IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 24/2018

REPORTABLE: NO

CIRCULATE TO JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

CIRCULATE TO REGIONAL MAGISTRATES: NO

In the matter between.

LETLHOGONOLO ERNEST LEBURU **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen J, Snyman J

Heard: 21 October 2022

Handed down: 05 January 2022

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against sentence is dismissed.

PETERSEN J

Introduction

[1] The appellant was tried on 16 August 2016 in the Regional Court, Mmabatho on seven (7) charges including housebreaking with intent to rape (counts 1 and 5), contravening section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with section 51 (1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') — (count 2), robbery with aggravating circumstances read with section 51 (2) of the CLAA (counts 3, 4 and 7) and contravening section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with section 51 (2) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') — (count 6). The appellant pleaded not guilty and following a trial on the charges, he was duly convicted on 14 June 2017 on all the charges proffered against him. On 28 July 2017 the appellant was sentenced as follows:

"Count 1 and 3 are taken together for purpose of sentence: Fifteen (15) years imprisonment Counts 4, 5 and 7 are taken together for purpose of sentence: Fifteen (15) years imprisonment.

Count 6: Ten (10) years imprisonment.

Count 2: Life imprisonment. "

[2] The appellant only appeals against sentence pursuant to the right to an automatic appeal in terms of section 309(1 of the Criminal Procedure Act 51 of 1977 ('the CPA').

Condonation

[3] The appellant failed to prosecute his appeal timeously and has filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application.

[4] The authorities on an application for condonation is trite. In *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*, [1] Ponnan JA reaffirmed the factors to be considered in respect of an application for condonation stated in *Melane v Santam Insurance Co. Ltd*:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[5] In *Grootboom v National Prosecuting Authority*[2] the Constitutional Court re-affirmed the trite principle that:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default. '

[6] The reasons advanced by the appellant for the lateness in prosecuting the appeal against sentence, is set out as follows in the affidavit in support of the application for condonation. On 28 July 2017, following sentence he instructed his

[1] [2017] ZASCA 88; [2017] 3 All SA 520 (SCA)•, 2017 (6) SA 90 (SCA); 1962 (4) SA 531 (A) at 532 C -E

[2] [2013] ZACC 37; 2014 (2) SA 68 (CC) at paragraph 23

legal representative from Legal Aid South Africa ('LASA') to note an appeal. It appears that the appellant's initial instruction was to note an appeal. It is not clear whether such instruction included an appeal against conviction and sentence. That need not detain this Court as the appeal before this Court is only against sentence. From intimations from the appellant's legal representative on 28 July 2017 that a practitioner would be allocated by LASA to consult with him and request a transcription of the record, he waited for feedback. During May 2018 the transcribed record was forwarded to the Mahikeng Office of LASA and assigned to Mr Gonyane who discovered that the record was incomplete.

[7] The reconstructed transcribed record was only received during May 2022, notwithstanding regular follow ups by the appellant with LASA, Mafikeng. Mr Gonyane consulted with the appellant on 14 June 2022 and caused the appeal to be enrolled.

[8] Whilst the application for condonation is opposed by the respondent on the basis that there are no reasonable prospects of success on appeal, the delay in prosecuting the appeal cannot be attributed to the appellant. The appellant's explanation is accepted and sufficient cause has been shown for condonation to be granted and the main issues in the appeal to be ventilated and considered. Condonation for the late prosecution of the appeal against sentence is accordingly granted.

Grounds of appeal

[9] It is apposite to set out the very brief grounds of appeal as set out in the Notice of Appeal:

"AD SENTENCE

1. that the trial court misdirected itself by failure to find that the appellant's cumulative personal circumstances are substantial and compelling circumstances

justifying a departure from the prescribed minimum sentence of life imprisonment on a charge of Rape (Count 2) read with the provision of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 and on the charges of Robbery with aggravating circumstances read with section 51(2) of the Act.

2. .that the trial court misdirected itself by sentencing the appellant to an effective sentence of life imprisonment. The sentence is shocking and inappropriately severe when considering the appellant's cumulative facts in mitigation outlined in his affidavit and in the heads of argument. '

