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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A26/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES / NO

[19 JUNE 2020] .....
SIGNATURE

In the matter between:

THIPE, THAPELO SHELELE **APPELLANT**

And

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] The appellant in this matter was convicted on one count of rape and robbery with aggravating circumstances in the Nebo magistrate's court. Subsequently, he was sentenced to life imprisonment in respect of the rape charge and 15 years' imprisonment for robbery. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977(CPA), the sentence in respect of robbery was ordered to run concurrently with the sentence imposed in respect of count the rape charge. Pursuant to the sentence of life imprisonment being imposed by the regional court, the respondent lodged an appeal against his conviction and sentence by virtue of the automatic right of appeal sanctioned in terms of s 309(1)(a) of the CPA. After an agreement with counsel, this appeal was disposed of on papers without further oral submissions in open court, pursuant to section 19 (a) of the Superior Courts Act 10 of 2013. From the written submissions on behalf of the appellant, there is no substantive attack on the convictions.

[2] Briefly stated, the facts regarding this matter are as follows. Ms. PDM testified that as at 30 December 2014, which is the day of the incident she was 17 years of age. At about 6 PM she and her cousins, D[….], M[….] and K[….] went for a visit at her grandmother's place. They visited a shop in the area where they spent time dancing to the music. Between 11 and 12 midnight later as they walked back home, they met with two men who stood in front of them on the road. One of the two men, the appellant in this matter produced a huge knife that he scratched on the road surface, which caused sparks. This frightened the girls who ran in separate directions. However, the appellant chased after her still holding the knife with which he threatened her to stop.

[3] Upon reaching her, the appellant punched her on the mouth. Consequently as per the J 88 report compiled at 04:40 early the next morning, she was bruised on the inner aspect of her upper lip. Thereafter he demanded the two cell phones that she had in her possession one of which belonged to her cousin, D[….]. As the appellant was taking off the chain around her neck, his companion who had been chasing one of the other girls joined them. She had hoped to be released after handing over her valuables. That was not to be. Her pleas were ignored. They told her clearly that she was not going

anywhere, and that they wanted to have sexual intercourse with her. Both of them started touching her on her private parts whilst pulling her away. They pulled her to a dilapidated house after which she was ordered to take off her pants. The appellant's companion, a hefty man in appearance, took out his penis that he ordered her to insert into her vagina. She was then pushed to the ground. The man was rude and swearing at her.

[4] She pleaded with him to at least, use a condom before raping her. At all material times, the appellant stood by, holding the knife telling her not to shout. The appellant's companion proceeded to rape her without the use of a condom, which took approximately 15 minutes until he ejaculated. Thereafter, the appellant raped her as well without the use of a condom for about 10 minutes until he too ejaculated. As she was being raped, the appellant's companion held the knife. She was on here menstrual cycle at the time. When he was finished raping her at that point, he ordered her to dress up. Her panties were soiled up. She left her sanitary pad on the scene.

[5] She did not put her panties on again. She was taken further into the veld. At some rocks, there she was ordered to bend over and threatened with death in case she refused. Once more, the two of them raped her vaginally without the use of condoms and in turn. When the appellant's companion was finished raping her, the appellant raped her one more time, again without the use of a condom. They threatened her with death in the event she reported the incident to the police as they left. Eventually she made her way to the shop where she and her cousins were earlier that night. Police were called, and the incident was reported. She later identified the appellant at an identification parade. The complainant's cousin, Mpho also testified and confirmed the events that occurred that night. She placed the appellant and his companion at the scene of the incident before the girls ran away.

[6] The appellant testified and denied committing any of the crimes with which he was charged.

[7] The case against the appellant was also based on the forensic evidence concerning the matching of his DNA with the DNA analysis of the semen extracted from the complainant's vagina after she was gang raped. The DNA evidence was not seriously challenged. The learned magistrate carefully analysed all the evidence before him, considered all the arguments presented, and in a well-reasoned judgment concluded that the appellant was guilty of the charges referred to above. In my view, the learned magistrate cannot be faulted for finding the appellant guilty of the crimes he was charged with. The trial court was correct in rejecting the appellant's version on the merits.

[8] It remains to deal with the appeal on sentence. The attack against the sentence is that the trial court erred in finding that there are no substantial and compelling circumstances justifying another sentence other than life imprisonment. It is trite that, a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. "There must be more than that, the Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore, improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with". (See S. v *Anderson*, 1964 (3) SA 494 (A) at 495.)

[9] From the presentencing report presented, the appellant was 19 years of age when the offences were committed. He was the youngest of four siblings. He came from a difficult upbringing in that his mother, a domestic worker was the main source of income. The family depended largely on social grants for upkeep. He passed matric, after having trouble passing in earlier grades. However, he was 22 years of age, a first offender, unmarried and without dependents, upon being sentence. In spite of his initial denial of the offences, the appellant acknowledged his guilt to the probation officer who compiled the report.

[10] On his version, he had succumbed to pressure from his companion in committing the offences. The nature of the pressure was not spelt out. The report surrounding his interpersonal relations is somewhat conflicted. Before he matriculated with a diploma pass and change schools, there was a report of him having tried to stab another leaner. The last report was that he was a good person. The probation officer recommended a sentence in terms of section 276 (1) (i) of the CPA. The section provides for imprisonment from which such a person may be placed under correctional supervision in in the discretion of the commissioner of prisons.

