IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A965 / 2014

REPORTABLE:NO

OF INTERST TO OTHER JUDGES:NO

REVISED.

DATE:18/05/21

In the matter between:

ELIAS MOTHATE Appellant

and

THE STATE Respondent

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 18 MAY 2021 AT 12H00.

PICK D, AJ

Introduction:

1 This is an Appeal from the Pretoria North Regional Court, Gauteng.

Leave to appeal was refused by the trial Court. The Appellant is before this Court by virtue of his right to automatic appeal. The appeal is on both conviction and sentence. The Appellant was not legally represented during the trial, but was legally represented by Legal Aid at the time of sentencing.

2 On 23 April 2013 the Appellant was convicted and sentenced as set outon the following charges: Robbery with aggravating circumstances - 20 years imprisonment; theft - 1 year imprisonment; rape - Life imprisonment, kidnapping - 5 years imprisonment; attempted murder - 10 years imprisonment.

3 On sentencing the Magistrate also imposed the following terms:

-the Appellant was not allowed to apply for parole within the first 25 yearsof his imprisonment (Section 276(b)(1) of Act 52 of 1977);
-the Appellant was declared unfit to possess a firearm (Section 103(1) of Act 60 of 2000)
-the Appellant's name was entered into the name of the Register of Sexual Offenders (Section 50(1)(a1) of Act 32 of 2007).

Evidence before Court:

It is the State's case that:

4 The Appellant gained entry to the house of the complainant in the early morning hours of 24 July 2010. He switched on the light in the room

where she and her son (aged […]) were sleeping at the time and demanded money. The complainant was robbed of her cell phone, bank cards and later her motor vehicle, all of which was later recovered. The Appellant robbed the complainant's son of an amount of R 30, 00 which he tendered to the Appellant when theAppellant demanded money from the complainant.

5 The Appellant severely assaulted the complainant by repeatedly stabbing and beating her with a garden fork during the incident which lasted two and a half to three hours. She was raped by the Appellant. The rape lasted about 20 minutes. As a result, the Appellant suffered serious bodily injuries for which she had to received medical treatment. The complainant spent three to four weeks in hospital as a result of the injuries she sustained during the assault. Photos of the injuries and the J 88 were handed in as evidence.

6 After the rape, the Appellant told the complainant to get dressed and forced her into her motor vehicle with the apparent intent of withdrawing further cash from her bank accounts. The complainant escaped from the Appellant by jumping from her moving vehicle on the Mabopane highway at about 06h00 in the morning. In the process she sustained more injuries. The Appellant then caught up with her and started assaulting her again whist she was lying on the ground. One MrsN[...]came to her rescue when, on hearing the commotion behind her house shouted that she would phone the police. The Appellant then fled. MrsN[...]solicited the assistance of a security company called ADT. The police and paramedics arrived shortly thereafter.

7 During the month of August 2010, the Appellant's sister-in-law was foundin possession of the complainant's phone. She told the police that she received the phone from the Appellant on 25 July 2010, two days after the incident.

The Appellant was arrested on 08 October 2010.

8 On 18 October 2010 the complainant identified the Appellant on an

identification parade as the perpetrator. She identified the Appellant by his physical built, his dark skin, his eyes and a mark on his forehead. The complainant's 7-year-old son did not identify anybody at the identification parade. Neither did he testify at the trial.

9 The State called the complainant and twelve other witnesses to prove its case. Amongst these witnesses were MrsN[...]who found the complainant, the Appellant's sister-in-law, the investigating officers, the police officer who arranged- and presided over the identification parade, the medical professionals who treated the complainant, and a fraud specialist from Vodacom.

10 The specialist from Vodacom testified that the complainant's phone was last used on the day of the incident, being 23 July 2010 and again switched on 25 July 2010, two days after the incident.

It is the evidence of the Appellant that:

11 He was not involved in the incident at all and bears no knowledge thereof. He does not know the complainant. He pleaded not guilty to all the charges. Before his arrest he was permanently employed. He testified that he therefor could not have been at the scene of the crime on the morning in question, as he slept at home when he was working.

12 He bought the cell phone from an unknown man at Mabopane train station closer to the end of July (near payday) and gave it to his sister-in-law as she needed a phone. She testified that it was given to her as a birthday gift.