Conviction

[10] The appeal against sentence cannot be considered without having regard to the facts which underscore the convictions. In the charges proffered against the appellant the State alleged on count 1 that the appellant between 16 and 17 March 2015 at P[...] Village unlawfully and intentionally broke open and entered the house of I[...] B[...] with the intent to rape and on count 2 in fact committed an act of sexual penetration with the said I[...] B[...] without her consent in circumstances where she was raped by more than one person and raped more than once in the furtherance of a common purpose. On count 3 the appellant is alleged to have assaulted the said I[...] B[...] and used force to take from her at knifepoint and the use of a firearm two black Nokia cellphones, a pink Nokia cellphone, RI50 cash and groceries and meat valued at R200. On count 4 the appellant is alleged to have assaulted T[…] E[…] M[…] and used force to take from him at gunpoint a Samsung cellphone and sneakers. On count 5 the appellant is alleged to have similarly between 16 and 17 March 2015 at P[...] Village unlawfully and intentionally break open and enter the house of B[...] M[...] with the intent to rape and on count 6 in fact committed an act of sexual penetration with the said B[...] M[...] without her consent. On count 7 the appellant is alleged to have assaulted the said B[...] M[...] and used force to take from her at gunpoint an AG Mobile cellphone.

[11] The evidence relevant to counts 1 to 3 as summarised and accepted in the judgment by the Acting Regional Magistrate may be succinctly summarised as follows. On Monday 16 March 2015 at 22h00 pm, the complainant (I[…] B[…]), a 25 year' old female was at her home in the company of her child, another friends' child and K[...] T[...] and her child. As they sat chatting with the lights in the room on, the house door was kicked open and two male persons entered. One was armed with two opened knives and the other with a firearm which he pointed at the victims in the house. The gun wielding perpetrator moved to the victims and demanded cellphones, ordered the said victims not to scream or he would shoot them and instructed his cohort to collect the cellphones which he did. The gun wielding perpetrator asked I[...] B[...] where her laptop was and when she said it was with a person named P[…], he told her that she was lying. The two perpetrators searched for the laptop to no avail. The gun wielding perpetrator returned and asked for a second time where the laptop was and was met with the same response. He left the house to a nearby two bedroomed house whilst the knife wielding perpetrator remained behind.

[12] When he returned he took I[…] B[…]'s handbag in which he found R 100 cash. He enquired about the bank card he found in the handbag and whether there was any cash in the account which I[...] B[...]denied. After throwing the bank card on a bed, he approached the ladies and asked which of them were willing to engage in sexual intercourse with him. U[…] and K[…] told him in turn that they were either too young or could not manage. As a last resort he approached I[...] B[...] and despite her also intimating that she could not do it, he told her that he desired her. As she was wearing a short dress he lifted her dress and inserted his finger in her vagina from the side of her panty and penetrated her vagina with his finger. This transpired in the presence of all who were present including his cohort.

[13] He instructed his cohort to go outside to see if their fellow cohorts had fled. When he left the gun wielding perpetrator opened the fridge, took out some items and placed it in a schoolbag which belonged to I[…] B[…]. He once again asked who could engage in sexual intercourse with him and they all declined. He instructed K[...] and I[...] B[...]to stand up and made K[...] stand in such a manner to shield the others from seeing what he was about to do to I[...] B[...]. He caused I[...] B[...] to bend forward, took off her panty and penetrated her anally. When he enquired if he was in she confirmed but being unconvinced he withdrew his penis, penetrated her vaginally and engaged in non-consensual sexual intercourse with her. When he was done his cohort knocked at the door and he opened for him. I[...] B[...]requested him to allow her to go urinate and his cohort found her crying. When he enquired why she was crying the gun wielding perpetrator simply looked at her. The ladies were told that they would return and no one should scream, but they did not return. I[...] B[...] testified that she developed a rash on her vagina following the incident.

[14] The evidence relevant to count 4 as summarised and accepted in the judgment by the Acting Regional Magistrate may be succinctly summarised as follows. On 16 March 2015 T[…] M[…] was at P[...] Village visiting a friend M[...]. As they were cooking fish in M[...]'s room, the room door was forced open and two men entered, armed with firearms. They were ordered not to look at the men and to lay on the floor. As they lay on the floor they were searched, Thato M[...]'s Samsung cellphone and sneakers was taken from him and R40 cash was taken from M[...]. M[...] was asked about a laptop and if he knew who lived in the two roomed house behind him. Mr M[...] knew the occupants as I[...] B[...] and her husband who happened to be M[...]'s uncle. The intruders threatened to shoot M[...] as they believed he was refusing to give them the laptop. They left and Mr M[...] heard the door of the two roomed house where I[...] B[...] lived being kicked open, followed by silence until he later heard screaming from the ladies from I[...] B[...]'s house who came to unlock the door for them.

