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

Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 40/2018

In the matter between:

VUYO DINGIZWAYO **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen J, Williams AJ

Heard: 01 December 2023

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **21 December 2023** at 14h00pm.

Summary: Criminal Appeal against a sentence of life imprisonment imposed in the Regional Court – appellant charged with two counts of rape – co-accused acquitted, appellant convicted of one count of rape – gang rape – no substantial and compelling circumstances to deviate from life imprisonment - appeal dismissed.

ORDER

On appeal from: Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate T Melodi sitting as court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

PETERSEN J

Introduction

[1] This is an appeal against sentence only. The appeal comes before this Court by virtue of the provisions of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA'), as the appellant was sentenced to life imprisonment in the Regional Court.

[2] The appellant and three co-accused were charged with two counts of contravening section 3 read with ss 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) – counts 1 and 2. The charges were further read with section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). On 18 September 2014 the appellant was convicted on count 1 and acquitted on count 2. His co-accused were acquitted on both counts. On 30 September 2014 the appelant was sentenced to life imprisonment.

The grounds of appeal

[3] The appellant assails the sentence of life imprisonment on a contention that the sentence is shockingly inappropriate when regard is had to the fact that he was relatively young, a first offender who was 28 years old at the time of sentencing, and 25 years old at the time of the commission of the offence, and he is a candidate for rehabilitation.

Background facts

[4] The appeal against sentence cannot be considered without having regard to the facts which underscore the conviction. The appellant raised the defence of consent to the rape which occurred on 20 November 2008, for which he was convicted. The appellant was linked to the rape by DNA evidence which he formally admitted in terms of section of 220 of the CPA.

[5] On 20 November 2008, J[…] M[…] the complainant on count 1, her sister K[…] M[…] and their cousin one P[…], paid a visit to her grandmother at Jouberton Extension 10. Between 16h00pm and 17h00pm, the sisters M[…] left with P[…] to visit J[…] M[…] and P[…]'s boyfriends, at Jouberton Extension 12. Both boyfriends share a common name, Lebogang. At around 21h00pm they left the residence of their boyfriends accompanied by their boyfriends and one Papa. They separated into pairs. P[…] and her boyfriend were walking behind the rest of the group. P[…] and her boyfriend disappeared along the way prompting a frantic search for them.

[6] During the search they encountered a group of young boys. When they asked them about the couple, the appellant told them that they had just seen a couple run past them. They entered a hostel in search of the pair, where they encountered another group of young men, who told them that they had not seen the missing

couple. The search for the missing couple continued well into one or two hours.

[7] They eventually encountered the two groups of young men who were now together, totaling about seven in number. They were all armed with weapons, which included axes and pangas. As they attempted to walk through the group, two members of the group grabbed K[…] M[…] and three grabbed J[…] M[…]. Thie male companions, Lebogang and Papa were threatened with knives and told that they would be stabbed if they came any closer to the group. At that time, the members of the group who had grabbed hold of the M[…] sisters, made their way with them to a hillock. The group who was dragging K[…] M[…] were assaulting her with open hands.

[8] The appellant was part of the group dragging J[…] M[…] to the hillock. As she was screaming and crying, the appellant struck her with the flat side of an axe on her upper arms, instructing her to remain quiet. At the top of the hillock, the appellant undressed J[…] M[…] and raped her vaginally with his penis. A co-perpetrator initially described as accused 3 (who was acquitted) which does not make a difference to the jurisdictional fact that Ms M[…] was gang raped, stood by with his trousers lowered, impatient to rape Ms M[…]. This person dissatisfied with the appellant's tardiness,

pushed him aside and proceeded to rape Ms M[…] vaginally with his penis. The co-perpetrator described as accused 1, who was also acquitted, stood by on the lookout for the police. When he raised the alarm about the police, the group ran away leaving Ms M[…] naked on the hillock. The M[…] sisters were in fact both found naked on the hillock, when the police who were flagged down by J[…] M[…]'s boyfriend, arrived. K[…] M[…] had been raped by the group who dragged her away to the hillock.

[9] The appellant in his evidence claimed that he engaged in consensual sexual intercourse with J[…] M[…], three weeks prior to the incident. For this reason, he believed it accounted for the presence of his DNA on the vaginal swab obtained from her. He disputed any involvement in the events, where the sisters M[…] were raped on the hillock.

The test on appeal against sentence

[10] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. The position is succinctly encapsulated in *S v Malgas* 2001 (2) SA 1222 (SCA) as follows:

> "[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of

course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(emphasis added)

[11] The ground of appeal relied on by the appellant is analogous to what Ponnan JA warned against in *S v Matyityi* (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010), at paragraph 14:

> "[14] Turning to the respondent's age: What exactly about the respondent's age tipped the scales in his favour was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness' without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. **In my view a person of 20 years or more**

> **must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor**. At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box and **we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did**."
>
> (emphasis added)

[12] The appellant testified in mitigation of sentence. Save for testifying about his personal circumstances in a perfunctory manner, no evidence was adduced regarding his alleged immaturity to mitigate the imposition of sentence. Tellingly, no remorse was verbalised by the appellant for his most dastardly deed committed with his cohorts as a gang, where he played the leading role. There was no evidence from the appellant to explain why he acted in the manner he did.

