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

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

Appeal No: **A12/2024**

In the appeal between:

**THAPELO JOHANNES MATHEATSIE** Appellant

and

**THE STATE** Respondent

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**CORAM:** NAIDOO, J *et* REINDERS, J

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**JUDGEMENT:** REINDERS, J

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**HEARD ON:** 20 MAY 2024

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**DELIVERED ON:** 20 AUGUST 2024

This judgment was handed down in open court and circulated to the parties' representatives by email.

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[1] The appellant, who was legally represented, was arraigned before the Regional Court at Bloemfontein on a charge of contravening s 3 of the Sexual Offences and Related Matters Amendment Act[1] (rape) read with the provisions of s 51(1) of the Criminal Law Amendment Act. [2] The prosecution alleged that on or about 27 and 28 July 2019 the appellant unlawfully and intentionally committed acts of sexual

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[1] Sexual Offences and Related Matters Amendment Act 32 of 2007.
[2] Criminal Law Amendment Act 105 of 1997.

penetration with M.M. (17 years old) by penetrating her vagina with his penis without her consent (more than once). The appellant pleaded not guilty to the charge but was subsequently convicted on 27 February 2023 and sentenced to life imprisonment on even date. This appeal against both conviction and sentence comes before us by virtue of the appellant's automatic right of appeal in accordance with the first proviso of s 309(1)*(a)* of the Criminal Procedure Act.[3]

[2] Mr. P Mokoena appearing on behalf of the appellant, contended that the trial court erred by:

(i) finding that the state has proved its case beyond a reasonable doubt;

(ii) finding that the evidence of a single witness was satisfactory in all respects;

(iii) not placing enough weight on the lengthy period that lapsed since the incident before complainant laid any charges;

(iv) not taking into account the conduct of the complainant after she was allegedly raped by not informing her friends immediately thereof; and

(v) rejecting the appellant's version and not taking into account the possible motive appellant had placed on record.

In respect of the sentence of imprisonment for life it was submitted that the court *a quo* had erred in finding that there exist no substantial and compelling circumstances to deviate from the minimum prescribed sentence, more specifically by not taking into account 'factors such as appellant's age, his dependants and the assets he owns'.

[3] The State, for its part, supports both the conviction and the sentence. Ms Tunzi, representing the prosecution, contended that the trial court did not misdirect itself in any way, either in convicting the appellant or in imposing a sentence of life imprisonment. A synopsis of the State's version, as accepted by the trial court, reveals the following (reference to the appellant shall be 'the accused'):

(i) As held by the learned magistrate, it is not in dispute that the complainant and her three girlfriends decided to visit a tavern in the suburb of Turflaagte at 20:00 on the day in question. While on their way, they were approached by four unknown males, one of whom was the accused. Realising they were going to the same tavern, the two groups proceeded in walking there. Upon arrival the men initially bought twelve bottles of beer, later another twelve and still later some more, which were consumed by all of

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[3] Criminal Procedure Act 51 of 1977

them. The group stayed there for a long time, and shortly before closure time in the early morning hours, the group of females decided to return home. It is further common cause that the complainant laid a charge of rape against the accused only some weeks after the alleged rape had taken place.

(ii) According to the complainant, upon deciding to leave, the four males they had met earlier remained at the tavern, and two of their own male friends indicated that they would accompany them home. When they reached the spot where they had earlier met the four males, they were accosted by a group of men from behind who were throwing stones at them. In fact, one of their male friends was hit with a brick on his ear and struck to the ground. The complainant was grabbed by the accused who informed her that she had a choice between him raping or killing her, whereupon he took her to an outside toilet near a house and had sexual intercourse with her without her consent. Apart from slapping her in the face, she was threatened that, even if she would open a case against him, he would kill her. Hereafter, he grabbed her by the hand and made her to walk for hours. She did not know the area where they arrived at dawn, but he took her inside one of the shacks behind a RDP house. She was very scared at that stage because he had already raped her and repeated his threat of killing her, so she complied with his order that they were going to sleep in the bed. There was a knock at the door, the appellant spoke with a lady and he later returned with food, which she refused to eat. The appellant then told her if she gives him 'another round' he would let her go, and in that belief of her being able to gain her freedom the appellant had sexual intercourse with her again. He informed her that he would accompany her home, and upon them exiting, she saw two people sitting in front of the RDP house. They then walked in a different direction. Whilst walking, the accused instructed her to walk in front of him when he saw his girlfriend approaching. She then went in another direction and started crying when she realised the area was unknown to her. A group of soccer players approached her, and one of them introduced himself as Max and asked her what was wrong. Upon his insistence, she told him that she had been raped. He told her the area she was in and enquired where she lived, whether she knew the rapist, and after describing the appellant, Max asked her whether it was one Thapelo, but she was unsure of the name. Max then asked her to accompany him to get taxi fare for her to return home. On their way they met with a friend of Max, and upon request she also told the friend of her ordeal. With the money so obtained, she could return home with a taxi. She requested her friends via social

