

SOUTH AFRICA / JUDGMENT

Mohono v S (A44/2024) [2024]

ZAFSHC 418 (18 September 2024)

[2024] ZAFSHC 418

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi, Daniso

CASE / FILE NUMBER

A44/2024

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE STATE****DIVISION, BLOEMFONTEIN****Reportable / Not****reportable****Case****no: A44/2024****In****the matter between****ANDRIES****MPHO MOHONO****Appellant****And****THE****STATE****Respondent****Coram:**Mhlambi J, et
Daniso J**Heard:**

26 August 2024

Delivered: 18
September 2024
ORDER
1.
Condonation to file a supplemented Notice
of Appeal is granted.
2.
The appeal against the convictions and
sentences is dismissed.

JUDGMENT

Daniso J (Mhlambi J concurring)

- [1] On 10 September 2018 the appellant was convicted after pleading not guilty to six counts involving: two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”), two counts of pretending to be a police officer in contravention of the South African Police Services Act,[1] abduction and kidnapping a minor by the Bloemfontein regional court. He elected not to disclose the basis of his defence in terms of section 115 of the Criminal Procedure Act[2] (CPA).
- [2] The State alleged that on 24 December 2013 at Freedom Square in Bloemfontein the appellant raped P[...] K[...] (count 1) while impersonating a police officer (count 2). Approximately two years later on 2 April 2015 at Theunissen, the appellant raped N[...] M[...] (count 3) after abducting her (count 5) and kidnapping K[...] N[...] (count 6). He also committed these offences while pretending to be a police officer (count 4).
- [3] Count 1 and 3 attracted the prescribed minimum sentences of life imprisonment in terms of the CLAA as the complainants were 15 and 13 years old respectively. The appellant was subsequently sentenced to life imprisonment in respect of those counts the trial court having found no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences and on the remaining counts, the following
- sentences were imposed; count 2, two year’s imprisonment; count 4, two year’s imprisonment; count 5, three years’
- imprisonment and count 6, three years’ imprisonment. In terms of section 280 of the CPA, the sentence in count 2 was ordered to run concurrently with the sentence imposed in count 1 and those imposed in count 4, 5 and 6 to run concurrently with the sentence imposed in count 3.
- [4] This appeal is directed against the convictions and sentences.

- [5] Before turning to the issue to be considered in this application, there is a preliminary issue raised by the appellant which needs to be addressed. The appellant seeks condonation to file a supplemented Notice of Appeal on the grounds that the Notice of Appeal filed on 7 March 2022 was incomplete.
- [6] The application is not opposed and taking into account that the ineptitude in filing a proper Notice of Appeal is not attributable to the appellant and that no prejudice has been indicated by the State, I am of the view that the appellant should not be prejudiced in exercising his right to bring this matter before court. It is also in the interests of the State as well that this matter is finalized. Accordingly, condonation for the late filing of the supplementary Notice of Appeal to form part of the record of these proceedings is granted.
- [7] In respect of count 1 and 2, the appellant was convicted on the evidence of P[...] K [...], her friends P[...] O [...], M[...] T[...] (M [...]), B[...] H[...] (B [...]), the first report in respect of the rape charge, Ms K[...] R[...] (P[...] K [...]'s Aunt), the J88 medical report and the deoxyribonucleic acid (DNA) evidence.
- [8] P[...] K[...] testified that on 24 December 2013, she was with her friends when they were accosted by the appellant on their way from purchasing Whiskey. He introduced himself as a police officer and reprimanded B[...] who was urinating in the street. The appellant was wearing civilian clothing and had a police badge attached to his clothing. He also told them that he was searching the youth drinking in the street. After searching their bag, he found the bottle of Whiskey and phoned someone he referred to as Sergeant. He informed that person that he had found some youth in possession of liquor. He asked them for their ages and told them they will be arrested for being in possession of liquor. He then let B[...] and M[...] leave as they were older. He remained with P[...] K[...] and P[...] O [...], he promised to release them also but he only released P[...] O [...]. After P[...] O[...] left, he told P[...] K[...] that he is arresting her for drinking in public and asked her whether she wanted to go to prison. When she said no, he told her that she will have to drink the entire bottle of the Whisky as punishment. P[...] K[...] did as she was told but she became inebriated as a result she sat down on the ground and that is when the appellant unzipped her jeans, pulled them down and raped her by penetrating her vagina with his penis. Her friends returned later and found her unable to move. They took her home, on the next day she asked her mother to call her Aunt and relayed the rape incident to her. She was 15 years old at that time.
- [9] Under cross-examination, she was asked whether she had consumed the Whiskey before she was allegedly instructed by the appellant to drink it. She responded in the negative and explained that she only drank a Savanna Dry cider.
- [10] P[...] O[...] and M[...] corroborated her version that the appellant approached them and introduced himself as a police officer and that he had a police badge attached to his clothing. After asking them what they were doing in the street because they were underage, he called

