IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A125/2015

In the matter between:

LEHLOHONOLO ERICK DLAMINI Appellant

And

THE STATE Respondent

CORAM: RAMPAI, J *et* MOHALE, AJ

HEARD ON: 5 OCTOBER 2015

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 12 NOVEMBER 2015

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[1] This were appeal proceedings. The appellant was found guilty in the regional court. He was then sentenced to life imprisonment in respect of one of the charges. He was aggrieved by the conviction and sentence. He came to us on appeal by virtue of his automatic right to appeal in terms of section 309 of the Criminal Procedure Act 51/1977. The respondent opposed the appeal on all grounds.

[2] An incident occurred at Kroonstad on Monday the 3 August 2009. The victim subsequently reported the incident to the police. The

investigation of the incident led to the arrest of three men. The appellant was one of them. They were held in custody throughout the entire duration of their trial.

[3] The appellant, accused number 3 in the court *a quo,* was charged with two others. Itumeleng Helepi, Neo Mohlomi and Lehlohonolo Dlamini were charged as accused number 1, accused number 2 then accused number 3 respectively. The appellant's co-accused were not before us.

[4] The first charge was robbery with aggravating circumstances as defined in sec 1 Act No 51/1977. The prosecution alleged that the three accused persons unlawfully and intentionally attacked and assaulted Ms Mokgantsi Petunia Mokhomo (24 years of age) and violently took her brown leather jacket worth R350.00 and her Nokia 1100 cellphone worth R300.00. The prosecution added that before, during and after the crime the accused were armed with dangerous weapons.

[5] The second charge was that the accused persons, without the consent of the aforesaid lady, wrongfully and intentionally committed acts of sexual penetration with her. The prosecution alleged further that by so doing they contravened section 3 of the Sexual Offenses and Related Matters Act 32/2007 read with other provisions thereof as specified in the written charge sheet; sec 261 of the Criminal Procedure Act 51/1977; sec 51 of the Criminal Law Amendment Act 105/1977 as well as section 52 thereof.

[6] The aforesaid crimes were committed at Kroonstad on Monday the 3 August 2009 according to the charge sheet. The undisputed evidence later amplified the charge sheet and showed that the scene of the crime was in the vicinity of the mortuary at Seeisoville shopping centre.

[7] The trial commenced in the Kroonstad regional court on 1 September 2010. Mr. Jonker presided, Mr Lesapo prosecuted and Mr Mahanke appeared for accused number 1, and Mr Campher for accused number 2 and accused number 3. The accused persons were called upon to plead to the charges. The three of them pleaded not guilty in respect of both charges. There was no explanation given by accused number 1 in respect of both charges. The explanation given by accused number 2 was that he and the victim had consensual sexual intercourse on 3 August 2009. The appellant did not explain his plea in respect of both charges.

[8] Notwithstanding his plea, the appellant was convicted as charged on 28 February 2011. On the same day he was sentenced to 10 years imprisonment in respect of the first charge, robbery with aggravating circumstance and to life imprisonment in respect of the second charge, rape.

[9] On the 3 March 2011 the appellant filed his notice of appeal. In terms of sec 309(1)(a) Act No. 51/1977 he had an automatic right to appeal against his conviction and sentence.

[10] As regards conviction, the grounds of appeal were: That the trial court add in finding that the identity of the appellant was proved; that the trial court misdirected itself by overlooking “exi c”, in other words, the statement made by the investigating officer; that the trial court misdirected itself by not taking into account the fact that the appellant was not linked to the incident by any forensic evidence and that the trial court erred in finding that there were no substantial and compelling circumstances which justified deviation from the prescribed minimum sentence.

[11] The version of the prosecution was narrated by three witnesses, namely:

Ms Mokgantsi Petunia Mokhomo, the victim;

Mr Lephoko Paul Rabanye, aka Sono, the victim’s boyfriend;

Inspector Molahleng Simon Makhethi, the investigating officer.

