

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



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

**CASE NO: CA 82/2018
REGIONAL CASE NO:**

RC2/208/07

In the matter between:

TSHEPO ABEDNIGO MOATSHE

APPELLANT

and

THE STATE

RESPONDENT

Coram: Petersen J, Williams AJ

Date Heard: 01 December 2023

The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be **09 April 2024** at 12h00pm.

ORDER

On appeal from: The Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Nzimande sitting as court of first instance):

1. The application for condonation for the late prosecution of the appeal is granted.
2. The appeal against conviction on counts 1 and 2 is dismissed.
3. The appeal against sentence on count 1 is dismissed.
4. The appeal against sentence on count 2 is upheld. The sentence of life imprisonment imposed by the court *a quo* on count 2 is set aside and replaced with the following sentence:
"Fifteen (15) years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997."
5. The sentence on count 2 is ante-dated to 22 February 2010.
6. The sentences on counts 1 and 2 shall commence the one after the expiration of the other.
7. The appeal against conviction and sentence on count 8 is upheld and the conviction and sentence are accordingly set aside.
8. The consequential orders made by the court *a quo* in terms of section 103(1) of the Firearms Control Act 60 of 2000 (that the accused shall remain unfit to possess a firearm); and in terms of section 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 that the accused name be entered in the register for sexual offenders is confirmed.

JUDGMENT

THE COURT

Introduction

- [1] The appellant stood trial in the Regional Court Klerksdorp. This appeal, which is against conviction and sentence comes before this court in terms of the appellant's automatic right of appeal in terms of section 309(1)(a) of the CPA.
- [2] The trial records are incomplete and the evidence in mitigation of sentence and the sentence judgment are missing. The matter was referred back to the Regional Court, but reconstruction of the records was not possible as the Regional Magistrate lost his notes. No other attempts were made at reconstruction of the record. Considering the history of the matter the appeal is otherwise ripe for consideration.
- [3] The appellant was legally represented throughout the trial. He faced eight (8) charges and pleaded not guilty thereto with no plea

explanation. He was acquitted on counts 3, 4, 5, 6 and 7, which does not merit further attention. The rape charges relate to the common law crime of rape as the crimes are alleged to have been committed in 2005, prior to the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on 16 December 2007.

- [4] On counts 1 and 2 respectively, the State alleged that the appellant was guilty of the crime of rape read with the provisions of sections 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). The crime of rape on count 1 was alleged to have been committed on or about **20/08/2005** at or near Khuma in the Regional Division North West in that the appellant is alleged to have unlawfully and intentionally had sexual intercourse with a female person, to wit BN a 15 year old girl without her consent. The crime of rape on count 2 was alleged to have been committed on or about **22/08/2005** at or near Khuma in the Regional Division North West in that the appellant is alleged to have unlawfully and intentionally had sexual intercourse with a female person, to wit LM a 15 year old girl without her consent. The crime robbery with aggravating circumstances (read with the provisions of section 51(2) of the CLAA on count 8 was alleged to have been committed on or about 20/08/2005 at or near Khuma by the appellant allegedly unlawfully and intentionally insulting a minor child TR and there and then and with force taking one pair of shoes his property or property in is lawful possession from him, with the aggravating circumstances being the wielding of a firearm.

[5] On **19 November 2009** the appellant was found guilty as charged on counts 1 and 2; and guilty of attempted robbery as a competent verdict on count 8. On **22 February 2010** the appellant was sentenced to fifteen (15) years imprisonment on count 1, life imprisonment on count 2; and six (6) years imprisonment on count 8. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 (“CPA”) the court *a quo* ordered the sentences on counts 1 and 8 to run concurrently with the sentence on count 2.

The grounds of appeal

[6] The grounds of appeal on conviction are very broadly stated and do not ordinarily constitute grounds of appeal. For reasons stated below, the appeal against conviction on counts 1 and 2 in particular are without merit, whilst the appeal against count 8 is justified.

[7] The grounds of appeal against sentence are that the trial court erred in imposing a life sentence on count 2 and not ordering a shorter sentence; not having regard to the personal circumstances and age of the appellant; and not considering the mitigation factors and the element of rehabilitation.

