Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

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

CASE NO: CA16/2024

COURT *A QUO*: SH169/06

In the appeal of:

MBAMALI, SIFISO Appellant

And

THE STATE Respondent

CORAM: HENDRICKS JP *ET* KORAAN AJ

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 18 July 2024.

JUDGMENT

ORDER

On appeal from the Regional Division of North West, Rustenburg (Magistrate CP Nel sitting as trial court).

Resultantly, the following order is made:

[1] The appeal against the conviction is dismissed.

[2] The appeal against the 5 life imprisonment sentences on counts 2, 4, 6, 9 and 10 is hereby upheld.

[3] The life imprisonment imposed on counts 2,4,6,9 and 10 by the court *a quo*, is set aside a replaced with the following:

a) Count 2 - the accused is sentenced to 15 years imprisonment.
b) Count 4 - the accused is sentenced to 15 years imprisonment.
c) The sentence on count 2 and count 4 are ordered to run consecutively.
d) Counts 6, 9 and 10 - the accused is sentenced to 15 years imprisonment, respectively on each of these counts.
e) The sentence on counts 6, 9 and 10 is ordered to run concurrently with the sentence on count 2 in terms of section 280 of the Criminal Procedure Act 51 of 1977, as amended.
f) The sentence imposed by the court *a quo* on counts 1, 3, 5, 8 and 11 is ordered to run concurrently with the sentence on count 4 in terms of section 280 of the Criminal Procedure Act 51 of 1977, as amended.
g) The effective sentence to be served is 30 years imprisonment.
h) The sentence is ante-dated to 21 August 2008.

JUDGEMENT

KORAAN AJ

INTRODUCTION

[1] The appellant, Mr. Sifiso Mbamali ('the Appellant'), was charged with 5 counts of rape (counts 2, 4, 6, 9 and 10), 2 counts of attempted rape (counts 1 and 7), two counts of robbery with aggravating circumstances (counts 5 and 11) and 2 counts of robbery (counts 3 and 8). The appellant enjoyed legal representation in the court *a quo* and pleaded not guilty to all charges. On 21 August 2008 the appellant was convicted on counts 1, 2, 4, 5, 6, 8, 9 and 10. He was also convicted of theft in respect of counts 3 and 11 and acquitted on count 7.

[2] The appellant was sentenced to life imprisonment for counts 2,4,6,9 and 10, respectively; seven (7) years imprisonment in respect of count 1; fifteen(15) years imprisonment for count 5; three(3) years imprisonment for count 8 and one(1) year imprisonment for counts 3 and 11. The sentences were ordered to run concurrently.

[3] The appeal lies against the conviction and sentence handed down on 21 August 2008. The appeal is based on several grounds. These grounds of appeal are comprehensively set out in the notice of appeal dated 3 June 2024. When the grounds of appeal are categorised according to the themes in the notice of appeal, five (5) categories are distinguished. It is alleged that the court *a quo* erred in finding that:

3.1 the State proved the guilt of the Appellant beyond a reasonable doubt;

3.2 there are no improbabilities in the State's version;

3.3 the State's witnesses gave evidence in a satisfactory manner;

3.4 the evidence of the State's witnesses can be criticised on matter of detail only, whereas the evidence was contradictory in material aspects;

3.5 minor differences between the State's witnesses were sufficient to reject the Appellant's evidence.

[4] The appeal against the sentence is premised on the five (5) life terms of imprisonment on counts 2, 4, 6, 9 and 10 respectively. The grounds for appeal are distinguished in that the terms of imprisonment:

4.1 over-emphasizes the public interest and negates the personal circumstances of the Appellant;

4.2 disregards the period the Appellant spent in custody awaiting trial.

The respondent submitted in its written heads of argument that the court *a quo* convicted the Appellant in terms. of Part III of Schedule 2, which required the magistrate in terms of section 51(2) of the Criminal Law Amendment Act ('the Act') to sentence the appellant to a minimum of 10 years (because he was treated as a first offender). Furthermore, that the Regional Courts's sentencing jurisdiction was limited in terms of section 51(2) to a maximum of 15 years imprisonment. It was submitted that the appeal against sentence should be upheld.

