

SOUTH AFRICA / JUDGMENT

Morotoba and Another v S (Appeal) (A149/22) [2025] ZAGPPHC 550 (21 May 2025) [2025] ZAGPPHC 550

COURT

North Gauteng High Court, Pretoria

BEFORE

N L Moila, J S Nyathi

CASE / FILE NUMBER

A149/22

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Appeal

Case Number: A149/22

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

21/05/2025

SIGNATURE

In

the matter between:

MOTLATSO
LLOYD MOROTوبا
First Appellant
HLENGANI
JOHANNES
RINGANI
Second Appellant
and
THE
STATE
Respondent

Delivered:

21 May 2025 - This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines and by release to SAFLII. The date for hand-down is deemed to be 21 May 2025.

JUDGMENT

MOILA, AJ and NYATHI, J,

A.

Introduction

- [1] This is an appeal against conviction and sentence. The Appellants appeared in the Pretoria Regional Court on two counts of Rape, Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, read with section 51(1) of schedule two of the Criminal Law Amendment Act 105 of 1997.
- [2] Both Appellants were represented throughout the trial. They pleaded not guilty on both counts and tendered a plea explanation in terms of section 115(1) of the Criminal Procedure Act 51 of 1977. The plea explanation was later reduced to Admissions in terms of section 220 of the Criminal Procedure Act.

On 27 September 2013, they were both police officers. They conducted a patrol in a marked vehicle with registration number B[...]. They witnessed an altercation between the complainant and her boyfriend outside the Shebeen. They intervened, and the complainant left with them in the police bakkie at 23:05. The complainant sat in front of the motor vehicle with them in the police bakkie. She wanted to go to the police station, and they dropped her at 23:18. The second Appellant was the driver, and the first Appellant was a passenger. They indicated that the complainant was under the influence of alcohol.

Both Appellants denied raping the complainant.

- [4] On 15 September 2017, the two Appellants were convicted of two counts of Rape; the Court found that it was no doubt that the two Appellants acted for a common purpose, and they were sentenced to two life imprisonment.
- [5] Aggrieved by this, the two Appellants exercised their right of appeal under section 309(1)(a) of the Criminal Procedure Act, seeking a reversal of the conviction and sentence imposed by the Court a quo.
- [6] The record of the proceedings is incomplete. However, it is still possible to decide the case fairly.

B. Background facts

- [7] On 27 September 2013, the complainant and her boyfriend, Tebogo, were at the tavern or pub with other friends drinking alcohol. The complainant was drinking wine. The complainant and her boyfriend quarrelled and pulled each other outside the tavern. The Appellants, who are former South African police officers based at Attridgeville police station and holding the ranks of student constable and warrant officer, respectively, arrived at the tavern. They were driving a marked police bakkie. The Appellants separated the complainant and her boyfriend and drove off with her.
- [8] On 28 September 2013, at Attridgeville police station, just before 5:00 am, the complainant reported that she was raped. The investigating officer took the complainant for medical examination. Doctor Naledi Ramopo examined her. The doctor completed a J88 stating that the complainant had tenderness inside her vagina, and it happened after forceful penetration. The identity of the Appellants is not in dispute.

C. Grounds of appeal

- [9] The Appellants raised the following grounds on conviction:

The learned magistrate erred in finding that the State had proved its case beyond a reasonable doubt in that ;

9.1 the evidence of the state witnesses is credible and not contradictory,

9.2 the appellants had unlawful sexual intercourse with the complainant despite that there is no proof, specification, or confirmation of the alleged date, time, and place of the sexual intercourse.

9.3 The learned magistrate erred in finding that the appellants should have challenged the testimony of the motor vehicle tracking experts, despite the fact that the said testimony supported their case, as the police vehicle in issue had shown no period of stoppage on that day,

9.4 The learned magistrate erred in finding the appellants guilty and ignored the fact that the complainant was not a credible witness.

9.5 The learned magistrate erred in not taking into account the evidence of Tebogo Mashiane, who testified that he and the complainant were drunk, and the inconsistencies in the testimony of both the complainant and Tebogo Mashiane.

9.6 The learned magistrate erred in not attempting to analyse the consistency and credibility of the complainant's evidence as presented in different stages, that is, disciplinary hearing, initial testimony, and her testimony after being recalled.

9.7 The learned magistrate erred in believing the complainant when testifying that she felt the condom inside her vagina without explaining how she felt it.

