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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

APPEAL NUMBER: **A118/2020**

In the appeal of:

TINI KOLOI MOTAUNG **Appellant**

and

THE STATE **Respondent**

CORAM: **MBHELE, DJP *et* VAN RHYN, AJ**

HEARD ON: **11 OCTOBER 2021**

DELIVERED: **4 NOVEMBER 2021**

JUDGMENT BY: **VAN RHYN, AJ**

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[1] The appellant was arraigned and convicted in the Regional Court at Heilbron on

the following charges;

1.1 Counts 1 - 19: Rape read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997.

1.2 Count 20: Assault with the intent to cause grievous bodily harm.

1.3 Counts 21 & 23: Rape read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997.

1.4 Count 22: Attempted rape.

[2] The appellant was sentenced as follows:

2.1 Counts 1-19: Rape - Life imprisonment on each of the charges;

2.2 Count 20: Assault with the intent to cause grievous bodily harm- One (1) year imprisonment;

2.3 Counts 21 & 23: Rape – Ten (10) years imprisonment on each of the charges;

2.4 Count 22: Attempted rape – One (1) year imprisonment.

[3] Appellant, who was duly represented, pleaded not guilty to the charges against him and elected not to give a plea explanation. The trial commenced on 2 April 2007 and lasted until 5 November 2009 when the appellant was sentenced. The appeal was automatic as provided for in section 309B(1) of the Criminal Procedure Act 51 of 1977 and is in respect of both conviction and sentence.

[4] The grounds upon which the appellant's appeal against the conviction rest are that the court *a quo* erred in:

4.1 finding that the guilt of the appellant was proved beyond reasonable doubt;

4.2 not properly evaluating the evidence presented by the respondent;

4.3 not approaching the evidence by the complainant, who was a single witness, with caution. She testified about the incidents some 4 years

after the events occurred and furthermore reported the incidents long after the alleged occurrence thereof.

4.4 failling to appreciate that the medical evidence did not support a finding of injuries nor forced penetration. Appellant was not linked to the crime of rape through DNA;

4.5 not finding that the allegations made by the complainant was a fabrication.

4.6 in rejecting the appellant's version.

[5] The grounds upon which the appellant's appeal against the sentence rest are that the court *a quo:*

5.1 over emphasized the seriousness of the offence and the interests of society and failed to give adequate consideration to the personal circumstances of the appellant.

5.2 did not adequately consider the possibility of the appellant's rehabilitation;

5.3 failed to consider the sentence in a balanced manner and over emphasized the factors in aggravation.

[6] The facts underlying the conviction are briefly as follows: The complainant is the daughter of the appellant. Her parents divorced and her mother remarried. The complainant resided with her grandparents at Petrus Steyn in the Free State Province. During March 2004 she telephonically made contact with the appellant. On 7 March 2004 the complainant moved in with the appellant at his place of residence at Atteridgeville, Pretoria. A few days later, on 10 March 2004, the appellant informed the complainant that since she is his eldest daughter, a certain cultural practice or custom had to be complied with. The appellant explained to the complainant that the custom requires that he must have sexual intercourse with her. On the following day, 11 March 2004 the appellant insisted that they have sexual intercourse whereafter the complainant

refused to comply with the appellant's demands. The appellant physically assaulted the complainant by hitting and slapping her in the face. The appellant then undressed her and inserted his penis into her vagina.

[7] This was the first of many similar incidents that occurred and which the complainant was able to recall during her testimony. The appellant assaulted and raped her on numerous occasions during the period from 11 March 2004 to 18 January 2006. The rapes occurred approximately every second day during the initial period which lasted from 11 March to 11 July 2004. The appellant was held in custody for a period of approximately a year and subsequent to his release from custody during January 2006, he continued with the same *modus operandi.*

[8] The complainant recorded the dates of each incident in a diary. She handed the diary to a member of the South African Police Service (the "police") at Atteridgeville at the time when she reported the crimes during July 2004. During the trial the complainant had to rely on the dates recorded in her statement made to the police, which was compiled in accordance with the dates recorded in her dairy. The diary however could not be found for purposes of the trial.

[9] The complainant testified that she had left the appellant's residence during May – June 2004 and fled to Heilbron to seek refuge from the appellant. She stayed with her aunt, M[....] M[....]. Complainant reported the rapes to her aunt. The appellant came to Heilbron and Frankfort to fetch the complainant on two separate occasions and took her back to Atteridgeville. The complainant showed the diary to S[....] M[....] who confirmed that, even though she is illiterate, she saw the diary.