APPLICABLE PRINCIPLES

[5] It is trite that since **R v Dhlumayo and Another** 1948 (2) SA 677 (A), an appeal court will be careful not to easily overturn a finding of fact of the trial court, unless there is a misdirection on the part of the trial court in the application of law or the facts. The reason for the reluctance of an appellate court to interfere with the credibility findings of a trial court is the advantage of the trial court to hear and see the witnesses during the trial. The trial court has a front-row seat to the evidence, which cannot necessarily be translated through the record.

GROUNDS OF APPEAL PERTAINING TO THE CONVICTION

Proving the guilt of the Appellant beyond a reasonable doubt

The State's case

[6] The gist of the testimony of the state witnesses can be summarized as follows. For a chronological depiction of events, it is necessary to start with the evidence lead regarding counts 10 and 11. Ms. D[redacted] B[redacted] (B[redacted]) testified that on the 20th of May 2004, she was looking for work and she accompanied a woman to the woman's workplace. She was supposed to meet a man who knew of a woman who was looking for someone to work for her. The man who she was supposed to meet arrived and she identified him as the accused, the appellant in this case. The appellant did not give her his name and indicated that he was going to take her to a white lady. They then walked through town to the railway line, using a specific footpath through the bush. The appellant then started walking slower, removed his jacket, tied it around his waist, and jumped on her back. She fell to the ground after which the appellant

removed her underwear and raped her. The appellant also had a knife with him which he placed next to her. When he finished, he told her to remain seated as he was not done and that he enjoyed it. After he raped her for a second time, he took her handbag and held it upside down for the content to fall out. He then took her cellphone and told her to leave. At the time he took the cellphone, the knife was in his pocket. B[redacted] further testified that she was in the presence of the appellant for about three hours and could identify the appellant. She said: "*Yes, your worship on looking at him, the picture appeared of the time when he did those nasty things to me".* She testified that this was the first time she saw the appellant. The next time she saw him was at the identification parade where she pointed him out. Photos of the identification parade are part of the record. She also indicated that she had not seen a photo of the appellant beforehand.

[7] During cross-examination, it was put to B[redacted] that the appellant denies raping her and robbing her of her items. It was further put to her that the appellant saw her for the first time during the identification parade. It was also put to her that the appellant could not speak Tswana properly, to which she responded that he could speak proper Tswana.

[8] On count 1, Ms. R[redacted] testified to the effect that she was at home on the 31st of May 2004. At around 18:00, one of her mother's friends, Tlhabe, arrived. As Ms. R[redacted] was also looking for work at the time, Tlhabe told her about someone who may have a job opportunity for her. Arrangements were made for them to meet this person the next morning at 8:00 at Rustenburg-East. According to Ms. R[redacted], the

person she met was the appellant and he introduced himself to her as Thabo. He indicated to her that the work was that of a receptionist at the mines. They started walking and crossed the railway line into the bush using a footpath. As they were walking, he started to walk slower; he took off his jacket and laid it on the ground. He held a knife in his hand. After asking who she thinks she is, he pushed her to the ground and she landed on her back. She then kicked him and he fell. He managed to get up before her because she injured her back during the fall. He told her that he was going to rape her and then kill her because she was stubborn. She then pleaded with him to let her go since she was still a virgin, but he told her that that was not his business. He then took her handbag containing a flip file (a see-through sleeve) pocket with her Curriculum Vitae (CV) in it. He informed her that he would use the file pocket as a condom. He informed her if she ran, he would stab her. He got undressed with one hand while holding the knife in the other hand, after which he wrapped his penis with the file pocket. He then started to undress her but struggled with the belt. It was at this stage that she heard voices. She started to scream for help, and the voices drew nearer, causing the appellant to run away. Two men approached her and she relayed what happened. The men looked for the appellant but could not find him. Ms. R[redacted] indicated further that during the struggle, she managed to scratch the appellant under the eye, causing it to bleed; she just could not remember which eye. She testified that it was for the first time she saw the appellant on the day of the incident. The second time she saw him was at the identification parade where she pointed him out. To this regard, the record reflect photos of the identification parade and photos of where the witness pointed out the scene of the crime, with Captain Van der Merwe, as well as the file pocket. She also indicated

that she was in the presence of the appellant for about three hours on the day of the incident.

