IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO

CASE NO.: 37/2022

In the matter between:

LERATO MARIA KGITSANE Applicant[1]

and

THE STATE Respondent

Coram: Opperman J

Hearing: 9 February 2024

Delivered: 23 February 2024.

Judgment: Opperman J

Summary: Application for leave to appeal – criminal trial – convictions and sentences – evidence of accomplice

[1] Also "accused".

JUDGMENT

INTRODUCTION

[1] The basis on which the application for leave to appeal here rests is for the accomplice testimony to be rejected. The State alleged that an eight-year-old girl was abducted for ransom, raped, and killed by the applicant and the accomplice.

[2] Lerato Maria Kgitsane was convicted and sentenced on 3 November 2023 and as follows:

ORDER

S v LERATO MARIA KGITSANE

COUNT 1:

Guilty: Kidnapping as charged.

Sentence

15 (fifteen) years' imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

COUNT 2: Guilty of attempted extortion as charged.

Sentence

5 (five) years' imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

COUNT 3: Guilty of Rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as charged.

Sentence

Life imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

COUNT 4: Guilty of Murder as charged.

Sentence

Life imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

It is ordered in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 that the sentences shall be served concurrently.

Further orders

1. It is further ordered that the particulars of the accused must be included in the register in terms of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
2. The accused is declared unsuitable to work with children in terms of section 120(4)(a) of the Children's Act 38 of 2005.
3. No order is made in terms of section 103(1) of the Firearms Control Act 60 of 2000.

[3] It is often argued in criminal cases that the single witness – evidence of an accomplice's testimony may at no time or rarely lead to a conviction. This fallacy causes the administration of justice to struggle. Perpetrators of crime have as their core business to hide their criminal activities; it is often only their partners in crime that can tell of it. The witnesses are what they are; often hardened criminals that are familiar with the justice system and that knows how to get the best out of it.

[4] But Van den Heever JA said it well in 1949. He was supported by Watermeyer CJ and Hoexter JA.[2] He stated about and accomplice witness that:

[2] *Rex v Gumede* [1949] 4 All SA 9 (A) (1949 (3) SA 749 (A)) at pages 14 to 15 with reference to Schreiner AJ in *Rex v. Ncanana* 1948 (4), S.A.L.R. at page 405.

> Ultimately at her own trial, as well as at the trial of applicant, she came out with the story which the majority of the Judges *a quo* accepted as substantially true. *Semel mentitus semper mentitur* is as unreliable and illogical as the *maxim falsum in uno falsum in omnibus*.[3]
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> In *Regina v. Farler* (8 C. & P. 106, 108; 173 E.R. 419), Lord ABINGER, C.B., stated the policy underlying the cautionary practice in regard to the evidence of accomplices in these terms.
>
> "The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others."
>
> In that case the accomplice had already been punished, so that it would seem that in the opinion of Lord ABINGER this fact did not dispense with corroboration *aliunde* directly implicating the accused. On the other hand, Wigmore, Evidence (vol. 7, sec. 2057, p. 322), observes:
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> "The essential element, however (in the distrust of the evidence of an accomplice), is this supposed promise or expectation of conditional clemency. If this is lacking, the whole basis of distrust fails. *We have passed beyond the stage of thought in which his commission of crime, self-confessed, is deemed to render him radically a liar. The extreme case of the wretch who fabricates merely for the malicious desire to drag others down in his own ruin can be no foundation for a general rule*." (Accentuation added)

[5] In this case the accomplice had already been convicted and sentenced and to; among others, life imprisonment. He, Mr. Rapuleng, had nothing to lose and nothing to gain. There is not a situation here wherein the accomplice wants or is even able to "purchase impunity". The evidence depicted hereunder will show that he did not exhibit a malicious desire to make the applicant the main culprit or exaggerate her participation.

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[3] The old maxims "falsus in uno, falsus in omnibus" (false in one thing, false in everything) and "semel mentitus, semper mentitur" (once a liar, always a liar) are not part of the South African law of evidence anymore.