media to wait upon her arriving with the taxi, but did not inform them of the ordeal that she had gone through. Some time thereafter she informed her sister of what had happened. She pointed out to the police the toilet and shack where she was raped.

(iii) The complainant denied any suggestion of a false motive (in respect of certain gang related animosity) to lay a charge against the accused, stating that she decided to do so because the ordeal had impacted her very negatively and she wanted to get closure regarding the ordeal.

(iv) The complainant's older sister testified that she was the one assisting the complainant to lay a charge early in September 2019 after the complainant confided in her what had happened some weeks prior. She (the sister) did in fact notice that in the weeks prior thereto, the complainant was 'not herself and not happy'. The complainant looked scared and started crying when relaying what had happened to her.

(v) Two of the complainant's female friends (Ms B.S.S and K.E.M) who accompanied her to the tavern that Saturday evening, corroborated the complainant on going to the tavern, the fight that occurred after they had left, when bricks and stones were thrown at them from behind, the complainant being taken away by the accused and the complainant's lack of informing them what exactly had happened to her. Ms B.S.S testified that she could identify the accused as one of their assailants. When she saw the complainant again later on that Sunday, her face was swollen and she was 'a bit down as she was crying'. Ms K.E.M testified that whilst running away from their assailants, she managed to run into the yard of her home. She observed the complainant calling her, and saw one person grabbing the complainant's wrist, whilst the other slapped the complainant whereafter they left with the complainant. She did not see where they went. Later that Sunday afternoon, they met the complainant when she arrived in a taxi. The complainant did not inform them what had happened to her but her eyes were reddish, she looked sad and her face was swollen.

(vi) In respect of Max and his friend, the version of the complainant was corroborated by both witnesses in all material respects, from the point where Max had found her up to where she departed for home in a taxi. Of importance is the testimony by Max that the complainant was crying when he encountered her and that she made a report to him on what had transpired. In relaying her story to him, she told him that that there was an altercation upon leaving the tavern when her assailant told her that she must

leave with him as he was the one who had provided the alcohol. She refused to accompany him where after he pulled her with force to walk with him.

(vii) The aunt of the accused confirmed seeing a lady sitting on the bed when she went to the shack of the accused and managed to peek through the slightly ajar, yet chained, door. The accused then exited the shack and followed her (the aunt) to the house where he requested some food. She was asked by the accused not to tell anyone about his girlfriend as he was a married man with a wife and a child.

(viii) Captain Cilliers attended to the identification parade which was done by showing the complainant an album of 22 photos of male faces. He testified that, when the complainant reached the photo of the accused, she identified him as the perpetrator. According to him, the complainant was initially calm but upon identifying the appellant, she was 'shocked and tense.' The complainant informed him that she was raped twice by the accused and he took down a statement from her.

[4] The defence put up by the appellant initially entailed that sexual intercourse between him and the complainant indeed took place at a shack of a family member. According to him, upon leaving the tavern he proposed love to the complainant, and she freely agreed not only to accompany him to the shack, but also to have sexual intercourse with him. As indicated by the learned magistrate, the appellant, in his evidence in chief, was able to furnish vivid details of the sequence of events from the tavern, arriving at the shack (even describing the bedding), the food and the like. During cross-examination when confronted by the prosecution with several important aspects not put to the state witnesses by appellant's legal representative, the appellant attempted to justify the same by blaming his attorney. This included his testimony that he and the complainant, on their way to his place, had met with the police and community members, that his aunt had spoken to the complainant and most importantly, that due to his level of intoxication at the time (being 'too drunk'), he was unable to recall whether he even as a fact had sexual intercourse with the complainant.