9.8 The learned magistrate erred in ignoring the DNA report that exonerated the appellants.

9.10 The learned magistrate erred in finding that there was no evidence under oath by the appellants when their bail application record on which they had testified under oath was incorporated through the prosecutor's application to form part of the record and in finding that version of the appellants as put forth from the bar by the legal representative against the state witnesses testimony is of no value or consideration, or is not part and parcel of the contestation of the state witnesses' testimony whether appellants did not testify.

[10] The following are the grounds for sentence :

10.1 The Court should have found that substantial and compelling circumstances justify imposing a lesser sentence.

10.2 The court erred in passing a sentence that is excessively inappropriate and raises a sense of shock on the following grounds: the learned magistrate failed to take into account the personal circumstances of the appellants,

10.3 the court a quo erred in not considering other types of sentences and or short-term imprisonment,

10.4 the court erred in effecting a sentence that is shockingly disproportionate by overemphasizing the deterrent effect of the sentence, the seriousness of the crime, and the interest of society,

10.5 the Appellants were sentenced to two life imprisonments besides the fact that their capability of being rehabilitated,

10.6 The Appellants should be granted leave to appeal against the decision of the learned Magistrate because a different court may arrive at a different finding on both conviction and sentence.

D. Evidence

[11] The state led the evidence of five witnesses. The first witness was the complainant, N[...] P[...]. She was 17 years old at the time of the alleged rape. She testified that she was with her boyfriend and other friends at a pub in Attridgeville. They arrived there at around 21:00.

- [12] She was drinking wine. She and her boyfriend had a quarrel and pushed each other until they were outside the pub. A motor vehicle, a Chevrolet-marked police vehicle, arrived and stopped in front of them. Two police officers alighted from the vehicle and separated them. The first Appellant fought with Tebogo. She then went inside the Chevrolet.
- [13] The two police officers took the complainant and drove off. Tebogo remained in the tavern. She asked them to go back to fetch her friend, who was staying two houses away. The Appellants turned, drove, and stopped in front of her friend's house.
- [14] The second Appellant told her to go to the back of the bakkie in order to sit with her friend. The second Appellant alighted from the vehicle and gave her space to alight. She went to the back of the bakkie. The first Appellant was still sitting in the motor vehicle.
- [15] The second Appellant came to the back of the bakkie, closed the door, and sexually penetrated her. He used a condom. When he was done, the first Appellant also sexually penetrated her. She was crying, but she did not shout or scream. She had tears on her cheeks. After they were done, they shouted at her to go and sit in front. They drove and dropped her off a street away from the police station.
- [16] She did not go to the police station because she thought she would not get help. She walked home, met her sister, and reported that police officers had raped her. They went to her boyfriend, Tebogo, and then went to the police station and reported the matter. She was taken to the hospital on the morning of 28 September 2013.
- [17] The second witness was Naledi Ramopo. He is a medical doctor with 38 years of service. He qualified in 1976. On 28 September 2013, he was on duty and examined the complainant. He concluded that there was tenderness on the internal vagina. This is in keeping with a forced penetration or rape.
- [18] The third state witness was P[...] P[...]. She testified that on 27 September 2013 at 23:45, she was standing at the gate with her friend when she saw the complainant approaching, crying. The complainant reported that two police officers had raped her. She related that she was with Tebogo and Rethabile at the pub. She had an argument with Tebogo. She saw the police and ran to them. The case was reported, they informed Tebogo, and she also accompanied her to the hospital.
- [19] The next witness was Tebogo Mashego. He testified that he was the complainant's boyfriend. On 27 September 2013, he was with the complainant and friends at the Tavern. It was approximately 21 hours. They ordered their drinks, and an incident ensued between him and the complainant, and they went outside, pulling each other. That's when the police arrived and enquired as to what was happening. The complainant asked them to take her home, but he declined.

- [20] The first Appellant then started pulling him around, and he could see that the police officers were drunk. He could smell the alcohol. The complainant got inside the police motor vehicle, and they drove off with her. Later, the complainant came back, and she was crying. She alleged that those officers raped her. She was crying profusely. He did not know those police officers before this incident. He did not have sexual intercourse with the complainant on that day.
- [21] The last witness was Mr Eric Deysel. He testified that he is employed by Digicor Fleet Management and is a consultant at the South African Police Fleet. They put devices on SAPS motor vehicles to monitor their movements. He referred to exhibit G, which was handed in. It is the movement report of the motor vehicle with registration number B[...] for the period 27-28 September 2013.
- [22] The state closed its case.
- [23] The two Appellants applied to be discharged under section 174 of the Criminal Procedure Act. The application was refused.
- [24] Both Appellants elected not to testify. The defence case was closed.