[12] The case for accused number 1 was closed. Then accused number 2 and the appellant terminated the mandate of their legal representative, Mr Campher. The trial was then postponed to 3 December 2010 to enable them to appoint another legal representative. The trial was then postponed on a few occasions afterwards for various reasons. On 28 February 2011 Mr Campher resurfaced on behalf of accused number 2 only. Mr Kamati appeared on the scene on behalf of accused number 3 on the same day. The victim and the investigating officer were recalled at his request. The court afforded him an opportunity to cross examine the two prosecution witnesses. His cross examination revolved around the statement of the investigating officer which was handed up and labelled “exi c”. The witnesses

were also again re-examined by Mr Lesapo. The case for accused number 3, the appellant, was then closed. The appellant did not testify and he called no witness to give evidence on his behalf.

[13] The question in the appeal was whether the evidence established beyond reasonable doubt, the identity of the appellant as one of the perpetrators involved in the criminal enterprise.

[14] On the one hand Mr. Kambi, counsel for the appellant, contended that the victim was not in a good position to reliably identify the culprits because it was dark and because she was fearful. Accordingly he submitted that the court *a quo* misdirected itself by finding that the evidence proved beyond reasonable doubt that the appellant was involved in the commission of the aforesaid offences. On the strength of that and other alleged misdirections, Mr. Kambi urged us to uphold the appeal.

[15] On the other hand Mr. Mashamaite, counsel for the respondent, sharply differed. He submitted that the trial court did not err in finding that the appellant was correctly identified by the complainant. Counsel contended that there was sufficient evidence which indicated that the identification of the appellant by the victim was not only credible but also reliable to secure his conviction. Accordingly counsel urged us to dismiss the appeal.

[16] Sitting as we were in an appellate mode, we had to remind ourselves that our appellate powers to interfere with the factual findings of the trial court are limited; that we have to bear in mind

the advantages which the trial court had of seeing, hearing and appraising witnesses and that an appellate court will be entitled to interfere with the evaluation of oral testimony by the trial court only in exceptional cases. **S v Francis** 1991 (2) SACR 198 (A) at 204 c-e.

[17] The correct approach to a criminal trial was articulated as follows in **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139 i-j.

> "The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[18] It is trite that the uncorroborated evidence of a single, competent credible and reliable witness is sufficient to secure a conviction provided the evidence of such a witness is clear and satisfactory in all material respects – **R v Mokoena** 1932 OPD 79 at 80 per De Villiers JP. (See also sec 208 Act No 51-1977)

[19] The evidence of a single witness cannot be summarily repudiated merely because, in certain respect, it is blemished by some unfavourable features. **R v Abdoordam** 1954 (3) SA 163 (N) at 165 per Broome JP.

> "The Court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The Court may be satisfied that a witness is speaking the truth

notwithstanding that he is in some respects an unsatisfactory witness."

[20] In **S v Sauls & Others** 1981 (3) SA 172 (A) at 180 E-G Diemont JA refined the single witness rule.

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to 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 the witnesses' evidence were well founded"."

[21] In **S v Mthethwa** 1972 (3) SA 766 at 167 A-B Holmes JA laid down two cornerstones of evidence of identification.

"It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as 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 by or on behalf of the accused. The list is not exhaustive."

[22] As far as the credibility aspect of the complainant as an identifying witness was concerned, it was never suggested let

alone contended that she was not an honest witness. Therefore, it must be accepted that she was a truthful witness who gave a credible account of the criminal incident which precipitated these criminal proceedings.

[23] As far as the reliability aspect of the complainant as an identifying witness was concerned, it was contended on behalf of the appellant that she did not have a good opportunity for making proper observation both as to time and situation. Therefore, the reliability of her observation had to be tested. The underlying purpose for the testing exercise is to determine whether the appellant was identified beyond reasonable doubt as one of the perpetrators. Since human observation is fallible, the evidence of the complainant as an identifying witness has to be treated with caution. Mr. Kambi submitted that the court *a quo* did not thoroughly or cautiously interrogate the circumstances in which the complainant found herself at the time she made the observation.

[24] In the first place the unfavourable features of the complainant's observations were the following:

24.1 The incident took place at night shortly after 01:00. It is ordinarily dark during night-time;

24.2 The complainant was walking in a street without the usual burning street lamps;

24.3 The street was deserted shortly before the incident;

24.4 The complainant was surprised not by one but three men. It follows, therefore, that her attention was divided. She could not concentrate on one person all the time;

24.5 The three men were all strangers to her. Therefore, she had no prior knowledge of any of them;

24.6 They were armed with 2 knives and threatened to kill her. The attack took her by complete surprise. She was very frightened. She feared for her life.