13 He places the integrity of the identification parade in question as he was not legally represented at the time thereof. He requested legal aid assistance on the 11th of October 2010 and the parade took place on the 18th of October 2010, when he was still legally unrepresented. He also says that the description the complainant gave of the person who robbed-, assaulted- and raped her is that ofthe man from whom he bought the phone.

14 The Appellant called no witnesses. Apart from contesting the evidence of the complainant, the arresting officer and the legitimacy of the identification

parade the Appellant did not cross-examine any other witnesses. This concluded the case for the Appellant.

Issues to be decided by this Court

15 On Appeal the Appellant places the complainant's evidence as a **single witness** in dispute and avers that proper corroboration for her evidence was not made out by the State's case.

16 The Pretoria Justice Centre on behalf of the Appellant circles out **two issues** to be decided by this Court, namely:

-the **identity of the perpetrator** who robbed the complainant;
-the **reliability of the identification parade**

17 The Appellant avers that he did not have a fair trial and the State did not proof its case beyond reasonable doubt as his version could reasonably possibly be true. It is argued that there is an **unfair duplication** in the charge of **attempted murder,** therein that the Appellant had no intention to kill the complainant. It is said that he kept her alive to drive him to the bank to withdraw more money and that the injuries induced *"were directed at forcing her to give him money and subdue her to the rape."*

18 The Appellant further avers that the Court a quo did not exercise its **sentencing discretion** properly. The provisions of the Criminal Law Amendment Act, Act 105 of 1997 were not mentioned to the Appellant when the charges were put to him and he was not informed of the consequences in the event that he was found guilty on the charges.

19 The Appellant's legal representative argues that the Appellant was in custody for a period of 2 years and 6 months awaiting trial and that this together with his personal circumstances constituted **substantial and compelling circumstances,** warranting a deviation from the prescribed minimum sentence which circumstances w re not considered by the Court a quo.

20 The Appellant further held that the seriousness of the offences and the interest of society were **over-emphasised,** whilst his personal circumstances

were **under-emphasised** during sentencing and therefor the sentence was "shockingly harsh and induces a sense of shock".

The Law

21 First and foremost and as held in **S v Francis [1991] 2 All SA 9 (C); 1991 SACR 198 (A)** it must be borne in mind that there is a presumption that thetrial court's evaluation of the evidence is correct and it will only be disregarded if it is clearly wrong. In **S v Pieters 1987 (3) SA 717 (A) at, 14-16** the Appeal Court held that it will not interfere with the sentence of the trial· Court unless it is patently clear that the court a quo exercised its sentence discretion improperly and unreasonably.

On the Single Witness & the Cautionary Rule:

22 **Section 208 of the Criminal Procedure Act, Act 51 of 1977** states

"An accused may be convicted on the single evidence qt any competent witness." This section of the Act deals with the Cautionary Rule which is applicable to- and should be observed in the consideration of certain classes of evidence which are placed before a court from time to time.

23 In **S v Stevens 2005 (1) SACR (SCA), (417/03) [2004] ZASCA 70,**

[2005] 1 ALL SA (1) SCA at 17, the Supreme Court of Appeal confirmed the application of the Cautionary Rule as set out in **S v Sauls and Others 1981 (3)SA 172 (A) at 180E-G.** The Court quoted:
"There is no rule of thumb test or formula to apply when it comes to consideration of the credibility of a single witness (see the remarks of Rumpff JAin S v Webber 1971 (3) SA 754 (A) at *758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done* so, *will decide whether it is trustworthy and whether, despite the fact that there are short comings or defects or contradictions in the testimony, he is satisfied that the truthhas been told. The Cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be* a *guide to* a *right decision but it does not mean "that the appeal must succeed if any criticism, however slender,*

of thewitness' evidence were well-founded" (per Schreiner JA in R v Nhlapho (AD 10 *November 1952) quoted in R* v *Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.* "

On the Identification Parade

24 It is trite that evidence of identification should be treated with caution.

In **S v Mthethwa 1972(3) SA 766 (A) at 768A** the Court said the following:
"Because of the ability of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: The reliability of his observations must also be tested. This depends on various factors, such as the lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence byor on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidenceand the probabilities .."

25 In **S v Thapedi 2002 1 SACR 598 (T)** it was held that the absence of a legal representative for the accused at an identification parade does not per se amount to the denial of the right to legal representation.

On Attempted Murder:

26 Shongwe JA in **S v Makgatho 2013 (2) SACR 13 (SCA) at 9** held that:
"A person acts with intention, in the form of dolus eventualis, if the commission of the unlawful act or the: causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may

ensue, and he reconciles himself to this possibility..”

