

Reportable:	YES
Circulate to Judges:	YES
Circulate to Magistrates:	YES
Circulate to Regional Magistrates:	YES

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



**IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**APPEAL NO: CA 13/2023  
CASE NUMBER: R/CA91/2019**

In the matter between:

**KGOTSO EMMANUEL LENKOPANE**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

**Coram: Petersen ADJP, Dewrance AJ**

**Heard: 28 July 2023**

**Delivered: December 2023**

**ORDER**

**On appeal from:** Regional Court, Mmabatho, North West Regional Division, (Regional Magistrate Malane (as she then was) sitting as court of first instance):

1. The appeal against the conviction on counts 1 and 2 is upheld.
2. The conviction on counts 1 and 2, and the resultant sentences are set aside.
3. The appellant is to be released from custody with immediate effect.

## JUDGMENT

### PETERSEN ADJP

#### Introduction

[1] The appellant was charged and tried in the Regional Court, Mmabatho before Regional Magistrate Malane (the court *a quo*). He faced two (2) counts of rape in contravention of section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA').

[2] The State alleged respectively, on counts 1 and 2, that the appellant between 26 and 27 October 2015 and on or about 19 January 2019 respectively and at or near Majemantshe Village in the Regional Division, North-West Province, unlawfully and intentionally committed acts of sexual penetration with N[...] N[...] and D[...] T[...] respectively, by inserting his penis in their vaginas, without their consent. On both counts the rapes are alleged to have involved the

infliction of grievous bodily harm, and on count 2 the complainant is further alleged to have been raped more than once.

- [3] The trial commenced on 9 November 2020. On 26 October 2021 the appellant was convicted on both counts of rape and sentenced on 28 October 2021 to two terms of life imprisonment.
- [4] The appeal comes before this Court by virtue of the automatic right of appeal provided in section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

### **Condonation**

- [5] The appellant seeks condonation for the late prosecution of the appeal. The lateness in prosecuting the appeal according to the appellant is based on a delay in securing a transcription of the record of proceedings during 2022. The transcription further had to be certified as being correct by the court *a quo*, which transpired during November 2022. The court *a quo* presented a statement in terms of Rule 67(5) of the Magistrates Court Rules on 21 February 2023. The respondent does not oppose the application for condonation.
- [6] The explanation proffered by the appellant is reasonable and demonstrates good cause for the granting of condonation, which is accordingly granted.

## **The grounds of appeal**

[7] The appellant assails his conviction and sentence on the following grounds:

### *“AD CONVICTION*

1. *The trial court incorrectly invoked the provisions of section 342A of the Criminal Procedure Act 51 of 1977, as amended, and misdirected itself by denying the Appellant a postponement due to ill health.*
2. *The Appellant did not receive a fair trial as he was denied the right to legal representation and further that he did not have sufficient time, opportunity and resources to prepare.*
3. *In convicting the Appellant, the Court erred in making the following findings:*
  - 3.1 *That the State proved the guilt of the Appellant beyond reasonable doubt.*
  - 3.2 *That the contradictions in the State’s versions are not material.*
  - 3.3 *That the state witness gave evidence in a satisfactory manner.*
4. *In convicting the Appellant, the Court erred in failing to:*
  - 4.1 *Properly analyse or evaluate the evidence of the State witnesses.*
5. *In convicting the Appellant the Court further erred in the following respects:*
  - 5.1 *Rejecting the evidence of the Appellant as not being reasonably possibly true.*
  - 5.2 *Accepting the evidence of the State witnesses and rejecting that of the Appellant.*

### *AD SENTENCE*

6. *An effective term of Life imprisonment on each count is shockingly inappropriate and excessive in that it:*
  - 6.1 *Is out of proportion to the totality of the accepted facts in mitigation.*
  
7. *The Court erred by not imposing a shorter term of imprisonment, more particularly in view of the following factors:*
  - 7.1 *The age and personal circumstances of the Appellant.*
  - 7.2 *The Appellant was a first offender.*
  - 7.3 *The time spent in custody by the Appellant awaiting trial.*
  - 7.4 *The element of mercy was overlooked.*
  - 7.5 *The prospects of rehabilitation were not considered.*
  
8. *The Court further erred in over-emphasizing the following factors:*
  - 8.1 *The seriousness of the offence.*
  - 8.2 *The interest of society.*
  - 8.3 *The prevalence of the offence.*
  - 8.4 *The deterrent effect of the sentence.*
  - 8.5 *The retributive element of sentencing.*
  
9. *The Appellant submits that the convictions be set aside and/or the sentence be set aside and be considered afresh.”*

## **Background**

- [8] The first and second grounds of appeal necessitate regard being had to the history of the remands in the matter to consider the merits of

the grounds of appeal. The first entry made on the appearance sheet which forms part of the Charge Sheet (J15) indicates that the appellant made his first appearance in the Regional Court, Mmabatho on 16 July 2019 before Regional Magistrate Mr Lephadi, which was the position with all subsequent appearances until 27 February 2020.