24.7 The attack was launched in stealth and from behind. She was then pulled from the street into the toilet of an disused and dark building. There only accused 1 raped her.

24.8 She was then taken outside to a secluded and dark spot between two disused buildings. There all the three men raped her. It was so dark that she could not see their faces well.

[25] In the second place, the favourable features of the complainant's observation were as follows:

25.1 Although there were no street lamps at the spot where the attack initially took place, there was a high mast lamp, in common parlace called Apollo light, which illuminated the spot very well;

25.2 There were outside lamps affixed to the morgue which also illuminated the same spot;

25.3 The complainant had the opportunity of seeing the unmasked faces of the culprits before she was taken to the

eventual scene where she was actually raped inside and outside the building;

25.4 She walked with the three culprits from the scene of the crime at Seeisoville to Malefu's Shebeen at Marabastad. The streets where they walked were brightly illuminated by the high mast lamp.

25.5 The rape was an accomplished fact by then. The complainant had already clinched a deal with accused 1 which secured her safety. She "freely" walked with them to Malefu Shebeen. She was no longer as scared as she was before the rape. The walk to Malefu's Shebeen gave her a further opportunity of observing the appellant and his accomplices.

[26] Indeed the complainant could not tell; as to who immediately followed accused number 1 in raping her because it was dark on the second scene where she was raped. However, she testified that the second rapists had wrapped his penis with a plastic and that the third rapist did not use a condom. Seeing that accused number 2 was incriminated by strong forensic evidence and accused number 3 not, it was highly probable that the second rapist was exonerated by forensic evidence because he was the rapist who had his penis plastically wrapped up before he sexually penetrated the complainant. It can be reasonably deduced, therefore, that the second rapist was not accused number 2. Now the spotlight obviously falls on the companion of accused number 1 and accused number 2. Who their companion

was still remains to be ascertained. The criticism that the complainant could not tell who followed accused number 1 in the perking order of rape, though well founded, did not, therefore, carry much weight.

[27] Indeed the complainant could not tell as to who threatened to kill her if she yelled. The evidence of the complainant was that a1 the first rapist, was busy scanning the surroundings and the second rapist, the culprit with a plastic-wrapped penis, was busy penetrating her at the time their companion threatened to kill her. Here the spotlight falls on the third rapist, whom we have already identified as the third rapist in the gang perking order. The third rapist was clearly accused number 2. The criticism was well founded but it was cosmetic in my view.

[28] The description of the clothes a suspect was wearing becomes very important in a case where a suspect(s) is arrested shortly after the incident on the strength of the description of the clothes given to the police soon after the incident. The situation was different here. The appellant was not arrested on the strength of the clothes he was wearing. Moreover he was not arrested on the same day shortly after the incident like accused number 1. Therefore, the critique was neither here nor there.

[29] Indeed the complainant could not tell as to what facial or other physical features peculiar to the appellant enabled her to recognize him as one of the perpetrators. Her evidence was that where she was confronted she saw the appellant's face well but where she was raped she could not. However, she was not

pertinently asked to describe the appellant's face. It has been held, and I respectfully subscribe to that view, that the mere assertion by an identifying witness, however honest, is never sufficient to eradicate the danger of possible mistaken identification based on fallible human observation. Something more is, therefore, required in this case.

[30] The high watermark of the single identifying witness in this instance was her apparent confidence and firm belief that she saw the appellant's face very well. She expressed such belief in court for the very first time. Precisely what she saw in his face she did not spell out. Her firm belief subsequently expressed on 1 September 2010 was in sharp contrast to the apparently doubtful belief she originally expressed on 4 August 2009 outside court. Such doubtful belief was attributed to her by the investigating officer. W/O Makhethi recorded her as follows:

> "Complainant did not know the two and informed me he would not be able to point them out."