E.

Submissions

Appellants'

submissions

Conviction

- [25] Counsel for the Appellants, Mr Molatelo Malowa, submitted that there was a contradiction in the street name where the complainant alleged that the police officers dropped her. The charge sheet stipulates that the crime scene is Mphalane Street. The complainant stipulates that the crime scene is behind Maude. At the bail hearing, evidence alleged the crime scene was at Semenya Street. He referred the Court to a map of Attridgeville indicating the streets.
- [26] Counsel for the Appellants further submitted that it is not in dispute that the complainant was taken from the Tavern by the two Appellants. However, her evidence was not clear, and it was contradictory. In this manner, she said she had taken alcohol, but she was not drunk; yet her boyfriend said they were drunk.
- [27] Counsel asserted that the Aviation report handed in by the State does not support the State's case; however, it supports the evidence of the two Appellants regarding where the Appellants dropped the complainant.

- [28] Counsel referred the Court to the version of the Appellants as testified in the bail application that the complainant had requested them to take her to the police station to report the assault case against her boyfriend, and not her home because she had not given them the address.
- [29] Counsel for the Appellants argued that it was common cause that she was under the influence of alcohol. The question is, to what degree was the influence of alcohol? He also urged the Court to take into account that she was a minor who was under the influence. This is a 17-year-old girl, a school-going child, a minor for that matter, who was at a tavern at 23:00 under the influence of alcohol and involved in sexual activity; who requires the Court to believe her story.
- [30] Counsel for the Appellants further submitted that the complainant was probably too drunk to know exactly what happened, so she could not be believed. After reporting the case at 01:00, the police made her sit at the police station until 5:30 to take her to the hospital. Which might show they wanted her to sober up.
- [31] The version by the complainant was that she was wearing jeans, which were below her knees above her ankle, lying on her back, and she could not have been able to open her legs to allow penetration to her vagina. Hearing that the complainant had stretched her legs while the Appellants were standing and having sex with her in the bakkie is improbable.
- [32] Counsel further argued that the allegation that the complainant's last sexual intercourse was two weeks prior could not be true, because her boyfriend testified that they usually meet on weekends.
- [33] Mr Malowa submitted that the complainant was not honest; she testified that she felt a condom inside her vagina but did not see it. How do you feel that there is a condom? If this question is unfair, it determines how untruthful the allegation is.
- [34] Counsel further argued that the Court a quo ignored the fact that the complainant was a single, minor witness in a sexual offence case. Her evidence must be satisfactory in all material respects; if not, the court will seek corroboration from various facts before allowing such evidence. The credibility finding seems to have been ignored by the Court a quo, considering the weakness in the witnesses in the State's case.
- [35] In conclusion, counsel submitted that the Appellants had elected not to testify because DNA results excluded them from being the persons who sexually penetrated the complainant. The Court cannot reject the defence version as averred in the plea explanation or put to the state witness as untruthful or false. The Court must consider this; although the Appellants did not testify, their version was put forth to the witnesses, and the bail transcript was part of the evidence to be considered.

Sentence

[36] Counsel for the Appellants submitted that the Court should find that the imposition of the minimum sentence was very harsh and unjust. The Court must not take the sledgehammer approach where presenting mitigating factors is just paying off lip service. He finally submitted that the honourable Court should uphold this appeal against conviction and sentence and set them aside.