27 In **S v Masita 2005 (1) SACR 272 (C) at 277a-b** it was held that failure to explain a competent verdict to an unrepresented accused is not in itself a fatal irregularity. The main consideration is whether the accused had a fair trial.

On Evaluation of Evidence & Proof beyond a Reasonabie Doubt:

\

28 Nugent J in **S.v Van der Meyden 1999 (1) SACR 447 (W) at 450b** heldthe following:

“.. *The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence. which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to beunreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”*

On Sentencing:

29 It was held in **S v Zinn [1969] 3 All SA 57 (A) 61; 1969 (2) SA 537 (A)at 540 G-H** that in imposing sentence the Court must consider the triad consisting of the crime, the offender and the interest of society.

30 In **S v Malgas 2001 (1) SACR 469 (SCA) at 478 d-h** the general approach in imposing minimum sentences in terms of the Criminal Procedure Amendment Act 105 of 1997 was considered. Same was endorsed in **S v Vilakazi (2008) 4 All SA 396 SCA; (2008) JOL 22360 (SCA); 2012 (6) SA 353 (SCA); 2009 (1) SACR 552 (SCA).** The court held the following **at 15:**

"…*If a court is indeed satisfied that a lessor sentence is called for in a particular case, thus justifying* a *departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that les or sentence."*

At **16** the Court says; "... *What is said (in Malgas) is that the court must approach the matter "conscious [of the fact] that the* ***Legislature has ordained*** *[the prescribed sentence] as* ***the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances . . ... any*** *circumstances that would render the prescribed sentence disproportioned to the offence would constitute the requisite*

"weighty justification" for the imposition of a *lessor sentence."*

At 20 the Court held that " ... *Whether* a *sentence is proportionate cannot be determined in the abstract, but only upon* a *consideration of all material circumstance of the particular case, through bearing in mind what the legislaturehas ordained and the other strictures referred to in Malgas."*

Application of the Law to the facts

31 At the risk of compartmentalising the evidence and viewing it in isolation against the issues to be decided by this Court, one has to evaluate the evidence piece by piece in the light of the technicalities raised by the Appellant and then put the puzzle back together, in order to come to a reasoned conclusion whereinsanity prevails, and justice is served.

32 Indeed the complainant was a single witness. The Court a quo however observed the necessary caution when evaluating her evidence. Throughout the record it is clear that the complainant, notwithstanding the trauma she suffered, was able to give a coherent, clear recollection of the incident. On the J88 completed a day after the incident it is recorded that the complainant was *"very emotional, can give good report of what happened."* Adjudant Officer van Dyk testifies on the complainant's reaction at the identification parade: "…*sy was baie bang gewees, maar sy was seker van*

haar saak gewees." (She was very scared, but certain of her case - my translation)

33 When evaluating the evidence in respect of the identification parade, the complainant's evidence was scrutinised carefully by the Court a quo. Attention was given to the necessary detail and evidence in how the parade was constructed and what transpired on the day was lead at length. The Court a quo again observed the cautionary rule. The tests crystallised in our law were applied during judgement. The court a quo quoted the tests at length. On entering the complainant's room, the Appellant switched on the light. The complainant saw his uncovered face in the light. The complainant identified the Appellant within 30 seconds at the identification parade as the man who assaulted her for two and a half to three hours and raped her for almost 20 minutes. Being in such close proximity to the Appellant, the complainant was bound to notice his physical built, his complexion, his eyes, his nose and facial features, such as marks by which she identified him. This Court is satisfied with how the trial court handledthe issue on the day. This ground of Appeal must not succeed.

34 The Appellant was made aware of the fact that he was entitled to legal representation. He chose to conduct his own defence. Throughout the trial he was assisted and guided by the Court as to his rights at the various stages of trial. The Appellant was informed of the identification parade a week before the time. He indicated during this appearance that he wanted legal aid representation. On the day of the parade however, legal aid was not present. This however does not discredit the evidentiary value of the identification parade *per se.* Notwithstanding legal aid's absence he proceeded with the parade. His rights were explained to him at the parade, He chose his position in the line-up himself.

35 The fact that he had no legal representation did not change the way in which the parade took place. He was not prejudiced, as ,.it is only the complainant who identified him. The question to be answered is whether the presence of a legal representative would have changed anything in the procedure of the parade on the day? The answer is a clear no. It would not take the parade anywhere else. The Appellant was not prejudiced by the absence of a legal representative in the circumstances as a legal

representative would not have played any active role in the outcome of the identification parade. This ground of Appeal must also not succeed.