- [9] It appears that the appellant was legally represented but the details of his legal representative are not recorded. The matter was remanded to 14 August 2019 for consultation. Mr Thuwe was on record for the appellant and the matter was remanded to 13 September 2019 for bail application. On 13 September 2019 the appellant was still represented by Mr Thuwe and the matter was remanded for consultation and a possible bail application to 08 October 2019. On 08 October 2019 the appellant was represented by Mrs Machogo and the narrative changed to the appellant having to bring a bail application on new facts in the District Court and the matter was once again remanded for consultation to 04 November 2019. On 04 November 2019 no further mention was made of a bail application on new facts, but of a trial date for 03 December 2019, with Mrs Machogo confirming that she had consulted with the appellant. The matter was remanded to the aforesaid date for *“witnesses and trial”*. On 03 December 2019, the prosecutor Adv Kalakgosi informed the court that the defence did not have copies of the docket for the second count and still had to consult with the appellant, which Mrs Machogo confirmed. The matter was consequently remanded to 04 December 2019 for copies of the docket to be supplied to the defence and for consultation, and the two complainants were excused. On 04

December 2019 the matter was remanded to 29 January 2020 for witnesses and trial, but the trial could not commence on the said date due to “*no electricity*”.

[10] The matter was remanded to 27 February 2020 for trial but once again could not proceed due to “*no electricity*”, which resulted in a remand to 20 April 2020 for trial. Notably the country was under strict lockdown from the end of March 2020 due to the worldwide Covid 19 pandemic. The appellant was therefore not brought to court from Rooigrond Correctional Centre on two occasions, being 20 April 2020 and 19 June 2020.

[11] On 23 June 2020 the appellant appeared before Regional Magistrate Malane who for the first time and in accordance with the Practice Directives for the Criminal Regional Courts in force at the time, remanded the matter to 24 June 2020 for a pre-trial conference. Notably Mr Lephadi failed to comply with the peremptory directive in the Practice Directives before the matter was remanded for trial on the first occasion. The pre-trial conference was ultimately conducted on 25 June 2020. Mrs Machogo at that stage was still representing the appellant. A full recordal of the readiness of the parties and state of readiness of the matter, was recorded on a document attached to the record. The matter was accordingly remanded to 17 and 18 August 2020 for plea and trial. The appearance of the appellant before Regional Magistrate Malane on 23 June 2020 is pivotal to a proper consideration of the first two grounds of appeal.



- [12] The trial did not commence on 17 August 2020 as the appellant was not transferred to court from Rooigrond Correctional Centre. On 18 August 2020, when the appellant did appear in court, Mrs Machogo reported that he was not well and had not been afforded medical attention at Rooigrond Correctional Centre. The court *a quo* ordered certain police officers to ensure that the appellant received medical attention before the close of business on 20 August 2020 and that he brought back to court on 28 August 2020 with a medical report. By 28 August 2020 the appellant received the requisite medical attention. An alternative trial date was fixed for 17 and 18 September 2020.
- [13] On 17 September 2020, Mrs Machogo was unavailable and the matter was remanded to 18 September 2020 for plea and trial. On 18 September 2020 after numerous trial dates, Mrs Machogo raised a conflict of interest between herself and the appellant and withdrew as attorney of record for the appellant. The transcribed record reflects the following discussion leading to Mrs Machogo being allowed to withdraw as attorney of record. These events constitute part of the genesis of the first ground of appeal, and encapsulates the purported notice given by the State in terms of section 342A of the CPA, which merits close scrutiny:

*“MS MACHOGO: ... Your Worship, the defence Your Worship was ready to proceed with this matter. Your Worship, during our consultation this morning to refresh the accused person, Your Worship, emanated conflict of interest between myself and the accused. Your Worship. As and such, Your Worship I do not have*

*instructions to proceed with this matter and due to the conflict emanated, Your Worship I would like to make an application to withdraw as an attorney of record.*

*COURT: A conflict of interest relating what? Because you, your relationship with your client has been amicable all along, so what happened now?*

*MS MACHOGO: Yes, but this morning, Your Worship, we are not on the same breath as we were on the previous postponement [indistinct]*

*COURT: May I ask for the details?*

*MS MACHOGO: No, Your Worship.*

*COURT: You are not willing to tell me what is wrong?*

*MS MACHOGO: Yes.*

*COURT: Do you confirm that?*

*ACCUSED: Yes.*

*COURT: You are excused Ms Machogo.*

*MS MACHOGO: Thank you, Your Worship.*

*COURT: So what do you intend to do?*

*ACCUSED: Your Honour, I would like to instruct my own attorney.*

*COURT: Your own attorney?*

*ACCUSED: Yes, at own costs.*

*COURT: Thank you. When will you bring that attorney to court?*

*ACCUSED: Month end. Your Honour, end of the month.*

*COURT: September?*

*ACCUSED: Yes.*

*COURT: Are you employed sir, gainfully employe?*

*ACCUSED: Your Honour, my family members are employed, they will be able to pay.*

*COURT: Yourself, are you gainfully employed?*

*ACCUSED: Your Honour, I can afford an attorney.*

*COURT: Okay. Alright. I must just hasten to add and explain to you sir, that this is a very old case, it was already...or it is already a backlog matter on my roll. It should start, or the trial should start as soon as possible. I am going to postpone this matter to 1 October, you must be here at court with your attorney.*

ACCUSED: Yes.

COURT: What I am going to do on the 1<sup>st</sup>, is allow your attorney to be supplied with further particulars, postpone the matter for a short while for consultation and pre-trial conference and then I will set a trial date.

