IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A 546/2016
DPP REF NUMBER: NO. PA89/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. YES

DATE: 4 JANUARY 2021

In the matter between:

PIET: MAGABE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: AVVAKOUMIDES AJ and DLAMINI AJ

JUDGEMENT

Because of the current pandemic, this judgment is handed down electronically. The case was heard in open court when it was possible to do so. Dlamini AJ is the author of the judgment and prepared it himself, (with which Avvakoumides AJ has concurred). It will be handed down electronically by circulation to the parties' representatives by way of electronic mail and by uploading it to the electronic file of this matter on the electronic application called Caselines. The date on which this judgment is handed down shall be deemed to be 4 January 2021.

DLAMINI AJ

[1] The appellant was convicted on the 18th September 2013 by the Atteridgeville Regional Court on six counts of rape, each read with the provision of section 51(1) of the Criminal Amendment Act, 105 of 1997. He pleaded not guilty to the charges. He was legally represented throughout the trial. At the end of the state's case, the court *a quo* found

him guilty as charged. He was then sentenced to life imprisonment on each count. He now appeals against both conviction and sentence.

[2] In the court *a quo* the state led evidence of the six complainants. The appellant testified in his defence and called two witnesses, namely, his wife Annie Malatjie and his granddaughter Mahlako Magabe. This will be dealt with later.

[3] The complainant in count one, Ms J[....] K[....] S[....] (J[....]), testified that the appellant raped her several times during the period 2010 to 2012. She says the first rape occurred at the appellant's house. She described in detail that the appellant took off her underwear, he smeared his saliva on her vagina, lowered his trousers, inserted his penis into her vagina and proceeded to rape her.

[4] The second rape occurred at Thabiso' father's house. She was playing outside that house with her friend A[....]. The appellant called her inside the house, he laid her on the bed, he once again smeared saliva on her vagina, inserted his penis into her vagina and raped her. Thereafter he told her to go and call her friend to come to the house.

[5] A further rape occurred when the appellant took her and her friends to a mountain. There he placed a plastic sheet on the ground. He told her to

lie down on the plastic. He smeared saliva on her vagina, inserted his penis into her vagina and he raped her.

[6] The last occasion occurred at M[....], her friend's father's shack. There the appellant called her inside the shack. He laid her on the bed undressed her and smeared saliva on her vagina, he inserted his penis into her vagina, and he raped her.

[7] She told her sister of what the appellant was doing to her, but her sister did not believe her and did nothing about her complaint. She was cross examined fairly and at length by the appellant's legal representative. In my view nothing of significance came out of this cross examination.

[8] Next to testify was Dorothy S[....] (Ms S[....]), J[....] and Lorina's mother. Sometime around 8th December 2012, J[....] approached her and told her that the appellant had done naughty things to her, her sister Lorina and some of her friends. J[....] detailed how the appellant on several times raped her. Upon hearing this she then called Lorina to seek clarity on these allegations. Lorina confirmed the rape incidents and explained to her how these occurred.

[9] On hearing this from J[....] and Lorina she then approached Mavis, the mother of A[....], the complainant in count 4. She together with Mavis went

to the police to lay a charge of rape against the appellant. Thereafter she took J[....] and Lorina to the doctor. The doctor examined them, compiled and completed the J88 form.

[10] L[....] S[....] (L[....]) was the complainant on count 2. She testified that on the day, she was playing with her friend, M[....]. The appellant called her into his bedroom. Inside, he put her on top of the bed, he took off her t-shirt and her pants, he took off his trouser, he put his penis into her vagina, and he raped her. Another rape incident occurred at her friend's Thabiso's father's house. In that house the appellant took off only his trouser. He spat saliva onto her vagina and his penis. He then inserted his penis into her vagina and raped her. On another occasion the appellant also raped her in the bush. There he put a plastic sheet onto the ground and ordered her to lie down on the plastic. He took off her clothes, inserted his penis inside her vagina and raped her.

[11] M[....] C[....] M[....] (C[....]), the elder sister of the complainant, A[....] M[....] testified and confirmed that A[....] told her about the incidents in or around 2010 and that the appellant had done naughty things to her. However, she did not take A[....]'s complaint further because she knew that the appellant always talks about naughty things like having sex.

