

SOUTH AFRICA / JUDGMENT

Muregu v S (Appeal) (HCA 02/2024)

[2025] ZALMPTHC 2 (21 January 2025)

[2025] ZALMPTHC 2**COURT**

Limpopo High Court, Thohoyandou

BEFORE

Matumba, MV Semenya, TC Tshidada

CASE / FILE NUMBER

HCA 02/2024

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Source record**THE****REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA;****LIMPOPO****LOCAL DIVISION; THOHOYANDOU.****CASE****NO. HCA 02/2024****(1) REPORTABLE: YES/NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED.****DATE:**

21/01/2025

SIGNATURE:

In

the matter between:AVHAPFANI
ZACHARIA MUREGU
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

Date Heard: 06 September 2024

Delivered: 21 January 2025.

On appeal from the High Court of South Africa, Limpopo Local Division, Thohoyandou (Shaik, AJ sitting as the court of first instance)

Matumba, AJ

Introduction

[1] Mr. Avhaphani Zacharia Muregu (the appellant) is appealing against the convictions and sentences issued on 11 December 2012 and 24 January 2013 by Shaik, AJ, while sitting as the trial court in this division of the High Court.

[2] The appellant was arrested and charged with several counts of assault with intent to do grievous bodily harm (assault GBH), robbery with aggravating circumstances (robbery) and rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 and kidnapping. He faced a total of twelve counts. He

pleaded guilty to two counts of assault GBH, namely, counts four and eleven and he was convicted in accordance with his pleas. In respect of counts one, two and twelve, he was acquitted in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (the CPA). He pleaded not guilty in respect of counts three (rape), five (rape), six (robbery), seven (rape), eight (robbery), nine (assault GBH) and ten (kidnapping).

[3] The trial court acquitted the appellant in relation to count three (rape) and convicted him on counts five to ten. For counts five to ten, the appellant was sentenced as follows: five-years' imprisonment for count four; fifteen-years' imprisonment for count five; ten-years' imprisonment for six; life imprisonment for count seven; ten-years' imprisonment for count eight; five-years' imprisonment for count nine; and eight-years' imprisonment for count ten. Some sentences were ordered to run concurrently, as follows: for count five, with the sentence for count six and for counts seven and nine, with the sentence for count ten.

[4] In relation to counts four and eleven, the appellant was sentenced to five-years' imprisonment per count and the sentences were not ordered to run concurrently with any other sentence.

[5] In counts five and six, the complainant was MM, in counts seven and eight, the complainant was ND, and in counts nine and ten, the complainant AN.[1]

[6] The appellant was granted leave to appeal to this court by AML Phatudi, J, on 24 October 2022, against the convictions and sentences for counts five to ten.

- [7] In this appeal, the appellant argues, in relation the convictions, that the trial court failed to assess the entire evidence presented before it and did not adequately explain its reasons for rejecting his defences and accepting the versions of the state. Regarding the sentences, he contends that the trial court neglected to incorporate the element of mercy and over-emphasized the severity of the offences at the expenses of other factors.

Condonation

- [8] The appellant's notice of appeal was filed late. It was due for filing on or before 24 October 2022. For this reason, he sought condonation for the late filing. He attributes the delay to the fact that he only became aware in May 2023, through the Registrar, that he had been granted leave to appeal. At that time, the deadline for filing the notice of appeal had already elapsed. This application was not opposed. Therefore, there are no factors preventing the granting of the requested condonation. Accordingly, condonation for the late filing of the appellant's notice of appeal should be granted.

Incomplete record

- [9] Counsel for the appellant argued that the record of appeal does not include the evidence of MM, ND, AN, Dr. Norman Mukwevho; Police Officer Murovhi, . Dr. Yvonne Denga, and Mr. Aluwani Desmond Lavhengwa. This argument was rejected by this court, considering that the evidence of all witnesses relevant to this appeal is contained in the appeal record.

Summary of the evidence presented before the trial court

- [10] MM testified regarding counts five (rape) and six (robbery), indicating that these incidents occurred on 19 March 2007 when she was 18 years old. She stated that the events took place around 16h00 in the afternoon when she was walking home from Thohoyandou Technical

High School, where she was a student. While walking along the footpath, she noticed the appellant suddenly approaching from behind.

He was moving in the same direction as she was.