PROSECUTOR: Your Worship, I do have witnesses in this matter, Your Worship, I thought the Court will hear me on this application, Your Worship, by the defence.

COURT: But you cannot force her to proceed.

PROSECUTOR: But in...[intervenes]

COURT: You are going to say. I will allow you to say some things and make submissions then.

PROSECUTOR: Yes, Your Worship. The submissions that I wanted to make. Your Worship, is with regard to the withdrawal by the defence. Your Worship and which was not substantiated at first as to why the, we could not proceed with trial, because I have to explain to my witnesses as to why we have to, we have to postpone.

COURT: She was not willing to give us details.

PROSECUTOR: As the Court pleases, your Worship.

COURT: I believe it is an attorney/client privilege.

PROSECUTOR: The other application that the state would like to make, Your Worship, is that the State, Your Worship, will give an oral notice in terms of section 342A today, Your Worship, to the accused that in the next occasion if he does not have an attorney, Your Worship, the trial date will be set Your Worship, and an application would be made and the implication of that section should also be explained to the accused, Your Worship. As the Court pleases, Your Worship.

COURT: Let me explain to you sir, this court has a common law judicial power to determine whether the matter should proceed, even though an accused person does not have an attorney and the Court is of the opinion that there is a delay on the part of an accused person, or for that matter, the state. Do you understand?

ACCUSED: Yes.

COURT: The prosecutor informs me that he is giving you a notice in terms of section 342A that he will make an application and ask this Court to hold an inquiry if you do not bring an attorney to court on the next occasion, for the delay to the procedure or proceedings in this matter. Oh he is, understands. Do you understand?

ACCUSED: [Inaudible]

COURT: So the implications are the following, that if you do not bring an attorney, this Court might refuse to postpone the matter for another day, if the Court is of the opinion that you are causing an unreasonable delay and the Court will hold a pre-trial conference on that day and prepare you for trial and then postpone the matter for trial without you having an attorney. Do you understand?

ACCUSED: Yes.

COURT: So it is very important that you bring an attorney to court on the next occasion, otherwise this section 342A application shall be brought by the state. Do you understand?

ACCUSED: Yes.

PROSECUTOR: Your Worship...[intervenes]

COURT: And like I have explained already, this Court has a common law power to also determine whether the matter should proceed or not, if I am of opinion that you are causing an unreasonably delay. Do understand, sir?

ACCUSED: Yes.

COURT: That is the state does not make this application.

PROSECUTOR: May these witnesses be excused. Your Worship?

COURT: Okay. I believe you have listened to my submissions and my rulings and explanations?"

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- [14] On 01 October 2020, before a different Regional Magistrate whose details are not recorded, despite Mrs Machogo having pertinently raised a conflict of interest between herself and the appellant, the appellant indicated that he wished to retain her services since a

certain Mr Molefe could not assist him due to his busy schedule. The matter was remanded to 12 October 2020 for legal aid application, on which date, and again before a Regional Magistrate who is not identified, the matter was remanded to 26 October 2020 for a *judicare* application. On 26 October 2020 the matter was remanded by Regional Magistrate Maphango to 09 and 10 November 2020 for trial. A certain Ms Modise noted that she was standing in for Mrs Machogo, who had previously withdrawn as attorney of record due to a conflict of interest with the accused. Ms Modise explained that “*there was a bit of a misunderstanding between Mrs Machogo and the accused person...*” which was resolved. The appellant confirmed that the differences between himself and Mrs Machogo had been resolved and that he wanted to proceed with her legal assistance.

- [15] The trial eventually commenced on 09 November 2020 before the court *a quo*. The appellant pleaded not guilty to both counts and raised consent as a defence. Several exhibits were admitted as evidence, by consent of the appellant duly represented by Mrs Machogo. These exhibits included an admission on a buccal sample collected from the appellant, two J88 (medical reports) in respect of the complainants and what was referred to broadly as DNA results. The trial was remanded to 10 November 2020 for further trial. On the said date the state witnesses in respect of count 1 were not available as they reside in Kimberley and Kakamas respectively. This resulted in a remand of the matter to 24 November 2020 for further trial.

[16] On 24 November 2020 the two state witnesses on count 1 were present at court. Mrs Machogo intimated that whilst she was ready to proceed that morning, the appellant complained of a toothache which he addressed with the Correctional Centre but had not received treatment. The court *a quo* endeavored to get Mrs Machogo to convince the appellant to proceed as the witnesses were from Kimberley and Kakamas, mindful of his position, but this came to nought. A postponement of the matter was sought and granted by the Regional Magistrate on humanitarian grounds, to 19 January 2021. On 19 January 2021 Mrs Machogo was absent due to family responsibility. The matter was consequently remanded to 21 January 2021 for Mrs Machogo and further trial.

[17] On 21 January 2021, Mrs Machogo informed the court, that the toothache the appellant complained about on 24 November 2020 persisted. The appellant it was said had not been given any painkillers at Rooigrond Correctional Centre and was informed that no detainees would leave the Correctional Centre to receive medical attention. Mrs Machogo further intimated that during consultation with the appellant he was tapping his feet in pain, complaining about excruciating pain. The retort from Mr Diseko the prosecutor, to paraphrase, was that he was not a medical doctor to comment on the complaint by the appellant. Mr Diseko instead proceeded to address the court *a quo* about what he termed his application in terms of section 342A of the CPA on 18 September 2020 predicated, on the issues related to the delays with legal representation prior to that date, which he labelled delaying tactics. He further questioned why

the appellant failed to inform the court *a quo* about the persisting toothache on 19 January 2021. Notably Mrs Machogo was not present on 19 January 2021 and the remand of the matter on the said date followed swiftly.