someone he referred to as Sergeant and told him that he had found some youngsters in possession of liquor. He then turned around and told B[...] and M[...] to leave and that he will tell his colleague that they had escaped. Later he released P[...] O[...] and remained with P[...] K[...]. He also kept their bag containing the Whiskey and promised to let her “escape” later. P[...] O[...] later met with B[...] and M[...] and when they realized that P[...] K[...] was not coming they went and informed her mother. M[...] and P[...] K[...]’s brother, Thabiso, went looking for her and found her very drunk, lying on the rocks nearby some hills and took her home.

- [11] P[...] K[...]’s Aunt confirmed that on arrival at P[...] K[...]’s home she found her crying, very emotional and even vomiting. She then spontaneously relayed the rape incident to her. Upon informing Ms K[...]’s mother, they accompanied P[...] K[...] to the police station where a rape case was opened. Thereafter, she was taken for medical examination at National hospital.
- [12] The J88 medical report compiled by a forensic nurse on 25 December 2013 indicated no injuries on the genitalia but confirmed that the absence of injuries does not exclude forceful penetration. The appellant’s DNA also matched the DNA profile extracted from P[...] K[...]’s vaginal swab. The contents and the veracity of the J88 medical report and the DNA results were not placed in dispute, they were formally admitted by the appellant as part of evidence in terms of section 220 of the CPA and marked as Exhibit “B” and “E”

respectively.

- [13] With regard to count 3 to 6, the trial court relied on testimony of Ms K[...] N[...] (K[...]), Mr. M[...] E[...] N[...], the first report in respect of the rape charge, Constable Madipuo Arlinah Sigarume Mantsoe, sergeant Kotwane and the statement deposed to by N[...] M[...] (N[...]) including the J88 medical report and the DNA evidence.
- [14] K[...] was eight years old at the time of the incident. She testified that she was walking to church with N[...] when they were approached by the appellant driving a motor vehicle. He stopped his vehicle next to them, bundled them into his motor vehicle and drove away with them to a veld where he stopped his vehicle, removed them from the vehicle and told her to close her eyes and face the other direction. She then heard him ordering N[...] to remove her underwear and when she opened her eyes again, she saw N[...] pulling up her panties. She was also crying and told her that the appellant had raped her. After the

appellant let them go, they went to N[...]’s home but there was no one. They then went to the residence of N[...]’s uncle Mr N[...], upon their arrival, N[...] reported the rape to Mr. N[...].

- [15] Mr. N[...] corroborated N[...]’s first report of the rape incident. He confirmed that N[...] arrived at his home with K[...] crying, her hair was dishevelled and dirty. She called him aside and informed him that she was raped by an unknown man who accosted them on the street and took them to a veld where he raped her. He called N[...]’s mother and they took both the children to the police station.

- [16] The J88 medical report indicates extensive injuries consisting of bruises and fresh bleeding of the clitoris, urethral orifice, posterior fourchette, hymen including the anal orifice. The injuries were found to be consistent with sexual penetration. The appellant's DNA matched the DNA profile extracted from N[...]’s vaginal swab. The J88 medical report and the DNA results were also formally admitted by the appellant as part of evidence in terms of section 220 of the CPA as Exhibit “G” and “E” respectively. N[...] was 13 years old at that time.
- [17] Hereafter the State applied for an order to admit N[...]’s statement in terms of section 3 (1) (c) of the Law of Evidence Amendment Act,[3] (the Act), as evidence in lieu of her oral testimony.
- [18] The State led the evidence of Constable Mantsoe who took down the statement on the day of the incident and Sergeant Kutwane, the Investigating Officer of the case.
- [19] Constable Mantsoe confirmed that N[...] relayed the rape incident to her accompanied by a guardian and she (Constable Mantsoe), observed N[...]’s dire emotional state when she was relaying the incident. She was also shaking and crying of pain.
- [20] Sergeant Kutwane testified that N[...]’s whereabouts were unknown and this is despite a diligent search of her last known addresses, calls made to her known numbers, radio announcements and publication in The Express newspaper circulating in the Free State Province, she remained untraceable.
- [21] The statement was subsequently admitted as Exhibit “K.” The following is the recordal of the said statement:

“3.

