

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



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

CASE NO : CA 02/20

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

In the appeal of:

DAVID MAREMAGAE

Appellant

and

THE STATE

Respondent

ORDER

- (i) The appeal against the conviction and sentence is dismissed.

JUDGMENT

ROUX AJ

- [1] This is an appeal against the convictions and sentences with leave of the trial court. The Appellant and Respondent agreed in the practice note that the appeal could be considered and disposed of on the papers.
- [2] The Appellant was charged with four counts. The first two counts relate to the complainant, N[...] B[...] and consist of one count of rape and one count of robbery with aggravating circumstances. As regards the rape charge, the allegation is that the Appellant on

13 October 2010 and at or near Mabopane in the district of Odi, he unlawfully and intentionally had sexual penetration with the complainant, N[...] B[...].

[3] In count 2 it is alleged that on the same day and at the same place, the Appellant forcefully robbed the complainant, N[...] B[...], by taking her Nokia 2300 cellphone from her.

[4] Count 3 and 4 relate to another complainant, S[...] R[...]. In Count 3 it was alleged that on 18 October 2010 at Mabopane in the district of Odi, the Appellant raped the complainant by unlawfully and intentionally committing an act of sexual penetration with the complainant, S[...] R[...].

1. In count 4 it is alleged that the Appellant committed robbery with aggravating circumstances in that on the 18th of October 2010 and at the same place, he forcefully took her Nokia cellphone and R400,00 in cash.
2. The Appellant pleaded not guilty to all the charges and chose not to give an explanation for his pleas of not guilty in terms of Section 115 of the Criminal Procedure Act 51 of 1977.
3. The State called N[...] B[...] (“B[...]”) as the first witness. It is clear from B[...]’s evidence that on the 13th of October 2010 at about 20h30 she was confronted by two persons at the specific place. It was dark. One of the persons approached her with a firearm and the other person waited at her parental home’s gate. The person pointed a firearm at her and requested her to hand over her cellphone. She asked if she could keep the starter pack and SIM card, which he

handed back to her. He also requested money but she had no money on her. She was pregnant at the time. He took her into a bush in the dark and told her that if she was going to make a noise, he would shoot her and her unborn baby. He ordered her to undress and to lie on the ground. She undressed and the person pulled his pants down and had intercourse with her without her consent or as she put, *“he raped me. Then after that ... he screamed for his friend to also come”*. His friend did not come and did not participate in the rape. She reported the incident directly thereafter to her mother and shortly thereafter to the police. She testified that one of the two persons had a scratch mark on the side of his face or on his jaw. She was not sure if it was the person who was with him when they confronted her, who raped her or the other person who had the scratch mark.

4. She admitted in court that she could not identify the accused person in the dock (who was the Appellant) and she also accepted that the Appellant did not have a scratch mark. The Appellant’s attorney did not cross-examine the witness.

[5] Thereafter, S[...] R[...] gave evidence in relation to Counts 3 and 4. She testified that on 18 October 2010 at 4.30 in the morning, she was going to work. She was confronted by two persons which she referred to as *“boys”*. As she walked on, she again saw the one person who was at the side of a bush. He took out his firearm and she realised that it was an armed robbery. She took out her phone which was a Nokia, and handed her cellphone over to him. He grabbed her wrist and her waist belt and he pointed the firearm at her. He said she must not make any tricks or any movement or scream and he threatened to shoot her. In the bush he told her to undress but she refused to undress. He told her to lie on the

ground and she proceeded to sit on the ground. He ordered her to lie on her back and he undressed her and himself whereafter he had sexual intercourse with her without her consent. Thereafter he put her clothes on her face and ordered her not to remove the clothes. He then disappeared from the scene. She reported the matter to her mother and later to the police. She was unable to identify the person who had raped her and robbed her of her cellphone. There was no cross-examination.

[6] Her mother gave evidence confirming that the complainant, S[...] R[...], had reported to her the events as referred to above. Again there was no cross-examination.

[7] On 28 August 2014, the Appellant was represented by Advocate Huma.

[8] The reports of the doctors who respectively examined the two complainants were formally admitted in terms of the provisions of Section 220 of the Criminal Procedure Act. The first doctor's medical report was marked as Exhibit "A" and the medical practitioner was Dr Ramakoka who examined the complainant, S[...] R[...]. He took a swab specimen from her vagina for forensic analysis under seal 09[...]JJ. He found that he could not find any injuries but that the complainant was pregnant. He confirmed that the complainant had reported to him that she had been raped and he concluded that she was sexually penetrated by a male perpetrator.

- [9] The complainant S[...] B[...] was examined by Dr Vincent (it seemed to be Khumalo) on 21 October 2010. According to the medical history given to him, she confirmed that she was sexually assaulted and robbed on 13 October 2010. He concluded after a vaginal examination that there were signs of recent vaginal penetration. He took a forensic specimen as part of the vagina swab. The seal number was 09[...]XX.
- [10] The defence also admitted Exhibits C and D. Exhibit C is a statement by Warrant Officer Malawa. He took the Appellant to Sister Masehana, who took a blood sample for DNA analysis from the Appellant using kit number "D4[...]TF(or TP as the handwriting is to some extent difficult to decypher) which he took to the forensic laboratories on 6 March 2012. The case reference was Mabopane CAS 287/10/10. Exhibit D is a form for the collection of forensic reference blood sample and contains a signature of the Appellant and his full names "Tsepo David Maremagae" consenting to the collection of the blood sample by the police officer Mosehona.
- [11] Swasdi Gurie, employed as a forensic analyst in the South African Police Services, deposed to an affidavit in terms of Section 212 of the Criminal Procedure Act and also gave evidence. Her evidence was consistent with her affidavit that she analysed a blood sample under seal 11[...]DE Mabopane CAS 287/10/10 for DNA and compared the DNA found in the sample with DNA found in a number of vagina swabs analysed by Gurie at the forensic laboratory. Two of the swabs belonged to the complainants herein