- [18] What follows Mr Diseko's submission as reflected on the appearance sheet for 21 January 2021 is "***By Court: Application is refused.***" The refusal of the application for postponement resulted in the mandate of Mrs Machogo being terminated, for a second time, predicated on a belief by the appellant that she was the cause of the refusal of the postponement. When the appellant sought to secure the services of an alternative attorney, the court *a quo* ordered that the matter proceed. The appellant, now unrepresented, was made to proceed with the trial, with the toothache he complained of, and no copies of the docket being made available to him, to afforded him an opportunity to prepare himself, now unrepresented, with the further conduct of his defence.
- [19] The case for the prosecution was concluded on 21 January 2021 and the matter remanded to 15 February 2021 for the defence case. At that stage, the court *a quo* recognized that the appellant should receive medical attention for the toothache and ordered same to be provided before close of business on 21 January 2021.
- [20] The transcribed record of proceedings differs slightly from the entry on the appearance sheet in respect of Mr Diseko. It reads as follows:

*“PROSECUTOR: Your Worship, the court composition is still as before, Your Worship. And we are ready to proceed.*

*COURT: Right, you may proceed. Just a moment, wait. Sir, why is your hand raised up? No, why did you raise your hand, I want to hear? Who do you want to talk to, that is why?*

*ACCUSED: Your Worship, I may request to talk to my attorney*

*COURT: You have had your many consultations that I saw with your attorney, two in court and one whilst we had adjourned and another one now whilst we had adjourned to deal with another matter. Is it because you did not finish talking to her?*

*ACCUSED: Your Worship, my request is to talk directly to the Court because it seems that e and my legal representative do not come to an understanding. I need to go and remove my tooth because it is aching and therefore it is making me suffer.*

*COURT: I asked your attorney to speak to you directly and she refused me to. That is why I allowed her to adjourn and speak to you and consult with you thoroughly. So, I do not understand why is it that you did not tell her what you want to say to me now. I need you to explain why you did not tell her, whatever it is that you want to explain to me now.*

*ACCUSED: I do know whether my attorney told this Court what I told her, she was ..... [Intervened]*

*COURT: Okay, what is it that you want to say? What is it that you want to say?*

*ACCUSED: Your Worship, my request is that I be given an opportunity to go and extract my tooth because it is sore and is making me suffer.*

*COURT: Right, I understand your request Sir. We shall proceed now and once we are done I will make an order that you be taken to a dentist. I will make an order straight to the ... to the ... what is his name by the way, the commander of FSC ”*

*PROSECUTOR: Captain Wells.*



*COURT: I will make that order. A witness has been coming so many times from Kakamas and the matter was postponed at your instance on several occasions. So, I will ensure that you get medical attention once we are done today. You may sit down.*

*MS MATSHOGO: Your Worship, may I address the Court? just to follow up on what he is saying, my last consultation with him in the cells before I came and sat. he informed me that he is not happy with me and he does not want me anymore on his case. Therefore, Your Worship, my mandate as I am standing it is terminated.*

*COURT: Do you confirm that?*

*ACCUSED: Yes, Your Worship.*

*COURT: Have you noticed that you have fired a Legal Aid Attorney already before, prior to this. He fired... fire. This is not the first time do you remember that?*

*ACCUSED: I remember Your Worship.*

*COURT: And you said you will get your own attorney do you remember that?*

*ACCUSED: Yes Your Worship.*

*COURT: But he failed to do that. And Legal Aid came back on record, do you remember that?*

*ACCUSED: I remember Your Worship.*

*COURT: Now you are terminating Ms Matshogo's mandate for the second time. Do you confirm that?*

*ACCUSED: Yes, Your Worship.*

*COURT: So, where are you going to get another attorney seeing as you failed to pay for your own attorney the first time?*

*ACCUSED: My attorney was given me {indistinct – 08:07} coming to me that I had already spoken to the attorney.*

*COURT: Which attorney are you referring to?*

*ACCUSED: One Itumeleng Molefe[?], Your Worship.*

*COURT: So, you decided to go back to Legal Aid?*

*ACCUSED: Yes, Your Worship, because he was giving me hassels when he had to come.*

*COURT: So, what are you going to do because you have terminated the mandate of Ms Matshogo, what are you going to do after this?*

*ACCUSED: Your Worship, I am going to make an application that I be given Leal Aid, an attorney from Legal Aid who will assist me as soon as possible because I have been asking for assistance for a very long time.*

*COURT: I do not understand what you are talking about. I know Ms Matshogo is a competent attorney. She has cross-examined two witnesses already who were called by the state. So, your narrative that you are not being assisted as quickly as possible does not make sense to me, unless you are referring to something that I do not know. What are you referring to when you are saying that you are not helped quickly?*

*ACCUSED: Your Worship, I have requested help from her from 24 November last year until 19 January, but realized that she is unable to assist me.*

*COURT: Help with what?*

*ACCUSED: Help you with the request that I made, Your Worship, that I am... my teeth or I have a toothache that is giving me trouble.*

