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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A76/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

~~**Reportable: YES/NO**~~

~~**Of Interest to other Judges: YES/NO**~~

~~**Circulate to Magistrates: YES/NO**~~

~~Appeal number: A76/2021~~

In the appeal between:

POKAME JOHANNES METSING ———— Appellant

and

THE STATE Respondent

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CORAM: MBHELE, AJP *et* VAN ZYL, J

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: —MAY 2022

[1] This is an appeal against the convictions and sentences of the appellant imposed by the Regional Court, Welkom on 17 May 2021.

[2] The appellant was charged with the following counts:

—2.1 Count 1:

Rape, in that it was alleged that on or about 1 January 2020 and at or near Thabong, Welkom, the appellant unlawfully and intentionally committed acts of sexual penetration with the complainant, ~~Palesa Sehlabo~~ P[....] S[....], a 14-year-old girl, by penetrating her vagina with his penis without her consent and thus raping her more than once.

—2.2 Count 2:

—Kidnapping of the aforesaid complainant at the same date and place in that the appellant unlawfully and intentionally deprived her freedom of movement by means of threatening her with a knife and forcing her to go with him to Zoka Baloyi Stadium and even putting her on his back to Tosa College.

2.3 Count 3:

—Rape, in that it was alleged that at the date and place above the appellant unlawfully and intentionally committed acts of sexual penetration with the complainant, ~~Dikano~~ D[....] ~~Khosi~~ K[....]1, a 17-year-old girl, by penetrating her vagina with his penis without her consent and thus raping her more than once.

2.4 Count 4:

Kidnapping of the aforesaid complainant at the same date and place in that the appellant unlawfully and intentionally deprived her of her

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freedom of movement by means of threatening her with a knife and forcing her to go with him to Zoka Baloyi Stadium.

[3] The appellant was convicted on all four counts and sentenced as follows:

3.1 Count 1:

Life imprisonment.

3.2 Count 2:

Three years imprisonment

3.3 Count 3:

Life imprisonment.

3.4 Count 4:

Three years imprisonment.

[4] The appeal is in terms of the appellant's automatic right of appeal.

[5] In terms of the notice of appeal the appellant's grounds of appeal against his convictions can be summarised to be that the court *a quo* erred as follows:

5.1 In finding that there are no improbabilities in the State's case.

5.2 In failing to find that a mistake in identity is highly possible, more over so because no DNA evidence was led to support the rape charge against the appellant.

5.3 In finding that the State witnesses gave evidence in a satisfactory manner.

5.4 In rejecting the evidence of the appellant as not being reasonably and possibly true.

5.5 In accepting the evidence of the State witnesses and rejecting that of the appellant and by finding that his alibi is false.

5.6 In finding that there were material contradictions between the appellant's own evidence and the facts put to the State witnesses in cross-examination and/or facts which were not put to the State witnesses.

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5.7 In finding that the State proved its case beyond reasonable doubt in circumstances where the State relied on the evidence of a single child witness for purposes of establishing the identity of the appellant.

The evidence:

The evidence presented by the State:

[6] The birth certificate of the first complainant, ~~Palesa~~ P[....], was handed in as an exhibit. She was born on 30 November 2005.

[7] She testified with the assistance of an intermediary through the intermediary system.

[8] She testified that she and her best friend, ~~Dikano~~ D[....], celebrated New Year's Eve with her parents when they decided at about 1h00 on the morning of 1 January 2020 to walk to a nearby shop in the Thabong area. Before they could enter the yard of the shop, a man approached them, took out a knife and grabbed both of them around their necks with his hands. He was in the middle of the two of them. He placed the knife against ~~Palesa~~ P[....]'s throat. He told them that he does not want to injure them, but that they should go with him. In this manner he forced them to walk with him to the Zokabaloyi Stadium.

[9] When they arrived at the stadium, they entered the stadium and he took them to the toilets at the back of the stadium, within the stadium yard. He forced them into the toilets and instructed them to undress themselves. He then told them to lie down on the floor. He got on top of ~~Dikano~~ D[....], opened her legs and *"tried to put his penis into her vagina"*. Whilst busy with ~~Dikano~~ D[....], his face was facing in ~~Palesa~~ P[....]'s direction to ensure that she does not run away. He told ~~Dikano~~ D[....] that it was clear that she was still a virgin.