- [11] As her got closer, she began to run. The appellant ran after her and overtook her, blocking her path. He then demanded her money and she told him that she did not have any. He produced an Okapi knife and threatened her, then proceeded to search her. He took the Nokia cell phone from her and, after putting the knife to her waist, demanded money again. She then gave him an amount of about R30-00 which was in her possession. He then dragged her into the nearby bushes, where he undressed her panty and demanded that she engage in sexual intercourse with him. He produced a condom, wore it and proceeded to have sexual intercourse for about 15 minutes with her. She testified that she did not know him at the time and she did not give him permission to have sexual intercourse with her. He threatened her by saying that if she screamed, he would kill her.

- [12] As he was not wearing anything that would conceal his identity, she managed to see his face clearly. She also saw a bleeding injury on one of his legs. After the sexual intercourse, she dressed and went home where she to tell her mother what had happened to her. Her mother then took her to the clinic, and later to Tshilidzini Hospital, where she received treatment and was subsequently discharged.
- [13] She saw the appellant for the second time when she identified him during the identification parade on 27 March 2007 at the Thohoyandou Police Station (the parade). She mentioned that there were other individuals present at the parade and they were taken into the parade area one by one, after which they were directed to a different office to avoid contact with the individuals who were yet to enter the parade area.
- [14] MM's mother testified that on the day in question, MM returned home crying. When she asked her why she was crying, MM informed her that she had been raped and robbed of her money and cell phone. She then took her to the clinic, where she was transferred to Tshilidzini Hospital. The doctor confirmed to her that MM had been raped.
- [15] ND testified regarding counts seven (rape) and eight (robbery), stating that on 22 March 2007, between 10h00 and 11h00 in the morning, she was walking alone on the footpath from her home at Tshivhulana to the Thohoyandou Technical High School at Thohoyandou, where she was a student. She met the appellant at a place where the grass on the sides of the footpath stood out at her waist level. It

was sunny, and visibility was good and she was able to see the appellant clearly.

- [16] There was nobody else around; the nearest buildings were at a distance behind her. The appellant came from behind her and when she yielded to him for passage, he stopped near her. He was wearing a short khaki trouser, a cap, and at-shirt. He held an open knife in his hand and pointed it at her, demanding that she give him her cell phone and money. He took an LG cell phone and an amount of R16-00 from her.
- [17] She stated that she could not scream for help due to fear of being harmed with the knife. He then forcefully took her into the nearby bush, where he continued to demand more money from her. She gave him an amount of R12-00 that remained in her bag. He made her sit down and told her that he intended to have sexual intercourse with her. Following that, he ordered her to remove her clothing. He asked her if he should wear a condom or not, and she told him to wear one. He kissed her on the mouth and produced a condom, which he wore. He took off his cap and put it down together with the knife, and then began

to have sexual intercourse with her. After a short while, he stopped, removed the condom, knotted it, and put it in his pants. He then retrieved another condom, wore it, and engaged in a sexual intercourse with her for the second time while she was lying on the ground on her back. After that, he removed the condom, knotted it, and concealed it.

- [18] She made it clear that she did not consent to the sexual intercourse and that he said he did not propose love to her. She also mentioned that he asked her if she had a boyfriend, and when she replied that she did not have one, she asked him if he would want to be her boyfriend. He responded that he would like to be her boyfriend. They then exchanged their cell phone numbers. Eventually, he deleted her cell phone number from his cell phone and instructed her to delete his cell phone number from her cell phone as well. However, she managed to memorised it.
- [19] She said that after the sexual intercourse, he agreed to accompany her to the school, and when they were on their way there, they saw two boys. She told him to go a different direction, but he refused. She then started to scream for help. This enabled her to run away until she met two ladies who took her to her sister's place of work.
- [20] After explaining to her sister what had happened, the matter was reported to the police, and she was taken to the hospital for medical treatment. She mentioned that she met the appellant for the second time at the police station on 27 March 2007 during the parade where she identified him.
- [21] Dr. Yvonne Denga testified that she is the doctor who attended to ND at the hospital. She stated that ND complained of sexual assault on the day. She observed scratch marks on her left arm and the front of her elbow, along with lacerations in ND's private parts. In the J88 form, she recorded that the injuries on ND's private parts were consistent with the history of sexual assault and were most possibly caused by a penis.
- [22] AN testified regarding counts nine (assault GBH) and ten (kidnapping). She said on 19 January 2008, while watching soccer with her boyfriend, Aluwani Desmond Lavhengwa (Desmond), at the local soccer ground at Ha-Makhuvha, the appellant called her to ask her if she was seeing him and replied that she is seeing him. After the soccer match the appellant and his friend approached them and asked her to come with him. She refused. The appellant then grabbed her and slapped her several times on her face with his open hands. The appellant's friend tried to stop the appellant from assaulting her but was unsuccessful. When Desmond protested, he assaulted him. The appellant then grabbed a brick and warned that he would throw it at Desmond if he did not leave. AN stated that Desmond only left after she told him to do so. She said the appellant continued to assault her after Desmond had left. Although she screamed for help, no one came to her rescue. As a result of the assault, she sustained injuries, which were recorded on the J88 that was exhibited in court and marked as Exhibit D.
- [23] She further stated that the appellant did not allow her to go home. Later at night, when people in the nearby homes were already in their houses, the appellant took her to an area near the river, where he made her sit with him on the side of the river. She asked him to let her go home, but he refused. She phoned her father and told him she was dying and after that call, the appellant took her cell phone.