[12] A[....] M[....] (A[....]) was the complainant in count 4. She testified that she was violated and raped by the appellant on several different occasions over a number of years. The first rape occurred at the appellant's house bedroom. He called her into his bedroom he undressed her, took her panty, he lowered his trousers took out his penis. He inserted his penis into her vagina and raped her. Another rape incident occurred in the bush. The appellant placed a plastic sheet on the ground. He asked her to lay on top of the plastic. He removed her panties, lowered his trousers took out his penis. He inserted his penis into her vagina and raped her. The next incident occurred at her friend's Thabiso's father's house.

[13] The appellant called her inside the house. He took off her panties, smeared saliva into her vagina, took off his trousers and also smeared saliva onto his penis. He inserted his penis into her vagina and proceeded to rape her. She noted that the appellant had a ring on his penis.

[14] The last rape took place at a place which the appellant claimed was his workplace. There he laid her on the floor, took off her panties, then lowered his trouser, he inserted his penis in her vagina and raped her. She insists that she told her elder sister, C[....], about the rapes, but her sister did not believe her and dismissed her. She confirmed that during one of the rape incidents, her friend M[....], walked into appellant's bedroom and found appellant raping her. She was cross examined at

length. She stood her ground and insisted that the rapes occurred to her as she had described them.

[15] M[....] M[....] (M[....]) was the complainant in count 5. She testified that she was playing with her friend R[....], at M[....]'s place. The appellant called her at the back yard of that house. He undressed her and he also undressed himself. He asked her to kneel down, and he also knelt down. He inserted his penis in her vagina and raped her. She never told anyone about this ordeal, and never reported the rape to anyone.

[16] K[....] M[....] (K[....]) was the complainant in count 6. She testified that somewhere around 2009, she was playing with her friends at the appellant's house. The appellant called her to come inside the house. He ordered her to undress, he also undressed himself and ordered the complainant to close her eyes. She then felt something inside her vagina and he had sex with her. She never saw the appellant's penis enter her vagina because her eyes were closed. She never reported this incident as she feared her mother will beat her.

[17] M[....] S[....] K[....] (M[....]) testified that somewhere around 2010, he was playing with his friends J[....], L[....] and A[....] at the appellant's house. Later that day before sunset, he realised that his friend A[....] was still

inside the appellant's house. He then went to the back of the house to investigate the delay. He peeped through the window and saw the appellant on top of A[....] that he was raping her. He shouted and told the appellant, "*I found you what are you doing*." The appellant shouted at him. He says A[....] took her clothes and ran away.

[18] Under cross examination it was put to him, that J[....] testified that he saw the appellant raping her through the door. He denies this and is adamant that he saw the appellant through the open window.

[19] T[....] M[....] (T[....]) was the complainant in count 3. She testified that the appellant took her to the bush with her friends J[....], A[....] and L[....]. There he ordered her to lie down on her side. Appellant pulled aside her panties, he took out his penis on the side of his underwear, inserted his penis in her vagina and raped her. On another occasion, she testified that the appellant raped her again in his house. There he pulled up her skirt lowered her panty, he inserted his penis inside her vagina and raped her.

[20] Doctor Benjamin Matsotso Paul Senokwane testified that he is a qualified medical practitioner who is presently stationed at Laudium Community Centre. His duties entail mainly medical legal work, such as completing the J88 forms. He examined all the complainants and thus confirmed that they were penetrated. Their hymen were torn, and this was a sign that the

complainants were sexually penetrated. He was cross examined at length. However, his main evidence remained unchallenged and nothing meaningful arose from cross examination.

[21] The appellant testified in his defence and called his wife Annie Malatjie and grandchild, Mahlako Magabe to testify on his behalf. In the main he denied all the allegations against him although he knows all the complainants, he insists that he never raped any of them as the complainants testified.

[22] Under cross examination, he could not explain why some of the complainants knew that he was looking after M[....]'s house, the place where the complainants alleged the rapes occurred. Further he conceded that it was in fact not true that he was always with his wife. It turns out he would leave sometimes to do odd jobs, and sometimes she would be consulting clients alone as a traditional healer. He also conceded, that he did not always go with his wife to dig medication in the mountain.