[10] Thereafter he got onto P[....], opened her legs and inserted his penis into her vagina. She testified that she felt pain in her vagina. P[....] also testified that

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"whilst he was trying to put his penis in my vagina, in actual fact he did not succeed in doing so and also alluded that I am also a virgin and thereafter went to D[....] again." He was again *"trying to insert his penis in D[....]'s vagina forcefully so".* He continued his actions, moving from the one complainant to the other. P[....] confirmed that he in fact penetrated her vagina with force. She cannot remember how many times he went from the one to the other, *"but it was many times".* He apparently became frustrated with them and slapped both of them with open hands on the face. P[....] ultimately fell on top of D[....] as a result of the slapping.

[11] He then instructed them to get dressed, but after they got dressed, he instructed ~~Dikano~~ D[....] to get undressed again, which she did. He took ~~Dikano~~ D[....]'s clothes and they all three then exited the toilet, at which stage ~~Dikano~~ D[....] managed to run away.

[12] The perpetrator then forcefully put ~~Palesa~~ P[....] on his back and walked with her to Tosa College. Whilst on their way there, a dog followed them. Behind Tosa College, underneath a big tree, he tried to undress ~~Palesa~~ P[....], but then the dog tried to bite him. He, however, succeeded in undressing her, but when he tried to open her legs, the dog again tried to bite him and this prevented him from raping her. The perpetrator lied next to ~~Palesa~~ P[....] and placed his knife behind her head on the ground. The dog remained present at all relevant times. The perpetrator fell asleep, but when ~~Palesa~~ P[....] tried to move, he felt her movement. Much later, when the sun was already out and it was already daylight, he told her to get up, get dressed and that he was going to accompany her to her parental home.

[13] He gave her a R20.00 note from R40.00 which ~~Palesa~~ P[....] and ~~Dikano~~ D[....] gave him when he grabbed them with the hope that he would then leave them alone. When he gave her the money, he instructed her that she should tell her parents that she was from Phakisa. She told him not to accompany her to her parental home, where after she left on her own. She arrived at home at approximately 7h00.

[14] Upon her arrival at her parental home, she met with ~~Dikano~~ D[....]'s sister. At that stage her parents were out with police officials and ~~Dikano~~ D[....]. The police

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officials were called and informed that P[....] had arrived at home. The police, her parents and D[....] returned home, where after they all went to the police station. P[....] and D[....] were taken to Bongani Hospital for a medical examination. The J88 medical report pertaining to P[....] was handed in as an exhibit.

[15] With regard to the identity of the perpetrator, ~~Palesa~~ P[....] testified that at the shop and at Zoka Baloyi Stadium she could not see the perpetrator properly, since it was dark. He also did not want her to look at his face. However, she eventually managed to see his face during the period of time they spent at Tosa College since it was already daylight. She also testified that at Zoka Baloyi Stadium, the perpetrator had a black leather jacket on, which he eventually left at the stadium. He was also wearing a cap. She further testified that he was wearing a pair of black trousers with a blue T-shirt and black and white Superstar sneakers.

[16] According to ~~Palesa~~ P[....] she knew that she would be able to identify the perpetrator if she saw him again. After the incident, during or about April 2020, she again saw the perpetrator when she was on her way to school in the company of her cousin. She pointed him to her cousin and told her cousin that he was the perpetrator. She saw him for a second time when she was in the company of ~~Dikano~~ D[....]. She informed her mother that she had seen her perpetrator and she managed to find out what his name was and where he resides. She explained that on the day of the incident she saw that he had a swollen left eye. When she saw him again, he was also wearing the same clothing that he did on the day of the incident. Her mother advised Capt. Jilimba, the investigating officer, that ~~Palesa~~ P[....] will be able to point out the perpetrator at his place of residence. ~~Palesa~~ P[....] went with Capt. Jilimba to his place of residence, but he was absent. Capt. Jilimba, however, found him at the shop where he was busy smoking.