Respondent's

submissions

- [37] Counsel for the Respondent, Ms Nazley January, submitted that the correct approach for the Court to follow regarding a factual dispute between evidence of the State and that of the defence is to apply its mind, not only to the merits and demerits of the case or rather of the State and the defence witnesses, but also to the probabilities of the case.
- [38] Counsel argued that there was no contradictory evidence about the street name. The complainant testified that she was raped behind Maude street. Under cross-examination, she stated that she did not know all the streets in Attridgeville. If one examines the AVR report, it does not give the exact location, and the expert confirmed that.
- [39] Counsel further submitted that the Appellants admitted that they were with the complainant. The charge sheet reads, "at or near Mphalane Street". Looking at the map, Mphalane street is perpendicular to Maude street. If there were any shortcomings, they could have been cured by section 88 of the Criminal Procedure Act.
- [41] Ms January argued that Counsel for the Appellants is not an expert on alcohol. There was no evidence from police officers that she had to sober up from 1:00 to 5:30a.m. It is not a material contradiction that the complainant testified that she asked the police officers to take her home and her boyfriend said the police officers volunteered to take her home.
- [42] Counsel further submitted that no DNA report had been handed in. The allegation was that the Appellants used condoms in raping the complainant. The medical evidence also recorded that condoms were used. The doctor who examined the complainant corroborated her version that she was raped. The doctor concluded that "there is marked tenderness on vaginal examination. That was in keeping with forced vaginal penetration".
- [43] Counsel argued that there is no rule book on how rape victims must behave. Everyone acts differently. The complainant testified that she was crying, tears rolling down her face. Any sexual history is inadmissible in terms of section 227 of the Criminal Procedure Act. How do we expect a rape victim to count time when she is being sexually violated?
- [44] Counsel for the Respondent reiterated that the complainant was a single witness. Section 208 of the Criminal Procedure Act regulates whether a single witness' evidence can be accepted. In *R Mokoena*,^[1] the Court stated:

“Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [section 208], but in my opinion, that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material aspect.”

- [45] Ms January further submitted that the complainant testified that when she was at the back of the bakkie, she was lying on her back. She resisted with the second Appellant. He then pulled down her jeans to below her knees and above her ankles. He then forced her legs open and inserted his penis into her vagina without her consent. She started crying. She also testified that he was wearing a condom. The other Appellant then followed and did the exact same thing. The complainant went as far as demonstrating to the Court how the rape was done. She showed the Court how the second Appellant forced her legs open.
- [46] Counsel asserted that the evidence tendered in Court meets the definition of rape in terms of section 3 of the Sexual Offences Act 32 of 2007. She testified that both Appellants inserted their penis into her vagina without her consent, and both used condoms. She did not see it as it was dark, but she felt the condom.
- [47] Counsel referred the court to section 35(3)(h) of the Constitution, which states that “Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings”.
- [48] Counsel referred the Court to *State v Allan Boesak* (“Boesak”),[2] where the Court stated the following:

“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used as evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence”. (footnotes omitted)

- [49] Judge Langa (DP), in *Boesak*, also referred to *Madala J in Osman and Another v Attorney – General, Transvaal*,[3] where the following was said:

“Our legal system is an adversarial one. Once the prosecution has produced sufficient evidence to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.” (footnotes omitted)

[50] Counsel for the Respondent argued that the two Appellants did not testify. In as much as the proceedings of bail form part of the trial record, the evidence must be led during the trial, and a failure to lead such evidence relegates such evidence to hearsay evidence, which is inadmissible.

[51] Counsel further referred the Court to *S v Katoo*,^[4] where Jafta AJA, as he then was, had this to say:

“The other issue relates to the weight attached by the trial Judge to the defence version which was put to the State witnesses under

cross-examination. It was treated as if it were evidence when the trial court considered its verdict on the merits. As the respondent

failed to place any version before the Court by means of evidence. The Court's verdict should have been based on the evidence led by the prosecution only.”

[52] In conclusion, counsel submitted that as indicated previously, the Appellants have no evidence before this court, even though they testified in the bail proceedings. For that evidence to become available, they needed to testify at the trial. It is clear that the State discharges the onus of proof in a criminal case if the evidence establishes the guilt of the accused beyond reasonable doubt. The State submits that the prosecution proved its case beyond reasonable doubt.

[53] Counsel for the Respondent referred the Court to *State v Malgas*:^[5]

"Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[54] Counsel further referred to *S v C*:^[6]

“Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim

and subjects her to mental torment for the rest of her life – a fate often worse than the loss of life. . . . Society demands

protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes”

- [55] Ms January, in her submissions that sentence granted by the Court a quo is proportional to the offence committed, referred to *S v Vilakazi*,^[7] where the court, at paragraph 58, stated that in cases of serious crimes, 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 of whether the accused is married or single, or whether he has two or three children, or whether or not he is in employment, are in themselves largely immaterial to what the period should be, and those seem to me the kind of flimsy reasons or grounds that Malgas said should be avoided.
- [56] Counsel for the Respondent respectfully submitted that in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, the Legislature has ordained these hefty sentences. Regarding the Appellants’ personal circumstances, nothing was placed before the Court that was substantial and compelling to warrant deviation from the minimum sentence.
- [57] In conclusion, counsel submitted that the aggravating circumstance was that the Appellants were both police officers whose job was to protect the community. The complainant told the social worker that she saw the Appellants as her rescue; she trusted them that evening. The damage inflicted on the complainant, who was 17 years old at the time, will have a serious impact on her for the rest of her life. For all these reasons, she respectfully submitted that the appeal against conviction and sentence be denied.