- [24] At about 20h00, the appellant took her for a walk in the village. She said she could not scream for help because the appellant had a knife with him. At some point, she got her cell phone back from the appellant and she called her father, informing him that she was in danger. However, the appellant took the cell phone away again. At that point, he switched it off.
- [25] Later on, between 21h00 and 22h00, she managed to make another call to her father and informed him of her location and her father indicated that he was coming to her. After that, the appellant made them to move to another location so that her father could not find them at the location she called from. At that point, the appellant said he intended to have sexual intercourse with her. She then saw a police van passing by, and because it was far away, she could not scream for help. The appellant then took her to his home where he took some condoms. After that, he took her to the nearby school where he ordered her to take off her pants. When she refused, he threatened to stab her with the knife. He then started to undress her, but just then, the police van passed by. This prompted him to leave the school premises with her through an informal pathway.
- [26] At about 24h00, when they walking through a mealie field, her father called her, and when her cell phone rang, it flashed a big blue light and from the darkness, an unknown appeared. This prompted the appellant to run away. Her father found her there in the company of the said unknown man. Eventually, she was taken to the hospital where she was treated for the injuries she sustained. After she was discharged from the hospital, Desmond visited her at her home.
- [27] AN stated that her meeting with the appellant on the day was not their initial encounter. The first time they met was when she was with her friend Makhale[2], and he was accompanied by his younger brother Matika[3] where the appellant told her that he loves her. She said since the appellant was not her type of boyfriend, she and Makhale simply high-fived, laughed, and walked away. She said the other time she encountered him was on a stoney hill where he was by himself. On that encounter, he simply waved at her, and she waved back. She eventually became familiar with the appellant's home at Ha-Makhuvha. She mentioned that at one point she shared her cell phone number with the appellant, and he would often call her just to greet her.
- [28] Aluwani Desmond Lavhengwa testified that AN had been his girlfriend since before 19 January 2008, the day on which, he and AN met with the appellant when they were walking from the soccer ground where they were watching soccer together. He said when the appellant approached them, the appellant asked AN to come along, but she declined because she was with him. Then the appellant seized AN, but she resisted being taken away by clinging on him (Desmond). This led to the appellant slapping Desmond on the neck with an open hand. When AN became upset, the appellant slapped her across the face. Then AN pulled away from Desmond, and the appellant told Desmond to leave. AN questioned the appellant about why he was assaulting her, but eventually stopped asking and began to cry.

An argument broke out between him and the appellant, during which the picked up a brick and pelted it at him, but missed. AN urged him to leave, as the appellant had demanded. Ultimately, he left the appellant with AN, whom the appellant continued to assault. He said although he left for his own safety, he did not go far way because he wanted to see if AN would be safe. He was then joined by his friends who refused to assist him to rescue AN because they were afraid of the appellant.