[9] During cross-examination, the witness indicated that she identified the appellant with the scar under his eye, though it was healed by then. It was put to her during cross-examination that the appellant is not able to speak Setswana but is Zulu speaking, to which she responded that he spoke Setswana to her on the day. It was further put to her that the appellant denies being with her on the 1st of June 2004, that he denies being scratched by her or that he had a scar on the day of the identification parade. The version of the appellant was put to the witness in that he was assaulted by inmates in the cells and maybe had a bruise on the eye, but not a scar under the eye. A blatant denial of attempting to rape the complainant and that the witness was mistaken about the appellant's identity, then followed.

[10] On counts 2 and 3 evidence of Ms. M[redacted] was presented. She testified that on 5 June 2004 around 08:00 or 09:00, she was at her home when a woman called Valencia, arrived. Valencia was accompanied by a man who introduced himself as Search. She later identified Search as the appellant. The appellant was looking to offer work to people who were looking for work. Ms. M[redacted] accompanied the appellant since she was looking for work. They then walked down 'Kerkstraat' to East-end into the bush and then in the direction of the mine. She started to get scared and voiced to the appellant that they would never reach the place. The appellant then grabbed her by her clothes and threw her to the ground. He informed her that he was going to have sexual intercourse

with her. He removed her skirt and then he pulled down his trousers and underpants to his knees. He pulled down her underwear. She informed him that she was menstruating, but he told her that he did not care. He then had sexual intercourse with her. When he was done, he stood up, and she started to get dressed. He then asked her who said he was done. She told him when he got up, he was done, but he could do anything he wanted to do. On clarification by the court, she indicated that she meant he could kill her if he wanted to. He then took her bag and removed R300 and a Nokia cellphone from it, which he took and then left. Ms. M[redacted] also indicated that the appellant took the bag from the ground and did not use force. She left and he followed her. She met two ladies alongside the road and told them what happened. When she looked around, the appellant was gone. She then opened a case and, a few months later, pointed out the appellant at an identification parade. She indicated that she was in the presence of the appellant for about two hours on the day of the incident. She also testified that the appellant had a scratch mark under his right eye at the time of the incident but not during the identification parade. When asked on how she managed to identify the appellant during the identification parade she answered*: "Ek ken hom want ek het op die dag 'n lang tyd met hom geduur."* (Translated -I know him because I spent a lot of time with him on the day of the incident-). On the question if there were any other characteristics, she answered: "*Sy lengte was dieselfde. Sy velkleur was dieselfde en sy hare, sy hare was nog kort soos dit was tydens die voorval net soos vandag.*" (Translated -His height was the same. His skin color was the same and his hair, his hair was still short as it was during the incident just like today.).

[11] During cross-examination, Ms. M[redacted] indicated that the appellant spoke Setswana, but she could hear that he was not a Setswana-speaking person. She also indicated that the mark that the appellant had on the day of the incident was not a deep mark, it was a temporary mark like a scratch mark and could be the reason she did not see it on the day of the identification parade. The version put to the witness was that the appellant saw her for the first time on the day of the identification parade. Further that the appellant deny being with her on that day of the incident and deny that he raped and robbed her. The appellant further denies having a mark under his right eye on the day of the incident.

[12] On counts 4 and 5 Mrs. M[redacted] testified that on 9 June 2004, she was in town at Sterns Jewelery store waiting for a person called Thabo. Thabo was looking to employ someone who could work with computers. She then met Thabo, who she pointed out as the appellant, and he confirmed that they were looking for someone at the office. They then left for the office but walked down various streets. Because they walked so far, she started to ask questions pertaining to the location of the place. He pointed towards two tanks and said we are going there. They then walked into the bush and when she realized they were walking deeper and deeper into the bush, she asked him again about the whereabouts of this place. He then started to get aggressive and took out a firearm and informed her that he wanted 'koek' (vagina) and that if he did not get it, he would shoot her. She pleaded with him not to shoot her but rather take the belongings she had. He then took her ring, chain, earrings, Alcatel cellphone and R350. At the time he took the items., the firearm was not pointed at her. After this, he pushed her out of the footpath they were on and into the grass. He then placed the firearm on his hip and tried to tear