[6] Counsel for the applicant wants for the version of the applicant to be accepted. That begs the question as to whether she is guilty of the offences on her own version if the law is applied in regard to common purpose and disassociation. I will deal with the evidence in more detail later.

[7] The question that the court of appeal will have to grapple with is whether the guilt of Ms. Kgitsane was proven beyond a reasonable doubt. In doing so, it must be determined whether the trial court committed any irregularities during the trial, and whether those irregularities undermined Ms. Kgitsane' s right to a fair trial. A court of appeal may only interfere with the factual findings of the trial court where there had been a material misdirection.[4] This brings me to the law on the consideration of an application for leave to appeal.

THE LAW: APPLICATION FOR LEAVE TO APPEAL

[8] The contemporary test that must be applied when an application for leave to appeal is considered and that forms the background to this application is based on the following:

1. The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

[4] *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024) at [27] to [30].

2. The words "would" and "only" in the current legislation caused some to view that the bar for granting leave to appeal has been raised. [5] [6] All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection and care. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another court would come to another conclusion.[7]

3. The final word was spoken in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021. It also added the issue of "compelling reasons which exist why the appeal should be heard such as the interests of justice":

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will

[5] *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021).

[6] *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd* 2021 JDR 0273 (FB).

[7] 17. Leave to appeal. —
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
(a)(i) the appeal would have a reasonable prospect of success; or
(ii)there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

> have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

4. The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*[8]

GROUNDS FOR LEAVE TO APPEAL

[9] The application for leave to appeal is to the full bench of this court against the convictions on counts 3 and 4 and sentences of life imprisonment on counts 3 and 4 handed down on 3 November 2023. The applicant maintains that she did not rape and murder the deceased.

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[8] *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC).

[10] The submission is that the court *a quo* erred in finding that the State proved its case beyond reasonable doubt against the applicant. In finding that the contradictions in the State's case was immaterial and that Mr. Rapuleng could have made a mistake pertaining to the said contradictions. The court *a quo* erred by not properly analyzing and evaluating the evidence of the State's witnesses. Mr. Rapuleng was a single witness as well as a co-perpetrator of the offences in counts 3 and 4. The applicant submits that this calls for the so-called double cautionary approach in the evaluation of his evidence. Mr. Rapuleng never mentioned to the magistrate that he and the applicant raped the deceased by penetrating her vagina with their fingers. Only during the taking of the statement and the plea did he mention this aspect. The applicant's view is that it is an important aspect that goes to Mr. Rapuleng's credibility. "That there is so much detail as to the involvement of the Appellant in count 3 and 4 does not without doubt point to the guilt of the Applicant." Mr. Rapuleng admitted to being at the scene and he had intimate knowledge of what happened there. The applicant submitted that Mr. Rapuleng could have told lies about the applicant due to his intimate knowledge of the offences and crime scene.

[11] It was argued that the court ought to have found that subjectively the court need not believe the applicant, her version only needs to be reasonably possibly true. If there is doubt, she must be given the benefit of the doubt.

[12] On sentence the applicant maintains that an effective term of life imprisonment is strikingly inappropriate in that the sentence is excessive and induces a sense of shock. *A quo* the court erred on the finding that there were

no substantial and compelling reasons present to deviate from the prescribed minimum sentences for counts 3 and 4, the type of sentence imposed on the applicant does not afford her an opportunity to rehabilitate, the court *a quo* did not adequately consider the applicant's personal circumstances and the court *a quo* overemphasized the seriousness of the offence, interest of the society, the effect of the offence on the complainants and the deterrent and retributive effect of sentencing.

THE EVIDENCE THAT CAUSED THE CONVICTIONS AND SENTENCES

The case for the applicant

[13] It is trite that the applicant, Ms. Kgitsane, was a pathetic witness. Her evidence had to be rejected in total and counsel for the applicant could not argue in any way that her evidence must be believed. The basis argued as in the notice for leave to appeal is that the court need not believe the applicant to acquit her. The reality is that there is not any version placed before the court by the applicant that can be regarded as sufficient to let the case turn in favour of the applicant.

