the argument, it is necessary to consider the three sets of interests that are required to be balanced in the sentencing process.

[30] In assessing whether an appropriate sentence was imposed on the appellant, it is necessary to consider the crime, the offender and the interests of society.<sup>10</sup> It has further been held in *S v Rabie*<sup>11</sup> that:

‘[t]he main purposes of punishment are deterrent, preventive, reformatory and retributive’.

[31] In *S v Chapman* the court held:<sup>12</sup>

‘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 the insecurity which constantly diminishes the quality and enjoyment

<sup>8</sup> *S v Malgas* 2001 (1) SACR 469 (SCA) para 8.

<sup>9</sup> See section 51(1) and 51(3), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

<sup>10</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

<sup>11</sup> 1975 (4) SA 855 (A) at 862A-B.

<sup>12</sup> 1997 (2) SACR 3 (SCA) at 5c-e.



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.'

[32] The court also held in *S v Rabie*<sup>13</sup> that '[p]unishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

[33] In *S v Banda and others*<sup>14</sup> it was held the court will have to take into consideration the accused's personal circumstances, the interests of society as well as the seriousness of the offences.

[34] The court *a quo* considered the personal circumstances of the appellant. He was 57 years old at the time of the commission of the offences, a first offender, in stable self-employment as the sheriff of Greytown and his family's breadwinner. He displayed no remorse for violating the complainant. It must be added that as a result of his false denial, he put the complainant through the gruelling, and unpleasant experience of having to testify about her ordeal. While the appellant's lack of remorse is not an aggravating factor,<sup>15</sup> it is indicative of a failure on his part to take responsibility for his actions and of an absence of empathy for his victim. The court *a quo* took most of these factors into account.

[35] The court *a quo* also took into account the complainant's circumstances as contained in the victim impact statement. It is apparent from this statement that the offences left the complainant traumatised and she tried to commit suicide on several occasions. The complainant was an orphan, being raised by step-parents and these step-parents together with the church and the appellant colluded to force the complainant into a marriage. The complainant was without any moral support and she was fighting alone for justice. The complainant was an innocent, defenceless and vulnerable child at the time, who now has to live for the rest of her life with these emotional scars and the stigma of having been humiliated and violated.

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<sup>13</sup> *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.

<sup>14</sup> *S v Banda and others* 1991 (2) SA 352 (BG) at 356E-F.

<sup>15</sup> *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 16.

[36] The court *a quo* further took into account that the appellant knew very well that the complainant no longer wanted to go ahead with the marriage and that the sexual intercourse was without the complainant's consent. Notwithstanding her wishes, the appellant proceeded to kidnap the complainant with the assistance of two men and raped her on several occasions. On the last day, the complainant was handcuffed to a table leg as if she was an animal.

[37] The court *a quo* found that a custodial sentence was the most appropriate sentence in the circumstances. I can detect no misdirection in the court *a quo*'s approach to sentence. The offences, for the reasons cited above, are of a particular serious nature. The personal circumstances of the appellant have properly been weighed against the seriousness of the offences and the interests of society. The carefully considered sentence imposed by the court *a quo* is found to be proportionate to 'the crime, the criminal and the legitimate needs of society'.<sup>16</sup> I am of the view that the court *a quo* correctly found that there are no substantial and compelling circumstances to justify a deviation from the imposition of life imprisonment in respect of the rape conviction.

[38] In the circumstances, no basis has been established for this court to interfere with the sentence imposed by the court *a quo*. The appeal against sentence must therefore also fail.

### **Order**

[39] In the result, I make the following order:

1. The appeal against conviction and sentence is dismissed.

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**PIETERSEN AJ**

I agree.

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<sup>16</sup> *S v Malgas* 2001 (1) SACR 469 (SCA) para 22.

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**MLABA AJ**