her clothes. She told him she would remove her clothes, and she removed her pants and underpants. He did not undress. He only opened his zip and took out his penis; he then got on top of her and penetrated her vagina. At that moment, while he was busy and on top of her, she indicated to him that she had HIV; he then jumped off from her and said "*voerstek hoer, gaan weg*" (Translated - get lost whore, go away-). She then got dressed and walked away. The appellant also walked away in a different direction. She only reported the case two weeks after the incident because she was afraid of her husband. She eventually reported the case when she heard that someone was arrested for rape cases. When she arrived at the police station, she noticed that it was not the person who raped her, but she reported the case. She identified the appellant a few months after the incident at an identification parade. Photos of the identification parade were submitted into evidence.

[13] During cross-examination this witness indicated that she identified the person who raped her as short, light in complexion and he had a mark underneath his right eye. He also wore a white cap during the incident. She further stated on the question if she saw the mark during the identification parade, that she did not notice much (*Ek het nie baie opgelet nie*). The witness indicated they spoke Tswana but could hear in his accent that he was not Tswana speaking. It was put to the witness that the accused cannot speak Tswana. The witness responded that they spoke Tswana and no other language. The witness also indicated that she identified the appellant at the identification parade from memory. It was put to the witness that the Appellant did not rape her on the 9th of June 2004 and he also did not point her with a firearm and robbed her of her belongings.

[14] On count 4 and 5, Mrs. M[redacted]'s sister-in-law, N[redacted], testified that on 7 June 2004, she was at Rustenburg College where she met a man who introduced himself as Thabo. She identified the man as the appellant. She was on her way to the Department of Education and met him outside. He then asked her if she knew of someone who was computer literate and looking for work. They exchanged cellphone numbers, and she informed her sister-in-law. N[redacted] did not attend the identification parade. During cross-examination she testified that she was in the presence of the appellant for about 15 minutes on the day she met him. When asked how she could remember him after so many years, she responded and said: "*The image your Worship. I can see this is the man I met.*" She also testified that she could not see a mark on him and that he could speak Tswana fluently.

[15] On count 6, Mrs. P[redacted] testified that on 4 August 2004, at around 07:00, she met a man on her way to work. The man introduced himself as Themba and asked her if she knew of someone looking for work. She pointed out the appellant as Themba. She then told him that she does not know of someone, but she was looking for work because she is not earning much at her current place of employment. They exchanged numbers and he called her that evening. They made arrangements to meet the next morning at the same place where they met, *Oosstraat* (Translated - East Street). They then met the next morning, 5 August, at 7:00. He informed her that they had to go over the railway lines into the bush; it was a shortcut. They were walking on the footpath when the appellant grabbed her with both hands from behind. She testified that it felt like he was choking her. He then told her to take out the *koek (vagina)*. He then threw her to the ground, unzipped her pants and then

his. He broke the button of her pants and pulled her pants and underwear down. He then put his penis in her vagina. He told her that he was going to have sexual intercourse with her, and that if she resisted, he would choke her with the rope he had in his pocket. After he raped her, he took out the rope and threw it on the ground, grabbed her bag and took out R10. He then chased her away and told her not to tell the police or he would use witchcraft on her. She then left and so did he. She saw the appellant again at the identification parade in 2005. Photos of the identification parade were submitted into evidence. She testified that the appellant had a mark on his right cheek underneath his right eye and noticed it on the first day, the 4th of August 2004. She also testified that on the day of the incident, the appellant had short hair, he had black pants, and a sky blue T-shirt on. During the identification parade she identified him with his short hair and a mark underneath his right eye. Mrs. P[redacted] indicated that she and the appellant were together for about three hours on the 5th of August 2004.

[16] During cross-examination Mrs. P[redacted] indicated that the appellant could not speak Tswana fluently, but he could communicate in short sentences. She also testified that there was a mistake in her statement regarding the place where the scar was. The statement indicates that the scar was on top of his right eye. It was put to the witness that the appellant denies raping her on the 5th of August 2004. The learned magistrate indicated, correctly so, that there was never a charge of robbery or theft put to the appellant with in regard to this specific incident. It was further put to the witness that the appellant can, to a limited extend, understand Tswana but can barely speak it.