*COURT: You are contradicting yourself. When she addressed me, she said the people who are giving you problems are the people at Rooigrond, not her. Not her.*

*ACCUSED: Yes, they are also refusing me, Your Worship.*

*COURT: Yes, but you did not say that she is also troublesome?*

*ACCUSED: Your Worship, I realise that I have asked her for help for a very long time and I have waited for a very long time but she cannot help me.*

*COURT: Do you remember that you once fell sick and she informed me?*

*ACCUSED: I remember, Your Worship.*

*COURT: And what I do or say?*

*ACCUSED: Then this Court made an order that I be taken for medical attention at Bophelong, Your Worship.*

*COURT: On 24 November, who informed me about your toothache?*

*ACCUSED: It is my.... I informed my attorney, Your Worship.*

*COURT: Who informed me?*

*ACCUSED: It is my attorney Your Worship.*

*COURT: Is she not doing her job?*

*ACCUSED: Up to now I do not know what is she waiting for and telling the police that they need to take me to the hospital.*

*COURT: Why are you blaming her, because on the last occasion, the first occasion when you fell sick, she informed me, an order was made that the police take you to the doctor, why are you blaming her this time around knowing how the process goes?*

*ACCUSED: She is my attorney, there is no one that I can tell besides her and the problem is that the police did not do anything.*

*COURT: Are you aware that you are sailing against the wind? He is sailing against the wind.*

*ACCUSED: Your Worship, my request is that I be given an attorney who will be able to assist me Your Worship, so that I can finalise this matter....so this matter can be finalized.*

*COURT: Okay, before I make a ruling ...[intervened].*

*ACCUSED: and if only my tooth can be extracted, Your Worship*

*COURT: Before I make a ruling, do you have any submissions to make?*

*PROSECUTOR: None, Your Worship.*

*COURT: Thank you. Right Ms Matshogo, you are excused.*

*MS MATSHOGO: Thank you.*

*COURT: Your application to have an attorney assist you sir is refused, I am of the opinion that you are playing delaying tactic, this matter has been delayed on several occasions at your instance and I am of the opinion that it is in the interest of justice that we proceed. The witnesses are here today, they have been here consistently from the time that the matter was postponed, 24 November. You failed to inform this Court on 19 January that you have an issue with your toothache. I am not a medical doctor but I have been engaging with you and you*

*seem healthy and you are speaking freely with me without showing any form of pain.*

*All you want to do is extract your tooth and this could have been done a long time ago had it been reported on time. So, I am of the opinion that you are causing a delay to this matter and I am ordering that we proceed without an attorney.*

*PROSECUTOR: As the Court pleases, Your Worship. State calls Nthato Nzima.*

*MS MATSHOGO: May I be excused?*

*COURT: You are excused. Sit down. The state I going to call witnesses, you must listen carefully because you are going to be given an opportunity to cross-examine the witnesses.*

*Make sure that you raise issues that you are of the opinion that are in conflict with what you believe or what you know. Make sure that you raise them during cross-examination.*

*Failure to do so, the Court might at the end of the day accept the evidence of the state as being the truth, so make sure that you cross-examine the witnesses thoroughly. Do you understand?*

*ACCUSED: I did not hear anything Your Worship.*

*COURT: You did not hear or you did not understand?*

*ACCUSED: I DID NOT UNDERSTAND ANYTHING Your Worship.*

*COURT: You have the right to cross-examine this witness, do you understand that?*

*ACCUSED: Yes, Your Worship.*

*COURT: Make sure that you raise your defence and raise issues that you dispute during cross-examination. Do you understand?*

*ACCUSED: Understood Your Worship.*

*COURT: If necessary, you can put your side of the story to the witness through statements. Do you understand?*

*ACCUSED: Understood Your Worship.*

*COURT: May I have your full names please?*

*WITNESS: Nthato Nzima, Your Worship.*

*COURT: Do you have objection against taking the prescribed oath?*

*WITNESS: N objection Your Worship.*

*COURT: Please swear him in.*

[21] On 15 February 2021 Mr Diseko applied for a postponement of the matter raising ill health on his part. The Regional Magistrate similarly noted that she too was feeling ill. The matter was accordingly remanded to 1 March 2021 for the defence case, with the appellant still unrepresented. The transcribed record for 15 February 2021 reads as follows in this regard:

*“PROSECUTOR: Today, Your Worship, 15 February 2021, Presiding Officer, Your Worship, is Ms Malane; Prosecutor: Ms Diseko; interpreter, Your Worship is Ms Leguru, accused appears in person in this matter, Your Worship.*

*On the last occasion, Your Worship, there was an order by Court, Your Worship to make sure, Your Worship, that the accused be treated, Your Worship. Same has been done, Your Worship, and the accused had a toothache, his tooth has been extracted, Your Worship. I am in possession of a copy to show the Court that he was indeed assisted, Your Worship.*

*COURT; Right, does he need this or is it your copy, can I ...[intervened].*

*PROSECUTOR: Yes, Your Worship, it ...[intervened].*

*COURT; Keep this for the record.*

*PROSECUTOR: Yes, Your Worship, it is just for the record, Your Worship.*

*COURT: Okay, the Court notes that his tooth has been extracted and it looks like it was on 22 January 2021.*