36 The State called a fraud specialist from Vodacom with 9 years' experience. She testified that the complainant's cell phone was last used on the day of the incident and then again on the day that he gave it to his sister-in-law. The Appellant gave the investigating officers three different versions as to wherehe got the phone - first on his way to Lethlabile, then in Soshanguve and then at the Mabopane station. He could not remember what he paid for the phone and later said R 200, 00 when questioned during trial. The Appellant said he gave thephone to her as she needed a phone. She testified that he gave it to her as a birthday present.

37 The evidence is that the complainant's cell phone was found in possession of Appellant's sister-in-law, after he gave the phone to her - a meretwo days after the incident. He could not give a satisfying explanation as to where he found it and how much he bought it for. This in itself is, based on the doctrine of recent possession, together with the positive identification of the Appellant enough to corroborate the complainant's testimony as a single witness and satisfactorily connect the Appellant to the incident on the day. This ground ofAppeal is dismissed.

38 The Appellant should have foreseen that he could have killed the complainant in repeatedly assaulting- and stabbing her with the garden fork. In his repeatedly and continuously doing so over a period of two and a half to threehours, he reconciled himself with the consequences of his action. The robbery initself was no ordinary robbery and has to be qualified as aggravated, therein that a dangerous weapon with sharp points was used to inflict serious wounds in the commissioning of the crime. The complainant was stabbed and hit in the face, the forehead, the cranium, the back of her bead, the neck and in the upper leg. These are sensitive areas of the human body. It is common knowledge that wound inflicted in these areas of the body could lead to the death of the person so attacked. It is stated on the J88 that severe force was used in the attack on the complainant. The Appellant's argument that he did not intend to kill the complainant, as she was kept alive to drive him to the bank and the injuries were directed at getting her to

subdue to the robbery does not go up and is, to say theleast devoid of all logical- and legal argument. This ground of Appeal must not succeed.

39 It is clear from the record that the seriousness of the charges and the consequences of being found guilty thereof was explained to the Appellant. The Magistrate refers to same in her judgement at pages 218 and 219 of the record. Same is also clear from the record of the proceedings on 25 May 2011.

This ground of Appeal bears no weight either.

40 During sentencing the Court a quo paid attention to the effect of the trauma suffered by the complainant and her minor son. Consideration was given to the violent nature of the crimes. Consideration was given to the interest of society. At the same time the personal circumstances of the Appellant as well as the pre-sentencing report were duly considered by the Court a quo at length in the sentencing procedure. The Appellant's previous convictions were considered. The Malgas-decision was cited by the Court a quo in so far as minimum sentencing was concerned. The sentence invoked by the Court a quowas well considered in the circumstances and this Court has to align itself therewith.

41 After all is said and done, the evidence has got to be pieced back together. It is clear that the Appellant went to the complainant's house on the dayof the incident to deprive her of possession of her property. In doing so, he inflicted her with serious and life-threatening bodily injuries. These injuries were directed at having her subdue to the crimes of robbery and rape. He thereafter forced her into her vehicle. She jumped from the moving vehicle to escape the Appellant. Even after she escaped from him, he caught up with her and
continued to assault her whilst she was lying helpless on the ground. In inflicting

these serious injuries he should've foreseen that she could have died. He reconciled himself with this possibility as he continued inflicting these injuriesover a period of two and a half to three hours.

42 In the words of the learned *Curlewis JA in* **Rex v Hepworth 1928 AD 265 (at 277)** it is concluded that:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game is observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control proceedings according torecognised rules of procedure but to see that justice is done."

43 The evidence in this matter was weighed cautiously as the complainant was a single witness and the only person who did a positive identification on the identification parade. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

Conclusion

44 The Court finds that the court a quo did not misdirect itself in both conviction and sentence.

Order

45 I would order that the Appeal against both conviction and sentence be dismissed.

PICK AJ
ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered

MALI J
JUDGE OF THE HIGH COURT

For the Appellant: S.Moeng

Pretoria Justice Centre

4th Floor Locarno Building

317 Francis Baard Street

Pretoria.

For the State: Adv C. Pruis

Office of the Director of Public Prosecutions
Church Square
Pretoria.

Heard on 03 March 2021.

Delivered on 18 May 2021.