[17] On counts 7 and 8, E[redacted] S[redacted] testified that on 25 January 2005 at 8:30, she was with a friend, C[redacted] N[redacted], at the mall to look for work. They met a man who introduced himself as Thabo. She points out the appellant as Thabo. The appellant then asked them if they were looking for work. He informed them that at the place he works, there are white people looking for two people to work for them. They then went with the appellant to *Geelhout*. They crossed the tar road near the cemetery. He then grabbed them both saying *"Julle poes waar het julle ooit werk gesien verniet"*, amounting to where have they seen that someone can get work for free. He then grabbed Mrs. S[redacted]'s bag, which was in possession of C[redacted] N[redacted], from her. Mrs. S[redacted] then asked the appellant why he took the bag and he indicated that they should pay him. She told him she does not have money only a R20. He then threw the bag back at her and she took out the R20 and gave it to him. He then saw the cellphone of the witness in the bag and took it. Ms. S[redacted] and C[redacted] then fought with the appellant to get the phone back. He then kicked C[redacted] in the stomach. S[redacted] asked him why he assaulted C[redacted] and not her as well. He then said he did not want to assault her. He then told them to remove their clothes to give him '*koeke*' (vagina). They refused and told him he could rather kill them. They then ran away into the bush. S[redacted] and C[redacted] walked to the main road where they came across a police van. They informed the police what happened and the police went to look for the appellant. The appellant was then arrested in the bush under a tree.

[18] During cross examination S[redacted] indicated that the appellant had short hair and a mark under his eye but could not remember which eye. It was put to her that the appellant was found sleeping under the tree by the

police. Further that he was then accused of the rape but denied it. It was also put to the witness that the accused deny ever taking the wallet and cellphone.

[19] On count 9, L[redacted] H[redacted] testified that on the 17th of January 2005 at 10:00, she was on her way to Zinniaville to look for work. On route, she met a man who she identified as the appellant. She then indicated that she was looking for work at the mine. He introduced himself as Thabo and he told her that there is work for her as a cleaner. The appellant then said it was her lucky day because his brother was working at the mine. He said he would call her the next day so they could go to the mine. He called her the next day and made an appointment for the following day, the 19th of January 2005 at Zinniaville. They then met on the said day and walked towards the mine. They walked for a long time and used a shortcut. They walked until they got to an abandoned house. The appellant then started to look around and took out a screwdriver and pressed it against her neck, telling her that she would do everything he told her to do if she did not want to die. He indicated to her that he killed people before and discarded their bodies at that abandoned house. He told her to take off her pants and underwear, which she did. He told her to bend over forwards and put her hands on the ground. He moved behind her and unzipped his pants and loosened his belt. He then took out his penis and started to have sexual intercourse with her. When he was done, they then moved to a place not far from where they were, but this place had more bushes. He told her to sit on her knees and had sexual intercourse with her again. When he was done, he told her to clean herself with her underwear and give it to him. He then told her if she told anyone what happened, she would die because he would take

her underwear to someone who would bewitch it. After they got dressed, they walked to a ditch with water in (*riviersloot*). While they were walking, he took her bag and removed a R20 and her Motorola cellphone, which he took with him. It is noteworthy to mention that the appellant was not charged with this. The appellant then showed her the road to take, but she did not take the road. She went to the police station. The appellant then left in the direction they came. Ms. H[redacted] indicated that the appellant was wearing all black, black beanie (*mus*), black shirt, black denim pants and black shoes (*tekkies*). She further testified that the appellant had a mark under his right eye and that he was short and brown or dark in complexion. She also indicated that she was not for longer than an hour in the presence of the appellant. She then pointed out the appellant at an identification parade held at Phokeng police station. Photos of the identification parade were handed in submitted as exhibit.

[20] During cross-examination Ms. H[redacted] testified that the mark under the appellants right eye was still there but not as visible during the identification parade. She also testified that the appellant was speaking Setswana. It was put to her that the appellant was not Setswana speaking and that he did not rape her on that day.