[31] At the trial the complainant and the investigating officer tried very hard to qualify and to moderate the ordinary and natural meaning of the words chosen by the investigating officer. In my view they both failed. Whatever they said or tried to say did not substantially change the plain meaning of the words used in the passage as quoted above. Way back then, on 4 August 2009 being a day after the incident, the complainant did not have the firm belief that she could ever identify accused number 1's companions or fellow perpetrators. This explains why there was no police identification parade held after the arrest of the

appellant. The record shows that the appellant was arrested a day after the incident. Now, if she has seen the appellants face very well as she testified and if she told the investigating officer so the identification parade would probably have been held. The fact that it was not militates against her testimony and that of the investigating officer. I am, therefore, persuaded that she was correctly recorded in para 2 exi c.

[32] In comparing the favourable features with the unfavourable features of the complainant's observation, I am not persuaded that the evidence given by the complainant as an identifying witness was reliable. Her apparent confidence and firm belief were not sufficient safeguards to exclude the possibility of an honest but mistaken identification of the appellant – **Magadla v State** (80/2011) ZASCA 195 (16.11.20110.

[33] None of the goods that were stolen from the complainant were recovered from the appellant. Therefore no real evidence was produced or exhibited which objectively connected him to the crimes committed against the complainant. **S v Charzen & Another** [2006] 2 ALL SA 371 (SCA) para [11]. Before conviction can follow, the law requires certainty beyond reasonable doubt that he was involved.

[34] Notwithstanding lack of such real evidence coupled with the unfavourable features of the observation by the identifying witness, there was something more. The following exchange between the appellant's first trial lawyer, Mr Campher and the complainant must be borne in mind.

- "Ms Mokhomo: … Ja, nadat hulle my nou klaar verkrag het en ons nou weg van die geboue af beweeg ek kon die gesigte sien.
- Mr Campher: Dame, ek gaan sommer by beskuldigde 3 begin. Ek stel aan u hy sal kom getuig hy was glad nie daar nie. Hy weet nie waarvan u praat nie. …
- Ms Mokhomo: Hy was daar.
- Mr Campher: Hy sal kom getuig hy was by sy huis. Hy het gelê en slap in sy bed. …
- Ms Mokhomo: Hy was daar."

It emerged from that exchange that the appellant's defence was an alibi.

[35] During the cross examination of accused 1 by Mr. Lesapo, the following evidence was unearthed:

35.1 He answered that he was with accused number 3, the appellant, at Stocks Tavern where the complainant also was during the night of the incident;

35.2 He, by implication, answered that he knew the appellant better than he knew accused number 2;

35.3 He answered that he took the police to the appellant's home and pointed him out as one of his two companions during the night of the incident;

35.4 He answered that he called upon the appellant to point out accused 2 to the police; (Apparently he did not know accused number 2's place of residence or his exact whereabouts at the time).

35.5 He answered that the three of them were together at Peter's Tavern earlier before they went to Stock's Tavern during the night of the incident;

35.6 He answered that the three of them did not shift from Pieter's Tavern to Stock's Tavern at the same time.

[36] It must be borne in mind that accused number 1 was in the company of the complainant at the time he was apprehended by members of the public handed to the complainants boyfriend and ultimately arrested on the scene by the police. That heavily implicated man was a friend to the appellant. When the police questioned him about his 2 companions, the appellant was the very first person he fingered out. Why would he protect the real culprit at the expense of the innocent man, his friend for that matter, who was peacefully asleep in his bed?

[37] The evidence of accused number 1 also indicated that the ties of friendship were stronger between accused number 2 and the appellant than between accused number 2 and accused number 1 himself. Accused number 1 and accused number 2, the men who were heavily implicated in this case, had a common friend in the person of the appellant. The saying that birds of the same feather flock together seems to be applicable to them.

[38] The evidence of accused number 1 was never challenged by the appellant through cross examination despite its devastating adverse impact on his alibi defence. This is the first thing.

Moreover, the appellant did not challenge the evidence of accused number 1 by testifying. Such incriminating evidence called for a decisive response by an innocent man to set the record straight. But appellant did not rise up to meet the challenge. This is the second thing. Failure to testify has certain adverse implications – **S v Letsoko &** Others 1964 (4) SA 768 (AD) at 776B and **S v Boesak** 2000 (1) SACR 633 (SCA) at 646 d-e. The appellant did not, in the presence of the police, repudiate accused number 1's allegation that they were together during the night of the incident. He did not instantly say that he was fast asleep at all times relevant to the incident. Instead he tacitly endorsed the allegations made by accused number 1 by taking the police to accused number 2's home.