[14] Ms. Kgitsane maintained that she did not take part in the rape and the murder. She walked away before this happened. The objective facts and her own version show that she did however, in the least and on her version, realise and foresaw that the child will come to some harm and be murdered. Common purpose and dissociation come to the fore now. The law on the evaluation of the conduct of the accused/applicant and the evidence as it stands before court is the following:

1. Nugent JA in *S v Mbuli* 2003 (1) SACR 97 (SCA) stated that:

[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R LAC* (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f - h:
'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof is the test. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

2. The onus is on the State to prove its case beyond a reasonable doubt. If the subjective version of the accused is reasonably possibly true

after the evaluation of the evidence, the accused must receive the benefit of the doubt and go free. This was decreed in 1957; sixty-seven years ago, in *S v Mlambo* [1957] 4 All SA 326 (A); 1957 (4) SA 727 (A). The dictum is still applied and has been applied in the courts of South Africa over the many decades that followed.

3. For resolve in this case and slotting in with the dictum of the Mlambo-case, the directives on the doctrine of common purpose where numerous perpetrators are involved, needs to be stated. It is in, among others, *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003). The precedent on the issue of law regarding disassociation from common purpose is in cases such as *S v Lungile* 2000 (1) All SA 179 (SCA): 1999 (2) SACR 597 (SCA), *S v Musingadi* 2005 (1) SACR 395 (SCA) and *S v Beahan* 1992 (1) SACR 307 (ZS).

4. The version of the accused of the event as placed before the court lies in the hands of the accused person. If she chooses not to avail herself thereof or is deceitful, she has only herself to blame if an adverse verdict is given. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence and gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.[9]

5. I cannot put it better than Malan JA in the Mlambo-case *supra* when he stated that to place a premium upon false testimony and to afford protection to the cunning and ingenious criminal who could with

[9] *S v Mlambo supra* at 738B-C.

impunity commit murders, will cause serious miscarriages of justice that would be very real.

6. Again, the Mlambo-case: There is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, concludes that there exists no reasonable doubt that an accused committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

7. The Constitutional Court in the Thebus-case *supra*, codified the test for common purpose to exist:

> In my view, these criticisms do not render unconstitutional the liability requirement of active association. If anything, they bring home the duty of every trial court, when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. *The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other pre-requisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.* (Accentuation added)[10]

8. Association is defined[11] as the act of consorting with or joining others and the state of being connected together in spirit, memory or imagination. It involves a physical and mental presence.

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[10] *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003) at paragraph 45.

[11] "Association." Definitions.net. STANDS4 LLC, 2016. Web. 16 Feb 2016. http://www.definitions.net/definition/Association.

9. Where there has been participation in a substantial manner a reasonable effort to nullify or frustrate the effect of association is required. Snyman,[12] after research of the relevant case law, submits that the following factors reflect the law on disassociation:

   a. The accused must have a clear and unambiguous intention to withdraw from the common purpose,
   b. some positive act of withdrawal must take place,
   c. the withdrawal must be voluntary,
   d. the withdrawal must not take place when it is no longer possible to desist from or to frustrate the commission of the crime,
   e. the type of act needed for an effective withdrawal depends on several circumstances, and
   f. the role played by the accused in devising the plan to commit the crime has a strong influence on the type of conduct which the law requires him or her to perform in order to succeed with a defence of withdrawal.

10. The doctrine of common purpose thus establishes that where two or more people agree to a commit a crime, each will be responsible for the acts of the others that fall within their common purpose or design. In the judgement of *Tshabalala v S; Ntuli v S* (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019), the South African Constitutional Court held that this doctrine applies to the crime of rape.

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[12] *Criminal Law*: Part 1, Chapter VII Participation and accessories after the fact, at pages 223 to 230, Last Updated: 2020 - Seventh Edition. https://www.mylexisnexis.co.za/Index.aspx on 20 February 2024.