Application for condonation

[8] The appellant applied for condonation for his failure to prosecute his appeal timeously. The condonation application is not opposed by the respondent. The condonation application is supported by an affidavit in which the appellant provides a full and detailed explanation of the steps he has taken since the date of his sentence to prosecute the appeal. The appellant also attached all the correspondence which shows all the attempts he has made in order to prosecute his appeal. The main reason advanced for the lateness in prosecuting the appeal is attributed to the missing recordings of the trial and/or the inability to reconstruct and transcribe the record of his trial. Upon due consideration of the reasons advanced in the application and the real prospects of success on appeal, condonation is granted.

Background facts

[9] The appellant (accused 1 in the court *a quo*) was charged on counts 1 and 8 with two co-accused; accused 2 and accused 3 in the court *a quo*. The charges against accused 3 (“Kalaote”) were withdrawn as he became a state witness. Kalaote is related to the appellant and they grew up together.

[10] The facts that gave rise to the conviction of the appellant on counts 1 and 8 can be summarized as follows. On the evening of 20 August 2005, the complainant (“BN”) and her companion encountered the appellant and four other male persons (“the group”) near a school in Khuma. The appellant was wearing a hat which was pulled down to cover his face. The appellant pointed a firearm at BN and told her that

if she screams, he will smash her head. The group attacked BN's companion, removed his shoes, took his hat and the appellant then ordered him to run away. The appellant held onto BN's hand and ordered her to the school yard. The appellant entered the school yard after BN and the group followed. BN was crying and was terrified. The appellant took her into a passage next to the classrooms. A big flood light not far from the school provided illumination. The appellant ordered BN to undress. When she refused, he lifted her skirt; took off her panty; made her lay on the ground; lowered his pants and proceeded to rape her. According to BN the group was not present when the appellant raped her as they were walking around the school building.

[11] Kalaote, however, testified that the whole group was present and looking on while the appellant raped BN. Whilst the appellant was raping BN his hat moved and she could see his face. BN resultantly pointed out the appellant at an identification parade as the person who raped her. The evidence of identification which ordinarily could be best by error and misdescription found consistency in the DNA evidence adduced by the State, which linked the appellant to the rape of BN. The appellant when confronted with the DNA evidence found it difficult to explain the presence of his semen in the vaginal vault of BN.

[12] The evidence that gave rise to the conviction on count 2 can be summarized as follows. On the evening of 22 August 2005 LM was

walking home. Along the way she encountered three male persons approaching her from the front, whom she later identified as the appellant and his friends. The appellant stopped LM, who tried to run away. The appellant's friend, however, pushed her back to the appellant. The appellant's face was covered with a balaclava; he had gloves on, and he was in possession of a firearm. When the appellant grabbed hold of LM, his friends left. The appellant demanded money from LM and when she replied that she did not have money, he asked her if she knew him. When she told him that she did not know him, he told her that she should know him. The appellant threatened to shoot LM if she made a noise and proceeded to fire shots in the air and on the ground. The appellant took LM to a veld where he undressed her, made her lay on the grass and raped her. After the appellant raped LM, he took her to a house where he removed the balaclava. LM knew the appellant by sight only. The appellant and LM were alone in the house. He then ordered LM to undress, to get under the blankets, removed his clothes and raped her for a second time that night. The next morning, he raped her again. She managed to run away from the appellant; reported the rape and thereafter went to the police station to lay a complaint. The police took LM to a doctor.

- [13] It was initially put on behalf of the appellant to LM, that he denies meeting LM that night. However, during the appellant's evidence in chief he changed his version and admitted that he had sexual intercourse with LM but contended that it was consensual. Notably the version put to LM was never formally withdrawn.

Appeal against conviction

- [14] The findings of fact and credibility by a trial court are presumed to be correct because it is that court and not the court of appeal which has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See *S v Leve* 2011 (1) SACR 87 (ECG) at paragraph 8. It is trite that a court of appeal will not overturn a trial court's findings of fact, unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. See *S v Francis* 1991 (1) SACR 198 (A) at 204 c-e.
- [15] On count 1, the appellant admitted to meeting BN and her companion on the evening of the incident but denied that he was the one who raped her. The State adduced DNA evidence which linked the DNA profile of the appellant with semen found in the vaginal vault of BN. The appellant was at pains to explain the presence of his DNA found in BN, if he had not raped her. BN's evidence and that of Kalaote differed in some respects but the contradictions, if they may be termed such, are not material. The trial court was alive to the fact that it should treat the evidence of Kalaote with caution as he was an accomplice. In any event, even in the absence of the evidence of Kalaote, the evidence presented by the State was sufficient to justify the conviction of the appellant on count 1.