[39] All those factors strengthened the contention that the untested alibi defence of the appellant was false. All those pieces of circumstantial evidence materially corroborated the evidence of the complainant that she was raped by 3 men, accused number 1 and his 2 companions. The appellant and accused number 2 were positively identified by an insider, as his 2 companions at all times material to the incident.

[40] Where, as in this instance, one accused person, gives evidence in his own defence which has the effect of incriminating his co-accused such evidence is admissible as against a co-accused thereby incriminated provided such evidence does not amount to a confession - See **R v Rorke** 1915 AD 145 and **R v Zawels & Another** 1937 AD 342. Also see sec 196 and sec 219 Criminal Procedure Act 51/1977.

[41] Mr Helepi, in other words accused number 1, was an accomplice. That being the case, his evidence had to be treated with caution. I have cautiously approached his evidence in relation to the appellant. Along the way I highlighted certain factors that materially reduced the dangers inherently present in the evidence of an accomplice. To reject or to ignore the testimony of this particular accomplice would offend the principle that the exercise of caution should not be allowed to displace common sense. **S v Sauls & Others** 1981 (3) SA 172 (AD).

[42] For the reasons given above I am persuaded that the appellant was correctly convicted. The finding by the trial magistrate that the appellant was involved together with his highly implicated 2 co-accused, is one which I, on appeal, cannot hold to be wrong. As I see it, the trial magistrate committed no material and thus appealable misdirection as regards the substantive merits. In the absence of an appealable misdirection no appellate interference is justified. **S v Francis** 1991 (1) SACR 198 (AD) at 204 c-e. I would, therefore, dismiss the appeal as regards conviction.

[43] Now I turn to the sentence component of the appeal. The appellant was sentenced to 10 years imprisonment in respect of the first charge and life imprisonment in respect of the second charge. As regards the latter, the court *a quo* found that no substantial and compelling circumstances existed to warrant deviation from the prescribe minimum sentence of life imprisonment, a punishment ordinarily ordained for the situation where, as in this instance, a victim, often a woman, is raped by

two or more co-perpetrators, often men – see Part I Schedule 2 to Act No 105/1997.

[44] In every appeal against sentence, the judges hearing the appeal should be guided by certain appellate principles. The first is that punishment of an offender is primarily a matter for the discretion of the trial court. The second is that such judges should be careful not to erode such discretion. The third is that the sentence should only be altered, on appeal, if the discretion has not been judiciously and properly exercised – **S v Rabie** 1975 (4) SA 855 (A) at per Holmes JA.

[45] In **S v Malgas** 2001 (1) SACR 469 (SCA) para 12 Marais JA aptly sounded a word of caution.

> "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."

[46] The court fulfils a very important function in applying the law in our society. It has a duty to see to it that orderliness is maintained. Society thrives in a state of orderliness. It abhors anarchy and chaos. The court operates in a society to eradicate lawlessness. Its decisions have an impact on individuals in the ordinary circumstances of daily living. It covers all possible grounds. This is no space it does not include. By its decisions,

including the imposition of sentence, it promotes respect for the law. Its sentencing decisions must reflect the seriousness and gravity of the offence. It must strive to provide just punishment for offenders whose personal circumstances must always be taken into account. The feeling of society and its needs for protection from offenders must be considered. So must the maintenance of peace and tranquillity in our land. **S v Banda & Others** 1991 (2) SA 352 (BGD) per Friedman J.

[47] In sentencing the appellant the trial court was alive to his personal circumstances. The following mitigating factors were taken into account:

47.1 He was 24 years of age at the time he committed the offences and 26 years of age at the time he was sentenced.
47.2 He was arrested on 4 August 2009. He was incarcerated ever since then.
47.3 He attended school up to grade 12.
47.4 He was on the verge of starting a new employment at Sentec Fencing at Vereniging where he was due to earn a livelihood of R2000 per month at the time of his arrest.
47.5 He was single.
47.6 He had no children.

