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

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CA 43/2016

In the matter between:

SEKWALE JOHANNES DIALE	1st Appellant
KATLEGO SONNYBOY MOGOLEGOA	2nd Appellant
OLEBOGENG JOSEPH METLHALENG	3rd Appellant
BUTI DOCTOR MOYO	4th Appellant

and

THE STATE	Respondent

CRIMINAL APPEAL

HENDRICKS J & KGOELE J

DATE OF HEARING	:	02 DECEMBER 2016
DATE OF JUDGMENT	:	29 DECEMBER 2016
COUNSEL FOR APPELLANT	:	MR. GONYANE
COUNSEL FOR THE RESPONDENT	:	ADV. ZONDO

JUDGMENT

HENDRICKS J

[1] Messrs Sekwale Johannes Diale (Appellant 1), Katlego Magolegoa (Appellant 2), Olegogang Joseph Motlhaleng (Appellant 3) and Butiki Doctor Moyo (Appellant 4) were arraigned in the aforementioned order as accused in the Regional Court, Mogwase on the charge of rape. All four Appellants pleaded not guilty and in explanation of their pleas, stated that they had consensual sexual intercourse with the complainant. They were convicted and sentenced to life imprisonment. Appellants 1, 2 and 4 appeal against the sentence imposed whilst Appellant 3 appeal against both his conviction and sentence.

[2] The facts of this case as presented by the State can be succinctly summarized as follows. During the evening of 12 July 2008 the complainant and her friend, K. were at a tavern. K. then left with her boyfriend leaving the complainant behind. The complainant thereafter requested T. to take her halfway, which he did. Along the way, they were approached by four men, being the four Appellants. As a result of the behavior of these four men, T. decided to go and look for help. Upon his return, T. could not find any of them.

[3] The complainant testified that these four men became aggressive and even broke bottles. She was pulled by Appellants 1 and 4 to a nearby cemetery. Appellants 2 and 3 followed them. Her mouth was closed with a handkerchief in order to prevent her from screaming. At the cemetery, the four Appellants took turns in having sexual intercourse with her without her consent. First was Appellant 4 followed by Appellants 1, 2 and 3 respectively. Thereafter, Appellant 1 suggested that she should be thrown into an open grave. Appellant 4 prevented this from happening and ended up taking the complainant to his parental home where he again had sexual intercourse with her on two occasions without her consent, before releasing her the following morning (13th July 2008).

[4] Upon her arrival at home, the complainant reported the incident to her aunt E., who was the first report. E. corroborated the complainant's evidence in material respects. She testified that the complainant reported to her that she was raped by four men. She remembers the names of two of the men which are Appellants 1 and 4.

[5] Dr. Skosana examined the complainant medically on 13th July 2008 and concluded that this was a case of sexual assault based not only on the information but also because the "perineum is unhygienic with soil particles and semen deposits" which is indicative of involuntary indulgence in sexual intercourse.

[6] In contrast to the evidence of the complainant, is the evidence of the four Appellants. According to Appellant 3, he and the complaint had a love affair since February 2008 – which means for approximately five (5) months. On the night in question, he saw her at the tavern in the company of K.. He approached her and suggested that they should leave together to go and sleep (meaning to have sexual intercourse). She agreed and around 22:00 they left together for his place of residence where they had consensual sexual intercourse. After approximately an hour, they went back to the same tavern. She was again with her friend K. when he last saw her at the tavern. When he again looked for her she was nowhere to be found. He then left the tavern at about 02:00 the following morning. He denied that he was in the company of the other three Appellants at the cemetery.

[7] The learned Regional Magistrate found that it is quite surprising that the complainant did not know the name of Appellant 3, yet he claim to have a love relationship with her for approximately five (5) months. If his evidence is to be believed, then it is inexplicable why she would remember the names of two of the Appellants namely Appellants 1 and 4 and not his name. Furthermore, it is highly improbable that she, after being raped by the three other Appellants (1, 2 and 4), implicate him if indeed they had a love relationship.

[8] It defies all logic that she would under the circumstances as outlined by Appellant 3 implicate him falsely and furthermore do so a day after she was raped by the other three Appellants. The reasoning of the learned Regional Magistrate in this regard cannot be faulted. In his carefully reasoned judgment the learned Regional Magistrate dealt extensively with all the relevant issues in analyzing the evidence and applied the correct test bearing in mind that the onus is on the State to prove the guilt of Appellant 3 as well (as the other three Appellants) beyond any reasonable doubt.
In my view, the appeal of Appellant 3 against his conviction should fail.