- [16] On count 2, it was initially put to LM on behalf of the appellant that the appellant denies meeting her on the street that fateful night. However, during his evidence in chief he admitted that he met LM that night and changed his version to claiming that he had consensual intercourse with LM. The trial court correctly found that he changed his version after he learned of the DNA evidence which linked him to the rape of LM.
- [17] The evidence and the reasons for the convictions by the court *a quo* have been carefully considered, as a whole. It cannot be said that the court *a quo* misdirected itself in this regard and I am satisfied that the convictions of counts 1 and 2 are in order in that State proved its case beyond a reasonable doubt. Counsel for the appellant Mr Monnahela therefore rightly conceded that the appeal against conviction on counts 1 and 2 should be dismissed.
- [18] The only evidence led on count 8 was that of BN and Kalaote. The complainant on the robbery charge, who was BN's companion that fateful night, was not called as a witness. The evidence of BN was that when the appellant approached her and pointed a firearm at her, she looked back and saw her companion on the ground, with "*these other boys*" taking his shoes and hat. Thereafter, she did not see her companion again. The evidence of Kalaote was that the appellant's friends grabbed BN's companion whilst the appellant grabbed BN. The appellant then ordered BN's companion to run away and he obliged. Nowhere in the evidence of both BN and Kalaote did they

implicate the appellant in the robbery. The conviction of attempted robbery on count 8 was based solely on the fact that the appellant during his evidence testified that *“to be candid with this court your worship I held him, I searched him, but I did not find anything from him. Your worship I have attempted to do that your worship, because I held him, but however upon searching him I could not find anything your worship of valuable in his possession.”* The court *a quo* erred in this regard by intentionally disregarding the evidence of BN and Kalaote. The appeal against the conviction and sentence on count 8 should therefore be upheld.

Appeal against sentence

[19] The approach to an appeal against sentence was set out in *S v Malgas* 2001 (2) SA 1222 (SCA) at paragraph 12 as follows:

“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the

sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[20] It is necessary to point out again that the record is incomplete and the evidence in mitigation of sentence and the sentence judgment are missing. The record contains a pre-sentence report that was adduced in mitigation of sentence. This Court is unable to determine which factors the court *a quo* considered, and how it was influenced in sentencing the appellant. More so, since the appellant was sentenced to life imprisonment on count 2 when the conviction read guilty as charged, meaning rape read with section 51(2) of the CLAA.

[21] Counsel for the appellant was of the view that the Court can still properly determine the appeal based on the record before it. The main issue taken by the appellant on count 2 is that the court *a quo* impermissibly imposed a sentence of life imprisonment in terms of section 51(1) whereas the charge sheet reflected section 51(2) as being applicable. Section 51(1) read with Part 1 of Schedule 2 of the CLAA is therefore not applicable. No issue is taken with the sentence of fifteen (15) years imprisonment imposed on count 1. Counsel for

the respondent takes no issue with the contention that the court *a quo* erred in imposing life imprisonment on count 2.

[22] Counsel for the appellant and the respondent submit that if the sentence on count 2 is set aside, the sentences on count 1 and the sentence imposed on count 2 by this Court should run concurrently. The issues raised by the appellant in which the respondent acquiesces calls for consideration of the applicable provisions of section 51 and Part I and Part III of schedule 2 of the CLAA, and section 280 of the CPA.

The provisions of section 51 of the CLAA

[23] The appellant relies on *Ndlovu v S* 2017 (2) SACR 305 (CC) to support the contention that the Regional Court did not have jurisdiction to impose life imprisonment on count 2. The contention is mainly based on paragraphs 41 to 46 of *Ndlovu* where the Constitutional Court said the following regarding the jurisdiction of the Regional Court:

“[41] It is trite that Magistrates’ Courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrates’ Courts Act and other relevant statutes. Because Mr Ndlovu was treated as a first offender, under section 51(2) the sentencing jurisdiction of the Regional Court was limited to a maximum of 15 years’ imprisonment. The Regional Court, however, sentenced

Mr Ndlovu to life imprisonment under section 51(1), which it would have had the power to do only if the application of the section was triggered.

[42] In terms of section 51(1) of the Minimum Sentencing Act, the Regional Court would have had jurisdiction to sentence Mr Ndlovu to life imprisonment only if it had convicted him of an offence referred to in Part I of Schedule 2. The question is thus whether Mr Ndlovu was convicted of an offence referred to in Part I of Schedule 2.

[43] When handing down its judgment convicting Mr Ndlovu, the Regional Court first made reference to the fact that Mr Ndlovu was charged with rape read with section 51(2) of the Minimum Sentencing Act. The Regional Court then recounted all of the evidence put before it, and finally concluded:

“The evidence of the complainant is satisfactory in all materials. There is no evidence to suggest that she is not honest or [is biased]. Therefore the Court is satisfied with the manner in which the complainant testified. Therefore the accused is found ‘guilty as charged’ as his version is not possibly true.”

[44] The Magistrate’s statement that the accused is found “guilty as charged” is unambiguous. Mr Ndlovu was convicted of “rape read with the provisions of [s]ection 51(2)”. This means that he was convicted of an offence referred to in Part III of Schedule 2 – not an offence referred to in Part I of Schedule 2.

[45] The Magistrate was aware that the charge was “rape read with the provisions of [s]ection 51(2)” and specifically found Mr Ndlovu “guilty as charged”. This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(1). Nor does the evidence of the complainant’s injuries automatically cure

the charge in terms of section 51(1), as posited by the state. A defective, or incomplete charge may be remedied by evidence in some instances by section 88 of the Criminal Procedure Act. However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.

[46] In the light of this, I can do nought but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51(2); accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender). The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years."

(emphasis added)

[24] In *Director of Public Prosecutions, Gauteng Division, Pretoria v Buthelezi* 2020 (2) SACR 113 (SCA), the Supreme Court of Appeal was called to consider an appeal brought in terms of s 311(1) of the CPA, arising from what the DPP submitted was a question of law in relation to sentence decided in favour of the respondent. The issue related to the formulation of a charge with reference only to section 51 and Part I of Schedule 2 with reference to the incorrect legislative Act. The judgment re-emphasizes the correct approach to be adopted by a court of appeal on this contentious and sensitive issue. The SCA stated as follows:

“[12] Section 51(1) of the CLAA provides that a regional court or a High Court shall sentence a person it has convicted of an offence referred to in part 1 of sch 2 to life imprisonment unless there exist substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed one. Rape of a child under the age of 16 years falls under part 1 of sch 2.

[13] The rule that the accused person should be informed of the minimum sentence that is applicable in the case, owes its genesis to S v Legoa where this court held that it was desirable that the facts the state intended to prove to increase the sentencing jurisdiction under the Act (CLAA) should be clearly set out in the charge-sheet. The court concluded by stating that the matter is one of substance and not form, and a general rule could not be laid down that the charge-sheet in every case had to recite either the specific form of the scheduled offence with which the accused was charged, or the facts the state intended to prove to establish it. Recently, in *S v Khoza and Another* this court stated:

‘As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentence Act . . . that the state intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge-sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused before or at the commencement of the trial.’

[14] The charge-sheet in this matter stated that 'the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant . . . a 13-year-old by inserting his penis in her vagina'. The appellant therefore knew that he was being charged with rape of a girl

below the age of 16. Although by reason of a typographical error the charge-sheet referred to the Criminal Law (Sentencing) Amendment Act 38 of 2007 — which has neither a s 51 nor a sch 2 — **both the respondent and his counsel were aware that the intention was to refer to s 51(1) of the CLAA 105 of 1997. This is so because after the respondent had pleaded guilty and his statement in terms of s 112(2) of the CPA was read into the record, but before the state accepted the plea, the trial court posed the following questions to the respondent:**

‘Court: And Mr Buthelezi the last aspect that I want to verify with you, that the Minimum Sentence Act was fully explained to you by your legal representative? Do you understand the consequences and the sentence that can be imposed in accordance with Section 51 of life imprisonment with the conviction?’

Accused: I, fully understood that. Yes, you Worship.’