F. AD CONVICTION

- [58] When evaluating or assessing evidence, it is required that all evidence must be evaluated. Judge Nugent, as he then was, in *S v Van Der Meyden*,^[8] stated that:

“What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.”

- [59] In *S v Hadebe and Others*,^[9] the flynote reads:

“Trial court's evaluation of evidence – Presumption that trial Court's findings of fact are correct - In the absence of demonstrable and material misdirection by trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong - In determining whether the trial court's findings of fact were clearly wrong, it is a useful aid to break the body of evidence down into its component parts, but in doing so, one must guard against a tendency to focus too intently upon separate and individual parts of what is, after all, a mosaic of proof. Evidence ultimately to be assessed as a whole.”

- [60] The State presented the evidence of five witnesses: the complainant, her boyfriend, her sister, the doctor, and Mr Deysel. The complainant testified that she was at a pub with her boyfriend and some friends. They quarreled and pulled each other outside the pub.
- [61] The Appellants arrived and separated them. She requested that they take her home and drove off with them. They drove and stopped on the street behind Maude street and told her to go to the back of the bakkie while they went to collect her friend, as she requested, so that she could sit with her friend.
- [62] The second Appellant alighted and gave her space to alight. She went to the back of the Bakkie; the second Appellant followed her and sexually penetrated her using a condom. The first Appellant also came and sexually penetrated her. They dropped her and left.
- [63] She walked, met her sister at the gate, and reported the rape to her. They went to her boyfriend and reported the ordeal. They accompanied her to the police station and the rape case was reported.
- [64] She was taken to the hospital and examined by the doctor. Her sister corroborated her version of what happened after the rape. The complainant arrived where she was and reported that the police raped her. Her boyfriend also corroborated her version of what happened before and after the rape. The doctor supported her evidence by concluding, after examination, that there was tenderness in her vagina, and that is in keeping with forced vaginal penetration.
- [65] The complainant was a single child witness who was 17 years old. Experience has shown that most rape victims are single witnesses. In the landmark case of *S v Jackson*,^[10] the Supreme Court of Appeal's ruling effectively eliminated the cautionary rule in sexual assault cases, acknowledging that it was discriminatory and inappropriate.
- [66] Section 208 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of any witness. The complainant made a favorable impression on the Court a quo. Despite being a minor, her evidence was found to be clear, satisfactory, and reliable in all material respects.
- [67] In *S v Sauls and Others*,^[11] the Court held that there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, consider its merits and demerits and, having done so, decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.
- [68] The two Appellants made Admissions in terms of section 220 of the Criminal Procedure Act. They corroborated the version of the complainant. The only issue in dispute was the sexual intercourse. The Appellants' basis of defence was a bare denial.

- [69] Counsel for the Appellants submitted that the Court must not believe the evidence of a school-going child, a minor who was at the tavern at 23:00, under the influence of alcohol and involved in sexual activity. It is impossible for the complainant to have felt a condom inside her vagina. It was impossible for rape to have occurred at the back of the bakkie.
- [70] I am appalled, if not disappointed by counsel's submissions. Does the fact that the complainant is young, drinks alcohol, and is sexually active make her a bad witness? How does counsel know that women cannot feel the condom? I agree with counsel for the Respondent that an inspection in loco was not done on the police bakkie to conclude that it was impossible.
- [71] In *S v Chapman*,^[12] the Supreme Court of Appeal articulately stated that women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without fear, apprehension, or insecurity, which constantly diminishes their quality and enjoyment of life.
- [72] The Appellants elected not to testify. Counsel for the Appellants submitted that the Court could not reject the defence version as averred in the plea explanation or put to the state witness as untruthful or false. The Court must also consider the version of the Appellants' bail transcript.
- [73] The Appellants' failure to give evidence must be considered along with all the other factors in the matter to ascertain whether their guilt has been proven beyond reasonable doubt. The value to be attributed to their failure to give evidence depends upon the surrounding circumstances of the matter.
- [74] The Court agrees with counsel for the Respondent that the bail proceedings are not admissible in trial proceedings. In *S v Sibeko*,^[13] the Court stated:
- "The District Court record of bail proceedings may have been part of the record of proceedings that were transferred to the regional court, but that did not automatically render it part of the trial record. It is so that section 60(11B)(c) of the CPA not only makes the record of the bail proceedings part of the record of the subsequent trial record, but makes any evidence that the accused elects to give at the bail hearing admissible against him or her at trial, provided the court hearing the bail application had warned the accused of the risk of such use. The record of the bail proceedings is neither automatically excluded from nor included in the evidentiary material at trial. Whether or not it is to be excluded is governed by the principles of a fair trial. The regional magistrate seems to have mistakenly interpreted this bail provision to mean that the record of the bail proceedings is automatically admissible in toto."*
- [75] It is trite that all versions must be repeated under oath and tested in cross-examination before any Court can accept any facts and, in turn, attach evidentiary weight to the said evidence. Versions put to the witnesses must, alike, be repeated under oath and be tested in cross-examination before any party can argue that the truth was told.

- [76] The Court is mindful of the fact that no duty rests upon the accused to prove his innocence. However, in light of the strong evidence implicating the Appellants, one would have expected them, in these circumstances, to answer to the allegations if they are innocent. The defence put forward during plea explanation, or cross-examination of the state witnesses, could have been repeated with ease and even conviction in the witness box.
- [77] The fact that this was not done, after proper consideration, the Court found that they knew that its untruthfulness would have been exposed during cross-examination.
- [78] As a result, this Court is satisfied that the trial Court rightly convicted the Appellants. The appeal against conviction must fail.

G. AD SENTENCE

- [79] I now turn to the question of sentence. In terms of section 51(1) of Schedule Two of the Criminal Law Amendment Act 105 of 1997, on conviction of rape by more than one person, the Court was bound to sentence the Appellants to life imprisonment unless there were substantial and compelling circumstances justifying a lesser sentence.
- [80] In *S v C*,^[14] the Court stated that rape is regarded by society as the most heinous of crimes, and rightly so. A rapist does not murder his victim, he murders her self-respect and destroys her feeling of physical and mental integrity and security.
- [81] In *Maila v S*,^[15] the Court stated that:
- “With the onslaught of rape on children, destroying their lives forever, it cannot be ‘business as usual.’ Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences.”*
- [82] The general principles governing the imposition of a sentence in terms of the Minimum Sentences Act, as articulated by the Supreme Court of Appeal in *Malgas*, have been endorsed by our Courts and cannot be ignored.
- [83] In *S v Matyityi*,^[16] the Supreme Court of Appeal reaffirmed that:
- “The fact that parliament had enacted the minimum sentencing legislation was an indication that it was no longer ‘business as usual’. The court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.”*

To avoid these sentences, the accused must satisfy the Court that substantial and compelling circumstances exist to justify a lesser sentence.

[84] The Court a quo considered the totality of the evidence, mitigating and aggravating circumstances, and found that there were no substantial and compelling circumstances justifying a lesser sentence. It follows, accordingly, that there is no misdirection by the trial Court. There is, accordingly, no merit in the appeal against the sentence. The sentence of life imprisonment is, therefore, confirmed.

[85] The following order is made;

Appeal against conviction and sentence is dismissed.

N L MOILA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

J S NYATHI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants: Molatelo Malowa SC

Instructed by Zamisa Shisinga Attorneys

Counsel for the Respondent: Nazley January

Instructed by the State.

Date of hearing: 19 March 2025

Delivered: 21 May 2025

[1] 1932 OPD 79 at 80.

[2]

[2000] ZACC 25; 2001

(1) SA 912 (CC) at para 24.

[3] 1998

(4) SA 1224 (CC). at para 22.

[4] 2005

(1) SACR 522 (SCA) at para 19.

[5] 2001

(1) SACR 469 (SCA) at para 25.

[6] 1996

(2) SACR 181 (C) at 186D-E.

[7] 2012

(6) SA 353 (SCA).

[8] 1999

(1) SACR 447 (W) at 450A-B.

[9] 1998

(1) SACR 422 (SCA).

[10] 1998

(1) SACR 470 (SCA).

[11] 1981

(3) SA 172 (A).

[12]

[1997] ZASCA 45; 1997

(3) SA 341 (SCA) at 345A-B.

[13] 2024

(2) SACR 25 (NWM) at para 17.

[14] Above n 6.

[15] [2023] ZASCA 3 at para 59.

[16] 2011

(1) SACR 40 (SCA) at para 11.

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