[21] The State also called Captain van der Merwe, the investigating officer, to testify. His testimony is that he was assigned the case. On 26 October 2004 he started to contact the various complainants in the matter to point out the places where the incidents took place. On one of these occasions, where complainants were pointing out the scenes, he received information that there was a suspect moving in his direction with

another woman. The complainants went back to the police vehicle, and he walked slowly down the footpath where he saw a man and a woman walking. He tried to arrest the man but could not do so. He identified the man as the appellant. This happened about 300 to 400 meters from the places indicated. Captain van der Merwe further testified that the appellant was about a meter from him when he tried to apprehend him, and in the process, the appellant's black hat that he was wearing fell from his head. The hat was collected for DNA evidence but this evidence was never placed before court.

[22] During cross-examination, it was put to Captain Van der Merwe that there was a photo album containing a photo of the appellant removed from the appellant's home. That this album was never returned to the appellant. The witness denied these statements.

[23] During the State's address, the State conceded that it did not prove count 7 and that count 3 should be that of theft and not robbery.

The appellants' version

[24] The appellant's version constituted nothing more than a bare denial of all the counts. The appellant testified that the last state witness, Captain Van der Merwe, removed items from his home and never returned it. It is worth noting that this testimony was not cleared up by his counsel, especially since a specific version of the items removed from the appellant's home was put to the witness. During his testimony, he further

indicated that he was arrested on 25 January 2005 near a cemetery on route to Olympia while taking a rest under a tree. The police approached him from the front and the rear and started shooting at him. He then ran away but stopped and raised his hands when he did not know where to run to. The police then cuffed him and assaulted him while asking for a cellphone. He informed the police that he left his cellphone at home. They took him to the police station. He denied that one of the complainants scratched him. He indicated that the only marks he had was caused at the time the police assaulted him. He could not remember where the marks were but indicated it was somewhere in his face. The only injury he remembered where it was located, was the one on the bridge of his nose, caused during arrest.

[25] During cross-examination the appellant also testified that he has not looked in a mirror since his arrest, until now, to determine his facial injuries. He has not even seen a reflection of his face. His testimony was that he could not remember if he had a mark on his face before his arrest, but later recanted and said he did not have a mark.

The trial court judgement

[26] In its judgment, the trial court recounted the testimony and compared the State's version to the appellant's version. The court correctly found that the State could not prove attempted rape regarding count 7. When looking at the record, it is clear, according to the testimony of the witness in the above count, that the intention of robbing her of her items was not clear at the time the appellant was having sexual intercourse with her.

The bag was on the ground, the appellant took it and removed the iteMs.. When evaluating the evidence provided by the witness in the above count, the learned magistrate cannot be faulted for finding that the above act does not amount to robbery. Robbery is defined as the:

> *theft of property by unlawfully and intentionally using:*
>
> *(a) violence to take the property from somebody else; or*
>
> *(b) threats of violence to induce the possessor of the property to submit to the taking of property* [1]

This was conceded by the State in its address to the court *a quo*.

[27] The learned magistrate held that the evidence tendered convinced the court that the State proved beyond a reasonable doubt that all these crimes were indeed committed. The evidence regarding the execution of these crimes was never disputed. The question was whether the appellant was the one who committed these crimes or whether it was a case of mistaken identity. The learned magistrate evaluated the evidence of the State and held that what must be considered is the relevance of the evidence. The court held that corroborating evidence was led regarding identity by means of an identification parade, except for counts 2, 3, 4 and 5. On these counts, the witnesses identified or pointed out the appellant during the trial court proceedings. The court did not attach any value to their evidence regarding identity but still considered their evidence regarding the rest (**S v Gokool** 1965 (3) SA 461 (N) at 475 e). The court held that this evidence is relevant, especially when dealing with a *modus operandi* which is the same. *In casu* it was about the accused

[1] Definition by SV Hoctor Snyman's Criminal Law 7th ed, 448.