*Right.*

*PROSECUTOR: Your Worship, the matter was postponed until today for further trial, specifically for the defence case, Your Worship. Today, Your Worship, I am*

*not of good health, I am requesting, Your Worship, that this matter be postponed, it may also be postponed within this week Your Worship.*

*COURT; Yes, I think we can look at the 17<sup>th</sup>, I am not well myself, so.*

*PROSECUTOR: Your Worship on the 17<sup>th</sup> if I may indicate to the Court, Your Worship, there is a possibility that I would also have to go to Klerksdorp for a check-up, on the 17<sup>th</sup>.*

*COURT; Oh Okay, so we should look at ...[intervened].*

*PROSECUTOR: Therefore, Your Worship, we will not do the partly heard matters, the matter that was just postponed will be for judgment he can stand in.*

*COURT; When is my .... When is my next sitting again? Is it March, the first week of March?*

*PROSECUTOR: Yes, Your Worship. The 1<sup>st</sup> until the 5<sup>th</sup>.*

*COURT: Let us look at 1 March, what do we have there?*

*PROSECUTOR: We only have one case according to my diary on 1 March.*

*COURT: Then we can place this for 1 March?*

*PROSECUTOR: Yes, Your Worship.*

*COURT: The matter here is postponed until 1 March 2021, it is for defence case. You are remanded in custody. The prosecutor is not of good health, I also. So, this matter is postponed until then, you are rermanded in custody.*

*PROSECUTOR: That will be the court roll, Your Worship.*

*COURT: Ms [indistinct – 5:00] will you kindly note the dates for the trials. Thank you, Court adjourns for the day*

*MATTER POSTPONED TO 1 MARCH 2021*

*COURT ADJOURNS”*

- [22] On 01 March 2021 the defence case proceeded, with the appellant still unrepresented. A defence witness, Beauty Lenkopane was called to testify before the appellant himself testified. This procedure is contrary to the peremptory provisions of section 151(1)(b)(i) of the

CPA, which is designed to prevent an accused from tailoring his evidence to fit that of his defence witnesses. More on this later.

[23] The defence case was closed on 01 March 2021. The matter was remanded to 03 March 2021 for argument and subsequently remanded on two occasions, with an order being made on 18 March 2021 for the first time, that the Clerk of Court was to ensure that the appellant is furnished with a transcript of the proceedings. This followed after Mr Diseko for the state addressed the court *a quo* on the merits. The appellant received the transcribed record on 13 April 2021. Three remands later, the matter was remanded on 25 May 2021 for a legal aid application to 03 June 2021. On 03 June 2021 Ms Narlya appeared for the appellant to seek a remand for the appointment of *judicare*, which resulted in a postponement of the matter to 07 July 2021. On 07 July 2021, Ms Mkansi stood in for Ms Modise who was indisposed. It is not clear what happened to the transcript provided to the appellant as far back as 13 April 2021 but the matter was remanded for Ms Modise and a transcript of the record to 20 July 2021. On 20 July 2021, the matter was remanded to 16 August 2021 for the court *a quo* who was not available. The closing arguments on merits were eventually presented on behalf of the appellant on 17 August 2021, followed by a remand to 30 August 2021 for judgment.

[24] On 30 August 2021 and 13 September 2021 Regional Magistrate Malane was not available. The matter was consequently remanded to 14 October 2021 and further to 22 October 2021 for judgment. On 22

October 2021 Ms Modise was absent, causing a further remand of the matter to 26 October 2021, on which date the appellant was duly convicted as charged on both counts of rape; and two days later, on 28 October 2021 sentenced to two life terms.

## **Discussion**

### **The first two grounds of appeal on conviction**

#### **Fair trial rights**

[25] The first two grounds of appeal implicate the fair trial rights enunciated in section 35(2) and section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996. Section 35(2)(e) of the Constitution provides that “Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least ... **medical treatment**; ...” Section 35(3) (b) provides the right to have adequate time and facilities to prepare a defence, and section 35(3)(f) the right to legal representation.

[26] The approach to fair trial rights was enunciated as follows by the Constitutional Court in *S v Jaipal* (CCT21/04) [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (18 February 2005):

26. *Section 35(3) of the Constitution states that every accused person has a right to a fair trial. The basic requirement that a trial must be fair is central*



to any civilized criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognized in key international human rights instruments.

27. Section 35(3) mentions 15 aspects of the right to a fair trial... the list is not exhaustive. In one of its early judgments, this Court expressed itself as follows in the words of Kentridge AJ in *S v Zuma and Others*:

“The right to a fair trial conferred by [section 25(3)] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another*; *S v Mthwana* [1992 \(1\) SA 343](#) (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire:

**‘whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted’.**

A Court of appeal, it was said (at 377),

**‘does not enquire whether the trial was fair in accordance with “notions of basic fairness and justice”, or with the “ideas**

underlying the concept of justice which are the basis of all civilised systems of criminal administration”.

That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those ‘notions of basic fairness and justice’. **It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.”**

28. In *Sanderson v Attorney-General Eastern Cape*<sup>16</sup> Kriegler J, referring to Zuma, again emphasized the significant break from the past and the need to conduct criminal trials in accordance with open-ended notions of basic fairness and justice and stated that a narrow textual approach was likely to miss important features of the fair trial provision. He proceeded as follows:

“The central reason for my view... goes to the nature of the criminal justice system itself. In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial.”