[23] Annie Malatje (Ms Malatjie) testified that she is married to the appellant. She is a traditional healer. She insists that the appellant never raped any of the complainants. This is so because she is always at home and in the presence of the appellant. She goes and digs medication in the

mountains, the appellant would be present and assisted her.

[24] Under cross examination she contradicted the appellant's testimony that he was not present when she was consulting patients as she needed privacy. Further she insisted that she goes to dig for medication with the appellant all the time. The appellant admitted that sometimes she goes dig for medication alone, or with a certain aunt Munage.

[25] Mahlako Magabe testified that she is the grandchild of the appellant. She admits that some of the complainants, J[....], L[....] often came to her place to play with her. She denies that the appellant has ever sent her to the shop and she left her friends alone in the yard with the appellant.

[26] The onus of proof in a criminal trial case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent. These are not separate tests but an expression of the same test when viewed from the opposite perspective. This means that in order there to be a reasonable possibility that an innocent explanation of an accused might be true, there must be at the same time, a reasonable possibility that the evidence implicating him might be false or mistaken.

[27] Author, A Kruger captures it well in his book "*Hiemstra's Criminal Procedure"*[1]. He says:

"*A court of appeal must bear in mind that a trial court saw the witness in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusions were correct. The court of appeal will only reject a trial court's assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (S v Robbinson 1968(1) 666 (A) at 675 H). The court of appeal does not really look for the points upon which to contradict the trial court's conclusions and the fact that something has not been mentioned does not in itself mean that it has been overlooked."*

[28] A court of appeal must decide the appeal on the facts before it as contained in the record of appeal. The obligation is on this court to establish from the record of appeal, firstly if the court *a quo* assessment of evidence was not wrong. The crux of this case revolves around the identification of the accused as the one who raped the complainants and the appellant's alibi.

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[1] Pages 30-45

[29] It is trite that when the identification of an alleged offender is an issue, everything turns not only on the honesty of the witness but his or her reliability as well. This is so because experience has shown that mistakes are easily made on identification. The *locus classicus* when it comes to issues of identity is S v Mthethwa[2] where Holmes J warned that *"because of fallibility of human observation, evidence of identification is approached by our courts with some great caution."*

[30] The complainants in this case did not hesitate. They knew and pointed the appellant as the person who raped them. They all live within close proximity from the appellant's home. They were of the same age with the appellant's granddaughter. They frequently visited the appellant's home and played with the appellant's grandchild.

[31] It is thus my view that the court *a quo* was correct when it held that the complainants had correctly identified the appellant as the person that raped them.

[32] As in this case, I am reminded of the difficulty of the prosecution of rape cases involving minor children. In **S V VILAKAZI[3]** "*from prosecutors it*

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[2] 1972 (3) SA 766 at 768

[3] 2009 (1) SACR 552 (CSA) para 21

calls for thoughtful preparation, patience and sensitive presentation of all the available evidence and meticulous attention to detail from judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence."

[33] In this case although the complainants are uncertain of the dates, they clearly described in detail how each was raped by the appellant. They described how the appellant raped them in his home, in the bush, at M[....] father's house, and at Thabani's father's house.

[34] They detailed how he undressed them, inserted his penis in their vaginas and raped them. They fully described the setting of each of the places that they were raped. They noticed that the appellant had a ring in his penis. The complainants in my view corroborated each other in all the material aspects.

[35] The court *a quo* also held that there was some discrepancy in the evidence of some of the complainants. On contradiction the court in S v Mkohle[4] *"Contradictions per se do not lead to the rejection of a witnesses' evidence. A. Nicolas J observed in S. Oosthuizen 1982 (3 SA 576 TPD at 576 B-C, they may simply be indicative of an error. And (at 576 G-H) it is*

[4] 1990 (1) SACR 95 (A) at 98E-F

stated that not every error made by a witness affects his/her credibility; in each case the trier of facts has to make an evaluation taking into account such matters as the nature of the contradictions, their number of importance and their bearing of the other parts of the witness' evidence is indicative of an error."

[36] The court *a quo* held that because the complainants were children at the time they were raped, and this happened over a period it is possible that there would be contradictions and challenges in their evidence. Some parts of M[....] M[....]'s evidence were unclear as to how the rape occurred. I agree with the court *a quo's* finding that the contradictions were not material and did not affect the credibility of the complainants.