I was walking in the street with K[...] N[...] who is 8 years old, she is my church mate we were going to fit the uniform of the church, we were passing Thusanong Orphanage then came a blue car towards our direction.

4.

Then the car passed by and after few minutes the car came back and it was a black male coffee in colour. Then he stopped his car and he came out and he came to us and he didn't say a word he just pushed both of us inside his car and he climb also and he locked the door. He then drove his car and he went to Caltex garage and he told us he is a police officer we must not be scared and he went to the ZR Mahabane's road.

5.

He then took the direction of the old dumping site at that time he was not talking to us, he then went inside the veld he then stopped his car and he climbed up and he open the doors for us he unlocked the door.

6.

He then told us to step out of his car we then climb out. That unknown black male told K[...] to close her eyes. He then told me to sleep on the ground, I then looked at him he then pushed me to the ground and he told me that I must close my eyes. He then take out my panty and he put his trouser on his knees and also underwear.

7.

He then came on top of me and put his penis to my vagina and he raped me, I was crying at that time and I was screaming and he told me to shut up, because it will be my last day today I will not see my parents again, I then stopped to scream and K[...] was laying near us on the ground. The K[...] took a deep breath and he told me to stop K[...] because she will make me and him to fight. I asked him to take us back to our places and he told me that he will take us back when he is finished with me.

8.

At that time he was still on top of me, I was feeling paid and he the stand up and he told us not to open our eyes, I then saw him wearing his underwear and trouser and he told us to stand up and I must get dressed after I get dressed he pushed us again inside his car, he then drove us to Election Park and he told us not to say anything. He then left us there..."

[22] On the other side, the appellant testified in his defence. In response to count 1 and 2 he countered the State's evidence by pleading consensual sex with P[...] K[...]. It was his testimony that P[...] K[...] and her friends approached him at the tavern where he was sitting alone and enjoying his cool drink. After they introduced themselves to him they asked him to buy some drinks. He told them that he was a teetotaler and gave them R150 to buy liquor for themselves. When P[...] K[...] found out that he did not have a place to sleep, she invited him to her shack telling him that she lived alone and was lonely and that's where they had consensual sex until 2 a.m. when she received a call that her boyfriend was looking for her and he was very angry. Upon receiving this call, she asked him to leave and explained that her boyfriend was a Maroma gang member and was coming with his friends. Fearing for his life he hurriedly left and watched from the distance P[...] K[...] being assaulted by her boyfriend.

[23] The appellant denied impersonating a police officer and said at no stage was he wearing a police badge. He insisted that it was P[...] K[...] who initiated and arranged their sexual rendezvous and all was well between him and P[...] K[...] when they parted ways. As for the remaining counts, the appellant elected not to testify with the result that the defence closed its case.

[24] The appellant's grounds for appeal are embodied in a lengthy and mostly incoherent notice of appeal consisting of at least six pages which are essentially that: in convicting the appellant the trial court erred in its finding that the State had proved its case against the appellant. In respect of count 1 and 2, the trial court did not properly apply the cautionary rule to P[...]

K[...]’s evidence in the rape count. She was under the influence of alcohol. She told the court that the appellant offered her the alcohol and she drank it without being forced. Her version regarding the rape did not make sense considering the proximity of the shack dwellings to the alleged place of the incident and it was contradictory in that, in her direct evidence, the complainant testified that after unzipping her trousers the appellant penetrated her with his penis whereas under cross-examination she said her last recollection of the event was when the appellant unzipped her trousers. She did not confirm the penetration. She also contradicted her witnesses by stating that she did not consume alcohol before her encounter with the appellant and her witnesses said they all drank ciders. She was also unable to explain what the appellant used to pretend to be a police officer as he was not wearing police uniform. The issue about whether a cell phone was given to the appellant by the witnesses was never canvassed by the State and it was clearly made up by the witnesses to “close gap on how P[...] K[...] was found” (sic). The appellant submits that the trial court failed to attach weight to these material contradictions in the State’s evidence whilst it overemphasized the minor discrepancies in the appellant’s testimony which was clear.

- [25] As regards count 3 to 6, the court erred by convicting the appellant without evidence and by relying on N[...]’s statement which was not tested as N[...] wilfully evaded trial and avoided the police when she was warned about the court date. The court wrongly applied section 3 of the Law of Evidence Amendment Act 45 of 1988 and K[...] N[...], as the eye witness, did not know which jurisdiction the rape occurred, the date and the time of incident. She also did not testify about the count relating to the appellant pretending to be a police officer.
- [26] It is the appellant’s case that the trial court should not have accepted the manner in which both the rapes were reported. In respect of count 1, P[...] K[...] went to sleep at home and did not report the incident to her mother and N[...] (count 3) also reported the rape to Mr M[...] N[...] instead of the females who were in his presence, her mother and grandmother.
- [27] There are also discrepancies in the State’s case with regard to who accompanied N[...] to the police station. Mr N[...] testified that he took the complainant to police station whereas, the police officer constable Mantsoe who took down N[...]’ statement said N[...] was accompanied by a female person and relying on *S v Matshivha*[4] and sections 162 and 164 of the CPA, the appellant also attacks the validity of the statement on the basis that constable Mantsoe was also clueless about the import of Oath and its consequences.
- [28] With regard to sentence, it is the appellant’s case that the court erred in “considering previous conviction of 2015 against 2013 matter and not consider the fact that the appellant is the first offender on that offence. Court did not take into consideration the personal circumstances of the Appellant.”
- [29] The appeal is opposed by the State.

[30] It is an established principle that a court of appeal will not interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another*.^[5] The principle was also restated in *AM & Another v MEC Health, Western Cape*^[6] as follows:

"It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear

misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court...."

[31] At the commencement of the proceedings, counsel for the appellant Mr van der Merwe rose to frankly concede that having regard to the facts pertaining to both the incidences and the evidence adduced by the State in the court a quo, he could not argue in favour of what is deliberated in the appellant's grounds of appeal in respect of the convictions and sentences.

[32] I am of the view that the concession is correctly made for the reason that, in the record of the proceedings^[7] it is clear that the trial court was alive to the cautionary rules applicable in the circumstances where a complainant was both a single witness and also a child witness implicating an accused in a rape charge.

[33] In terms of section 208 of the CPA, an accused can be convicted of any offence on the evidence of any competent single witness. The court need only to find that the evidence was trustworthy and that the truth has been told in that case, corroboration is not even

necessary. See *S v Sauls and Others*^[8] and *S v Mahlangu*.^[9]

[34] In this matter, the trial court meticulously evaluated P[...] K[...]’s evidence. It duly considered its merits and demerits and having weighed it against the appellant's defence of consensual sexual intercourse it determined that despite having been rendered intoxicated by the appellant, she was able to comprehend and observe her surroundings and was later able to relay to the court a succinct and detailed description of how and where the rape occurred. Her version that the sexual intercourse with the appellant was not consensual was cogent, reliable account of what had happened and it was also corroborated by the evidence of her first report to her Aunt, the J88 medical report which did not rule out penetration and the DNA evidence.

[35] I am unable to fault the trial court for disregarding the contradictions alluded to by the appellant in the grounds of appeal. The issues pertaining to whether P[...] K[...] had consumed alcohol or not before the rape, the situation regarding the shacks nearby the scene of the incident and K[...]’s lack of knowledge about the jurisdiction where the rape occurred including the date and time of the incident are immaterial, they have no bearing on the determination of whether the appellant raped the complainants and also perpetrated the other crimes or not.