getting someone who is looking for work and then taking them to a place where they could get work. In most of these cases, he introduced himself as Thabo except in count 2, where he introduced himself as Search, and in count 6, where he introduced himself as Temba. His mode of operation was identical; he would lure people away under false pretenses and then rape them in the bush. The court considered the evidence of Captain Van der Merwe in that all the places pointed out to him were the places where the crimes took place and that they were all in the same area. The court also found the evidence of the above witness that the person he tried to apprehend at the time he was at the scene of the crime was, indeed, the appellant as admissible. The court held that in all counts, except for counts 10 and 11, evidence was adduced to the fact the appellant had a mark underneath his right eye. The complainant in count 1 testified that she inflicted the said mark. Some of the witnesses identified the appellant at the identification parade due to the very same mark. The appellant's version that he was assaulted during arrest and had several marks on his face was rejected by the court. The court based this on the photos taken of the appellant 6 days after his arrest which clearly contradicts the version of the appellant, as it is clear there was no evidence of several marks on his face. There was, however, a mark underneath the right eye of the appellant that was visible in the photos.

[28] The learned magistrate correctly stated that evidence regarding identity should be approached with caution. In **S v Mthetwa** 1972 (3) SA 766 (A) at 768 it was held that:

> "*Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the*

identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation. Both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused, The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;"

[29] In **S v Mehlape** 1963 (2) SA 29 (A) at 32A–B, Williamson JA held that:

"It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification."

[30] The learned magistrate held that the crimes happened during the day and the appellant was identified by the mark under his eye. Even if one witness testified that the mark was not clear at the identification parade, the photos of said parade paint a different story. It is common cause that there were no irregularities during the identification parade. The appellant, in his own testimony, said he couldn't remember if he had a mark during the incidents, and when asked about this, he changed his version. The trial court also rejected the version of the appellant that he has never looked in a mirror since the day he was arrested in January 2005.

[31] The trial court found that most of the witnesses, with the exception of counts 2, 3, 4 and 5, testified to the fact that the appellant was not fluent in Tswana. It was put to some witnesses by the appellant's legal representative that the appellant can't speak Tswana at all and to others that he can't speak Tswana well. This version, albeit one or the other, was not put to all witnesses.

[32] *In casu* the magistrate found that the State indeed proved beyond a reasonable doubt that the person who committed these crimes was the appellant.

The appeal

[33] Counsel for the appellant states in his written heads of argument that the trial court accepted evidence by means of a DNA report without proof of the chain of evidence. It is clear when going through the record that although the testimony of Captain Van der Merwe, who adduced the existence of the above report, was considered, the court did not put much evidential weight on the report itself. In the trial court's judgment the magistrate held: '*Die beskuldigde is ook klaarblyklik met DNA verbind, maar daardie getuienis is nooit behoorlik voor die hof geplaas nie*' (Translated -The accused was also apparently linked by DNA, but that evidence was never properly put before the court-). This court cannot fault the learned magistrate's approach in this regard.

[34] Counsel for the appellant, in his heads of argument, highlighted a discrepancy in that both witnesses, Ms. M[redacted] and Ms. M[redacted], testified that the appellant did not have a mark under his eye during the identification parade. When evaluating the record, the witness Ms. M[redacted], testified when asked if the appellant had a mark under his right eye during the identification parade that she did not notice much. She testified that she remembered the appellant from the day of the incident. Ms. M[redacted] testified that the appellant did not have a mark on the day of the identification parade, but she identified him based on his skin colour and his hair. She also testified that she spent a lot of time with the appellant on the day of the incident, so she knows him.

[35] The learned magistrate was aware of the discrepancy in the abovementioned evidence and held that the photos from the identification parade clearly show that there is a blackish mark underneath the right eye of the appellant, leading to this discrepancy as being immaterial. This court cannot fault the position of the trial court.