[10] The appellant also came looking for the complainant at the time when she resided with her aunt on a farm in the Frankfort district. The appellant arrived by bicycle on the farm and when the complainant resisted the appellant's attempts to take her away from her aunt's residence, he took his belt and assaulted her on her head and body. The complainant, due to intimidation and

fear of her father, left her aunt's residence and on their way along the road to Sanderville the appellant attempted to rape her. Fortunately for the complainant, a police vehicle stopped and the police enquired why the appellant seemed to drag the young girl by her arm along the side of the road at night.

[11] Captain T S Motsiri of the Heilbron Police Station confirmed the testimony of the complainant that the appellant dragged her by her arm along the road from Phiritona in the direction of Sasolburg on the 13th of July 2004. The Complainant's evidence regarding the violent attack upon her and the injuries sustained when the appellant assaulted her with his belt, is corroborated by Captain Motsiri, who evidently was suspicious of the intentions of the appellant. He questioned the appellant and noticed the complainant's indication that she was in disagreement of the appellant's responses to the questions posed to him. Subsequent to the appellant absconding, Captain Motsiri took the complainant to the hospital at Heilbron for medical treatment of the wounds she sustained when the appellant assaulted her.

[12] On their return to Atteridgeville the complainant was able to slip away from home during the appellant's temporary absence and laid a charge of rape against the appellant at the Atteridgeville Police Station. The appellant was arrested. The complainant returned to Petrus Steyn to stay with her grandfather.

[13] It is assumed that the complainant could not be traced by the police for the court proceedings at Atteridgeville which resulted in the charges against the appellant being withdrawn. On 10 January 2006 the appellant was released from custody. On 17 January 2006 the appellant arrived at his father's residence on a farm near Petrus Steyn where the complainant and her brother, Morena were staying with their grandfather and his wife, L[....] M[....]. Notwithstanding the family members' attempts to stop him, the appellant, forcibly dragged the complainant away from her grandfather's home. While they were walking in the direction of Petrus Steyn, at an area next to the road, the appellant again raped the complainant.

[14] Shortly thereafter they returned to the grandfather's house where the appellant attempted to rape the complainant again the very same evening. The complainant testified that she and the appellant were together in a bedroom when he attempted to rape her. Her grandmother knocked on the door which interrupted the appellant. The appellant then took his blanket and went to sleep in the kitchen while she remained in the bedroom. This incident relates to count 22 of attempted rape.

[15] The next morning the appellant took the complainant, once again with force and against her will, to visit an area referred to as Mamafubedu, where he kept some of his belongings in a shack. Inside the shack, the appellant placed a spongelike cushion on the floor and raped the complainant. The next day, on 19 January 2006 the police took the appellant away which provided the complainant with an opportunity to escape to a friend's residence where she could hide from the appellant. Thereafter she relocated to her aunt's residence on a farm in the Heilbron district. Once again, the appellant came looking for her and arrived at the farm the next morning. The complainant, with the assistance of her aunt, concealed herself in her aunt's house while her aunt alerted the owner of the farm regarding the situation. The farmer called the police. Shortly thereafter the police arrived and arrested the appellant.

[16] During the trial, two J-88 medico-legal examination forms were received as evidence. The medical evidence confirmed the presence of a laceration on the complainant's head subsequent to the appellant assaulting her with his belt. Marks, resembling the buckle of a belt were visible on the complainant's back and was recorded by the medical practitioner who examined the complainant. Old tears of the hymen revealed evidence of penetration. Although possible traces of semen were detected, the quantity was not enough for DNA comparison.

[17] The appellant testified in his defence and denied the allegations of rape, attempted rape and assaults perpetrated against the complainant. The appellant confirmed that the complainant requested him, during March 2004

whether she could stay with him. He however denied that she stayed with him for several months. On the appellant's version the complainant only resided with him at Atteridgeville for a week. However, his version in this regard was not put to the complainant when she testified. The appellant conceded that he travelled from Atteridgeville to Heilbron and to the farm where his sister resided, to look for the complainant after she ran away to reside with her family members. He was unable to explain why his sister called the police on his arrival and why the complainant was hiding from him when he arrived at the farm. The appellant could furthermore not provide a plausible explanation why his father's spouse, L[....] M[....], would falsely implicate him even though they had a good relationship.

[18] It is not necessary, in my view, to recapitulate all the evidence led at the trial apart from the concise summary already mentioned. It is trite that the onus which rests on the State in criminal cases is to prove the guilt of an accused beyond reasonable doubt. A court does not have to rely upon absolute certainty, but merely upon justifiable and reasonable certainty.[1] In its ultimate analysis the court must assess the evidence holistically.