[48] In sentencing the appellant the court *a quo* also took into account the following aggravating factors:

48.1 The nature and seriousness of the crimes;

48.2 The prevalence of rape in the region;

48.3 The appellant was a members of criminal gang of 3 rapists;

48.4 The complainant was raped four times;

48.5 The 2 members of the gang were armed with knives with which they threatened her;

48.6 The appellant was remorseless;

48.7 The interest of society dictated that woman be protected from rapists **S v Chapman** 1997 (2) SACR (SCA) 3 at 5 B-E.

[49] After considering the mitigating factors vis-à-vis the aggravating factors, the court *a quo* came to the conclusion that no substantial and compelling circumstances existed to justify departure from the prescribed minimum sentence of life imprisonment in respect of the rape charge. Mr Kambi submitted that the sentence of life imprisonment was disproportionate to the offence but Mr Mashamaite disagreed.

[50] The repulsive misdeed termed rape ranks among the most prevalent crimes in the country as a whole. The upsurge of rape by gangs is also a matter of great concern. The empherical study done has revealed that the right of a woman to give or withhold consent to sexual intercourse with a man is one of the most frequently violated human rights in our beloved country. It has also been lamentably shown that of the notoriously many who rape only few get caught and jailed.

[51] About the danger of that situation a judge once remarked:

> "There is considerable risk in those circumstances that excessive punishment will be heaped on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing

> hope that it will arrest the scourge. But the Constitutional Court reminded us in **S v Dodo** that punishment must always be proportionate to the deserts of the particular offender - no less but also no more - for all human beings 'ought to be treated as ends in themselves, never merely as means to an end"

S v Vilakazi 2009 (1) SACR 552 (SCA) para 3 per Nugent JA.

[52] It was incumbent upon the trial court, before it imposed the prescribed minimum sentence of life imprisonment, to consider all the peculiar circumstances of this particular case in order to determine whether the prescribed minimum sentence would indeed be proportionate to the crime committed. The prescribe minimum sentence of life imprisonment should not be assumed "a priori" to be proportionate to the crime. The victim, 24 years of age, was raped more than once, 4 times to be precise, by the appellant acting not alone but with his 2 accomplices. Those were crucial facts of the case which ordinarily attracted the ultimate sentence of life imprisonment.

[53] In a rape case of this notorious shade those objective hallmarks of the crime surge to the fore in determining the proper sentence. The mere fact that the complainant was sexually penetrated by the appellant acting collaboratively together with 2 accomplices is considered by the legislature to warrant the severest form of punishment permissible in our criminal law where a sentence of 10 years imprisonment would ordinarily have been the prescribed minimum sentence had the appellant acted alone since he penetrated her once.

[54] It has to be borne in mind that a trial court is not compelled to impose a sentence that is disproportionate to the particular crime of rape. If the prescribed minimum sentence is mechanically imposed as a norm an injustice may be perpetrated by the resultant disproportionate sentence imposed. See Vilakazi, *supra*, para 21 per Nugent JA.

> "Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound."

[55] The complainant sustained no bodily injury. Although the appellant and his accomplices, accused number 1 and accused number 2 were armed with knives, none of them actually stabbed the complainant. In this case there was no extraneous violence of any kind used by the appellant or any of his accomplices to harm the complainant which was why no physically injuries were caused. See Vilakazi *supra*, para 55. The court *a quo* underplayed the significance of that mitigating factor.

> "Sy is aangerand. Soos wat die verdediging tereg opgemerk het is daar nie noemenswaardige beserings op die J.88 nie. Ek dink nie ons moet die voordeel vir julle gee nie."

[56] In my view the regional court materially erred. The apparent lack of serious and permanent physical injuries was a material consideration. It indicated no excessive violence was used in order to break the victim's resistance.

See: **S v Nkawu** 2009 (2) SACR 402 (ECG). **S v Mabitse** 2012 (2) SACR 380 (FB). **Mokoena** (A323/2010) [2012] ZAFSHC 12 (9 February 2012). **S v SMM** 2013 (2) SACR 292 (SCA)

S v Mosia 2012 (2) SACR 537 (FB) para 20-22 examplies extremely violent and callously brutal acts of rape. In **S v Matyityi** 2011 (1) SACR 40 (SCA) Ponnan JA described the circumstances of the rape as breathtakingly and brazenly brutal. In casu there was no such brutal horror.