- [29] He said, at one point he lost sight of AN and the appellant, so he decided to go home with his friends. Before he arrived home, AN's father and other with him approached and asked him where AN was. He informed them that the appellant had taken her away by force. They then asked him to accompany them to the appellant's home to search for AN. made to come with them to the appellant's home in search for AN but they did not find her there. AN's father later received a text message from her asking for help and indicating her location. They went to that place but still could not find her. AN continued to send text messages about where they were, but each time they searched those locations, they came up empty. As it grew colder, he, along with AN's brother and cousin, went home to get jerseys. When they returned to the continue the search, they found AN with her father and other searchers. AN was crying and injured, with a swollen face and dirty clothing. Then the incident was reported to the police.
- [30] During cross examination, Desmond was asked if he lost interest in AN's safety when he lost sight of her, to which he answered yes, that was true. He admitted that although it was necessary and possible for him to report the incident to the police station at Matatshe, he did not do so because it was too far and he was unsure of what to do. He also admitted that he is not the one who informed AN's father about the incident. He also stated that AN did not mention that the appellant had previously proposed love to her or that the appellant used to call her regularly. He also stated that AN had not told him that the appellant had called her during the soccer-match to ask if she could spot him. Based on this, he testified that he found AN to be untrustworthy.
- [31] AN's father testified that on January 19, 2008, he received text message from AN around 17h00 that read, "Daddy, come quick, I am dying." When he tried to call her, her phone was off. He then called his son to ask where AN was, and his son informed him that she was at the soccer ground. He instructed his son to search for her there, but his son later sent a message saying there was no one at the soccer ground. After that, he called AN's mother and asked her to rush to Vhufulwi Clinic, but she found that AN had not reported there. Later that evening, he, along with others, began searching for AN. During the search, he learned that some people had seen the appellant dragging AN away. He then went to the appellant's mother, who told him that the appellant no longer lived there. He was directed to Dagama's house, where the appellant resided, but found no one.

- [32] He subsequently AN's father went to the satellite police station to report the matter. At 21h30, while he was still searching for AN, with police assistance, he received another call from her, stating that the appellant would not let her go home. This was followed by a "please call me" text from AN. When he called her back, she said the appellant is taking her home.
- [33] When AN's father got home, he received another text from AN saying they were at Matatshe. Upon arriving at Matatshe, she called again indicating that they were at a tavern, but when they reached the tavern, they could not find them. The he called her and she said they had turned towards the school and added, "You will not find me on the main road because he is taking me past various homes." As they were about to stop the search at 04h30 in the morning, they saw a cell phone light illuminating in the mealie fields. He recognized the light and then proceeded towards it where they found AN with man who rescued her from the appellant. AN's cheeks were swollen, and her eyes were red. AN was then taken to the satellite police station where the incident was reported. According to him, Desmond was AN's boyfriend.
- [34] Mr. Rudzani Stanley Takalani testified about the photos which were taken during the parade. He said he took the photos at the request of Captain Mutsila. The trial court admitted the said photos and marked them exhibit G.
- [35] Captain Murangi Mutsila testified as the person who conducted the parade. He stated that he took the appellant from the cell where he introduced himself to him by showing him his identification card. He informed him that he was going to conduct the parade and explained his rights, which included the right to refuse to join the parade. He also explained in detail the rights to legal representation and that any evidence adduced at the parade would be used against him in court. He said the appellant confirmed that he understood his rights and elected to participate in the parade without a legal representative. He then looked for the photographer (Takalani) and selected other ten inmates, of more or less the same age and built as the appellant, for participation in the parade. He designated Inspector Morobe as the guard of the witnesses and Inspector Lapatse as the escorter of the witnesses from Inspector Morobe's office to the parade area. He said appellant raised no issue with the clothes he was wearing. During the parade, the appellant was allowed an opportunity to change his clothes and change positions, and he did so. Captain Mutsila took the trial court through the photos in Exhibit G, including the photos which show MM, ND and AN pointing out the appellant.
- [36] Warrant Officer Matikole Nkandele, testified as the officer who investigated the case against the appellant. He denied that the appellant had contact with MM, ND and AN at the police station before the parade. He said after the identification parade, MM's cell phone was found in the possession of the appellant. He said the cell phone was later returned to MM.

[37] Inspector Lapatse served as the cell guard during the parade. He testified about his role and his evidence was brief and not contentious.

[38] The relevant exhibits handed in by the state were the certificate in terms of Section 214 of CPA and the J88 (Exhibit L) in respect of ND and the J88 in respect of MM (Exhibit M).