[5] When confronted with conflicting versions which cannot be reconciled, the court adopts a holistic approach to all the evidence available and has regard to probabilities.[4]

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[4] *S v Guess* 1976 (4) SA 715 (A).

[6] In argument before us Mr. P Mokoena responsibly conceded that the appellant's evidence was problematic. Of vital importance is that it was put to the complainant that the sexual intercourse was with her consent, whilst the appellant eventually testified that he cannot even remember if he had sexual intercourse with the complainant at all, as he was too drunk to remember what had happened that night.

[7] The main attack by the appellant against the judgment of the magistrate is focused on the court's finding that the evidence of the complainant as a single witness, is credible. Mr. P Mokoena pointed towards what he viewed as being improbabilities in the version of the complainant, namely that she did not draw the attention of the appellant's aunt when she was at the door of the shack, or request the people sitting in front of the house for assistance. He also alluded to the discrepancy between the date testified by the complainant and that testified by other state witnesses. Ms Tunzi submitted that the appellant did not rely on an alibi, and thus the importance of the date is not material. I am in agreement with her. Moreover, the matter was proceeded with on the basis of the date as alleged by the state, and specifically the testimony of the soccer player Max.

[9] It would seem that the appellant's main attack for the court's credibility finding is the failure of the complainant to make a report of the rape to her friends or sister shortly after it had happened and having waited some time to lay a charge of rape against the appellant. The magistrate in his judgment dealt comprehensively with the aforesaid issue. He alluded thereto that the complainant reported to Max and his friend 'almost immediately' after the second rape had occurred. He held that '. . . she then got on a taxi and went home. Her grandmother was not there. She was afraid of speaking with her friends about what had happened to her, because she was afraid they would judge her' and stressed the complainant's testimony that 'it is not a good thing to report to your friends because they are gossiping and you are actually placing yourself in a very strange situation.' He was satisfied with the complainant's explanation as to why she did not make a report to people other than those unknown people at Bergman Square.

[10] Recently, in *Maila v The State*[5] the Supreme Court of Appeal by mouth of Mocumie JA referred to the adverse emotional experience by a victim of sexual violence of 'a profound sense of shame, stigma and violation'. In para 28, the Court held:

'. . . Authors and experts in the field of psychology and criminology state that "[e]ach victim reacts differently after a violent act... [They] may only decide to report once [they are] supported by a family member or when a friend confirms that this behaviour is indeed wrong . . . Sexual violence victims often experience a profound sense of shame, stigma and violation". What is important is that the first report is made at the first opportunity available to the victim of sexual violence . . . Failure of the complainant to report an alleged rape as soon as possible cannot be 'the benchmark for determining whether or not a woman has been raped'.[6]

In my view therefore the magistrate did not err in finding the complainant's evidence in this regard, credible.

[11] It is evident from the record that the complainant was a single witness on what transpired in the public toilet and appellant's house behind closed doors. It is trite that an application of the necessary caution requires, in essence, that the court satisfy itself that despite the defects, shortcomings and contradictions in such evidence the truth has been told and that the complainant's evidence is trustworthy.[7]

[12] The court *a quo* found the evidence of the complainant to be logical and chronological, and accordingly, credible. It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect. In order to succeed on appeal, the appellant must convince us, on adequate grounds, that the trial court was wrong in accepting the evidence of the complainant. Bearing in mind the advantage which the learned magistrate had of seeing, hearing and appraising witnesses, it is only in exceptional cases that an appeal court will be entitled to interfere with a trial court's evaluation of oral testimony.[8]

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[5] *Maila v S* [2023] ZASCA 3.
[6] UNODC Handbook for the Judiciary on Effective Justice Responses to Gender-based Violence against Women and Girls at 25, as quoted ibid. See also *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) para 24.
[7] *S v Sauls* 1981 (3) SA 180 (A).
[8] *S v Francis* 1991 (1) SACR 198 (A) at 204c-e. *J v S* [1998] 2 All SA 267 (A) at 271c.

[13] The learned magistrate was satisfied from the totality of evidence before him that the truth had been told and properly rejected the appellant's version as not being reasonably possibly true, regard being had especially to his turnaround, from indeed having had sexual intercourse with the complainant, to not remembering any such act having taken place. On returning the guilty verdict, the trial court in my view, correctly rejected as not reasonably possibly true, the appellant's version on what had transpired. The conviction by the trial court can, in my opinion, not be faulted insofar as the trial court undertook a holistic consideration of the evidence and was, correctly, satisfied that the appellant's guilt had been established beyond reasonable doubt.