[57] As regards trauma, there was very little upon which the adverse emotional impact of the rape upon the complainant could be sensibly measured. I understand that the emotional response that rape might evoke differs from victim to victim. A trial court must realize that emotional damage that accompanies a rape incident might be extensive even if such adverse impact does not immediately and overtly manifest itself.

> "But while a court must inform itself sufficiently to be alive to the range of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample."

See: Vilakazi *supra*, para 56 per Nugent JA. The levels of emotional damage were very high in **S v Mosia** *supra* and **S v Matyityi**, *supra*

[58] To reasonably assess possible emotional harm done, it was important to have the complainant properly profiled and individualized. The emotional impact of rape on a rape victim is a

relevant and significant factor to be taken into account in the adjudicative process of determining an appropriate punishment for a rape offender. The record of the trial proceeding showed that no attempt was made to elicit any evidence relative to the emotional impact of the crime on the complainant. It would seem that no attempt was made to seek and obtain a victim impact report. Such a report might have cast some light on the question of emotional impact of the crime on the complainant.

[59] In *casu*, all we heard was that after the rape she walked from the scene of the crime to Malefu's Shebeen with the 3 rapists; that she returned to the scene of the crime with accused number 1; that they met 4 strangers in the vicinity of the scene; that she yelled for help when she saw the 4 strangers and that they 4 rescued her and that they called her boyfriend who found her on the scene of the crime. There was virtually no evidence canvassed relative to her emotional state when she met her boyfriend or her rescuers. At the trial she was not asked about the emotional impact of the rape on her for the past few months before she testified. All the same we have to accept that the complainant was, in one way or the other, adversely affected by the sexual assault and that she was emotionally traumatised. More than that the evidence revealed nothing specific. Proof of the adverse impact of crime, aggravates sentence. But there was no proof of emotional damage in this instance. Therefore the appellant deserved credit for such a material consideration.

[60] As regards incarceration, the appellant again received no credit from the trial court. The appellant was incarcerated for almost 19 months, from 4 August 2009 to 28 February 2011.

> "Die feit dat u in hegtenis aangehou is tot nou, is maar deel van die proses."

So said the trial magistrate.

[61] In Vilakazi, *supra*, para 60 Nugent JA, writing for the unanimous court, said that the offender's presentencing period of incarceration was a consideration that must be taken into account. About that he went on to say:

> "At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed"

The view that an offender be given double credit for the period of incarceration was finally repudiated and the debate put to rest in **Radebe v S** (726/12) [2013 ZASCA31 (27 March 2013) para 14 but the ordinary length of such period remains a cumulatively relevant factor and not an insignificant factor in the deviation equation.

[62] As regards his clean criminal record, once again the appellant got no joy. The appellant was a first offender. He had reached the age of 24 without any brushes with the law. He had educationally

progressed up to grade 12. He was about to start with a relatively stable job at the time he was arrested. There was nothing in his personal circumstances which is suspiciously indicative of an inherently lawless character. It was significant for the court *a quo* to consider whether the appellant could be expected to offend again. His remorselessness was not in itsself an absolute indication that, given a chance, he would offend again. That, in my view, was a material consideration. No one can accurately foretell but I venture to say that the evidence disclosed nothing to suggest that the appellant is likely to do it again unless he is permanently removed from society.

[63] The evidence indicated that the appellant and his accomplices prowled the streets and taverns. Before they proceeded to rape the victim they were at Peter's Tavern where they consumed some intoxicating beverages. From there they went to Stock's Tavern. They continued to drink even there. Again they left, probably when the saw the complainant venturing out alone into the street. Once again they prowled the streets. They ambushed the complainant and raped her. After the rape, they were on the move again. They walked to Malefu's Shebeen. They still wanted to drink further but they found the place closed. We have to accept, therefore, that alcohol played a role in the commission of the offence. The trial magistrate accepted this as a fact. Excessive consumption of alcoholic drinks adversely impairs a drinker's judgment. So it must have affected the appellant to some greater or lesser extent.

