Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appeal No.: CA 19/2019
Regional Court Case No.: BR/90/2015

In the matter between:

VICTOR VAKELE MOTAUNG **Appellant**

and

THE STATE **Respondent**

Coram: Petersen ADJP & Maree AJ

Date of hearing: **18 June 2024**

Date of judgment: **24 June 2024**

Delivered: The judgment was handed down electronically by circulation to the applicants' representative *via* email. The date and time for hand-down is deemed to be **24 June 2024** at 12h00.

ORDER

(i) The appeal against conviction on count 4 is upheld and substituted with the following order:

"The accused is found guilty of a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997."

(ii) The sentence imposed on count 4 is set aside and replaced with the following sentence:

"Fifteen (15) years imprisonment."

(iii) The sentence on count 2 is ordered to run concurrently with the sentence on count 1. On each of counts 3 and 4, five years of the imprisonment shall run concurrently with the sentence on count 1. The effective sentence is therefore thirty-five (35) years imprisonment.

(iv) The appellant shall remain unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

JUDGMENT

PETERSEN ADJP

[1] The appellant was charged in the Regional Court, Tlhabane with robbery with aggravating circumstances read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') – counts 1 and 2; and contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) – counts 3 and 4.

[2] The appellant pleaded not guilty to all four charges on 01 March 2017. On 30 November 2017 he was convicted as charged on all four counts and sentenced on even date to fifteen years imprisonment on each of counts 1 to 3, and life imprisonment on count 4. The Regional Magistrate ordered the sentences on counts 1 to 3 to run concurrently with the sentence of life imprisonment on count 4, under the guise of ameliorating the impact of the sentence. In passing, it merits to highlight that the order of concurrency was superfluous considering the provisions of section 39(2)(a) of the Correctional Services Act 111 of 1998 which provides that:

"(2)(a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but—

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence …"

[3] The appeal is before this Court by virtue of the automatic right of appeal premised on the sentence of life imprisonment imposed by the Regional Magistrate on count 4. The appeal lies against the conviction on count 4 only.

[4] In terms of the Notice of Appeal, the appellant asserts that the Regional Magistrate erred in convicting the appellant on count 4 on the basis that the State alleged that he raped the appellant more than once. On Count 4, the State alleged that the appellant sexually penetrated the complainant more than once, by inserting his penis in her mouth and in her vagina.

[5] A full exposition of the facts leading to the rape of the complainant is not necessary, considering the narrow issue taken in the ground of appeal. The totality of the evidence of the complainant on count 4, B[redacted] G[redacted] M[redacted] on this issue is as follows:

At lines 4 to 6 on page 38 of the transcribed record:

"After he raped my aunt he then instructed me to undress and forced me to perform a blow-job on him and thereafter he raped me.

...

At lines 8 to 14 on page 41 of the transcribed record:

"Ma'am you then testified that he instructed you to perform a blow-job. What do you mean by that? --- He forced, he sat (sic) his penis in my mouth... And then you also said that after that he raped you. What did you mean by raped you? --- He instructed me to undress and thereafter he inserted his penis inside my vagina..."

[6] The evidence of the complainant on count 3, D[redacted] M[redacted], relevant to the rape of B[redacted] G[redacted] M[redacted] placed in context is as follows:

At lines 7 to 24 on page 13 of the transcribed record:

"...After M[redacted] had given that man R100 that man then instructed me to undress.

I took off my clothes and after undressing I requested that man to use a condom. The man then asked me as to where is the condoms? And I told him that they are on top of the wardrobe.

That man managed to get hold of the condoms but he never used it. Then he told me that he want (sic) to ejaculate inside of me. He then told me that I should perform a blow job to him. I refused and I told him that I do not know how to perform such a thing.

He then forced me to perform a blow job to him, he then started to rape me. As he had already told me that he want (sic) to ejaculate inside of me, he did keep his promise. He thereafter went over to M[redacted] and instructed her to undress. He then instructed M[redacted] to perform a blow job to him. And thereafter he started to rape her."

and

At lines 18 to 22 on page 17 of the transcribed record:

"...I saw when she, when he instructed M[redacted], made to perform a blow job unto him and thereafter he inserted his penis inside M[redacted]'s mouth. And thereafter he then inserted his penis into M[redacted]'s vagina..."