[17] During her evidence in chief when P[....] confirmed that she will be able to identify the perpetrator if she sees him again, arrangements were made that two other male persons were to be placed in the accused dock, together with the appellant. P[....] was then brought into court and asked whether the perpetrator was present in court. She pointed out the person who was seated in the middle of the accused dock, who was the appellant. During this identification she

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was questioned about the fact that she testified that she saw that his left eye was swollen. According to her she could still see the swelling in court. The appellant was requested to stand closer to the prosecutor and the presiding Regional Magistrate, whereupon it was placed on record that there was a mark under the appellant's left eye which appeared to be two scars.

[18] During cross-examination ~~Palesa~~ P[....] testified that she had ample time to look at the appellant's face whilst he was sleeping when they were behind Tosa.

[19] In cross-examination, when her police statement was shown to her, ~~Palesa~~ P[....] confirmed that it contains the signatures of herself and her mother. However, even before she was confronted with the contents thereof, she testified that the statement was never read back to her. The legal representative of the appellant consequently requested that she be provisionally allowed to cross-examine on the contents of the statement and that the statement be provisionally admitted as an exhibit, since she intends calling the police officer who took the statement down as a witness. The statement was provisionally accepted as an exhibit and the cross-examination based on the contents of the statement, was also provisionally allowed. The complainant was then confronted with certain contradictions between the said statement and her evidence in court. For reasons which will become clear later in this judgment, I do not intend dealing with the cross-examination based on the statement.

[20] During further cross-examination it was put to P[....] that the appellant denies any involvement in the alleged incident. Further cross-examination specifically revealed that the appellant does not dispute that P[....] and D[....] had been raped, but that he disputes that he is the one who raped her. The version of the appellany which was put to P[....] was to the effect that *"on that new year between one and two he came to the park here to Liberty Centre in State Way", "at 12 o'clock he was still here in Welkom celebrating new year at this park next to Liberty", "he watched the fireworks here in town"* and that he was not near Zoka Baloyi Stadium or Tosa College during that night. P[....] vehemently denied his version and specifically testified that on his version it would not have been possible for her to see that he had a swollen eye on that particular

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night. It was then posed to her that the appellant will deny that he ever had a swollen eye. P[....]'s response was that he is lying.

[21] The second complainant, ~~Dikano~~ D[....], was also called to testify. Since her version of the events which occurred during the incident up to the point when she ran away when the assailant, ~~Palesa~~ P[....], and herself exited the toilets at the stadium corresponds with the version of ~~Palesa~~ P[....], I do not consider it necessary to repeat her evidence in this regard.

[22] She testified that when she ran away, she was wearing her underwear and held her shoes in her hands. She ran to her parental home where she knocked on the door and her mother opened the door for her. At that stage it was about 4h00. She narrated to her mother as to what happened at the stadium. Her mother told her to get dressed, where after she left the house to go to ~~Palesa~~ P[....]'s mother. Later that morning when they were in the police vehicle looking for ~~Palesa~~ P[....], they received a call that ~~Palesa~~ P[....] had arrived home.

[23] ~~Dikano~~ D[....] testified that she could not see the assailant since it was dark. She did, however, see that he had a leather jacket on and some form of hat on his head. He was wearing black and white Superstar sneakers.

[24] She also testified that she and ~~Palesa~~ P[....] were taken to Bongani Hospital for a medical examination. The J88 pertaining to ~~Dikano~~ D[....] was also handed in as an exhibit.

[25] ~~Dikano~~ D[....] became emotional more than once during the presentation of her evidence.

[26] With regard to penetration as such, she testified that the perpetrator forcefully opened her legs and that he wanted to insert his penis into her vagina. The following questions and answers followed:

> "PROSECUTOR: And was he capable? Was he able to insert his penis into your vagina?

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MS K[....]1: Your Worship, he was, he kept on trying to insert his penis into my vagina, but he could not manage to do such. He could not succeed, but I felt the pain, Your Worship.

PROSECUTOR: And where did you feel the pain?