[9] With regard to sentence. Sentence is primarily in the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of such discretion by the trial court. Only in limited instances will a court of appeal interfere with the exercise of the sentencing discretion by the trial court, for example, if the discretion was not exercise judiciously , if a gross irregularity was committed or where the sentence imposed by the trial court is shockingly severe, grossly exercise or totally out of proportion with the crime committed.

See: **S v Saddler** 2000 (1) SACR 331 (SCA)
S v Coetzee 2010 (1) SACR 176 (SCA)

[10] It was contended on behalf of the Appellants that the sentence of "life imprisonment is excessively long and it induces a sense of

shock" and that "the trial court attached little weight to the Appellants personal circumstances."

The following are the personal circumstances of the Appellants that were placed on record:

Appellant 1:
- was 22 years of age at the time of the commission of this offence;
- he is a first offender;
- he is single but has a minor child aged 2 years and 7 months.

Appellant 2:
- was 22 years of age at the time of the commission of this offence;
- he is a first offender;
- he spend one year and two months in custody awaiting trial;
- he achieved standard 8 at school as his highest qualification;
- he has a minor child aged two years;
- he maintain this minor child at the rate of R1 600.00 per month.

Appellant 3:
- was 24 years of age at the time of the commission of this offence;
- he is a first offender;
- he achieved standard 8 as his highest qualification;

- he spend one year and two months in custody awaiting the finalization of the trial;

Appellant 4:
- was 34 years of age at the time of the commission of this offence;
- he achieved standard 9 as his highest qualification;
- he had to drop out of school due to financial constrains;
- he is single
- he is the father of a minor child aged twelve years;
- he is the owner of a barbershop and earn an income of R800.00 to R1000.00 per month.
- he is responsible for the maintenance of this minor child;
- he is not a first offender.

[11] It was furthermore contended on behalf of the Appellants that the trial court erred in not finding that the aforementioned personal circumstances of the Appellants constitute substantial and compelling circumstances which warrants a deviation from imposing the prescribed sentence of life imprisonment.

In **S v Malgas** 2001 (1) SACR 469 (SCA) the Supreme Court of Appeal emphasized the fact that the traditional mitigating and aggravating circumstances still play a major role when it comes to determining the presence or absence of substantial and compelling circumstances.

See also: **S v Dodo** 2001 (2) SACR 594 (CC).

[12] On behalf of the Respondent (State) it was submitted that the following are the aggravating circumstances of this case:

- the complainant was raped in turn by four men;
- she was raped in a cemetery and it was even suggested that she be thrown in an open grave;
- she was taken by Appellant 4 to his parental home and raped again on two occasions and only released the following morning.
- she sustained genital injuries;
- the Appellants showed no remorse;

[13] In my view, the fact that the complainant was gang raped by the four Appellants is indeed disgraceful and appalling. This is indeed the most aggravating feature of this case. It behoves no argument what ordeal the complainant suffered and how traumatic it was for her to be subjected to such inhumane treatment by the four Appellants.

[14] I am in full agreement with the submission by counsel acting on behalf of the State (Respondent) that the personal circumstances of the Appellants as a whole does not constitute substantial and compelling circumstances which warrants a deviation from imposing the prescribed sentence of life imprisonment.

In my view, this is the type of case for which the legislature had ordained the ultimate sentence of life imprisonment. I am in this regard guided by the dictum in **S v Matyityi 2011 (1) SACR 40 (SCA)** wherein it was held that courts should not deviate from imposing the prescribed sentence of life imprisonment for the flimsiest reasons. It is stated in paragraph [23]:

> *"Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is*

foundational to the rule of law which lies at the heart of our constitutional order."

[15] I am therefore of the opinion that the appeal by all four the Appellants against their sentences should fail.

ORDER

[16] Consequently, the following order is made.

(i) The appeal by Appellant 3 against conviction is dismissed.

(ii) The conviction of Appellant 3 is confirmed.

(iii) The appeal against sentence by all four Appellants is dismissed.

(iv) The sentence of life imprisonment imposed by the Regional Court on all four Appellants is confirmed.

_____

R D HENDRICKS
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

_____

A.M KGOELE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG