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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: CA 36/2017

In the matter between:

JOHANNES OUPA MOTUBATSE **APPELLANT**

AND

THE STATE **RESPONDENT**

CRIMINAL APPEAL

DJAJE DJP; SCHOLTZ AJ

Heard: **29 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **26 JANUARY 2024**

ORDER

The following order is made:

1. The appeal against conviction and sentence is dismissed.

CRIMINAL APPEAL JUDGMENT

DJAJE DJP

[1] This matter was decided on paper at the request of the parties having submitted comprehensive heads of argument. This is an appeal against conviction and sentence where the appellant was convicted of rape. It was alleged that grievous bodily harm was caused to the complainant. After conviction, the appellant was sentenced to life imprisonment.

[2] The facts of this matter are that the complainant on the day of the incident was at the tavern consuming alcohol. She saw the appellant who was also present there. She left the tavern around 02h00 and whilst walking she was attacked by the appellant slapping her on her face and kicking her. She fell down and the appellant pulled towards the bush. In the bush he undressed her clothes and had sexual intercourse with her without her consent. Whilst the appellant was busy having sexual intercourse with her, the complainant testified that a person named Seuntjie Mokoni came and pushed the appellant off her. Mokoni the instructed her to get up and leave. She went to Mokoni's place and slept there until morning. In the morning she went to report the incident to one Sanah Mokwai.

[3] The evidence of Ms Mokwai was that she was at her shop on **13 November 2015** in the morning when the complainant approached her crying with visible injuries. She enquired from the complainant what happened. At first the complainant was afraid to talk to her but then told her what happened to her. The police were called. Ms Mokwai further testified that the appellant approached her and threatened to kill her as she and the complainant had laid charges against him. The state was not able to secure the attendance of the witness Seuntjie Mokoni.

[4] The state handed in a medical report of the complainant with the findings of bruises on her face and arms. The doctor also noted scars in the vagina and the cervix and a semen like substance suggesting sexual intercourse.

[5] At the close of the state case the application for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 was refused and the appellant closed his case without testifying or calling any witnesses.

[6] The court *a quo* accepted the state's version as true and convicted the appellant as charged.

AD CONVICTION

[7] It was argued that the identity of the perpetrator was not proven beyond a reasonable doubt as the complainant was from a tavern on the day of the incident, it was dark and she could not properly identify her attacker. Further that the person who helped the complainant did not testify and that was the person that took the complainant to his place until in the morning. The appellant submitted that the evidence of the first report cannot be reliable as she had to threaten the complainant to tell her what happened. As a result, the complainant only identified the appellant out of fear of being assaulted by Ms Mokwai.

[8] In contention the respondent argued that the identity of the perpetrator was properly established in that the complainant testified that she saw the appellant at the tavern that day and she referred to him by his name and surname. She also recognised his voice during the incident when the appellant told her that he was not satisfied. It was also submitted that the complainant had testified that she knew the appellant prior to the incident. When reporting to Ms Mokwai, the complainant reported that it was the appellant who assaulted and raped her.

[9] The Supreme Court of Appeal in **Arendse v S [2015] ZASCA 131** par 10 stated as follows:

"There is a plethora of authorities dealing with the dangers of incorrect identification. The locus classicus is S v Mthethwa 1972 (3) SA 766 (A) at 768A, where Holmes JA warned that: 'Because of the fallibility of human observation, evidence of identification is approached by courts with some

caution. In R v Dladla 1962(1) SA 307 (A) at 310 C-E, Holmes JA, writing for the full court referred with approval to the remarks by James J- delivering the judgment of the trial court when he observed that: 'one of the factors which in our view is of greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased…., In a case where the witness has known the person previously, questions of identification…, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made."

[10] In this matter the main issue is whether the complainant was able to properly identify her attacker on the day of the incident. It was her evidence that she saw the appellant at the tavern before the incident. She knew the appellant very well and that was not disputed. She further testified that she was also able to identify the appellant by his voice when he spoke to her about not being satisfied. The complainant although she had been consuming alcohol at the tavern, she could see her attacker and informed Ms Mokwai that it was the appellant who assaulted and raped her.