Appellant's case

[39] Regarding the offences MM and ND complained of, the appellant raised a similar defence. He denied that he robbed and raped them. He stated that he met them for the first time at the police detective's office at the police station on the day of the parade, where he found them seated with Inspector Nkandele. He stated that Inspector Nkandele informed him, in the presence of ND, about the parade, which was to take place. He said that is why both MM and ND were able to identify him at the parade. With regard to the injury on his leg, which MM testified about, he stated that MM could have seen his injury at the time when he found her seated with Inspector Nkandele before the parade. He denied that ND's cell phone was found in his bag after the parade.

[40] Regarding the offences AN complained of, the appellant denied that he assaulted and kidnapped her. He said on 19 January 2009, he made a telephonic arrangement to meet with AN at the soccer ground. When they were both at the soccer ground, he phoned her to alert her that he was also at the soccer ground. He said they confirmed seeing one another. During half-time, he met her and asked her to come with him. Desmond, who was in her company, stopped her from coming with him by pulling her backwards with her hand. He then held her with her other hand and pulled her towards him. When he and Desmond were pulling her in different directions, Desmond slapped her with his open hand. He let go of AN and started to fight with Desmond. AN ran away and stood about a kilometer from where they were fighting. Thereafter, Desmond ran away to go and rejoin AN, whom he continued to assault. He went home and did not see Desmond and AN again. He denied that AN was found in his company during the early hours of the next morning. He stated that all his friends at home know that him and AN were lovers and that he even had her photographs.

[41] Regarding the lawfulness of the parade, apart from his statement that MM and ND were able to identify him because he met them at the police detective's office before the parade, he stated that he was not informed of his right to have a legal representative at the parade. Otherwise, he would have sought that his legal representative be present.

The trial court's assessment of the evidence

[42] After rehashing the evidence, the trial court assessed the evidence as follows:-

"With regard to counts five and six the court is satisfied that the witness had correctly pointed out the accused as being the perpetrator. So too in counts seven and eight. That witness too had correctly pointed out the accused as the perpetrator at the identification parade which parade the court had ruled was correctly done and that there too the witness had clearly testified. As regards counts nine and ten the court was satisfied with the state witnesses that the accused did indeed

assault AN[4] on the day in question. And we heard the testimony of the father who testified clearly how he had suffered being in search of the child. And that she was deprived of[sic]. And also, he had testified that there were no ways that accused 1 could have been the boyfriend of AN because Desmond was the boyfriend. And Desmond was indeed assisting the father to look for the child. So, the court therefore then

court[sic] finds the accused guilty of counts five, six, seven eight, nine and ten."

[43] It needs to be pointed out here that the trial court's assessment of the evidence is not a model of clarity and adequacy. It therefore behooves this court to evaluate whether the state proved its case against the appellant beyond reasonable doubt based on the evidence presented before the trial court.

Convictions

[44] In respect of counts five and six, the evidence of MM shows that she the appellant met and stopped her when she was coming from school, going home. He threaded her with a knife, searched her, and forcefully took her Nokia cell phone and money in the amount of R30-00. This evidence proved the charge of robbery without any doubt.

[45] With regard to the charge of rape, MM testified that the appellant dragged her into the bushes, where he undressed her panty, wore a condom, and had sexual intercourse with her for about 15 minutes without her consent. She also testified that on the day in question, after she told her mother what f:lad happened to her, her mother took her to the clinic and later to Tshilidzini Hospital where she was treated and discharged. Her injuries were recorded on the J88 which was marked as Exhibit M. Her mother testified and her evidence was consistent with MM's evidence in so far as what MM told her when she got home on the day the incidents occurred. Plainly, this evidence proved beyond doubt that MM was raped. It needs to be mentioned here that the appellant did not deny that MM was raped. The appellant gave no evidence over that of MM that could redound to his favour.

[46] With regard to the identity of the appellant, MM stated that she did not know the appellant before these incidents took place, but she managed to see his face clearly because he was not wearing anything that prevented her from seeing him. It was during the day, and visibility was good. She mentioned that, that this why she was able to identify him at the parade. This evidence proves beyond that MM was able to identify the appellant at the parade because she had a clear and unobstructed view of him on the day of the incidents.

[47] What is more is that, MM even mentioned that she saw a bleeding injury on one of the appellant's legs on the day of the incidents. This injury was not denied. The appellant's defence that MM could have seen his injury on the day of the parade was inadequately detailed. The appellant did not indicate if he was wearing clothes that revealed the injury and whether the injury was still visible on the day of the parade and how MM could have seen it. This is not to suggest that the appellant was obligated to prove the truth of this defence, but that the appellant ought to have set out a defence which was reasonably

possibility true unlike this defence which is materially flawed. With this said, this court is of the view that the appellant was correctly identified by MM in the parade and that the appellant is the person who robbed and raped her.