- [36] It is also important to take note that K[...] was only eight years old when the incidents occurred and three years had passed when she ultimately testified. nevertheless, contradictions in the evidence do not necessarily demonstrate that the witnesses' evidence is flawed. They may simply be an indication of an error and not every error made by a witness affects their credibility: in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradiction, their number and importance, and their bearing on other parts of the witnesses' evidence.[10] It is also quite rare that two or more witnesses can give identical evidence relating to the same incident. [11]
- [37] I must also point out that the fact that the contradictions alluded to by the appellant are not enumerated in the trial court's judgment does not necessarily mean that they were not considered.[12]
- [38] There is nothing improbable about how P[...] K[...] and N[...] made their respective rape reports because, there is no formula regarding reporting rape, it is not even mandatory except that if it is reported that will show consistency and negate a defence of consent, it is not regarded as proof of rape or a corroboration of a complainant's version.[13]
- [39] Next what must be considered is whether the trial court was correct in admitting N[...]’s statement under Section 3 (1) (c) of the Act in lieu of her oral testimony.
- [40] There is no merit to the appellant's complaint that the trial court wrongfully relied on a statement which was not “tested”. Section 3 (1) (c) (i) to (vii) of the Act, confers a discretion on the court to admit hearsay evidence if the admission of the evidence would be in the interests of justice having regard to the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the admission of such evidence might entail, and any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- [41] In exercising its discretion to accept the statement, the trial court took into account that the reason for N[...] not testifying was because she was untraceable despite the diligent search at her known addresses, calls made to her known numbers and media announcements and it was also not known whether she was still alive as many years had elapsed since she made the statement. With regard to the value of the statement, the court was satisfied that it was bolstered by considerable evidence including the viva voce evidence relayed by K[...] and the first report including the J88 medical report and the DNA evidence was therefore reliable. On the other side the application was simply opposed on technical grounds relating to the invalidity of the statement on the grounds that the statement was not co-signed by N[...]’s guardian. Having considered all these factors, the trial court found that the appellant's prejudice resulting from his inability to cross-examine N[...] was outweighed by the interests

of justice.

- [42] I agree, for the reason that the appellant's objection against the admission of the statement was merely based on a technical point and not on the exceptions provided for in subsection (1) (c) (i) to (vii) of the Act. That aside, the accused's right to adduce and challenge evidence through cross-examination[14] is not absolute as stated in *S v Ndhlovu*: [15]

"The Bill of Rights does not guarantee an entitlement to subject all evidence to cross examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant."

- [43] The appellant's reliance on *Matshivha* and the provisions of sections 162 and 164 of the CPA to impugn the validity of N[...]s statement is unsound as these authorities deal with the formalities pertinent to the administration of oath to witnesses testifying in criminal court proceedings. [16]
- [44] Turning to the appellant's version in respect of count 1 and 2, his insinuation of false implication is gainsaid by his own evidence that it was P[...] K[...] who had been flirting with him, initiated the sexual encounter and when they parted ways all was well. There is therefore no reason why she would falsely accuse him of rape. Similarly, there is no reason why P[...] K[...]s friends would tell the court in minute detail how he accosted them, threatened them with arrest, detained them in the street and later released some of them till he remained with P[...] K[...] if that did not happen. On his own version, he bought them liquor at the tavern and they all had a nice time. The improbabilities in the appellant's version affected his credibility, the trial court was correct in rejecting his version as false beyond reasonable doubt.
- [45] As regards count 3 to 6, the trial court was alive to the trite principle that the accused's election not to testify does not relieve the prosecution of its duty to prove his guilt beyond reasonable doubt.
- [46] On the facts germane to this matter the issue which had to be determined by the trial court was the identity of the perpetrator of these crimes. The trial court was impressed by K[...]s ability to recollect and narrate how the appellant abducted N[...] and kidnapped her despite her young age. Although she did not see the rape as she was made to look away, N[...]s statement regarding the rape was succinct and was also corroborated by the gynaecological clinical findings recorded on the medical report (J88), Exhibit "G" indicating that she was raped about four hours earlier. The court also took into account the DNA evidence, Exhibit "E" from which the court inferred that the appellant is the perpetrator of the rape as his profile matched the profile extracted from N[...]s vaginal swabs and he admitted its

probative value in terms of section 220 of the CPA. Consequently, the trial court found that the inference is consistent with the proved facts to exclude any reasonable doubt about the accused's guilt.

