

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**

**Appeal No.: CA 52/2023**

**Regional Court Case No.: RC04/2022**

**In the matter between:**

**AMOGELANG HELLITON MASONDO**

**Appellant**

**and**

**THE STATE**

**Respondent**

**Coram:**

**Hendricks JP & Petersen J**

**Date of hearing:**

**17 May 2024**

**Delivered:** The judgment was handed down electronically by circulation to the applicants' representative *via* email. The date and time for hand-down is deemed to be **26 June 2024** at 14h00.

## **ORDER**

1. Condonation for the late noting and prosecution of the appeal is granted.
2. The appeal against sentence on count 2 is dismissed.

## **JUDGMENT**

### **PETERSEN J**

- [1] The appellant was charged in the Regional Court, Itsoseng with kidnapping (count 1); and contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) ('SORMA') – count 2.
- [2] The appellant pleaded not guilty to both charges on 07 June 2022. Following a marathon trial, he was convicted on both counts on 4 September 2023. On 29 September 2023, he was sentenced on count 1 to five (5) years imprisonment; and life imprisonment on count 2. In terms of section 39(2)(a) of the Correctional Services Act 111 of 1998, the sentence of five (5) years imprisonment

automatically runs concurrently with the sentence of life imprisonment.

[3] The appeal is before this Court by virtue of the automatic right of appeal premised on the sentence of life imprisonment imposed by the Regional Magistrate on count 2. The appeal lies against the sentence of life imprisonment imposed on count 2 only. The appeal was disposed of in terms of section 19(a) of the Superior Courts Act 12 of 2013.

[4] In the Notice of Appeal, the appellant assails the sentence imposed, asserting that the Regional Magistrate misdirected himself in failing to find that the personal circumstances of the appellant, constitute substantial and compelling circumstances which justify a departure from the mandated sentence of life imprisonment. The sentence is therefore said to be shockingly inappropriate when considering the cumulative facts in mitigation.

[5] The appellant seeks condonation for the late filing of the appeal. The prosecution of the appeal was delayed by Legal Aid South Africa securing the transcript of the proceedings, which were received on 30 November 2023. The matter was allocated to *Mr Gonyane* from Legal Aid South Africa on 13 December 2023, and following consultation with the appellant, the papers were drafted, and the record filed with the Registrar. A case is made for the granting of condonation, which is accordingly granted.

[6] The test on appeal against sentence is trite. In *S v Bogaards* 2013 (1) SACR 1 (CC), the Constitutional Court restated the approach that:

“[14] Ordinarily, sentence is within the discretion of the trial court. An appellate court’s power to interfere with sentence 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; ...”

(emphasis added)

[7] No issue is taken by the appellant with the fact that the State proved the existence of the jurisdictional fact that the complainant was raped more than once as provided in section 51(1) read with Part I of Schedule 2 of the CLAA. The appellant essentially takes issue with the sentence, on the basis that the Regional Magistrate should have deviated from the sentence of life imprisonment and imposed an alternative custodial sentence.

[8] Before turning to the appeal against sentence, it is prudent to briefly consider the facts which underscore the conviction of the appellant on both counts. The appellant and the complainant are connected through a child they share. This is where the events giving rise to the conviction of the appellant started. On 25 June 2021, the complainant was walking with a male person, Tebogo Sekedi (also known as Stoba) when they encountered the appellant. The appellant told the complainant that he wanted the child. When the complainant asked him why he wanted the child at that late hour of the day, he

remained silent. They continued walking. When the complainant was near her residence, the appellant told her that he wanted to talk to her. Tebogo Sekedi was requested to stand aside whilst they spoke. The appellant with force pulled the complainant to his residence. This version of events was confirmed by Tebogo Sekedi.

[9] When they arrived at his residence, the appellant assaulted the complainant in the presence of his mother, and despite being reprimanded by his mother, he continued. He threatened to burn down his mother's house and kicked a primus stove on which his mother was cooking. The appellant told her that they would be going to the residence of a certain Madida and threatened to harm her with a knife if she screamed. She saw a kitchen knife in his pocket which scared her.

[10] They left for Madida's place, found him in the yard and the appellant spoke to him whilst she stood at a distance. They eventually entered Madida's house where a one plate stove was on. The appellant warmed his hands on the stove. They left for another room where the appellant instructed her to undress herself. When she refused, he pushed her to the bed. She fell on her back, and he undressed her by removing her shoes, her trousers and her pantie, leaving her T-shirt on. The appellant stripped himself naked and told her that they should get into the bed between the blankets. Then without her consent and under threat from the appellant, he raped her vaginally using a condom. When he was done, the appellant slept. When he woke up, he raped the complainant vaginally for a second time. After the second incident, they were laying

face to face, and both fell asleep. The appellant woke up later and for a third time raped the complainant vaginally. The following day at around 12h00, Madida told the appellant that he was wanted at home. They parted ways.

[11] On arrival at home, she reported the incident to a Kelebogile Magonare. The medical evidence in the J88 completed by the doctor was neutral in that he concluded that the absence of injury did not exclude sexual penetration.