11. *Imperative and slotting in with the above is the law that disassociation must not be confused with avoidance of responsibility for the crime or mere squeamishness of the deed. The fact that you physically walk away whilst the crime is committed might not cause disassociation.* Disassociation cuts off the intent to commit the deed; the other may only place "distance" between the incident and the perpetrator. Gubbay CJ ventured the following dictum in *S v Beahan* 1992 (1) SACR 307 (ZS) at 324 and demanded that "reasonable effort to nullify or frustrate the effect of his contribution is required". In Lungile's case, *supra,* which was an armed robbery resulting in death, Olivier JA said at 603g-h:

> "… it is clear that, on whatever view one takes of the matter, there was no effective disassociation. The first appellant's mere departure from the scene is a neutral factor. It is more likely that he fled because he was afraid of being arrested, or of being injured, or to make good his escape with the stolen money and goods."

12. The applicant, on her own version, merely walked away and did nothing to show her dissociation. She realised on the facts before the court that the only option to evade detection by the authorities is to murder the deceased. She, in the least, realised that Mr. Rapuleng wanted to harm and kill the deceased. The deceased has seen them, she knew the witness from the work he had done at her home. The witness did state on several occasions that she will be killed. The applicant did participate in the planning and commission of the offences with a committed intent and premeditation to get what she wanted and get away with it. She did this with no regard to the life of the deceased.

13. She did not report the matter to anybody afterwards in an attempt to rescue the child. On her version she walked away with the knowledge that the deceased will be hurt and/or murdered. She tried to hide from the police at her parents' place afterwards. Throughout the trial she was deceitful and manipulative and cunning. She at times showed the utmost insight and intelligence and then when cornered ended up playing dumb. Her case must be rejected. But on her own version she remains guilty.

The case for the State

[15] The above said; the version of the witness and accomplice is to be preferred because it is detailed, honest and fits the objective facts of the case. He never over exaggerated his evidence against the applicant and was almost gentle in his evidence against her. He involved her as an accomplice and not the one that took the lead in the crimes. His evidence gave the impression that he was the leader.

[16] There was not any doubt with the court that Mr. Rapuleng is a hardened criminal with little respect for all than himself. He is intelligent and what he says must be taken with the proverbial pinch of salt. There were allegations that the father of the applicant was blackmailed for the applicant to be let of the hook, but it was never proven that it came from the accused. If he still wanted to gain some monetary advantage during this trial his testimony was not in line with this intent.

[17] Mr. Rapuleng had already been convicted and sentenced to life imprisonment. He had nothing to gain or to lose. There were discrepancies in his evidence, but he explained it and it did not affect his evidence as a

whole if compared to the objective facts. His evidence was accepted with caution as prescribed in law. In *R v Ncanana* 1948 (4) SA 399 (AD) at page 405 Schreiner JA stated that:

> The cautious court ... will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself... of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. The special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone.

[18] In his book on the Law of Evidence[13] Schmidt with reference to case law pointed out that the cautionary rule that wants for corroboration implicating the accused apart from the evidence of the co-accused is not absolute and there may be other factors which do away with the risk of an incorrect finding. For example, the accused's untruthfulness or his failure to give evidence to contradict or explain that of the accomplice. I agree with him when he goes on to say that even if such factors are absent, there will still be compliance with the cautionary rule if the trier of fact understands the peculiar danger inherent in accomplice evidence.

[19] The evidence of a witness can rarely be impeccable. The evidence of Mr. Rapuleng is not perfect. He did, however, not with ruthless and vengeful intent implicate the applicant.[14] In *S v Mafaladiso and Others* 2003 (1)

[13] Schmidt, CWH: BA LLD (FS), *Law of Evidence*, Chapter 4 at 4.3, 4.1.1 & 4.3.3, Last Updated: May 2023 - SI 21. https://www.mylexisnexis.co.za/Index.aspx on 20 February 2024.
[14] *R v Gumede* 1949 3 SA 749 (A) at page 758.

SACR 583 (SCA), Oliver JA set out the approach to be followed when a court is faced with evidence of this nature. The following approach to contradictions between two witnesses and contradictions between the versions of the same witnesses evolved:

1. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail.

2. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant.

3. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up.

4. Lastly, there is the final task of the trial judge, namely, to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.

5. If the accomplice is a single witness for the purposes of the cautionary rule regarding single witnesses, the court need not exercise any additional caution.[15] The issue of corroboration *aliunde* does however come to the fore. In this case it is clear from the photos and medical reports that the deceased was treated and murdered as the witness testified.

[20] The facts convicted on were:

1. The accused was involved in a love relationship with Motsika Stompie Rapuleng (witness and accomplice) who was an accused in this matter.
2. The accused and Mr. Rapuleng often discussed ways to make fast and easy money.
3. The deceased, B[…] S[…], was an 8-year-old scholar. She attended […] Primary School in Thabong, Welkom. She stayed with her mother, M[…] S[…] and grandmother, N[…] S[…].
4. During May 2021, the deceased's grandmother and/or mother hired Mr. Rapuleng to do household repairs at their house. He was paid in full.
5. During June 2021, Mr. Rapuleng conspired with accused to kidnap the deceased from school and then to extort money from her mother and/or grandmother.

[15] See *R v P* 1957 (3) SA 444 (A) and *S v Gokool* 1965 (3) SA 461 (N) at 472A.

6. On 21 June 2021 the deceased went to school at 7h20. She was wearing her grey and white school uniform, black school shoes and grey socks.
7. When the school adjourned for the day, the accused approached the deceased as she was leaving the school grounds. The accused had items with her which she pretended to sell for R20.00.
8. The accused convinced the deceased to take her to her mother so she could buy a tracksuit for the deceased.
9. The accused further offered to buy the deceased cooldrink and snacks at a nearby tuck shop. When they left the tuck shop Mr. Rapuleng stopped next to them in his car. He offered to give them a ride to the deceased's house.
10. The deceased got into the vehicle of Mr. Rapuleng together with the accused.
11. When the deceased did not arrive home after school her mother went to look for her at the school. She could not find the deceased and returned home.
12. Mr. Rapuleng phoned the grandmother of the deceased. He disguised his voice by speaking in a Nigerian accent.
13. The mother and grandmother immediately reported the matter to the Police Station.
14. Mr. Rapuleng was again called. He, Mr. Rapuleng demanded R50 000.00 and indicated that he would kill the child if he does not get the money.
15. That night the deceased was kept at the house of the accused till the following afternoon. Mr. Rapuleng did not want to sleep alone with the deceased.

16. The accused also phoned the grandmother of the deceased. She introduced herself as "Nthabileng". She urged the grandmother to convince the family to pay the money. She indicated that she was staying in Virginia and did not like what the kidnappers were doing to the child. It must be noted that the applicant denied the issue of calling herself “Nthabileng” until a witness for the State confirmed this unequivocally.
17. Mr. Rapuleng with the aid of the accused demanded R50 000.00 which had to be deposited at PEP Stores. He made it clear that if the money was not paid, the deceased would be raped and killed. Her body would be dropped where no one would find it. This was never disputed by the accused.
18. When it was pointed out that they did not have R50 000.00. Mr. Rapuleng indicated that he was willing to accept R1 500.00.
19. Proof that the deceased was still alive was requested. An unknown child was instructed to speak to the family and to pretend that she is the deceased. The family immediately realized that it was not the deceased.
20. Mr. Rapuleng phoned again. He now demanded R3 000.00.
21. During the evening of 22 June 2021, the deceased was locked up in the car of Mr. Rapuleng which was parked at his residence. It was in the middle of winter.
22. Several calls were made between Mr. Rapuleng and the family.
23. The accused and Mr. Rapuleng became despondent, they believed that they would not be paid. They decided to kill the deceased as she would have been able to identify them.

24. This is what was testified by the witness and the testimony is accepted beyond a reasonable doubt:[16]

MR RAPULENG: Then I asked her what now what must we do with this child, because we did not get the money? The Accused did not reply, she kept quiet.