respectively and the other three vaginal swabs belong to other persons and are not relevant for purposes of this appeal. She found that the DNA in the sample “11[...]DE (Mabopane 287/10/10)” matched the DNA in the vaginal swabs of the two complainants. As can be seen, the sample seal number analysed by her “11[...]DE (Mabopane 287/10/10)” is the same as the seal number of the sample delivered by Warrant Officer Malawa, but it has the letters EB and not TF (or TP) at the end.

[12] The relevance of Gurie’s affidavit and her evidence is that the vagina vault swabs and the vestibule swabs of the two complainants respectively matched the DNA sample of 11[...]DE.

[13] In cross-examination and in argument, it was contended on behalf of the Appellant that the matching DNA sample was only circumstantial evidence and not sufficient to secure a conviction. It is not necessary to entertain the debate whether it constituted circumstantial evidence, save to say that even if it did, it met the standard laid down in **S v Blom** 1938 AD, as it excluded all other reasonable possibilities and it was consistent with the evidence *aliunde* of the two complainants.

[14] Having regard to the weight of evidence against the Appellant, the fact that the Appellant failed to give evidence, although it was his right to remain silent, the consequences thereof are that the evidence, but for the cross-examination of Gurie, remained uncontested.

[15] As to the cross-examination of Gurie, her evidence remained consistent with her affidavit. I may add that it was argued that the Appellant should be acquitted in respect of counts 1 and 2 on the basis that the complainant identified her assailant to have a scar on his face or jaw and that it was common cause that the Appellant did not have a scar. However, this contention misconstrued the evidence of the first complainant who said that one of the assailants and not necessarily the person who had raped her, had a scratch mark on the side of his face or on his jaw. The *modus operandi* in respect of all the counts were remarkably similar.

[16] In the Appellant's heads of argument on appeal it was contended that there was a discrepancy of the seal number of the blood sample taken from the Appellant and the sample analysed by Gurie. According to Gurie's affidavit, it was "11[...]EB (Mabopane CAS 287/10/10)" and according to Malawa's admitted statement the seal number of the blood sample of the Appellant was "11[...]TF (or TP as it is somewhat illegible) and it was identified with Mabopane CAS 287/10/10.

[17] I accept that a difference in the seal number would generally create sufficient doubt as to whether it was indeed the blood sample taken from the Appellant that was forensically analysed.

[18] In this matter the DNA found in the blood sample, as marked in Gurie's statement matched the DNA analysed from the vaginal swabs taken from the two complainants. The only difference is the

last part of the numbering of the blood sample presumably taken from the Appellant which refers to EB instead of TP(TF). If the only identification was the seal number I would not have been able to find that it was beyond a reasonable doubt the blood sample of the Appellant that was analysed. However, the blood sample analysed by Gurie had a further identification namely "Mabopane CAS 287/10/10)". That is incidentally the same CAS number used by Warrant Officer Malawa for the blood sample taken from the Appellant. I know of no other incidents of rape complaints by the two complainants which would or could explain the matching DNA with vaginal swabs taken from them.

[19] It is simply too coincidental that the blood sample is matched by Gurie to be from "Mabopane CAS 287/10/10" and that the numbering of the blood sample is in most respects identical and it co-incidentally matches vaginal samples from the two complainants after the rape incidents.

[20] I am satisfied that there are sufficient indicators to match the blood sample taken from the Appellant to the blood sample analysed by Gurie. Proof beyond a reasonable doubt does not mean proof beyond all doubt.

[21] I am satisfied that the trial court was correct in finding that the evidence constituted proof beyond a reasonable doubt that the Appellant was guilty of the four counts.

[22] I propose to dismiss the appeal against the convictions.

The trial court sentenced the Appellant to 15 years' imprisonment in respect of count 1, and 7 years' imprisonment in respect of count 2, 15 years' imprisonment in respect of count 3 and 7 years' imprisonment in respect of count 4. The court ordered that counts 1 and 2 to run concurrently and counts 3 and 4 to run concurrently. The effective sentence is 30 years' imprisonment.

[23] I am unable to find that the court in sentencing the Appellant misdirected itself in any way or that the sentences imposed are shockingly inappropriate.

[24] As to the rape, the Appellant raped two young women. One was pregnant. He had no respect for them and clearly acted as if he had a right to do so. He showed no remorse. The Courts cannot condone these heinous crimes by imposing sentences which would not match what the crimes deserve. It would do an injustice to the victims and to society who rightfully demand that appropriate sentences be imposed to mark the Court and society's disapproval for rape. The Court cannot fail the victims and society and the prevalence of rape reconfirms the Court's duty and responsibility.

[25] Accordingly, I propose to dismiss the appeal against the convictions and sentences.

Order:

- (i) The appeal against the conviction and sentence is dismissed.

B ROUX
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I, agree

A REDDY
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

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Date of hearing:

28 November 2023

Date of judgment:

19 March 2024