[15] In the light of this, the reference to the incorrect Act, being a mere typographical error, cannot without more amount to a misdirection in this case. To hold otherwise will be to put form over substance. Accordingly, I agree with the DPP that the respondent's right to a fair trial was not infringed in any way. He was fully aware that the charge he was facing and to which he intended to plead guilty carried a minimum sentence of life imprisonment. He confirmed to the trial court that he understood the applicability and the consequences of the minimum sentence and that it had been fully explained to him. The respondent proceeded to plead guilty to the charge knowing fully that, if convicted, he may be sentenced to life imprisonment.

....

[17] I further agree with the DPP that the dictum in *Ndlovu* is not applicable in this matter. The facts in that case are clearly distinguishable from the present

matter. There the accused was charged with rape and was warned that s 51(2) was applicable (that when convicted he may be sentenced to 10 years' imprisonment). Upon his conviction, the trial court sentenced him to life imprisonment in terms of s 51(1). The Constitutional Court, however, held that the trial court on finding him guilty as charged had convicted him of an offence for which that sentence was not prescribed. Unlike *Ndlovu*, however, the charge-sheet in this matter referred to s 51 and sch 2, albeit of the wrong Act, and the respondent was adequately warned that a sentence of life imprisonment may be imposed if convicted. All the parties the appellant, his counsel, the prosecutor and the magistrate, laboured under the mistaken assumption that the correct Act had been referred to. The typographical error thus caused no prejudice to the appellant, and the respondent's right to a fair trial was in no way infringed by any of this.”

(emphasis added)

[25] In passing, if the charge sheet referred to section 51(1) and Part I of Schedule 2 and/or the Regional Magistrate brought the provision and its implication to the attention of the appellant, what the SCA stated at paragraph 16 of *DPP v Buthelezi* would have applied in the present appeal. The Regional Court at the time it sentenced the appellant had jurisdiction to impose life imprisonment which would not have been the case if the appellant was charged before 31 December 2007 for the crime of rape committed in 2005. The following was said at paragraph 16:

“[16] Regarding the regional court’s jurisdiction to impose a sentence of life imprisonment, s 52 of 105 of 1997 provided that once the regional court has convicted a person of an offence referred to in part 1 of sch 2, the regional court

shall adjourn the proceedings and refer the matter to the High Court for sentencing. However, this section was amended by the CLAA 38 of 2007 which came into operation on 31 December 2007. In terms of s 1 of the CLAA 38 of 2007, the regional court was granted jurisdiction to impose a sentence of life imprisonment if it convicts a person of an offence referred to in part 1 of sch 2. Therefore, when the regional magistrate sentenced the respondent to life imprisonment on 31 August 2012, the CLAA 38 of 2007 was already in operation, and the regional court had the jurisdiction to impose the sentence which it did."

(emphasis added)

- [26] Applying the reasoning in *Ndlovu* and *DPP v Buthelezi* relevant to the peculiar circumstances of this appeal in respect of count 2, it is apparent from the charge sheet that it specified reliance by the State on section 51(2) of the CLAA. A vigilant examination of the record reveals that the appellant was not warned by the trial court about the sentence of life imprisonment which a conviction read with section 51(1) of the CLAA attracts, as happened in *DPP v Buthelezi*.
- [27] Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it. This right was violated by the court *a quo* when it imposed a sentence of life imprisonment on count 2, in circumstances where the appellant's attention was not drawn to same either in the charge or by the Regional Magistrate. This Court is therefore at large to consider sentence on count 2 afresh.

The appeal against sentence on count 1 and sentence afresh on count 2

[28] The offences on counts 1 and count 2 were committed two days apart and perpetrated in respect of two different complainants. The appellant was in possession of a firearm with which he threatened to kill the complainants. The evidence revealed that both complainants were terrified. The complainant on count 2 was raped twice on the same night and again the next morning. She was taken to a house and held there until the next morning. These facts aggravate the imposition of sentence.

[29] The pre-sentence report which forms part of the record dated 22 February 2010, fourteen (14) years ago, revealed that the appellant was twenty-three (23) years old when he committed the offences. He is the second born of three children. The appellant grew up in Khuma and was raised by his mother and grandmother. His highest level of schooling was grade 11. The appellant does not have any children. The appellant was unemployed and was supported by his mother who received a disability grant which was used to pay rent, electricity and buy groceries. The appellant was a member of the Roman Catholic Church and attended church regularly. The appellant had four friends who were with him when he committed the offences. The appellant's mother passed away in 2006 after he was arrested.