- [48] The evidence of MM was credible and reliable, and there was no reason why the trial court would not convict the appellant on counts five and six based on the evidence of MM alone.
- [49] In respect of counts seven and eight, the evidence of ND was to the effect that the appellant met her when she was on her way to school. He took out a knife and pointed it at her and demanded her cell phone and money. He took from her, without her consent, her LG cell phone and a total amount of R28-00 (being the R16-00 he took earlier and the R12-00 which remained in her bag which he took after making a further demand). According Warrant Officer Nkandele, ND's cell phone was found in the appellant's bag after the parade. This evidence proved beyond doubt that ND was robbed.
- [50] With regard to the charge of rape, ND mentioned that after taking her cell phone and money, the appellant took her into the nearby bushes, where he forced her to undress herself, wore a condom and had sexual intercourse with her twice without her consent. The matter was reported to the police and she was taken to the hospital for medical treatment. In the J88, Dr Yvonne Denga, concluded that ND sustained injuries which were in keeping with the alleged sexual assault and most probably caused by a penis. This evidence proved without a doubt that ND was raped.
- [51] With regard to the issue of the identity of the appellant, ND said although she was meeting with the appellant for the first time, she was able to see him clearly. She said it was sunny and visibility was good and at some point, the appellant took off the cap he was wearing and put it down. This enabled her to see him clearly hence she was able to identify him at the parade. Undoubtedly, this evidence proves that ND was able to identify the appellant at the probable because she saw him clearly on the day on the incidents. What strengthened the evidence of ND regarding the identity of the appellant is that she memorised the cellphone number he gave on the day on the incidents. The principle of non-contestatio, admittitur would apply here, as the appellant did not deny that the cell phone number memorised by ND belonged to him, thereby inferring an admission of its ownership by the appellant. This proved beyond doubt that the appellant is the one who robbed and raped ND.
- [52] AN's evidence was credible and reliable. The trial court faced no barriers in accepting the evidence of ND as true, and inversus, it could justifiably reject the appellant evidence as false.
- [53] In view of the above, the appellant's defence that ND was able to identify him because he met with her at the office before the parade was mischievous.
- [54] With regard to counts nine and ten, the state relied on the evidence of AN, her father and her boyfriend, Desmond. AN mentioned that she refused to come with the appellant from the soccer ground where he found her with Desmond. This made him to grab her and slap

her on the face several times with his open hands. This evidence was corroborated by Desmond who was there when she was assaulted. She mentioned that the assault continued even after Desmond had left them. The J88 which was marked as exhibit D showed that she was injured. Undoubtedly, this evidence proved that AN was assaulted by the appellant.

- [55] The appellant's defence that AN was assaulted by Desmond was not true. AN, Desmond and AN's father mentioned that AN and Desmond were in a love relationship. There was no valid reason given why Desmond would assault AN on the day. In fact, the evidence of both AN show that Desmond was not happy with the appellant assaulting AN. He did not want to leave AN with the appellant at the soccer ground. He even asked his friends to assist him to rescue AN from the appellant. He even participated in the search for AN, and even visited her when she came back from the hospital. Undoubtedly, the evidence of AN and Desmond proved that it is the appellant who assaulted her, not Desmond.
- [56] With regard to the charge of kidnapping, AN mentioned that the appellant took her from the soccer ground by force and kept her until the early hours of the next morning. He used a knife to threaten her and prevent her from screaming for help. She alerted her father about the danger she was in and he, in turn, organised a search for her. At some point he took her phone from her and at another point he switched it off to prevent her from making calls. When he realised that people were searching for her, he took her from place to place to frustrate the searchers. He did not intend to let her go home until she was rescued. According to her, he could have raped her had it not been for the police van which passed near the school where he kept her at some point. Her father and Desmond corroborated her evidence regarding the search and rescue which took place. This evidence proved beyond doubt that AN was kidnaped by the appellant.
- [57] With regard to the evidence of AN as a single witness regarding the kidnapping, the appeal record shows no contradictions and or improbabilities in her evidence.
- [58] Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness.