- [47] Based on all the above reasons, I am satisfied that the dispute between the State and the defence with regard to whether the appellant perpetrated all the crimes he was charged with was resolved appropriately. In the circumstances, the appellant was properly convicted on all counts.
- [48] Regarding sentence, the trial court is criticized for disregarding the appellant's personal circumstances as factors justifying the deviation from the prescribed minimum sentence and for taking into consideration the appellant's previous conviction of the year 2015 instead of treating him as a first offender and the rehabilitative element of punishment. It is submitted that the sentence should have been blended with mercy.
- [49] It is tested law that sentencing is pre-eminently a matter for discretion of the trial court, the circumstances under which the appeal court can interfere with a sentence are limited.
- [50] The record of the proceedings reveals that the appellant's personal circumstances were taken into consideration namely that: he was 40 years old, unmarried with three children with two different mothers. One of the mothers is deceased. He was previously employed as a police reservist, presently he was self-employed in his own security company, he went to school until standard 10 and that he spent about four months in custody awaiting trial.
- [51] The traditional mitigating factors such as the appellant's personal circumstances cumulatively, can be taken into account as factors to be considered as substantial and compelling circumstances warranting a deviation from the minimum sentences applicable in count 1 and 3. However, they must be weighed against the aggravating factors as, on their own, they are immaterial and do not justify a lesser sentence.[17]
- [52] The appellant was convicted of rape on 10 November 2015 and thereafter sentenced to imprisonment for a period of 15 years. The offence was committed on 01 January 2013 approximately eleven months before he committed the crimes in count 1 and 2. The magistrate was thus correct into taking this conviction into account for the purpose of sentencing as it indicates the appellant's propensity to commit similar offences.
- [53] In this matter the nature of the offences the appellant was convicted of on its own is aggravating, it is equally aggravating that the crimes were targeted against vulnerable children and were intentional in that the appellant first took his time to establish the ages of the victims and then made sure that he picked the youngest from P[...] K[...]’s group. Two years later he went for the much younger N[...].
- [54] In arriving at the sentences, the trial court also took into account the brutality of N[...]’s rape as evidenced by the J88 medical report, the effect of these crimes on the appellant's victims’ emotional and psychological scars as demonstrated in their respective Victim Impact Reports and concluded that the appellant was a danger to children and the community as a

whole for that reason, a lengthy direct imprisonment sentence in respect of count 1 and 3 and various direct imprisonment sentences for the remaining charges would reflect the gravity of the offences committed by the appellant and also have an element that speaks to the plight of the society. I agree.

[55] Despite the egregious crimes the appellant was convicted of, the trial court showed him mercy by invoking the provisions of section 280 of the CPA. There is no basis to interfere with the sentences, they fit the offender and reflect the gravity of the crimes.

[56] In the result, I would make the following order:

Order

- (1) Condonation to file a supplemented Notice of Appeal is granted.
- (2) The appeal against both conviction and sentence is dismissed.

NS DANISO, J

I concur

JJ MHLAMBI, J

On behalf of appellant: Mr. PL van der Merwe Instructed by: Legal Aid SA BLOEMFONTEIN
On behalf of respondent: Adv. M Strauss Instructed by: The Director of Public Prosecutions
BLOEMFONTEIN

[1] Act No 68 of 1995.

[2] Act No, 51 of 1977.

[3] Act No, 45 of 1988.

[4] 2014

(1) SACR 29 SCA.

[5] 1948

(2) SA 677 (A).

[6] 2021(3) SA 337 (SCA) para 8.

[7] Record page 278 to 280.

[8] 1981

(3) SACR 172 (A) at 173.

[9] 2011

(2) SACR 164 (SCA) at 171 B.

[10] S v Mkohle 1990

(1) SACR 95 (A).

[11] S v Bruiners and Another 1998

(2) SACR 432 (SE) at 435 a to b.

[12] Director of Public Prosecutions: Limpopo v Molohe and another 2020

(2) SACR 343 (SCA) at para 55, Dhlumayo fn at 4 supra at 706.

[13] Milton, in South African Criminal Law and Procedure Vol II 3 ed; Vilakazi v The State [2016] SCA 103; 2016

(2) SACR 365 SCA at par 15.

[14] Section 35(3)(i) of the Constitution.

[15] [2002] ZASCA 70; 2002

(6) SA 305 (SCA) at para 24.

[16] The gist of the findings in Matshiva para 10 thereof is: “the reading of section 162(1) makes it clear that, with the exception of certain categories of witnesses either falling under section 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. ... the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.”

[16] The gist of the findings in Matshiva para 10 thereof is:

“the reading of section 162(1) makes it clear that, with the exception of certain categories of witnesses either falling under section 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. ... the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.”

[17] Vilakazi v The State (576/07) [2008] ZASCA 87 (2 September 2008) at paragraph 58 quoting: S v Malgas 2001

(1) SACR 469 (SCA).

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