[11] The state presented a victim impact assessment report. From this report, the complainant still suffered nightmares and experienced flashbacks because of the incident. The incident of the crime traumatized her badly. In 2015, she failed her matric. Her attempts to continue with her schooling in 2016 also failed. As at the time of the trial in 2017, she was doing nothing but remained at home. The complainant's family members reported suffering from secondary victimization from the incident. The complainant harboured hatred against men in particular. Although she attended counselling, it did not help. She became more withdrawn and isolated.

[12] In imposing the life sentence, the learned magistrate concluded that the appellant did not show any sign of remorse during the trial but only mentioned this aspect in the presentencing report. He was of the view that the appellant was not genuinely remorseful but regretted the incident with reference to S *Matyityi* 2011 (1) SACR 40 (SCA).

[13] In this case, there had been violence, as the complainant was punched on her resulting in an injury, preceded by threats thereof with a huge knife. The complainant, a young girl, suffered physical injury to her mouth over and above that, inherent in the offence committed. The appellant and his companion did not minimise the risk of pregnancy and transmission of other sex related diseases by using condoms. The emotional impact on the complainant because of the incident has been life changing. At the time of her

testimony, she was still suffering emotional distress and trauma. She cried during her testimony.The appellant face life imprisonment because the victim was raped more than once (several times) by the accused and as co-perpetrator, and because the complainant suffered an injury on her mouth in the course of the rape.

[14] In S *v Malgas* [2001] 3 All SA 220 (A), it is said that a court must approach the matter 'conscious [of the fact] that the Legislature has ordained [the prescribed sentence] as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. However, whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. *Malgas* made it clear that the Act signalled that it was not to be 'business as usual' when sentencing for the commission of the specified crimes.

[15] In S v *Vilakazi* (2009 (1) SACR 552 (SCA), Nugent JA stated at para 51: “In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided”. That our country is facing a crisis of epidemic proportions in respect of gender-based violence and rape, particularly of women and young children, is an understatement. It remains a blot given our human rights culture since the advent of the Constitution and the prestige in which this is viewed worldwide.

[16] The question to be answered is whether the trial court erred in failing to find that the circumstances of this case were so substantial and compelling, as to justify a departure from imprisonment for life. In this case the complainant was subjected to not only sexual abuse of an extreme nature, she was verbally abused, and as indicated above, but also physically assaulted. To add insult

to injury, two adult men sexually assaulted her over a long period repeatedly, a total of 5 times, during that period in the month that she needed ultimate privacy. That she was menstruating did not deter the appellant and his companion. Accordingly, it is necessary to echo a few incontrovertible truths. Rape is unquestionably a degrading, humiliating and brutal invasion of a person's most intimate, private space as evidenced by the facts in this case (The oft-quoted dictum of the SCA in S v Chapman 1997 (3) SA 341 (SCA) at 344J – 345A is apposite).

[17] Undeniably, life imprisonment is the most severe sentence that a court can impose. Courts are obliged to impose those sentences (specified minimum sentences) unless there are truly convincing reasons for departing from them (S v Matyityi 2011 (1) SACR 40 (SCA) at [23]. As Pillay J puts it in S v Abraham 2013 JDR 0909 (ECG) at para 22-23, where life imprisonment for a 19 years old was confirmed on appeal: "*[I]t is clear from the Act itself (51 (b)) that section 51 of the Act does not apply to offenders who are under the age of 16 years old and that even if it is applicable , a maximum of half the prescribed sentence may be suspended where the offender is under 18 years old. (51 (5) (b)). It is therefore clear that offenders over the age of 18 are perceived as capable of being sentenced in terms of the act without any exceptions. They must be treated as adults and youthfulness does not seem to constitute an exceptional factor. This means then that age must be accompanied by something more in order to find that it would be an injustice to impose the minimum sentence".*

[18] The trial magistrate made a finding in respect of which I can find no fault. The evidence against the appellant was overwhelming. To recap, this being the direct evidence by the witnesses, the results of the identification parade as well as the DNA evidence. During the trial, he expressed no remorse for his conduct, but did so when the report before sentence was compiled in respect of which the learned magistrate said the appellant was merely regretting that he was caught, and that the remorse was not genuine.

[19] In my view, the delicate relationship between the gravity of the offences, the interests of society and the interests of the appellant was properly considered. In the circumstances, having considered all the relevant issues, the appeal against conviction and sentence is without merit. There are no substantial or compelling circumstances that are found in favour of the appellant. As Mahomed CJ stated in Chapman: *"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights"*. I agree. It follows therefore that the appeal against conviction as well as prescribed sentence of life imprisonment must fail.

[20] In the result, the appeal against conviction and sentence is dismissed.

_____

T P MUDAU

Judge of the High Court

I agree

_____

M V SEMENYA

Judge of the High Court

Date of Hearing:	15 June 2020
Date of Judgment:	19 June 2020
APPEARANCES	
For the Appellant:	Adv.Nonyane
Instructed by:	Legal Aid

For the Respondent:	Adv. Kotze
Instructed by:	DPP – Polokwane