MS ~~KHOSI~~ K[....]1: Inside my vagina."

[27] After re-examination the court raised certain questions, to which the complainant responded as follows:

"COURT: Thank you. The court just wants to clarify, when you say that the accused tried to penetrate you but he could not succeed but you felt pain, was there any penetration at all, even slight penetration? Are you able to say?

MS ~~KHOSI~~ K[....]1: Your Worship, there was a penetration, but not to his liking where he wanted or how he wanted to penetrate me, Your Worship.

COURT: Okay, but irrespective of that you say there was penetration into your private part, into your vagina?

MS ~~KHOSI~~ K[....]1: Yes, because I felt pain, Your Worship."

The court then granted both the prosecution and the defence an opportunity to ask questions arising from the questions raised by the court, but no questions followed.

[28] ~~Matshidiso Florina Khosi~~M[....] F[....] K[....]2, the mother of ~~Dikano~~ D[....], was the last State witness.

[29] She testified that D[....] was born on 13 August 2002. On 1 January 2020 at around 4h00 D[....] arrived at their house, only wearing her underwear and she held her shoes in her hands. She was crying, shaking and could not talk properly. After she opened the door for D[....], D[....] narrated the events which occurred during that night to her. The version of events which Matshidiso presented in court as being the version which D[....] told her, corresponded in all material respects with the evidence of D[....] herself. I therefore do not deem it necessary to repeat same herein.

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[30] Matshediso also testified as to how they went to P[....]'s parental home, where after they accompanied the police in the search for P[....]. However, at one stage they received a phone call that P[....] had arrived at home.

The evidence presented by the defence:

[31] The appellant testified in his own defence. He testified that during New Year's Eve he spent his time in the park in front of the town hall near Liberty Centre, Welkom. He arrived at the park in the afternoon of 31 December 2019 at approximately 13h00/14h00. During the afternoon he did some window shopping in town, where after he returned to the park to watch the fireworks. He only got home the morning of 1 January 2020 at around 7h00/8h00.

[32] The appellant denied all the allegations against him. He testified that he was arrested on 6 April 2020 at the shop. He testified that both the complainants are unknown to him.

[33] The appellant also testified that despite the fact that DNA samples had been taken, the results thereof have not been presented by the State. He testified that he was sure that the DNA results would show his innocence.

[34] The appellant testified that although he does have problems with his eyes, his eye has never been swollen like testified by ~~Palesa~~ P[....]. With regard to the two scars underneath his left eye which were previously placed on record by the court *a quo,* the appellant testified that those are in fact not scars, but a tattoo consisting of two tear drops and a cross.

[35] During cross-examination he testified that he boarded a taxi in Welkom to go home at around 8h00. He explained that he is able to tell the time, because of the relevant TV programmes that were playing when he got home. With regard to his clothing, he testified that he was wearing MX sneakers and a green "*track top with the marks or sign of Heineken on it*".

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[36] When he was cross-examined as to in whose presence he was in Welkom, he testified that he was alone on that day. When questioned about this, the appellant testified that he left his friends in the township, since he is not really a person who likes being in the company of friends. When further questioned on the basis that on New Year's Eve people normally come together with their friends, he testified that the other reason that he did not want to be with his friends was that they consumed alcohol and had he been amongst them, he would maybe also have consumed alcohol, whilst he does not drink alcohol anymore. He was further cross-examined with regard to his last-mentioned explanation on the basis that the people who celebrated New Year's Eve in town would obviously also have been consuming alcohol. The appellant then cited a further reason why he preferred to be in town, being that according to him the fireworks were not celebrated the same in the township as in town.

[37] The prosecutor also cross-examined the appellant as to whether he did not meet people from Thabong who are known to him in the park. The appellant responded as follows:

> "Your Worship, when I was consulting with my attorney last year November such question was posed to me by her. I then told her I do not remember meeting people that I know in town, but when I was incarcerated I then met with one of the persons that was also … being detained. And he told me that he met with me here in town and that he was busy selling cigarettes."