[30] The appellant has previous convictions for rape, which offences were committed after the two offences in counts 1 and 2 in this matter. These previous convictions therefore do not constitute offences which increase the prescribed minimum sentence to twenty years imprisonment for a third or subsequent offender of any such offence. The previous convictions, however, aggravate the imposition of sentence as it speaks to the character of the appellant, who poses a clear danger to woman and in particular young girls. The report indicated that the appellant demonstrated no remorse for his dastardly deeds and that he is a danger to society.

[31] According to BN she was always crying and felt depressed. She found it hard to come to terms with what happened to her. Her mother stated that BN was traumatized in such a manner that she did not attend school and felt that the appellant is a danger to society as he was going around raping young girls at gunpoint. BN and her family were not willing to forgive the appellant and wanted him to be imprisoned. The report does not contain details of what impact the offence had on LM. The probation officer went to her last known address and found that she was no longer staying there.

[32] The pre-sentence report did not reveal anything which justified a decremental departure from the prescribed minimum sentence of ten years imprisonment on count 1, for a first offender on a charge of rape. The Regional Magistrate imposed fifteen years imprisonment on count 1, which would be the maximum term a Regional Court may

impose for a first offender on a charge of rape. It is inexplicable notwithstanding the issue highlighted in respect of count 2 above, and in the absence of a sentence judgment, how the Regional Magistrate imposed fifteen years imprisonment on count 1 since LM was fifteen years old at the time of the rape which would ordinarily merit life imprisonment. That notwithstanding and taking guidance from *Ndlovu supra* where the maximum term of fifteen years which a Regional Court may impose, was imposed by the Constitutional Court, and with due regard to the previous convictions for rape, the sentence of fifteen years imprisonment on count 1 is a sentence this Court would have considered a suitable sentence. The appeal against sentence on count 1 must accordingly fail.

[33] In respect of count 2, a sentence of fifteen years imprisonment is also merited. The appellant, on appeal therefore stands to be sentenced to fifteen years imprisonment on count 2, ante-dated to 22 February 2010.

The provisions of section 280 of the CPA and section 39(2)(a)(i) of the Correctional Services Act 111 of 1998

[34] As indicated above, counsel for the appellant and the respondent submit that the sentences on counts 1 and 2 should be ordered to run concurrently. Section 280 of the CPA provides as follows:

“280 Cumulative or concurrent sentences

- (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

(emphasis added)

[35] Section 39(2)(a) of the Correctional Services Act 111 of 1998 similarly provides that:

“a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each sentence, the one after expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise...”

[36] In *S v Mokela* 2012 (1) SACR 431 (SCA) at paragraph 11 the SCA stated that sentences should be ordered to run concurrently if *“the evidence shows that the relevant offences are inextricably linked in terms*

of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.”

[37] Having considered the totality of the evidence in sentence, this Court is not persuaded that an order in terms of section 280(2) of the CPA that the sentences on counts 1 and 2 run concurrently is merited, or in the interests of justice. The criminal record of the appellant demonstrates that he is in fact a danger to society and more particularly woman and girls. The sentences of imprisonment on counts 1 and 2 shall therefore in terms of section 280(2) of the CPA commence the one after the expiration of the other.

Order

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

1. The application for condonation for the late prosecution of the appeal is granted.
2. The appeal against conviction on counts 1 and 2 is dismissed.
3. The appeal against sentence on count 1 is dismissed.
4. The appeal against sentence on count 2 is upheld. The sentence of life imprisonment imposed by the court *a quo* on count 2 is set aside and replaced with the following sentence:
“Fifteen (15) years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.”
5. The sentence on count 2 is ante-dated to 22 February 2010.

6. The sentences on counts 1 and 2 shall commence the one after the expiration of the other.
7. The appeal against conviction and sentence on count 8 is upheld and the conviction and sentence are accordingly set aside.
8. The consequential orders made by the court *a quo* in terms of section 103(1) of the Firearms Control Act 60 of 2000 (that the accused shall remain unfit to possess a firearm); and in terms of section 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 that the accused name be entered in the register for sexual offenders is confirmed.

THE COURT

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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