[15] The next enquiry is whether or not the sentence imposed is just, regard being had to the cumulative impact of mitigating and aggravating factors inclusive of the interests of society. It is trite that the powers of a court of appeal to interfere with the sentence imposed, are limited insofar as it can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.[9]

[16] The magistrate was well aware of and applied the principles in *S v Malgas*[10] in respect of the imposition of a prescribed minimum sentence. The trial court had regard to the appellant's personal circumstances, the gravity of the offence and the interest of the public. The magistrate considered the interests of the victim and dealt with the victim impact assessment report of the complainant's sister which demonstrated the collateral damage that was done after complainant was raped. One of the aggravating factors considered by the magistrate was the fact that the appellant not only had a previous conviction for rape for which he had been sentenced to 10 years' imprisonment, but he was in fact out on parole when the rape occurred. The magistrate ultimately declined to find that there were substantial and compelling circumstances which would cause him to deviate from the prescribed sentence of imprisonment for life.

[17] Mr. P Mokoena responsibly did not attempt to convince us that appellant's commission of the crime whilst on parole, was not an aggravating factor weighing

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[9] *S v Pieters* 1987(3) SA 717 (A). See also *S v Makondo* 2002 (1) All SA 431 (A).
[10] *S v Malgas* 2001 (1) SACR 469 (A).

heavily against the appellant. However, he urged us to take into account that the complainant did not sustain any serious physical injuries on the basis of the acceptance by our courts that there are degrees of seriousness in rape cases. Moreover, he invited our attention thereto that liquor played an important role on that evening as a lot of beer was consumed. He alluded to the absence of a victim impact report by the victim herself (and only by her sister) which would have indicated any emotional trauma suffered by the complainant. In addition, so the argument went, there is no indication on the record that the court *a quo* took into account the three years that the appellant had spent in custody awaiting trial.

[18] In my view it is evident that the trial court properly considered the factors as alluded to in reaching the conclusion that there are no compelling and substantial factors which would cause him to deviate from the prescribed sentence. Our courts have consistently stressed the gravity of rape and held it to be a humiliating, degrading and brutal invasion of the dignity of the victim which is gender specific.[11]. I align myself with the sentiments expressed on a rape victim by Olivier JA in *J v S*:[12]

"Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad *nauseam*..."

[19] The role that alcohol had played in the commission of the rape, was never vigorously pursued by the appellant, and appears to have been raised, almost as an afterthought, by Mr. P Mokoena in argument as a mitigatory factor. The appellant's state of sobriety cannot lead to a conclusion that the appellant should therefore be pardoned by imposing a lesser custodial sentence. In fact, in my view it might even be more aggravating, in instances where youngsters who socialise in public, are lured or enticed by the provision of free alcohol by older persons, and harm follows. The appellant, who was 28 years old (and a mature man) at the time of the commission of

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[11] *S v Chapman* 1997 (2) SACR3 (SCA). See also *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC).
[12] Footnote 9.

the offence, appears to have deliberately preyed on the complainant, who was a mere 17 years old at the time, with the idea that, in return for the provision of free alcohol to the complainant, he could and would be entitled to demand sexual favours from her afterwards. It was specifically mentioned in the evidence that the appellant uttered words to this effect when he accosted the complainant as she and her friends left the tavern. Departing from the sentence imposed by the court *a quo* would be treading on dangerous ground where a message would be sent out by the courts that over-indulging in liquor, willingly and voluntarily, will ultimately be an excuse for crimes committed, more specifically so in instances of rape, and be used as a ploy to secure the imposition of lesser or more lenient sentences.

[20] It follows that I am satisfied that the sentence imposed by the trial court cannot be faulted in any way. Consequently, I make the following order:

The appeal against both conviction and sentence is dismissed.

[redacted]
C. REINDERS, J

I concur.

[redacted]
S. NAIDOO, J

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| On behalf of the appellant: | Mr. P Mokoena<br>Instructed by:<br>Legal Aid South Africa<br>BLOEMFONTEIN |
| On behalf of the respondent: | Adv. S. Tunzi<br>Instructed by:<br>Director: Public Prosecutions<br>BLOEMFONTEIN |