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[38] When questioned about when specifically the appellant met with this person during New Year`s Eve, the appellant testified that he met with him on three occasions, at approximately 13h00, 16h00 and 19h00. The first time when they met they conversed for a period not exceeding a minute and the other two times they just passed one another, greeting each other.

[39] He was further cross-examined about the fact that he himself did not remember that he met up with this person and that he did not advise his attorney accordingly, since he must have realised that this person can assist him in his

defence. The appellant responded that the said person was not in custody for even two months, but that he was present at court since he had a matter which he had to attend.

[40] The appellant was also cross-examined about ~~Palesa~~ P[....]'s evidence concerning his swollen left eye. Both the prosecutor and the court *a quo* then noted in court that a swelling could in fact be noted under the appellant's left eye. The appellant then explained that on the previous occasion when he appeared before court, there was no swelling. The swelling only started the previous Saturday.

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[41] The prosecutor posed to the appellant that the State witnesses testified during the incident he was wearing Superstar tekkies. The appellant responded that he does not own such tekkies and that he was wearing Nike MX sneakers on New Years Eve. He further denied that he owns a black leather jacket. He testified that during his arrest he was wearing a blue denim jean and push- in sandals.

[42] In further cross-examination the appellant testified that the only person who can confirm that he was in town, is the person he already referred to. The appellant explained that because he himself could not remember this person, he (the appellant) asked him many questions, whereupon this person, *inter alia,* said that they met near Mochachos. The appellant also gave a number of explanations as to why he did not inform his attorney that he has an alibi witness.

[43] After re-examination the court *a quo* enquired from the appellant whether it is the first time that he is experiencing this particular eye infection. The appellant responded that he has previously had this particular eye infection on many occasions, because he has been suffering from it since he was a child.

[44] The court thereafter adjourned for lunch. After the lunch break, K[....]3 S[....]v[....] W[....]was called as a defence witness. K[....]3 testified that he met the appellant near the town hall, Welkom, at around 7h00 the morning of 1 January 2020. They actually met twice that day whilst K[....]3 was selling cigarettes. The second time he met him was around 12h00 midday on 1 January 2020. Thereafter

they only met again when they were both detained in Odendaalsrus prison and K[....]3 reminded the appellant that they had previously met on 1 January 2020.

[45] ~~Korie~~ K[....]3 was asked what specifically made him remember the appellant as there would have been many people present during the celebrations. ~~Korie~~ K[....]3 explained that he remembers him by his clothing. He was wearing Nike sneakers, a blue denim jean a green track top.

[46] The prosecutor cross-examined ~~Korie~~ K[....]3 on the basis that since ~~Korie~~ K[....]3 was not able to remember what the first person who bought cigarettes from him on that day was wearing, it is strange that he would be able to remember exactly what the appellant was wearing. ~~Korie~~ K[....]3 explained that he remembers it because of the long period that they conversed with each other. He testified that they conversed for approximately 20 minutes.

[47] When ~~Korie~~ K[....]3 was confronted with the difference between his evidence and that of the appellant regarding the number of times they met each other on that day and, more importantly, that according to the appellant they met at night time on 31 December 2019, whilst ~~Korie~~ K[....]3 testified that they met during daytime on 1 January 2020. ~~Korie~~ K[....]3 responded that according to him they met twice and that it was during daytime. ~~Korie~~ K[....]3 denied that they met at Mochachos that day.

[48] According to ~~Korie~~ K[....]3 it was pure coincidence that he was also present at court on that particular day. He denied that he had any discussion with the appellant's alleged version.

[49] That concluded the defence case.

Witness called by the court *a quo*:

[50] Before handing down its judgment, the court called Constable Jilimba as a witness in terms of section 186 of the Criminal Procedure Act, 51 of 1977.

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[51] Constable Jilimba testified that he is the investigating officer. On 6 April 2020 he visited the first complainant at her parental home as part of his investigations. She told him that she saw the perpetrator when she came back from school. She followed him home and obtained his name from people in the vicinity. She went back to her parental home and informed her parents accordingly. P[....] told Constable Jilimba that she will be able to point out the house where he lives. P[....] accompanied Constable Jilimba and pointed the said house out to him. On their arrival they found that the perpetrator was not home and they only met with his mother. Based on information they received they went to a shop, where Constable Jilimba asked for the suspect by name. The appellant was then arrested.