In *S v Dzukuda and Others*; *S v Tshilo Ackerman* AJ referred to the concept of substantive fairness mentioned in Zuma and said:

“Elements of this comprehensive right are specified in paras (a) to (o) of ss (3). The words ‘which include the right’ preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete subrights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be

established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss (3).” (footnotes omitted)

He continued:

“At the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.” (footnotes omitted)

**28. The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.**

29. *In the context of the irregularity alleged to have occurred in this case, the right to a fair trial must be understood in conjunction with the constitutional imperatives that the courts are independent and that they must apply the law impartially and without fear, favour or prejudice,...*

(emphasis added)

[27] The approach to and duties of a judicial officer relevant to the right to legal representation was addressed as follows in *Ramabele v S; Msimango v S* (CCT 232/17; CCT 207/18) [2020] ZACC 22; 2020 (11) BCLR 1312 (CC); 2020 (2) SACR 604 (CC) (16 September 2020):

“[46] The right to legal representation during a trial is a fundamental right of an accused and is inherent in the right to a fair trial. Section 35(3)(f) provides—

“a right to a fair trial, which includes the right . . . to choose, and be represented by, a legal practitioner, and to be informed of this right promptly”.

[47] Generally, when legal assistance is appointed for the accused by the State, they ought to accept the legal representation. They do not necessarily have the right to select the legal representative appointed for them.<sup>1</sup>

[48] Furthermore, there is also a duty placed upon Judicial officers to afford the accused an opportunity to obtain legal representation as well as a duty to inform the accused that if their legal representative withdraws, they have a right to apply for a postponement to enable another legal representative to be appointed.<sup>2</sup> This constitutional guarantee requires that an accused is given a fair and reasonable opportunity to obtain legal representation. In

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<sup>1</sup>fn 29: In the context of section 25(3)(e) of the Interim Constitution see this Court’s judgment in *S v Vermaas, S v Du Plessis* [1995] ZACC 5; 1995 (3) SA 292; 1995 (7) BCLR 851 (CC) at para 15. The right to have legal representation at State expense does not include the right to have a legal representative of choice. See *S v Halgryn* [2002] ZASCA 59; 2002 (2) SACR 211 (SCA) at para 12.

<sup>2</sup>fn 30: See Currie and De Waal *Bill of Rights Handbook* 6 ed (Juta, Cape Town 2018) at 771-2 and *Mafongosi v Regional Magistrate, Mdantsane* 2008 (1) SACR 366 (Ck) at para 24.

order to consider what constitutes a fair and reasonable opportunity, there are a myriad of factors to take into account.<sup>3</sup> **This should be considered on a case by case basis, and failure to do so in certain circumstances may very well result in irregularities.** However, the right to be represented by a legal representative of the accused's own choice does not include: a right to have an ongoing trial postponed for a lengthy period in order to allow an accused an opportunity to earn and save sufficient income to secure the services of a particular legal representative of their choice, since this may go beyond the bounds of reasonableness."

(emphasis added)

[28] In *S v Lusu* 2005 (2) SACR 538 (EC), Plasket J (Froneman J concurring) stated as follows:

"[11] *The right to legal representation is a right that is central to the fairness of criminal trials. Kroon J, in S v Manguanyana, held that this right was 'an integral part of our legal system', and the 'cornerstone of a civilised system of justice.*

[12] *The purpose of the right to legal representation is explained as follows by Professor Steytler:*

*'The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common law tradition, produces a just result. In an adversary system a court's decision*

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<sup>3</sup> fn 31: Factors include: the gravity of the charges; the availability of sufficiently experienced practitioners; the amount of preparation required and the complexity of the case; the interests of the complainants, the witnesses and the co-accused as well as the desirability of disrupting court rolls and delaying the disposal of criminal cases. See further *K v Regional Court Magistrate N.O.* 1996 (1) SACR 434 (E); *S v Stefaans* 1999 (1) SACR 182 (C); *S v M* [2004] 2 All SA 74 (D); *S v Tsotetsi* 2003 (2) SACR 623 (W); and *Pretorius v Minister of Correctional Services* 2004 (2) SA 658 (T).

rests primarily on the evidence and arguments advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision.

Because effective participation requires legal knowledge and courtroom skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process'."

(emphasis added)

[29] The basis of the refusal of the postponement on 21 January 2021, was prompted by the submission of Mr Diseko of a previous application in terms of section 342A of the CPA, before the trial commenced, when the matter was delayed, *inter alia*, by issues of legal representation. What is clear is that the pre-trial delays predicated on the issue of legal representation was resolved after notice of an intention to bring an application based on section 342A was given by Mr Diseko. The court *a quo* was not precluded from having regard to the pre-trial delay, but it was incumbent on the court *a quo* on 21 January 2021, to specifically consider the matter relevant to the peculiar facts that were presented on that day.

[30] Section 342A(1) - (3), relevant to this appeal, specifically provides that:

“(1) A court before which criminal proceedings are pending shall investigate **any delay in the completion of proceedings** which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

- (a) the duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
- (g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice,....”

[31] What section 342A of the CPA envisages is the exercise of a discretion by the court before which the proceedings are pending to exercise a discretion, after considering the factors referred to in section 342A(2) of the CPA. If the discretion is not reasonable exercised, it may constitute a ground of appeal and the basis for upholding an appeal.

