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

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

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 67/2022

In the matter between:

AMOS RANTLAKANE KGOLENG **Appellant**

and

THE STATE **Respondent**

CORAM: HENDRICKS JP et MMOLAWA AJ

DATE OF HEARING : 27 NOVEMBER 2023

DATE OF JUDGMENT : 22 FEBRUARY 2024

FOR THE APPELLANT : ADV. MEIRING

FOR THE RESPONDENT : ADV. MOETAESI

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00 on 22 February 2024.

ORDER

Resultantly, the following order is made:

(i) The appeal against the sentence is dismissed.

JUDGMENT ON LEAVE TO APPEAL

MMOLAWA AJ

INTRODUCTION

[1] The appellant, **Amos Rantlakane Kgoleng**, who stood trial with his co-accused, **Thabiso Moloi** in the Regional Court, Klerksdorp, was convicted of one count of rape in that on 11 February 2012, he unlawfully and intentionally had sexual intercourse with the complainant, one **D[…] M[…] (D[…])** without her consent, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 23 of 2007, read with the provisions of section 51 (1) and Part 1 Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that the said complainant was born on […] 1995 and was raped by more than one person. The

complainant was 13 years of age at the time she was raped. The appellant was sentenced to a term of life imprisonment.

[2] He then noted an appeal against the sentence only. It was argued by Mr Meiring on behalf of the appellant that the learned Magistrate erred in imposing the sentence of life imprisonment, notwithstanding the fact that there were substantial and compelling circumstances, which justified the imposition of a lesser sentence than that ordained by the legislature. On the other hand, Mr Moetaesi on behalf of the State, contended that the trial court did not misdirect itself in imposing the sentence of life imprisonment.

SUMMARY OF FACTS

[3] On the evening of 11 February 2012, D[…] (who was the complainant, on count 2), S[…] M[…] (S[…]) (who was the complainant on count 1), together with another lady by the name of K[…] were accosted by a group of six to eight males whilst walking in a residential area of Jouberton Location, Klerksdorp.

[4] The group surrounded the three ladies, demanded money from them, and when they said they did not have money, the group started searching them and thereafter proceeded to take turns in raping the complainants. One of the assailants was brandishing a knife.

[5] D[…] said she was raped by seven of these males, one of whom was the appellant. According to S[…], she was raped by six males, one of whom

was appellant's former co-accused, Thabiso Moloi. The other suspects were never arrested.

[6] The appellant was positively linked to the commission of this offence in that his DNA profile was found to be a match to the one taken from the vaginal swab of D[…].

SENTENCE

[7] As stated above, the sentence is assailed on the basis that the learned Magistrate misdirected himself by not making a finding that there existed substantial and compelling circumstances, which justified the imposition of a lesser sentence. D[…] was 13 years of age at the time of the commission of this offence and was raped by more than one person. The prescribed sentence under the circumstances is therefore one of life imprisonment, unless there are substantial and compelling circumstances which justify the departure from the sentence of life imprisonment.

[8] The appellant, who was 22 years of age at the time of the commission of this offence, elected not to testify with the result that there was no evidence led on his behalf in support of mitigation of sentence.

[9] This personal circumstances of the appellant, as can be gleaned from the social worker's report, are the following, viz. he was a first offender; he was 22 years old at the time of the commission of the offence; he is the father of three children; he was providing for his family; he attended

school until Grade 10, and that he accepted responsibility for his actions. What is disturbing however is the fact that the report says the appellant felt the need to be accepted by his peers and gang members.

[10] It is settled law that sentencing falls within the preserve of the trial court. In **S v Rabie** 1975 (4) SA 855 (A) at 857 D – E, it was stated that:

> *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –*
>
> *(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";*
>
> *and*
>
> *(a) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."*

[11] In **S v Bailey** 2013 (2) SACR 533 (SCA) the Court stated the following:

> ***"**[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in*

my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not."

[12] In **S v Matyityi** 2011 (1) SACR 40 (SCA) paragraph [22], Ponnan JA stated thus:

"[22] Despite our particularly strong commitment to the promotion of the rights of victims of sexual crimes, particularly rape, we still do not have a clear strategy for dealing inclusively with it either at a primary preventative or secondary protective level.[35] *The result is that as alarmed as we may be by the reported incidence of rape the true extent of the scourge appears far more widespread. In De Beer it was put thus:*

> *'It is widely accepted that the statistics of reported rape reflect only a small percentage of actual offences. NICRO estimates that only 1 out of every 20 rapes is reported, whilst the South African Police Service puts the figure at 1 out of 35. For the first six months of 1998, 23 374 rapes were reported nationally. As an annual indicator of rape employing the lower 1 out of 20 estimate, the figure was a staggering 934 960. Research at the Sexual Offences Court in the Western Cape, for the same period, reveals that of the reported rape cases: 56.62% were referred to court; 18.67% were prosecuted; and, only 10.84% received guilty verdicts.'*

Those statistics although somewhat dated offer a more accurate indicator of the extent of the incidence of rape in this country. The reason, in part, is the introduction of the ***Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007****. The sexual assaults covered by this new Act extend beyond*

> *phenomena previously covered by the definition of rape to include male rape and sexual penetration of a whole range of orifices. It also covers human trafficking, pornography and prostitution (including charges against clients of sex workers).*

[13] As to the nature of a misdirection which entitles a court of appeal to interfere, the following was stated in **S v Pillay** 1977 (4) SA 531 (A):

> **"***Now the word "misdirection" in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.***"**

[14] In **Holtzhauzen v Roodt** 1997 (4) SA 766 (W) at 778 G – H, it was stated as follows:

> **"***Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood.***"**

15. In **S v Chapman 1997 (3) SA 341 (SCA) at 345** C-D, it was held as follows:

> ***"****Rape is regarded as a serious offence: "constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim." "Women have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come to work and to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives" "The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.****"***

[16] Notwithstanding such overwhelming evidence against him, the appellant showed no contrition for the heinous crime he committed. He and his group attacked a vulnerable, defenceless young girl and threatened her with a knife, in order to achieve their devious purpose.

[17] When one considers the factors personal to the appellant, the horrific nature of the crime and the interests of the society, one is forced to the conclusion that the factors personal and favourable to him, pale into insignificance when viewed against the horrific brutality and seriousness of the crime.

[18] I am of the view that in imposing the sentence it did, the trial court did not misdirect itself. Accordingly, the appeal against the sentence must therefore be dismissed.

ORDER

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

(i) The appeal against the sentence is dismissed.

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M. E. MMOLAWA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree

_____

R. D. HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appearances:

Counsel for the Appellant:	Mr J. J. Meiring, with him R. K. Banath and I. Hayath
Instructed by:	*Pro bono* – On request of the General Council of the Bar.
Counsel for the Respondent:	Mr M. T. Moetaesi
Instructed by:	The Director of Public Prosecutions, Mahikeng