[11] It is important to determine whether the failure by Mokoni to testify in corroboration of the complainant's evidence is detrimental to her version. According to the complainant, Mokoni came and reprimanded the appellant. She did not rely on the evidence of Mokoni to assist her with identifying her attacker. Ms Mokwai saw

the complainant crying with injuries and the report made to her was that the appellant assaulted and raped the complainant. The evidence of Mokoni, although important as far as corroboration of the sexual intercourse is concerned, failure to adduce it did not render the complainant's version improbable and unacceptable. The medical report also referred to injuries and that the soft tissue injuries sustained suggest that the sexual activity may not have been consensual.

[12] The appellant in this matter elected not to give any evidence and dispute being at the tavern on the day of the incident or that he knew the complainant or not. In my view the state succeeded to prove its case against the appellant and he was correctly convicted of rape.

AD SENTENCE

[13] On sentence the appellant's argument was that the sentence of life imprisonment is shocking and inappropriate considering the personal circumstances of the appellant. Further that the complainant did not suffer life threatening injuries.

[14] In sentencing the appellant the court a quo found that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable and that the sentence to be imposed is that of life imprisonment. The court found that there were no

substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[15] In contention the respondent submitted that the sentence of life imprisonment imposed is appropriate in that the complainant was assaulted and further that the appellant was not a first offender for the crime of rape. He was previously convicted of rape in **2003** and again in **2015**.

[16] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act") provides that:

"Notwithstanding any other law, but subject to subsection (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

In Part 1 Schedule 2 life imprisonment may be imposed in the offence of rape

(c) involving the infliction of grievous bodily harm.

[17] In sentencing the appellant the Court *a quo* applied the provisions of section 51(1) of the Act and imposed life imprisonment having found that the complainant was assaulted by the appellant before being raped.

[18] A Court of Appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. **See: S v Romer 2011 (2) SACR 153 (SCA) para 22.**

[19] In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. **See: S v Banda and Others 1991(2) SA 352 BGD) at 355.**

[20] The appellant herein was known to the complainant and he took advantage of the fact that the complainant had been drinking at the tavern. He waited for her to leave the tavern and then pounced on her. He humiliated her by assaulting her first and then had sexual intercourse with her in the bush. The offence of rape has been described as a horrific and dehumanizing violation of a person's dignity. It not only violates the mind and body of a complainant but also one that infuriates the soul. The complainant might not have sustained life threatening injuries but she has been scarred for life. There is no amount of punishment that can erase the experience from her mind.

[21] The appellant is not a first offender, he was previously convicted of rape on two separate occasions. He was simply not deterred by the punishment received and he continued to commit the same offence. His personal circumstances that he was 38 years old with two minor children should clearly recede in the background.

[22] In **S v Vilakazi 2012 (6) SA 353 (SCA)** it was held that:

"*The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crimes, the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a*

substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period will be, and those seem to me to be the kind of `flimsy` grounds that Malgas said should be avoided."

[23] Despite the seriousness of the offence the appellant showed no remorse and maintained his innocence throughout the trial. The court *a quo* correctly found that there were no substantial and compelling circumstances and imposed a sentence of life imprisonment.

[24] Having considered the submissions on behalf of the appellants and the respondent, the appeal against sentence stands to be dismissed.

Order

[25] Consequently, the following order is made:-

1. The appeal against conviction and sentence is dismissed.

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J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST DIVISION; MAHIKENG

I agree

_____

H SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	**: 29 NOVEMBER 2023**
DATE OF JUDGMENT	**: 26 JANUARY 2024**
COUNSEL FOR THE APPELLANTS	**: MR E SETUMU**
COUNSEL FOR THE RESPONDENT	**: ADV D G JACOBS**