[64] The court *a quo*, after dealing with the mitigating factors and the aggravating factors, came to the following conclusion:

> "Menere, wat wesenlike en dwingende omstandighede betref, moet die hof eintlik vir u sê dat daar nie voor die hof sodanige is nie. Die voorskrif is dat daar nie ligtelik van minimum vonnisse afgewyk moet word nie."

The legislative prescription must be carefully applied.

[65] Whether the prescribed minimum sentence is indeed proportionate to be imposed, is a question to be determined upon a painstaking consideration of all the peculiar circumstances of a particular case. It cannot be fleetingly done. The cardinal guiding principles are that a sentencing court must approach the matter conscious of the fact that the supreme lawmaker has ordained the prescribe minimum sentence as the sentence that should ordinarily be imposed in the absence of weighty consideration. That is the one principle. The other principle is that if the sentencing court is satisfied that the peculiar circumstances of a particular case render the prescribed minimum sentence unjust, it is entitled to impose a lesser sentence. Malgas, *supra*

[66] It is indeed so that, the first principle dictates that the sentencing courts should not readily depart, for flimsy reasons, from the prescribed minimum sentence ordained as an ordinarily appropriate punishment. In this instance, the sentencing courts said the following before it imposed the prescribe minimum sentence in connection with the charge of rape:

> "Op aanklag 2 het die hof geen keuse as om uitvoering aand die wet te gee nie en word u elkeen gevonnis tot LEWENSLANGE/…"

[67] The impression created was that the court *a quo* approached the prescribed minimum sentence from an incorrect angle that the prescribed minimum sentence of life had to be imposed as a matter of course. The prescribed minimum sentence of life imprisonment is the harshest sentence a court can impose on an offender. It is the ultimate punishment in our criminal law. It is impermissible to impose it as the norm. The prescribed minimum sentence is not a standardized rigid norm that must always be inflexibly imposed and that must be rarely deviated from only as an exception. A properly thorough enquiry in terms of sec 51(3) Act No 105/1997 would somehow indicate whether the ordained sentence or whether a different response was justified. The sentencing court always has that choice dictated by the peculiar circumstances of a particular case. To say that the court has no choice boiled down to some kind of neglect to exercise the sentencing discretion judiciously and constituted a material misdirection **S v Rabie**, *supra*.

[68] When the peculiar circumstances of this particular case are carefully viewed as a whole, the only material feature that emerges above the rest as having aggravated what is inherently a serious crime, was the fact that the complainant was raped by three men. To impose the ultimate sentence on the appellant only on the basis that the statutory formalities were proven would be tantamount to mechanical sentencing as the norm. Such a rigid approach would inevitably yield disproportionate outcome,

would erode the discretion of the sentencing in court and would give rise to unjust retributive punishment of offenders.

[69] I am satisfied that the peculiar circumstances of this particular case required a sentencing response different from the sentence of life imprisonment. To the extent that the trial court found otherwise, it materially erred in my respectful view. As I see it, the aggravating factors did not eclipse the mitigating factors. I have earlier pointed out that the appellant was not given credit in respect of some important mitigating factors. The sentence of life imprisonment imposed on the appellant was exceedingly retributive and disturbingly disproportionate given the peculiar circumstances of this particular case as a whole. The material misdirections call for an appellate interference. I consider that a substantial sentence of 18 years imprisonment would not just deterrently bring home to the appellant and other potential rapists the gravity of the crime he committed. Moreover, such sentence would also exact sufficient retribution for his crime. It seems to me to be excessive and enormously disproportionate, given the peculiar circumstance of this particular case to make him pay for the crime with the rest of his life. The circumstances of this case dictate that the punishment to be imposed on the appellant should be blended with a measure of mercy.

[70] Accordingly I make the following order:

70.1 The appeal against the conviction fails and the conviction is confirmed;

70.2 The appeal against the sentence succeeds. The sentence of life imprisonment imposed on the appellant is set aside and it is substituted with the one below;

70.3 The appellant, accused number 3 in the court *a quo*, is sentenced to 18 years imprisonment from which 19 months are to be deducted when calculating the date upon which the fresh sentence is to expire;

70.4 The sentence must be deemed to have been imposed on 28 February 2011;

70.5 The appeal fails in toto as regards the first charge of robbery with aggravating circumstances.

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M.H. RAMPAI, J

I concur

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B.I. MOHALE, AJ

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