[19] It is trite that a court of appeal will rarely interfere with findings of fact of the trial court, including credibility findings with regard to witnesses. In the absence of material misdirections by the trial court, its findings of fact are presumed to be accurate, and would be disregarded only if the recorded evidence shows them to be wrong. In *S v Naidoo & others*[2] this principle was stated as follows:

> "In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."

[20] Mr. Reyneke, on behalf of the appellant, conceded that notwithstanding the minor contradictions in the evidence presented by the complainant, the findings of fact by the trial court cannot be criticized. In S v Makgatho[3] the court held that: "A court of appeal should not seek anxiously to discover reasons adverse to the

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[1] S v Ntsele 1998 (2) SACR 178 (SCA), headnote at 180D.
[2] S v Naidoo & Others 2003 (1) SACR 347; [2002] 4 All SA 710 (SCA) para 26.
[3] 2013 (2) SACR 13 (SCA).

conclusions of the court *a quo* who has seen and heard the witnesses and determines the case on the comparison of their evidence"[4] The contradictions referred to by Mr Reyneke relate to, *inter alia*, the charge of attempted rape that occurred in the complainant's grandfather's house when the appellant was interrupted from raping her due to a knock on the door. The complainant's grandmother, L[....] M[....] testified that both the complainant and the appellant slept in the kitchen subsequent to the appellant removing a blanket from the bedroom and making a bed in the kitchen. The complainant's grandfather's testimony was that the complainant slept in the bedroom and the appellant slept in the kitchen or lounge, which consists of one room. The issue of whether the complainant ultimately slept in the kitchen or in the bedroom is, to my mind not a material contradiction. The complainant's account that she slept in the bedroom while her father slept in the kitchen, is corroborated by her grandfather. What is of importance is what occurred in the bedroom prior to the appellant taking a blanket and making a bed in the kitchen.

[21] The complainant denied visiting appellant while he was in custody at Petrus Steyn, but according to Mr. Reyneke, she later changed her version and indicated that she went to see the appellant. The complainant provided the following explanation which, in my view, sufficiently explains the misunderstanding. When she arrived at the place where the appellant was confined, she was informed that the appellant refuses to see her. She therefore did not enter the cell where the appellant was detained and thus did not see the appellant.

[22] The court *a quo* properly cautioned itself regarding the assessment of the evidence of a single witness and in weighing the complainant's evidence, was satisfied that her account of the events, that spanned over a lengthy period and included numerous incidents, could be accepted as trustworthy and reliable. The complainant had provided exhaustive details of the incidents of rape as well as clear accounts relating to the various acts of assaults with sufficient detail as to where the incidents occurred at several different locations despite

[4] At para 17.

the fact that the notes, she made in the diary, were not available. The complainant clearly indicated that numerous other incidents did in fact occur, but that she does not have a clear recollection of all the facts pertaining to each incident. She refrained from testifying about those incidents of which she was unable to present a credible and trustworthy account.

[23] The family members of the appellant eventually assisted the complainant and summoned the police which led his arrest and prosecution. Even once arrested and charged, the appellant denied his guilt and thus subjected his daughter to the ordeal of a trial. I am satisfied that the court a quo correctly rejected the appellant's version.

[24] I am convinced that the appeal against each of the convictions should fail.

[25] As to sentence, the different charge sheets regarding counts 1 – 19 as well as counts 21 – 23 merely refers to section 51 of Act 105 of 1997. Counsel on behalf of the respondent, Mrs Bester, argued that due to the failure of the trial court to adequately inform the appellant of the minimum sentence regime which includes its potential application in the event of a conviction on the numerous counts of rape at the commencement of the trial, the sentences imposed in respect of count 1 -19 must be set aside.

[26] It is evident from the record of the proceedings that the appellant was not informed of the applicability of the provisions of sections 51(1) and 51 (2) of the Criminal Law Amendment Ac 105 of 1997 ("the Minimum Sentences Act"). The Minimum Sentences Act came into effect in 1998. It provides for minimum sentences for certain serious offences stipulated in section 51 and directs that the court "shall" impose a sentence of life imprisonment where it has convicted a person of an offence referred to in Part 1 of Schedule 2, unless the sentencing court is satisfied that there are substantial and compelling circumstances to justify the imposition of a lesser sentence. The fact that the complainant was 15 years old at the time when the incidents regarding counts 1 – 19 occurred is stated in the charge sheets. However, no reference is made to the application of subsection 1 of section 51 and there is no

indication that the accused was apprised of the consequences in the event that substantial and compelling circumstances do not exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1). Neither the appellant's legal representatives nor the presiding magistrate alerted him to the provisions of section 51 referred to above.