PROSECUTOR: Yes?

MR RAPULENG: The Accused then slapped this child, and the child was sitting at the back seat.

PROSECUTOR: How did she slap her?

COURT: She turns her hand to the back, was she sitting in the front the Accused, front passenger seat?

MR RAPULENG: That is correct so

COURT: The deceased was sitting at the back, and she slapped her with an open hand to the back.

MR RAPULENG: That is correct so.

PROSECUTOR: Did she hit the child?

COURT: Did she strike her?

MR RAPULENG: That is correct so.

PROSECUTOR: Where?

MR RAPULENG: In the face.

PROSECUTOR: Yes and then?

COURT: Why did she do this?

MR RAPULENG: It was out of anger because the family is refusing to give the money.

COURT: Thank you.

MR RAPULENG: And the Accused undressed the child take off her pants and her underwear.

PROSECUTOR: Where was the Accused when she did this?

MR RAPULENG: The Accused?

PROSECUTOR: Yes.

[16]Transcribed record of proceedings.

COURT: Let us take it a step back, you were in the car now is that correct that is your white Jetta.

MR RAPULENG: That is correct.

COURT: You were driving Accused sitting in the front passenger seat, deceased on the back seat?

MR RAPULENG: Yes.

COURT: Now the scene where you explain the Accused undressed the child were you driving or were you stationary did you stop?

MR RAPULENG: We were stationary at the time, and it was Phumlani Graveyard.

COURT: Phumlani?

MR RAPULENG: Graveyard.

COURT: Graveyard.

PROSECUTOR: Is that in Thebong in Welkom?

MR RAPULENG: That is correct.

PROSECUTOR: And where was the Accused was she still in the vehicle?

MR RAPULENG: That is correct.

PROSECUTOR: Still in the front seat?

MR RAPULENG: That is correct.

PROSECUTOR: How did she manage to undress the child if she is sitting in the front seat?

MR RAPULENG: There is a space between the driver and the passenger like any other car and she managed to turn.

PROSECUTOR: She managed?

MR RAPULENG: To turn.

PROSECUTOR: And the child was she still on the backseat?

MR RAPULENG: That is correct.

PROSECUTOR: And what exactly did she take off, or not take off, undress?

MR RAPULENG: Her pants and her underwear.

PROSECUTOR: Did she completely take it off or did she just pull it down?

MR RAPULENG: No, she only pulled it down, not completely off.

PROSECUTOR: And the clothing that the deceased had on top what happened to that?

MR RAPULENG: She was still wearing them.

PROSECUTOR: And then?

MR RAPULENG: The Accused inserted her finger in her vagina.

PROSECUTOR: Only once?

MR RAPULENG: Only once.

PROSECUTOR: And then?

MR RAPULENG: I also turned and I also inserted my finger in her vagina.

PROSECUTOR: Why were you doing this?

MR RAPULENG: Maybe it was because of anger because we did not get what we wanted.

PROSECUTOR: Now how many times did you put your finger into the child's vagina?

MR RAPULENG: Only once.

PROSECUTOR: And what was the child's reaction?

MR RAPULENG: She cried, but she was crying before.

PROSECUTOR: And then?

MR RAPULENG: I then asked the Accused what now, what are you going to do because now the child was bleeding from the vagina.

PROSECUTOR: What was the light at that stage the ...[intervene].

COURT: What was the position in regard to visibility?

MR RAPULENG: It was dark.

PROSECUTOR: How did you manage to see the child was bleeding?

MR RAPULENG: I was using the cabin light.

PROSECUTOR: And then?

MR RAPULENG: We told the deceased to wear her panty and pants.

PROSECUTOR: Who told her?

MR RAPULENG: The Accused, myself and the Accused.

MS SMITH: M'Lady I did not hear what was said just before, you and the Accused told?

COURT: We told the deceased to wear the pants.

MR RAPULENG: Yes and the panty.

COURT: And the panty.

PROSECUTOR: What did the deceased do?

MR RAPULENG: She wore that panty and the pants.