[15] The evidence relevant to counts 5 to 7 as summarised and accepted in the judgment by the Acting Regional Magistrate may be succinctly summarised as follows. On 15 March 2015, 25 year' old B[...] M[...] was sleeping in her room in P[...] Village. It was dark in the room. She heard the sound of fiddling with the Sellotape she used to close the room window. When she switched on her cellphone to investigate a firearm was pointed at her. The intruder ordered her not to scream or she would be shot. She could not see the intruder's face but it was a male person. He enquired about money and when she said she did not have money he proceeded to search the room. He instructed her law down and she obliged. As he approached her she enquired if he wanted to engage in sexual intercourse with her without a condom. He retorted by swearing at her and she kept quiet. As she was wearing a night dress and panty, he instructed her to pull up the night dress and to take off her panty which she did. He then proceeded to penetrate her vaginally. When he was done he took her AG cellphone, instructed her to cover her face with a blanket and left through the same window he gained access to her room.

[16] The appellant was linked to the rape of I[...] B[...] by DNA evidence of a vaginal swab obtained from her and to the rape of B[...] M[...] from DNA obtained from a duvet seized by the police in her room.

Submissions on sentence

[17] The heads of argument by the appellant and the respondent are particularly brief. The argument for the appellant is essentially that his personal circumstances cumulatively considered constitute substantial and compelling circumstances. In particular, the age of the appellant at the time, being 30 years old, having spent 2 years in custody awaiting trial, that he was supporting his 4 year' old child whose mother was unemployed and was in receipt of a child support grant and that he was employed at A[...] C[...] earning R2000.00 per month for a period of 3 years before his arrest and did not cause the victims grievous bodily harm but only threatened

them with a weapon, with the rapes not being of the worst kind was said to constitute substantial and compelling circumstances.

[18] Adv Maseko for the respondent submitted in her heads of argument that the personal circumstances of the appellant did not constitute substantial and compelling circumstances as correctly found by the Regional Magistrate. The argument is further advanced that the appellant demonstrated no remorse for his involvement in the crimes. On the submission that the rapes were not the worst kind the submission is that there can be no such categorization of rape.

[19] Adv Maseko highlights the aggravating factors inherent in the rapes with reference to the circumstances under which they were perpetrated. I[...] B[...]was raped more than once vaginally and anally, in the presence of family members and children, in the sanctity of her home, whilst the appellant was armed with a firearm and his cohort with knives.

The test on appeal against sentence

[20] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. In the context of the mandated sentence of life imprisonment which was imposed in the present matter, this Court will only be entitled to interfere if there is a material misdirection on the part of the trial court, if the sentence is shockingly inappropriate or disproportionate to the crime, the offender and interests of society. The position is succinctly set out in *S v Malgas*[3] as follows.

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors

[3] 2001 (2) SA 1222 (SCA)

relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court. approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion. an appellate court is of course entitled to consider the question of sentence afresh. In doing so. it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However. even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking "startling" or "disturbingly inappropriate" It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(my emphasis)

[21] The sentence is assailed on the basis that is shockingly inappropriate. The appellant's personal circumstances are the sole basis for the argument that same cumulatively considered constitute substantial and compelling circumstances which merits deviation from the mandated sentence of life imprisonment on the rape in count 2 and on the minimum sentences imposed for the robberies.

[22] In S v Matytyi[4], Ponnan JA stated as follows:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons — reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

(my emphasis)

[23] The circumstances under which the rapes and robberies were committed is analogous to those in *Tshabalala v S; Muli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (1 1 December 2019). It is apposite in the circumstances to highlight what the Constitutional Court per Mathopo J and Khampepe J said regarding rape and

[4] 2011 (1) SACR 40 (SCA) at paragraph 23

robberies in similar circumstances to the present appeal where the Constitutional Court referenced the oft quoted passage from S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4 as an introduction:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. 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. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. '

[1] The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.

[5] The full background facts were comprehensively set out by the High Court, which I adopt and briefly restate hereinafter. On 20 September 1998, late in the night a group of men in their youth went on a rampage in the U[...] section of the township of T[...] in Gauteng. Their violent rape lasted into the early hours of the next morning. During this time the forced their way into several homes located on nine separate plots, in a neighbourhood inhabited by the marginalised and vulnerable members of our society. Once inside, the group ransacked, looted and in one case stabbed one of the occupants.

[6] The terror that poured out on this community was well orchestrated and meticulously calculated. A preordained pattern of attack was adopted by the men. On approaching some of the houses, they threw rocks and stones on the roofs, sowing confusion by masquerading as police and shouting out "Police! Police!". When their entry was refused, they broke down the doors and assaulted the occupants they found inside. Some of male occupants of the homes were attacked and made to lie on the ground with blankets covering their heads. This flurry. of violence included the rape of eight female occupants, some of whom were repeatedly, by several members of the group. The youngest of these victims was 14 years old. Another victim was a woman who was visibly pregnant: but this did not deter the group. Whilst some of the men raped the female occupants. other members of the group were posted outside to act as look-outs.