[37] Furthermore, I am persuaded by the court *a quo's* findings that in general the witnesses came across as honest and credible witnesses. That they did their best to give a credible account of what they said happened.

[38] The complainants' evidence remained unchallenged and were corroborated by strong medical evidence. The medical findings clearly confirm that the complainants were indeed sexually violated and two of the complaints had occurred recently as testified.

[39] The Appellant's defence was just a bald and bare denial, and an alibi. However, it turned out that the appellant had lied when he said he was always with his wife the whole day and had no opportunity to rape the complainants. His wife lied when she said the appellant always accompanied her to dig for medication in the bush. The appellant could not explain how the complainants knew that he was looking after M[....]'s house and Thabani's father's house. To evade convictions the appellant's wife coached the appellant's granddaughter to give testimony on behalf of the appellant. The court *a quo* correctly rejected the evidence of the appellant as a fabrication and a desperate attempt to evade conviction. It follows therefore that the appeal against the convictions of the appellant should fail.

[40] It is trite law that the imposition of sentence is pre-imminently a matter for the discretion of the trial court. The court of appeal may only interfere if the sentence has not been judicially and properly exercised. In determining the appropriate sentence regard must be had to the well-known tried factors, namely the seriousness of the offence, the offender's personal circumstances as well as the interests of society.

[41] All the counts that the appellant had been convicted of fall within the ambit of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 and invite a sentence of life imprisonment, substantial and compelling circumstances must exist to justify a lesser sentence. The Act does not

stipulate which circumstances must exist to justify a lesser sentence. Although it is trite that substantial and compelling factors are ordinarily considered when considering an appropriate sentence, the minimum sentence may not be departed from for flimsy reasons.

[42] In **S V VILAKAZI**[5], it was held that *"it is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The constitutional court made it clear that what is meant by the "offence" in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."*

[43] In respect of rape of a child, the following was stated by the court in **S V HEWITT**[6] "*Rape of a child, usually committed by those who believe they can get away with it and often do is far more horrendous. As was held* in

5 2009 (1) SACR 552 (SCA) para 15

6 (637/2015) [2016] ZASCA 100 para 9

S V JANSEN "*it is as appalling and perverse abuse of male power which strikes a blow at the very core of our claim to be a civilised society. It is unsurprising therefore that society demands the imposition of a harsh sentence which adequately reflects censure and retribution upon those who commit these monstrous offences and to deter would-be offenders."*

[44] In mitigation of sentence the following personal circumstances of the appellant where placed on record. The appellant is 60 years old. He has several children but could not remember their exact number. He does occasional work as a builder. It was argued on his behalf, that his advanced age and poor health should be considered as substantial and compelling circumstance. The court *a quo* did not find any substantial and compelling circumstances for it to deviate from the prescribed minimum sentence. I cannot find any either.

[45] Rape is brutal no matter how it is committed. The appellant raped six young girls who were the same age as his granddaughter. Worse, some of the complainants he raped repeatedly and some for several years. There is no reason whatsoever to interfere with the multiple life sentences.

[46] I am satisfied that the court *a quo* considered the evidence, the

circumstances of the commission of the offences, the nature of the offence and the seriousness thereof, the interests of society and the personal circumstances of the accused. It is thus my view that both the conviction and sentence on these counts cannot be interfered with.

[47] For these reasons I make the following order:

47.1 The appeal against the convictions and sentences is dismissed. The 6 life sentences are to run concurrently.

47.2 The appellant is found unsuitable to work with children in terms of subsection (2) (a) of Section 50 of Act 32 of 2007.

47.3 The appellant's particulars are to be recorded in the register of sex offenders.

47.4 The appellant is declared unfit to possess a firearm in terms of Subsection 1 of Act 60 of 2000.

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J. E. DLAMINI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

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G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

On behalf of the Appellant:	Adv. A. Thompson
Instructed by:	Legal Aid South Africa, Pretoria Justice Centre
On behalf of the Respondent:	Adv DWM Broughton

Instructed by:	Director of Public Prosecutions, Gauteng Division: Pretoria