COURT: So, she pulled it back on?

MR RAPULENG: That is correct so.

PROSECUTOR: And then?

MR RAPULENG: We waited for about two minutes.

PROSECUTOR: Yes?

MR RAPULENG: Wondering what was going on what was going to happen.

PROSECUTOR: Yes?

MR RAPULENG: Got out of the vehicle, I went to the boot to get a rope.

PROSECUTOR: Yes?

MR RAPULENG: Because myself and Lerato we agreed that now we must kill the child.

PROSECUTOR: When did you came to this agreement?

MR RAPULENG: That was there inside the car.

PROSECUTOR: Tell us how did it happen?

MR RAPULENG: Murder.

COURT: Yes, but remember we were not there, so we were now where the deceased pulled up her pants and you waited for another two minutes wondering what was going to happen, is that right? So, tell us exactly who said what and what happened?

MR RAPULENG: I informed the Accused that when in situations like this seeing that we arrested already we must kill this child and hide the evidence. After the Accused agreed to that I got out of the vehicle to get the rope in the boot.

PROSECUTOR: Did you discuss how you would kill the child?

MR RAPULENG: We said we should only strangle her and leave her there.

PROSECUTOR: Right, you went you took out rope?

MR RAPULENG: I told Lerato to keep an eye on the child and not to get out of the car. I went to the boot, got the rope, I tie her hands and her feet.

COURT: Who tied her hands and feet?

MR RAPULENG: Just to avoid her from running because she wanted to run away.

PROSECUTOR: You said you tied her hands and feet?

MR RAPULENG: That is correct and that stage Lerato was holding her.

PROSECUTOR: How did you tie her hands and feet?

MR RAPULENG: Hands against each other and feet the same.

COURT: Hands together and feet together and you make a movement as if you turned the rope around the hands and the feet, is that correct?

MR RAPULENG: That is correct so.

PROSECUTOR: Where the hands loose from the feet?

MR RAPULENG: That is correct.

PROSECUTOR: And how was the Accused holding her?

COURT: Let us ask the Court Orderly to come forward, come closer to you. Now were you still in the car or were you outside the car now?

MR RAPULENG: Inside the car.

COURT: Child in the backseat.

MR RAPULENG: The backseat.

COURT: Was the child sitting, laying down what position was the child in when Lerato was holding her down?

MR RAPULENG: Sitting.

COURT: Sitting.

PROSECUTOR: And where was Lerato?

MR RAPULENG: She was still sitting in the front seat but she turned to hold the child not to move to the left or to the right.

PROSECUTOR: As it pleases the Court, so she was holding her upper body?

MR RAPULENG: Just before I forget before we tied the child Lerato instructed the child to take off the tracksuit top and the jersey.

PROSECUTOR: Yes?

MR RAPULENG: We tied the child. After that we put on a plastic [indistinct] colour over her face.

COURT: You said a Checkers bag?

MR RAPULENG: Checkers.

PROSECUTOR: And who did it, who put it over her face as you say?

MR RAPULENG: It was myself.

PROSECUTOR: So, you pulled it over her head?

MR RAPULENG: That is correct.

PROSECUTOR: And what was the Accused doing?

MR RAPULENG: She was holding this child and seeing that this child, we tied the child she was just sitting there.

PROSECUTOR: Okay so you pulled the bag over the child's head and then?

MR RAPULENG: We tied the plastic around her neck.

PROSECUTOR: Yes.

COURT: Who tied the plastic around her neck?

MR RAPULENG: Myself.

COURT: Okay.

MR RAPULENG: The child cried and after a while she was quiet.

PROSECUTOR: After a while?

MR RAPULENG: She was quiet.

PROSECUTOR: Did the child not try to take the bag from her head?

MR RAPULENG: She would not have tried because now her hands were tied.

PROSECUTOR: But if I understood you correctly her hands were tied but she was still able to move her arms up and down?

MR RAPULENG: Yes.

PROSECUTOR: So, did she not try to take it off?

MR RAPULENG: No.