[13] The evidence only revealed that he was born on […] 1986, making him 28 years old at the time he was sentenced, and 25 years old at the time of the commission of the offence. He completed Grade 11 at school. He was unemployed doing piece jobs. He lived with his father. His mother had passed away. He was single, with no

children. Save for being a first offender, nothing stands out as substantial and compelling circumstances meriting deviation from the mandated sentence of life imprisonment, as correctly found by the court *a quo*.

[14] The prosecutor *in casu* did not call Ms J[…] M[…] in aggravation of sentence. In this regard, Ponnan JA remarked as follows at paragraph 15 of *Matytyi*:

> *"*[15] In *Dlamini* Nicholas AJA made the following observation: '**whereas criminal trials in both England and South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, the procedure at the sentencing stage is almost perfunctory.' That by and large continues to be the position**. This matter was conducted somewhat differently. Notwithstanding the respondent's guilty plea, evidence ostensibly in proof of aggravation was led by the state. Much of it though went to guilt not sentence. We thus know little, if anything, about Mr MF. Was he a breadwinner? Were others dependent on him? If so, how many? What were his scholastic or other achievements? What type of work did he do? What was the effect of his death on his family, employer and community? I hazard that the value of the sum of his life must have been far greater than the silent crime statistic that he has come to represent in death. It surely would therefore be safe to infer that in some way or the other his death must have had devastating consequences for others. Although she testified,

we know as little about the harm done to Ms KD by the respondent's deeds. All of those questions regrettably remain unanswered in respect of her as well.

…

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence but also the impact of the crime on the victim be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim. As Müller and Van der Merwe put it:

> 'It is extremely difficult for any individual, even a highly trained personsuch as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'"

(emphasis added)

[15] Save for the address of the prosecutor in aggravation of sentence, we know nothing about the effect of the rape on Ms M[…]i. At most

the court *a quo* and this Court is left to consider that the rape and the circumstances thereof had to be traumatic for the complainant and must have affected the quality of her life thereafter. She was gang raped and left naked on a hillock with no regard for her wellbeing.

[16] The personal circumstances of the appellant and in particular, his age and being a first offender, highlighted as a single ground of appeal, do not constitute substantial and compelling circumstances when weighed against the circumstances of the rapes and the interest of the complainant. When weighed against the circumstances of the rape of the M[…] sisters as whole and the interests of society, the personal circumstances of the appellant necessarily recede into the background.

[17] The words of Mohamed CJ in *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paragraphs 3 - 4 as echoed in *Tshabalala v S; Ntuli v S* (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019), which has become the mantra of many courts in our country, since first being expressed by the Chief Justice remain apt:

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

[18] In *Tshabala; Ntuli* the Constitutional in separate judgments, expressing its views on the scourge of rape in our country said, *inter alia*, the following:

MATHOPO AJ (as he then was):

"[1] The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men

view sexual violence as a method of reasserting masculinity and controlling women.

…

[61] I interpose to say that in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act which prescribes minimum sentences for certain specified serious offences. The Government's intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation.

[62] In further response to such conduct the Legislature in 2017 introduced SORMA to address the concerns which were raised by society about violence against women and children. Under SORMA's defined crime of rape, instrumentality is no longer a requirement. The Legislature acknowledged that rape now encompasses more than instrumentality

of male genitalia inserted into female genitalia. It therefore gave the definition of rape a wider meaning.

[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.

KHAMPEPE J:

[68] Who knows what the black woman thinks of rape? Who has asked her? Who *cares*?" This matter comes before this Court due to an abhorrent night wherein certain women in the Umthambeka section located in the township of Tembisa were raped by young men, some of whom were known to them, who broke into their homes.

…

[70] Rape is often mischaracterised as being an act of sexual intercourse, absent of consent, committed by inhumane monsters. This is a dangerous mischaracterisation of rape. Words matter. Words give a construction of a certain viewpoint of the world, and this viewpoint tends to be gendered. Although rape is defined as an unlawful and

intentional act of sexual penetration of one person by another, without consent, it must be buttressed that the victim does not experience rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation."

[71] To this end, the first judgment approvingly quotes Langa CJ in *Masiya*, where he stated that:

"Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy."

…

[73] Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side.

…

[77] The importance of the proper construction and characterisation of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims – the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural. We

ought to heed the warning by Sachs J, albeit in the context of domestic violence that:

"The ineffectiveness of the criminal justice system . . . sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little."

[78] Addressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our communities."

(emphasis added)

[19] The court *a quo* was correct in its assessment not to deviate from the mandated sentence of life imprisonment. The appeal against sentence accordingly stands to be dismissed.

Order

[20] In the result, the following order is made:

The appeal against sentence is dismissed.

_____

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

_____

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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