…

[61] *I interpose to say that in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act which prescribes minimum sentences for certain specified serious offences. The Government's intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without anv incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights which places a premium on the right to equality and the right to human dignity we are still grappling with what is a scourge in our nation.*

[62] In further response to such conduct the Legislature in 2017 introduced SORMA to address the concerns which were raised by society about violence against women and children. Under SORMA 's defined crime of rape, instrumentality is no longer a requirement. The Legislature acknowledged that rape now encompasses more than instrumentality of male genitalia inserted into female genitalia. It therefore gave the definition of rape a wider meaning.

[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts. society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send outa clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.

[70] Rape is often mischaracterised as being an act of sexual intercourse, absent of consent, committed by inhumane monsters. This is a dangerous mischaracterisation of rape. Words matter. Words give a construction of a certain viewpoint of the world, and this viewpoint tends to be gendered. Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another, without consent, it must be buttressed that the victim does not experience rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter

but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation.”

[71] To this end, the first judgment approvingly quotes Langa CJ in Masiya, where he stated that:

"Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. "

[72] In the same breadth, the Supreme Court of Appeal in Chapman elucidated on the nature of rape and held that "[r]ape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. "

[73] Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side.

[74] The notion that rape is committed by sexually deviant monsters with no self control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives. Terming rapists as monsters and degenerates tends to normalise the incidents of rape committed by men we know because they are not "monsters" — they are rational and well-respected men in the community. Yes, the abominable behaviour of these men is abhorrent and grotesque and the recognition that they are human does not seek to evoke sympathy — it serves to signify a switch from characterising rapists as out-of-control monsters, and centres the notion that

rapists are humans who choose to abuse their power The idea that rape is committed by monsters and animals may have adverse effects in that it may lead to the reinforcement of rape myths and stereotypes. For instance, labelling of this nature may lead to a cognitive dissonance when the actual rapist does not match the description of rapists. It has been said that this cognitive dissonance leads to the problematic questions like "person X is a good man, what happened to cause him to rape?" These questions have the effect of then centring the actions of the victims and not those of the actual rapist. This in turn reinforces the prevalent rape culture in South Africa and safeguards the patriarchal norms which normalise incidents of rape.

[75] Again, I underscore that I do not imply that rapists do not behave in a way that is heinous and inhumane. The moral repugnancy of the act is self-evident. The point is merely that you cannot tell that someone is a rapist by their mere physical appearance or their standing in the community or their relationship to you. This may obscure the wider targets of our response to the scourge by narrowing our focus onto abhorrent individuals as opposed to dismantling an abhorrent system.

[76] In 2018/19, the South African Police Service recorded 41 583 cases of rape, which is an increase from 40 035 cases of rape recorded in 2017/18. This indicates that approximately 114 cases of rape were recorded by the police each day in 2018/19. In 2003, it was also alleged that a woman was raped every 36 seconds in South Africa. This illustrates that rape is not rare, unusual and deviant. It is structural and systemic. Incidents of rape and the fear of rape are commonplace in the lives of women. Hall notes that rape is—

"an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women. Rape is not one form of attack, but a category of behaviour which is structurally generated (by the power imbalance between the sexes) and culturally sustained (in a male supremacist

ethos). It constitutes only one of the many forms of violence against women. The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship."

[77] The importance of the proper construction and characterisation of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims — the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural. We ought to heed the warning by Sachs J, albeit in the context of domestic violence that:

"The ineffectiveness of the criminal justice system sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. "

[78] Addressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our communities. The structural and systemic nature of rape emphasises that it would be irrational for the doctrine of common purpose not to be applicable to the common law crime of rape, while being applicable to other crimes. For these reasons, I concur in the judgment of my brother, Mathopo AJ. "

(my emphasis)

[24] Against the aforesaid background, I cannot fault the Acting Regional Magistrate for his finding on the absence of substantial and compelling circumstances. The personal circumstances of the appellant were clearly by far outweighed by the seriousness of the crimes he was convicted of and the interests of society and more particularly the victims. Having regard to the sentiments expressed by Kharnpepe J in *Tshabalala, Ntuli*, the submissions that the rapes were not the worst kind should be put paid to.

[25] The appeal against sentence should accordingly fail.

Order

[26] In the result, the following order is made:

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against the sentences imposed is dismissed.

A H PETERSEN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree
P M M SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

For appellant: Mr T G Gonyane
Instructed by: Legal Aid South Africa
Mahikeng Justice Centre

For respondent: Adv J Maseko
Instructed by: The Director of Public Prosecutions, Mahikeng