[52] During cross-examination by the prosecutor, Constable Jilimba testified that ~~Palesa~~ P[....] was adamant that she had a proper look at the perpetrator and that she will be able to identify him when she is to see him again.

[53] After his arrest, Constable Jilimba took the appellant to the police minibus, where ~~Palesa~~ P[....] was seated at the back seat. When the appellant entered the minibus, ~~Palesa~~ P[....] was very shocked and even cried. She then confirmed that the appellant is the person who raped her. According to Constable Jilimba ~~Palesa~~ P[....] previously made mention of the tekkies the appellant was wearing the night of the incident and when he was arrested, she remarked that he was wearing the very same tekkies.

Alleged improbabilities in the state`s case:

[54] Mr Mokoena, who appeared on behalf of the appellant, submitted that it is improbable that the appellant, all on his own, would have been able to grab both the two complainants and forcefully walk with them. He further submitted that it is improbable that there would not have been other people in the vicinity of the shop and in the streets who could have assisted the two complainants, considering that it was New Year`s Eve. Mr Mokoena also submitted that it is improbable that the respective complainants would not have escaped whilst the perpetrator was busy raping the other of the two complainants.

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[55] The aforesaid alleged improbabilities were, however, never raised during the cross-examination of the two complainants. To the contrary, like I previously mentioned, the appellant`s legal representative in the court *a quo* specifically stated during her cross-examination of P[....] that the defence does not deny that the two complainants had been raped, but denies that the appellant was the perpetrator. In any event, I do not consider any of the aforesaid aspects of the complainants` evidence to be improbable.

Alleged contradictions between the first complainant`s evidence in court and her police statement:

[56] I have already indicated earlier in my judgment that I do not deem it necessary to deal with the detail of these alleged contradictions. ~~Palesa~~ P[....] pertinently testified that the said statement was not read back to her before she and her mother signed it. This was her evidence even before she was confronted with the alleged contradictions.

[57] In **S v Tshabalala** 1999 (1) SACR 163 (T) at 168 I it was held that if a witness`s own statement is sought to be used during his/her cross-examination, it has first to be established that the statement was properly deposed to by the witness.

[58] The requirements for this purpose were set out in **S v Govender** 2006 (1) SACR 322 (E) at 327B – F:

> "As I have mentioned, in the present matter the cross-examination of the State witnesses, in so far as it was directed at the contents of the police statements, was done properly. In each instance the witness was asked to confirm that he had made a statement to the police. The witness was then asked whether that which he told the policeman was written down; whether it was read back to him; whether he was asked to confirm the correctness thereof; and whether, having done so, he was asked to sign, or place his mark, or thumb-print on the statement. …"

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[59] The fact that the statement was not read back to P[....] is the very reason why the court *a quo* only provisionally accepted the statement as an exhibit and allowed cross-examination also on a provisional basis. Although the defence at that stage indicated that the police officer who took down the statement will be called as a witness, they, for whatever reason, failed to do so. The statement and the cross-examination are therefore to be ignored.

Evaluation of the findings by the court *a quo:*

[60] It is evident from the judgment of the court *a quo* that it was alive to the fact that ~~Palesa~~ P[....] was a single witness and a child witness with regard to the identity of the appellant and the cautionary rules which should consequently be applied.

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[61] With regard to the fact that ~~Palesa~~ P[....] was a child witness, the court held as follows:

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> "However, ~~Palesa~~ P[....] is not a young child and she was able to understand all the questions posed to her. She was able to give intelligible answers and narrated her version very coherently. … Now ~~Palesa~~ P[....] testified, when she testified she appeared to be honest. And her evidence was clear and satisfactory in all material aspects. In fact, there were no defects in her evidence. In fact, ~~Palesa~~ P[....] made a good impression on the court. She also testified with such confidence, which emphasised the reliability of her evidence."

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[62] In my view the aforesaid findings of the court *a quo* cannot be faulted.