PROSECUTOR: And then when she was quiet what happened?

MR RAPULENG: I started the car and drove to Henneman [indistinct] road.

PROSECUTOR: Yes?

MR RAPULENG: Lerato took out the duvet, lay it down and put the child on the duvet.

PROSECUTOR: Where did you stop?

MR RAPULENG: It was on a tar road Henneman road.

PROSECUTOR: So, you put the duvet in the field next to the road?

MR RAPULENG: That is correct.

PROSECUTOR: Who put the duvet there?

MR RAPULENG: It was Lerato.

PROSECUTOR: And then?

MR RAPULENG: I requested her to help me to take the child and put her on the duvet.

PROSECUTOR: Was the child still alive?

MR RAPULENG: No.

COURT: How do you know that?

MR RAPULENG: She was not making any movements.

PROSECUTOR: Yes, and did the Accused help you to put the child on the duvet?

MR RAPULENG: We wrapped her with this duvet ...[intervene].

PROSECUTOR: Listen to what I am asking you. Did she help you ...[intervene].

MR RAPULENG: We put the child on the side of the road.

PROSECUTOR: Who carried the child?

MR RAPULENG: Seeing that the child was heavy she helped me, we both carried the child.

PROSECUTOR: What happened to her tracksuit top and her jersey?

MR RAPULENG: They jersey we have put it over her shoulders and Lerato took the tracksuit top and her school shoes.

PROSECUTOR: So, you put the jersey over her shoulders before you wrapped her?

MR RAPULENG: That is correct.

PROSECUTOR: And then after you wrapped her in the duvet what did you do?

MR RAPULENG: We took her and we put her on the side of the road and left her there.

PROSECUTOR: And PROSECUTOR: And then?

MR RAPULENG: I transported Lerato to her place.

PROSECUTOR: Yes?

MR RAPULENG: Inside the car the deceased schoolbooks were in there.

PROSECUTOR: Her schoolbag?

MR RAPULENG: Yes, the schoolbag with her books.

PROSECUTOR: Yes?

MR RAPULENG: When I arrived in Phukeng, I burned them.

25. The hands and feet of the deceased were tied with a rope. Her head was covered with a grey woolen hat and her school jersey was tied around the hat. A plastic bag was then put over her head and she was suffocated.

26. She was wrapped in a duvet and left for dead in the field.

27. According to the postmortem the cause of death was: "suffocation".

28. The state relied on the doctrine of common purpose to prove the guilt of the applicant.

29. It has been proven beyond reasonable doubt that at all times the accused acted in concert with Mr. Rapuleng.

30. Counsel for the State opposed the application for leave to appeal strongly.

CONCLUSION ON CONVICTIONS

[21] The evidence, in conspectus, even with caution applied in the evaluation and acceptance of the evidence of the accomplice, cannot cause leave to appeal to be granted to the applicant. The evidence on both that of the applicant and the single witness as supported by the objective evidence directs to a conviction of the applicant.

CONCLUSION: THE SENTENCES

[22] The applicant abducted, raped, and murdered a little eight-year-old girl with pre-meditated ruthlessness. She showed no remorse but made a mockery of the proceedings with her deceitful conduct in court that caused the mother to be required to testify. The ordeal for the family and friends that had to attend the trial was gravely unpleasant.

[23] There does not exist any factors that can convince the court that the minimum sentence decree should not be applied. Although not the leader in the acts she did not hesitate to participate. Her conduct was enforced by greed. Her father did testify that she had a difficult childhood but that does not justify her conduct and does not mitigate and abate the atrocity of the crimes and the sentence to be imposed. The law on minimum sentences need not be reiterated.

ORDER

[24] The application for leave to appeal to the full bench of this court against the convictions on counts 3 and 4 and sentences of life imprisonment on counts 3 and 4 handed down on 3 November 2023 is dismissed.

M OPPERMAN J

APPEARANCES

Counsel for applicant	**ADVOCATE V ABRAHAMS** Legal Aid: South Africa **Bloemfontein**
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