[27] Section 35(3) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to prepare for trial. In my view there clearly is a deficiency in the charge sheet and it is unfortunate that both the Regional Court Magistrate and the State Prosecutor failed to notice the omission in the charge sheets. Taking cognisance of the decision of S v Ndlovu,[5] I am in agreement with Mrs. Bester and Mr. Reyneke that due to the said omission the sentences imposed in respect of counts 1-19 must be set aside and replaced with appropriate sentences.

[28] In S v Chapman,[6] the Court reiterated the fact that rape is a serious offence. It is "…humiliating, degrading and a pitiless invasion of privacy, dignity and person of the victim". In Chapman, Mahomed CJ held as follows:

> "The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. [7]

[29] In S v SMM[8] the following was held in respect of the factors which a court has to consider when sentencing:

> "[13] ……. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to

[5] 2017 (2) SACR 305 (CC).
[6] 1997 (3) SA 341 (SCA).
[7] At 345A-B.
[8] 2013 (2) SACR 292 (SCA).

> both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in *S v Rabie*:
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> 'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'." [9]

[30] The following personal circumstances and aggravating facts as well as mitigating factors appear from the record:

30.1 He was 45 years old at the time of the imposition of sentence in 2009;

30.2 He obtained a Grade 3 qualification at school.

30.3 He was unemployed at the time of sentencing. He was employed prior to the committing the offences.

30.4 He was divorced and is the father of two children.

30.5 He was a first offender. He was in custody for a period of 3 years and 9 months.

[31] The offences committed by the appellant are extremely serious. It involves the rape by a father of his teenage daughter. The raping took place repeatedly over a period of approximately 5 months. During 2006-2007 the appellant was in custody for approximately a year whereafter he searched for the complainant. He located her where she was residing with her grandfather. On the same day that the appellant found the complainant at her grandfather's residence, he started raping and assaulting her again. The complainant

[9] At 297 b-e.

sought love, protection and nurturing from her father but had to flee to another province to seek protection from what should have been the sanctuary of her home. A victim impact report was not made available during the hearing of the matter at Heilbron, but it is palpable from the testimony presented by the complainant that she undoubtedly suffered tremendous hardship, pain and suffering due to the sexual abuse and concomitant violence perpetrated against her by her father.

[32] The appellant is a repeat offender that continues to disregard the law and persists in engaging in the same transgression. There appears to be no expression of remorse. In S v Nkosi & Others,[10] Farlam JA observed that:

> "[7] As was stated in *S v Bull and Another; S v Chavulla and Others* 2001 (2) SACR 681 (SCA) at 693*j* - 694*a*, this Court has, since the abolition of the death penalty, 'consistently recognised that life imprisonment is the most severe and onerous sentence that can be imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society'.
>
> In the *Bull* case it was also pointed out (at 694*b*) that this Court has repeatedly warned against excessively long sentences being imposed to circumvent the premature release of prisoners by the Executive."[11]

[33] I therefore propose what is stated in the order below to be an appropriate effective sentence, taking into account the cumulative effect of the individual sentences.

ORDER:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentences on counts 1-19 is upheld and the sentences are set aside.
3. The appeal against the sentences on counts 20 – 22 is dismissed.

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[10] 2003 (1) SACR 91 (SCA).
[11] At 94.

4. The sentences imposed by the court a quo on 5 November 2009 in respect of counts 1-19 are replaced as follows:

4.1 The appellant is sentenced to 25 years imprisonment in respect of each count.

4.2 The sentences in respect of counts 1-19 are ordered to be served concurrently.

5. The sentence imposed by the court a quo in respect of count 21, ten (10) years imprisonment and the sentence in respect of count 23, ten (10) years imprisonment shall be served concurrently.

6. The sentences imposed by the court a quo in respect of count 21 and count 23 shall not be served concurrently with any of the sentences imposed by this court.

7. The sentence imposed by the court a quo in respect of count 20, one (1) year imprisonment and the sentence imposed in respect of count 22, one (1) year imprisonment shall be served concurrently with the sentence imposed by this court in respect of counts 1 – 19.

8. Effectively the appellant is sentenced to 35 years imprisonment.

9. The sentence is antedated to 5 November 2009.

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VAN RHYN, AJ

I concur and it is so ordered

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MBHELE, DJP

On behalf of the Appellant:	Mr. DJ REYNEKE
Instructed by:	BLOEMFONTEIN JUSTICE CENTRE
On behalf of the Respondent:	Adv. A BESTER
Instructed by:	DIRECTOR PUBLIC PROSECUTIONS BLOEMFONTEIN