[7] The judgment on conviction on the issue is terse. The following appears from the judgment:

"He ordered G[redacted] to do the blow job also and thereafter he inserted his penis into her [indistinct] and raped her.

...

There is no doubt in the court's mind that the State through its five witnesses have proved these four counts against you without, or beyond reasonable doubt.

And for that reason you are found guilty as charged on four counts."

[8] It is trite that a court of appeal will not easily interfere with the factual findings of a trial court, and I may hasten to add, findings on law, unless such findings are clearly wrong. See *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a.

[9] The ground of appeal implicates a question of law predicated on the peculiar facts or evidence adduced in support thereof. Otherwise stated, the question is whether the paucity of evidence adduced by the State on the issue raised in the ground of appeal, satisfied the onus on the State to prove the existence of the jurisdictional fact that the complainant was raped more than once inherent in section 51(1) read with Part I of Schedule 2 of the CLAA, beyond a reasonable

doubt. The relevant jurisdictional fact in Part I of Schedule 2 of the CLAA, at the time of conviction of the accused provided for a sentence of life imprisonment for *"Rape when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice."*

[10] The appellant in the main relies on the Supreme Court of Appeal judgment in *Tladi v S* 2013 (2) SACR 287 (SCA) where reference was made to *S v Blaauw* 1999 (2) SACR 295 (W) at 300 A-G. In the said matter Salduker AJA (as she then was) said:

"[12] The second issue in this appeal is whether the state proved that there were two separate incidents of rape. In *S v Blaauw* the court said:

'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraw his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the

intent to rape her again, even if the second rape takes place soon after the first and at the same place.' (My emphasis.)

[13] ... There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption (*S v Mavundla* 2012 (1) SACR 548 (GNP) and *S v Willemse* 2011 (2) SACR 531 (ECG)) in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analysed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt...Consequently there was no basis for the conviction on the second count of rape. And it falls to be set aside."

[11] In *MS v S* (CA40/2017) [2019] ZANWHC 2 (25 January 2019), this Court (per Petersen AJ (as he then was) Djaje J (as she then was) dealt with a similar issue as follows:

"[17] In the present matter, the evidence on the sexual intercourse having taken place more than once was led in a very cursory manner by the state notwithstanding the court *a quo* interjecting on this issue...

[18] The paucity of evidence in this regard falls gravely shy of the proving the jurisdictional fact necessary to trigger section 51(1) of the Criminal Law Amendment Act, in particular rape more than once. In this regard

the court *a quo* erred in two respects, first on the evidence itself, and secondly in not pertinently making a finding on the applicable section. The court *a quo* was pertinently required to make a finding on whether section 51(1) or 51(2) of the Criminal Law Amendment Act was applicable. As noted above, the court *a quo* found the appellant guilty as charged without reference to the applicable section. This is a material misdirection requiring intervention by this court."

[12] In respect of the presentation of evidence in sexual offences matters, Nugent JA made the profound observation in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at paragraph [21], that:

"[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound."

[13] The difficulties presented by terse evidence, as in the present matter, following on the sentiments expressed in *Vilakazi* is demonstrated by the minority and majority judgments in *Molaza v*

S (A235/2018) [2020] ZAGPJHC 169; [2020] 4 All SA 167 (GJ) (31 July 2020). Paragraphs 71 to 80 of *Molaza* are apposite.

[14] An exposition of the case law on the issue of rape more than once demonstrates divergent approaches, which ultimately is dependent on the peculiar facts of each matter. And that is the approach adumbrated in this judgment, to consider the peculiar facts of the matter inherent in the very terse presentation of the evidence by the prosecution.

[15] Before turning to considering the evidence on count 4, a disconcerting feature inherent in the evidence of the complainant D[redacted] M[redacted], count 3, is highlighted. Count 3 encompasses a single count of rape, whereas the evidence of D[redacted] M[redacted] makes it plain that she was forced by the appellant to perform an act of fellatio (stimulation of the penis by using the mouth) on him before he raped her vaginally. This clearly evaded both the prosecutor and the Regional Magistrate.