The parade

- [59] Regarding the parade, the appellant's defence was that MM and ND were able to identify him because he met them at the police detective's office before the parade and that he stated that he was

not informed of his right to have a legal representative at the parade for him to have one. It has been shown in this judgment that MM and ND were not able to identify the appellant at the parade because he met with them at the police detective's office before the parade.

- [60] With regard to the explanation of the appellant's constitutional rights before the parade, Captain Mutsila testified that he informed the appellant of such rights. He said the appellant confirmed that he understood his rights and elected to participate in the identification parade without a legal representative. The appellant had an opportunity to cross examine

Captain Mutsila regarding this issue. He could have used the cross examination to challenge the credibility and reliability of Captain Mutsila and reveal his inconsistencies, biases, or ulterior motives, if any. The appeal record contains nothing which could have lessened the credibility and reliability of Captain Mutsila's evidence. Thus, the trial court's finding that MM and ND correctly identified the appellant and that the parade was done correctly was faultless.

Sentences

- [61] It is established law that when the sentence imposed by a trial court is considered on appeal, the court of appeal must remain alive to the fact that sentencing falls pre-eminently within the jurisdiction of the sentencing court. An appeal court is only to interfere with a sentence imposed where such a sentence is disturbingly inappropriate or vitiated by a misdirection of a nature that indicates that the trial court did not exercise its discretion reasonably. Where a particular criminal offense carries a prescribed minimum sentence, the prescribed minimum sentence is not to be departed from lightly and for flimsy reasons. Where a trial court imposed the prescribed minimum sentence, the appeal court must find substantial and compelling circumstances justifying the imposition of a lesser sentence that escaped the trial court's attention.
- [62] In this case, the appellant contends that the trial court failed to blend the sentences with the element of mercy and over-emphasized the seriousness of the offences at the expenses of other factors.
- [63] A court need not necessarily articulate that it considered the element of mercy. Inference that it considered it may be drawn from the statement made during sentencing. The record contains a statement made by the trial court during sentencing which reflect that the trial court considered various elements and factors before sentencing the appellant. It considered whether there were substantial and compelling circumstances to deviate from the minimum sentences. Although the trial court did not articulate that it considered the element of mercy, it is *lex constituta* that the element of mercy is a consideration when determining whether there are substantial and compelling circumstances to deviate from the minimum sentence. Therefore, this court finds no merit in the contention that the trial court failed to blend the sentences with the element of mercy.
- [64] What is clear from the record is that the trial did not over-emphasise the seriousness of the offences at the expenses of other factors. Rather, the trial court's sentences were based on its finding that there were no substantial and compelling circumstances to deviate from the minimum sentence. This court is of the view that the trial court did not err in finding that there are no substantial and compelling circumstances justifying the imposition of lesser sentences.

Conclusion

- [65] The appellate court has the authority to review the entire record of the trial, including the evidence presented, to assess the evidence that the trial court failed to properly evaluate and to determine whether the trial court's conclusion was reasonable based on the evidence. It needs to be mentioned here that is an established principle of our law that an appellate court can affirm a conviction and sentence even if there are concerns about the adequacy of the trial court's assessment of the evidence.
- [66] This court is of the view that the evidence presented before the trial court proved the guilt of the appellant beyond reasonable doubt. Put differently, this court is of the view that the evidence presented before the trial court was sufficient and it could lead a reasonable court to convict the appellant as the trial court did. Thus, the appellant's convictions were reasonable.
- [67] Regarding the sentences, this court finds that the appellant has not made out a case for it to interfere with the sentences determined by the trial court. Neither does this court find that the sentences imposed were disproportionately harsh.
- [68] Resultantly, this court is of the view that the appellant's convictions and sentences should be affirmed.

Order:

The following order is made:

1. Condonation of the late filing of the appellant's notice of appeal is hereby granted.
2. The appeal is dismissed.

TE Matumba, AJ

MV Semenya, DJP

TC Tshidada, J

Appearances:

For the appellant: Mr. MP Legodi

Legal Aid South Africa

Thohoyandou Local Office

For the State: Ms. M Molepo

National Prosecuting Authority

Thohoyandou

- [1] Abbreviations are used to protect the identity of the complainants.

- [2] She did not mention Makhale's surname.
- [3] At times, she referred to Matika as the friend of the appellant.
- [4] My abbreviation and emboldening.
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