[12] The appellant admitted two previous convictions. On 18 August 2016, he was convicted of a contravention of section 3 of the SORMA, committed on 14 March 2015, and sentenced to twenty-four (24) months correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 ('CPA'). On 11 December 2018, he was convicted of culpable homicide for an incident which occurred on 2 January 2018 and sentenced to four (4) years imprisonment in terms of section 276(1)(i) of the CPA.

[13] The personal circumstances of the appellant were addressed by his legal representative, *Mr Vorster*, from the bar. The mother of the appellant, Elisa Masondo, was also called in mitigation of sentence. The State adduced a victim impact statement in respect of the complainant in aggravation of sentence. On appeal, the question is ultimately whether the Regional Magistrate *in casu* misdirected himself in sentence to the extent that this Court should interfere with the sentence imposed.

[14] The Regional Magistrate considered the circumstances of the offences, which include the fact that the complainant was deprived of her liberty and ultimately sexually violated three times during the night until the following morning. What the Regional Magistrate omitted to state is that the complainant was also physically assaulted, on her evidence, and the remonstrations from the appellant's mother not to assault the complainant was ignored with a threat that he would burn down his own mother's house.

[15] The personal circumstances of the appellant as considered by the Regional Magistrate in the judgment on sentence, included that he was 25 years old; has one other sibling; resided with his mother who was very supportive of him; that he completed Grade 8 at school; and that he has a child with the complainant whom he was maintaining. The time spent in custody by the appellant from the date of his arrest until sentence which was two years and two months was also considered. The fact that the appellant remained adamant even at the stage of sentencing that he did not commit the crimes alleged against him was considered as demonstrative of an absence of remorse.

[16] The Regional Magistrate further considered the evidence of the mother of the appellant who testified that she is 44 years old, has a spaza shop and livestock and that the appellant who was obedient assisted her with chores at home and in the shop. The concession under cross examination that the appellant is a violent person was also considered.

[17] The Regional Magistrate, in the absence of *Mr Vorster*, the legal representative of the appellant addressing the issue of substantial and compelling circumstances, found that the time spent in custody, the age of the appellant, the fact that he maintained the child he shared with the complainant, and his close bond with his family when weighed up against his relevant previous convictions and absence of remorse, demonstrated no substantial and compelling circumstances. In this regard the Regional Magistrate cannot be faulted.

[18] In *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023), Mocumie JA (Carelse and Mothle JJA and Mjali and Salie AJJA concurring), albeit in the context of the rape of a child under the age of 16 years, made the following observations regarding rape in general, and the issue of absence of injuries in rape matters:

“[1] Rape remains under-reported nationally, but there may be no rapes more hidden than those committed within families. Sexual violence victims ‘often experience a profound sense of shame, stigma and violation’. These factors are compounded by attempts from family members of the victim or the perpetrator to influence the victims not to file charges or, if charges have been filed, to withdraw the case so that the families can resolve the problem amicably. Often the perpetrator offers to pay the medical costs for the victim’s medical treatment, including psychological treatment, and even maintenance of the family in cases of indigent families.

...



[46] The sentence imposed by the regional court is one that is prescribed by the legislature – that of life imprisonment – as it found that the appellant raped the complainant more than once and the complainant was under the age of 18 years. When setting out minimum sentencing for certain offences, ‘the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, *truly convincing reasons for a different response*’. (Emphasis added.)

[47] Counsel for the appellant submitted that the trial court did not take into account the appellant’s personal circumstances. It also, according to counsel, did not take into account that this was not one of the ‘brutal cases’, as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that ‘irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm’.

[48] The Legislature has specifically amended the [Criminal Law Amendment Act to](#) provide categorically that the fact that a complainant was not injured during a rape cannot be considered as compelling or substantial. In terms of s 51(3)(aA) of Act 105 of 1997, which came into operation in December 2007:

‘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:

....

(ii) an apparent lack of physical injury to the complainant;

....

(iv) any relationship between the accused person and the complainant prior to the offence being committed.”

[19] The absence of injuries raised as a factor in this appeal, does not avail the appellant when regard is had to the evidence, in that the complainant under threat of harm, without consent, surrendered to the sexual violation. The sentiments expressed in *Maila* in this regard are equally apt.

[20] The State adduced a Victim Impact Statement (VIS). The complainant expressed herself as follows. At the time of the incident, she was hurt and scared. Her family members were surprised by what happened. She has managed to calm herself since the incident and whilst she is now ‘fine’, she still questions what happened as does her family. She maintains that she did what was right for her, albeit that today she is no longer the same person she used to be. She does not want the presence of any male person in her life and looks at male persons she was on good terms with circumspect. People do not look at her the same way since the incident.

[21] In *Maila*, the Court stated as follows:

“[59] Taking into account *Jansen, Malgas, Matyityi, Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case... Courts should, through

consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, ... are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'."

[22] I cannot find any misdirection on the part of the Regional Magistrate in the imposition of the sentence of life imprisonment on count 2.

### Order

[23] In the result:

1. Condonation for the late noting and prosecution of the appeal is granted.
2. The appeal against sentence on count 2 is dismissed.

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**A H PETERSEN**

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF  
SOUTH AFRICA**

**NORTH WEST DIVISION, MAHIKENG**

I agree.

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**R D HENDRICKS**

**JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST DIVISION, MAHIKENG**

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