[16] The respondent in its heads of argument seeks to bolster its argument that two distinct acts of rape were perpetrated by the appellant with a submission that *"It is further argued that the break between the first and the second act of rape in this case is made significant by the fact that the complainant was still dressed when the accused penetrated her mouth. The first act (that she calls 'a blow job') ended. Thereafter, she was ordered to undress before being raped through the vagina. In other words, the first intention was to rape her through her mouth, the second intention formed was to rape her through a vagina."*

[17] The paucity of evidence led by the prosecution on the rape of both complainants is not echoed by the aforesaid submission. If anything, the evidence demonstrates the contrary. Both complainants testified they were respectively instructed to undress before any of the conduct inherent in their sexual violation occurred. None of the witnesses testified about any pause or break between the oral penetration and vaginal penetration. On an application of *Blaauw* and more importantly *Tladi* the very terse evidence led by the prosecution on the rape on count 4 demonstrates that the separate acts of penetration, orally and vaginally were so closely connected in terms of time and sequence, that it proves not a series of rapes but a single act of rape.

[18] The appeal against conviction count 4 accordingly stands to be upheld to the extent that the evidence proves a single act of rape and therefore the provisions of section 51(2) of the CLAA applies.

[19] It would be remiss of this Court not to castigate the language employed by the Regional Magistrate in the judgment. It may be that the witnesses used slang in reference to the fellatio, but a court as a rule should not perpetuate such expletives in its judgment. The extract from the judgment at paragraph [7] *supra* refers in this regard. In *Makau v Makhwentla and Another* (A123/2009) [2010] ZAGPPHC 42 (11 May 2010), Mavundla J at paragraphs 26 and 26 emphasized with reference to *S v Owies and Another* 2009 (2) SACK 107 at 113 a-j that:

"[26] ...Decorum must flow from the bench.

[27] *In casu,* the magistrate failed to observe this basic tenet. He was base in his language, for instance directing himself to the applicant he said, *inter alia* "that filthy penis". This type of language needs to be censored in the strongest terms.

[28] It is indeed so that a presiding officer is not expected to sit as a statue. He sits as an umpire, to ensure that the rules of the game are observed. Where necessary, the presiding officer is entitled to ask questions to clear ambiguity or uncertainty. **When discharging this judicial function, he must do so ensuring that decorum of the court is preserved.**"

[20] In *S v Bogaards* 2013 (1) SACR 1 (CC), the Constitutional Court held that:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

(emphasis added)

[21] This Court is now at large to consider the question of sentence afresh. The appellant implored this Court to impose a sentence of fifteen (15) years imprisonment on count 4, in the event of the appeal against count 4 was upheld. The appellant has a relevant previous conviction for rape, which makes him a seconder offender of such offence in terms of section 51(2) of the CLAA. No substantial and compelling circumstances were found by the court *a quo* to deviate from the mandated minimum sentences on the robbery charges (counts 1 and 2) and count 3 (rape), all read with section 51(2) of the CLAA. The appellant also does not challenge that finding by the Regional Magistrate.

[22] In the result, the appellant is sentenced on count 4 to fifteen (15) years imprisonment.

[23] Bearing in mind that the sentences on counts 1 to 3 automatically ran concurrently with the sentence of life imprisonment on count 4, a fair approach to the cumulative sentence of sixty (60) years imprisonment, premised on the sentence of fifteen (15) years imprisonment on each of counts 1 to 4, is merited, to ameliorate the impact of the sentence, which could otherwise be described as a *Methuselah* sentence. Without derogating from the seriousness of the robbery charges, the evidence demonstrates that they were committed at the same time in respect of the two complainants. A fair approach would be to order the sentence on count 2 to run concurrently with the sentence on count 1; and a portion of the sentences on count 3 and 4 to run concurrently.

Order

[24] In the premise, the following order is made:

(i) The appeal against conviction on count 4 is upheld and substituted with the following order:

"The accused is found guilty of a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997."

(ii) The sentence imposed on count 4 is set aside and replaced with the following sentence:

"Fifteen (15) years imprisonment."

(iii) The sentence on count 2 is ordered to run concurrently with the sentence on count 1. On each of counts 3 and 4, five years of the imprisonment shall run concurrently with the sentence on count 1. The effective sentence is therefore thirty-five (35) years imprisonment.

(iv) The appellant shall remain unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

[redacted]

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

[redacted]

G V MAREE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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