[63] The court *a quo* also duly dealt with the cautionary rule pertaining to evidence of identification and the fact that it is not enough for an identifying witness to be honest, but is his/her evidence also needs to be reliable. The necessity for this cautionary rule is clearly set out in the well-known judgment of **S v Mthethwa,** 1972 (3) SA 768 (A) to which the court *a quo* also referred.

[64] The court found that at Tosa College, P[....] spent about two hours with the perpetrator and she was in close proximity to him as they lay on the ground. He fell asleep, during which time P[....] was able to observe his face. The court *a quo* furthermore held that because that it was already 7h00 in the morning and therefore daylight she was in a proper position to clearly observe the perpetrator's face. The findings by the court *a quo* in this regard can also not be faulted.

[65] I also agree with the court *a quo* that corroboration for the correctness and reliability of ~~Palesa~~ P[....]'s identification of the appellant is also to be found in the evidence regarding the swollen left eye of the appellant. It became apparent from the appellant's evidence that he has been suffering from some or other condition of his left eye for many years. I therefore agree with the court *a quo* that, on probabilities, his eye would get swollen from time to time and therefore it is not improbable that it was also swollen on the day of the incident, like it was during his court appearance.

[66] ~~Dikano~~ D[....] also corroborated ~~Palesa~~ P[....]'s evidence in respect of the black and white Superstar sneakers which the assailant was wearing during the night of the incident. The appellant was wearing the very same sneakers when he was arrested. Although he denied during his cross-examination that he owns such sneakers, this denial was never put to any of the relevant State witnesses.

[67] When considering a defence of an alibi, the following principles are to be applied, as summarized in **Hiemstra`s Criminal Procedure**, A Kruger, at 14-32:

> "There is no onus on the accused to prove the alibi. The statement in *R v Dube* 1915 AD 557 at 582 that there is an onus on the accused was rejected by the Appellate Division in *R v Biya* 1952 (4) SA 514 (A) at 512D–E. The court said that if, taking into account all the evidence, there is a reasonable possibility that the alibi is true there is the same possibility that the accused did not commit the crime. The court does not assess the alibi in isolation, but assesses within the framework of all the evidence whether the alibi can reasonably possibly be true (*R v Hlongwane* 1959 (3) SA 337 (A) at 341A)."

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[68] With regard to the appellant's case in the present matter, the court *a quo* found as follows:

> "But in this case, the accused's version and that of his alibi witness is flawed with contradictions and improbabilities, which only serves to emphasise the unreliability of this version."

[69] It is evident from the record that the appellant and his alibi witness contradicted each other in material respects. These contradictions, *inter alia,* entail the time they spent together, the number of times they **met** during the relevant time period and most importantly, when they met each other. In respect of the last-mentioned aspect, the appellant mentioned times during the night of 31 December 2019 as the alleged times when they met, whilst the alibi witness referred to times during the day on 1 January 2020.

[70] In addition to the aforesaid, the very late stage at which the appellant for the first time made mention of his alibi witness, namely late during his cross-examination, is very suspicious. His explanation as to the manner in which he became aware of the existence of this witness, is also, to say the least, highly improbable.

[71] In the heads of argument filed on behalf of the appellant it was also conceded that the appellant's version contains improbabilities and that his alibi witness contradicted him. It was, however, indicated that their instructions are that the contradictions and improbabilities do not render the appellant's version to be false.

[72] The court *a quo* correctly referred to the principles enunciated in the judgment of **S v Chabalala,** 2003 (1) SACR 134 (SCA) at para [15] where the following was held:

> 15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97

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(SCA). The correct approach 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.

[73] When the aforesaid approach is applied to the totality of the evidence in the present matter, I agree with the conclusion of the court *a quo* that the appellant's version cannot be reasonably possibly true and stood to be rejected as false.

Penetration:

[74] Although the occurrence of the events as testified by the two complainants were not disputed during cross-examination, a court still needs to satisfy itself that the State proved all the elements of the respective charges beyond reasonable doubt.