[32] The issue at the heart of this appeal, is the toothache which the appellant complained of on 20 November 2020, for which he was denied medical attention. There is nothing in the record to show that this was not the case. The court *a quo* on 20 November 2020, endeavored to get Mrs Machogo to convince the appellant to proceed even with the toothache. That did not materialize and the court *a quo* ultimately accepted that the matter could not proceed and remanded the appellant in custody to 19 January 2021 for further trial. No order was made for the appellant to receive medical attention.



[33] The issue of the appellant's toothache was not canvassed on 19 January 2021 as Mrs Machogo was unavailable. The appellant, notwithstanding Mr Diseko raising the absence of such complaint on 19 January 2021, cannot be blamed for this. On 21 January 2021, the complaint about the continuing toothache was raised by Mrs Machogo, who informed the court *a quo* that the appellant was in fact in excruciating pain brought about by the toothache. Mr Diseko said he is no medical doctor and that submission was correct. Mr Diseko, however, was the catalyst for what subsequently transpired that day. As on 20 November 2020, the court *a quo* took no issue with the complaint about the toothache. In fact, the court *a quo* would that same day order that medical attention be afforded to the appellant when it remanded the accused in custody to 01 March 2021. This provides sufficient reason to believe that the court *a quo* accepted the complaint of the toothache to be of such a nature that it required medical intervention. That could have been done on the application of Mrs Machogo and would in all probability have averted the issues in this appeal on conviction. Mrs Machogo would have remained on record for the appellant.

[34] Reasonably, the toothache complained of, dating back to November 2020, was not disputed at that stage and was found to be sufficient reason to remand the accused in custody to 19 January 2021. The toothache persisted into January 2021, two months later, with no medical intervention. There is nothing to gainsay what Mrs Machogo placed on record on 21 January 2021, that the appellant was in

excruciating pain caused by the toothache. One reasonably has to beg the question how the appellant was made to proceed with the trial in the condition he was. The court *a quo* failed to carefully consider and weigh the factors set out in section 342A(2) of the CPA. The right of the appellant to medical attention as an awaiting detainee was not given effect to by the court *a quo*, which constitutes an intrusion on the right to a fair trial envisaged in section 35(2)(f) of the Constitution. This on its own constitutes a sufficient basis to overturn the convictions.

[34] A number of other irregularities in the proceedings which followed the termination of the mandate of Mrs Machogo and the appellant conducting his own defence, cannot be overlooked. After the termination of the mandate of Mrs Machogo by appellant, who firmly believed the refusal of a postponement was her fault, which it was in fact not, and a further refusal for the appellant to secure alternative legal representation, the trial proceeded and the case for the prosecution was closed. This is important, as the State was clearly close to finalizing its case and the harm of a postponement could have been mitigated by short remands by the court *a quo* for legal representation and the continuation of the trial. The appellant was not furnished with copies of the docket nor any notes from Mrs Machogo nor an opportunity to be furnished with a copy of the record of proceedings.

[35] The appellant should have been afforded an opportunity to secure an alternative legal representative appointed by Legal Aid South Africa.

The need for this was clear, as the appellant as the records demonstrates, once the defence case was closed, was caught in a legal quagmire, and so was the court *a quo*. The appellant was unable to address the court *a quo* and more importantly as shown above, was not furnished with a record of the proceedings nor copies of the docket. In fact, later the predicament the court *a quo* found itself in, resulted in it postponing the matter for legal aid (judicare). This could have been averted through meticulous consideration of what confronted the court *a quo* on 21 January 2021.

[36] After the close of the case for the prosecution, the matter was remanded for defence case. When the appellant returned to court on 01 March 2021, his rights relevant to the presentation of the defence case were explained to him. He was afforded the option of having his witnesses testify before he adduced evidence, which he opted for. This as indicated above is contrary to the peremptory provisions of section 151(1)(b)(i) of the CPA which provides that:

**“151 Accused may address court and adduce evidence**

(1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and —

- (i) if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or
- (ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.
- (2) (a) The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence as may be admissible.”

(emphasis added)

[37] In the absence of good cause to allow the appellant's witness to testify before him, this constitutes a further irregularity in the proceedings. It may, however, on its own, not be sufficient to vitiate a conviction. However, when weighed against the intrusion on the section 35(2)(f) and section 35(3)(f) rights, it adds to the grounds, to uphold the appeal.

## **Conclusion**

[38] Premised on the aforesaid irregularities in the proceedings and the intrusion on the rights of the appellant as envisaged in section 35(2)

(e) and section 35(3)(a) and (f) of the Constitution, the appeal against conviction on counts 1 and 2 stands to be upheld.

### **Order**

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

1. The appeal against the conviction on counts 1 and 2 is upheld.
2. The convictions on counts 1 and 2 and the resultant sentences are set aside.
3. The appellant is to be released from custody with immediate effect.

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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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**M DEWRANCE**

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

**NORTH WEST DIVISION, MAHIKENG**

**Appearances:**

For the Appellant: Mr M V Kekana

Instructed by: Legal Aid South Africa  
Mahikeng Justice Centre

For respondent: Adv G R Zazo

Instructed by: The Director of Public Prosecutions, Mahikeng