[75] With regard to ~~Palesa~~ P[....], it is in my view evident that penetration did in fact take place, although not as deep as the appellant apparently wanted it to be. Her *viva voce* evidence pertaining to penetration is also supported by the information on the J88 which relates to her where the gynaecological examination reflected two fresh tears and the conclusion was stated as follows:

"Genital injuries are consistent with history of forceful penetration."

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[76] With regard to the evidence of the second complainant, I already cited the questions raised by the court and her responses thereto. In my view, and in the absence of any contesting evidence, it is evident that penetration did in fact take place. The mere fact that her gynaecological examination did not show any genital injuries, does not exclude the possibility of sexual penetration, as also reflected as conclusion on the J88 report pertaining to her.

Conclusion:

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[77] I am consequently satisfied that the court *a quo* correctly found that the State proved the guilt of the appellant on all four counts beyond reasonable doubt.

***AD* SENTENCES:**

[78] It is trite than an appeal against sentence should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court which should not be lightly interfered with.

[79] In the present matter it is common cause that life imprisonment is the prescribed minimum sentence in respect of counts 1 and 3 in terms of section 51(1) of the Criminal Law Amendment Act, 105 of 1997. The court *a quo* was consequently compelled to have imposed life imprisonment on counts 1 and 3 unless it was satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence. See **S v Malgas,** 2001 (1) SACR 469 (SCA). Mr Mokoena submitted that the court *a quo* erred in finding that there were no substantial and compelling circumstances and that the imposition of the prescribed minimum sentence is just in the circumstances of this case.

[80] The appellant testified in mitigation of sentence. His personal circumstances are as follows:

1. He was 32 years of age at the time of the imposition of sentence.

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2. The appellant has three minor children with different mothers, the children's ages being 11 years old, 9 years old and 3 years old. They reside with their respective mothers.

3. At the time of his arrest, he was self-employed as a gardener, generating an income of between R200.00 and R300.00 per month.

4. His highest level of education is Grade 7.

5. He has been in custody since 6 April 2020 and consequently approximately 13 months in custody awaiting trial.

6. The appellant is a first offender.

[81] The court *a quo* duly referred to and dealt with the personal circumstances of the appellant.

[82] Victim impact reports pertaining to the two complainants and their respective mothers were handed in as exhibits. With reference to the said reports, the court *a quo* found, in my view correctly so, as follows:

> "These crimes of rape have had serious and devastating effects on both the victims and their families. … It is clear that the nightmares, fear, anxiety and stress of these incidents of being raped so many times has had a traumatic effect on both the victims as well as their parents."

[83] The court *a quo* also referred to the following aggravating factors:

1. The complainant in count 1 was only 14 years of age at the time of the incident. The complainant in respect of count 3 was 17 years of age. Both of them were therefore still minors.

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2. The appellant raped the complainants more than once, after he took them at knifepoint.

3. The court *a quo* also referred to the fact that ~~Dikano~~ D[....] was overcome by emotion on more than one occasion during the presentation of her evidence.

4. The devastating impact the rapes had on the two complainants and their mothers as reflected in the victim impact reports.

5. The high prevalence of the sexual abuse of children in South Africa.

6. During his evidence in mitigation of sentence the appellant persisted with his innocence and therefore showed no remorse.

[84] The court *a quo* also correctly referred to the interest of society as one of the elements when considering an appropriate sentence. This element comes to the fore when it comes to violent crimes, moreover so when such crimes involve innocent children.

[85] After having taken all relevant facts and principles into consideration the court *a quo* concluded that the imposition of the prescribed minimum sentence of life imprisonment on counts 1 and 3 will be just in the circumstances.

[86] In my view the court *a quo`s* finding that no substantial and compelling circumstances exist in this matter which justify the imposition of a lesser sentence, cannot be faulted or interfered with.

[87] The appeal against the sentences can consequently also not succeed.

Order:

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[88] The following order is made:

1. The appeal against the convictions and sentences is dismissed.

I concur:

On behalf of the appellant: Mr. P. Mokoena
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the State: Adv. L. B. Mpemvane
Instructed by:
Office of the Director of Public Prosecutions

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