[36] Counsel for the appellant indicated in their heads of argument that although the defense accepted that nothing irregular took place in the conduct of the identification parade, the appellant's version is that the Investigating Officer (Captain van der Merwe) took a photo album from the appellants' home before the identification parade. He further elaborates that this would explain why all the complainants would have pointed out the appellant as the perpetrator at the identification parade, because they had been shown the pictures of the appellant beforehand. This version was not put to the complainants. The only witness confronted

with the photo album been taken was Captain Van der Merwe, and even on this, the full version that the photo was taken and shown to the witnesses before the identification parade, was never put to the witness. During the appellant's evidence in chief, he was asked if there was anything he wanted to tell the court about these charges. His response was as follows: *"Ja dit het betrekking to die goedere wat deur hierdie laaste staatsgetuie uit my huis uit geneem is. Hy ontken van hierdie goedere. Dit wil sê hy ontken dat hy die goedere saam weggeneem het."* (Translated - Yes, it relates to the goods that were taken from my house by this last state witness. He denies these goods. That is, he denies that he took the goods away with him-). The Appellant was referring to Captain Van der Merwe, the last state witness. This was the only evidence regarding the appellant's version that a photo was taken and shown to the witnesses before the identity parade.

[37] The same can be said of the version of the appellant that another person was arrested after the arrest of the appellant for rape cases allegedly committed at the same scene. This was only put to the last state witness, Captain van der Merwe, during cross-examination. This was also not addressed or argued by the defense during the closing address, which leads this court to believe that this was an afterthought, a desperate, unsuccessful attempt to create reasonable doubt.

[38] The version of the appellant is that he had several injuries on his face during the identification parade. It is clear when looking at the Exhibits in the record, that it was not the case. The evidence of the appellant on the

fact that he could have had a mark under his eye, and then later recanting this statement, is also questionable.

[39] In considering the totality of the evidence presented in this case, the appellant's bare denial cannot stand. The learned magistrate properly evaluated the evidence presented by the witnesses. The evidence needs to be considered in context and in its entirety, and any immaterial contradictions are to be discarded. The trial court followed a cautionary approach when considering the evidence. On a proper appraisal of the trial record in its entirety, minor inconsistencies do not negate the bulk of clear logical testimony by the witnesses. When considering all the evidence on the record, there is no basis for this Court to find that the trial court misdirected itself in finding that the State proved its case beyond a reasonable doubt. As a result, the appeal against the conviction stands to be dismissed.

Sentence

[40] When an accused is sentenced, the appropriate sentence is at the discretion of the trial court, provided, that it exercises its discretion judicially and properly.[2]

[41] The counsel for the appellant outlined the reason for appeal against the sentence imposed by the Regional Court in his heads of argument. These

[2] **S v Rabie** 1975 (4) SA 855 (A). Also see **S v Malgas** (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

reasons amount to specifically the sentence of 5 terms of life imprisonment imposed on the appellant. Counsel submits that above sentence over-emphasizes the public interest and negates the personal circumstances of the appellant. Furthermore, above sentence also disregarded the period of time which the appellant spent in custody awaiting trial. Though the argument based on the first reason was extensively set out in the heads of argument, the latter was not elaborated on. I will deal with above arguments later on.

[42] In the respondent's heads of argument the jurisdiction of the Regional Court's sentencing capacity was disputed. The respondent based the above argument on the sentencing jurisdiction as established in section 51 of the Criminal Law Amendment Act, 105 of 1997 (the Act). It is trite law that section 51 of the Act provides for a minimum sentencing regime. This was a clear guide by the legislature to not only limit the discretion of the courts when dealing with the listed crimes but also to provide a measure of uniformity.[3] As it was stated in **S v Malgas** 2001 (1) SACR 469 (SCA), it was no longer "business as usual".

[43] Counsel for the respondent correctly states that the appellant was convicted of 5 counts of rape (counts 2, 4, 6, 9 and 10) read with section 51(2) of the Act. No appeal lies against the sentence on counts 1, 3, 5, 8 and 11. When looking at the trial record, the appellant was charged and convicted of rape read with section 51(2) of the Act, which provides for

[3] These crimes are listed in Schedule 2 of Act 105 of 1997.

minimum sentences for a range of offences referred to in Part III of Schedule 2.

[44] *In casu*, more specifically, section 51(2)(b) is applicable since it provides for minimum sentences for a range of offences referred to in Part III of Schedule 2. The minimum sentence for a conviction of rape under Part III of Schedule 2 varies from 10 to 20 years, depending on whether the convicted person has committed previous offences.[4] Section 51(2) further provides that:

> *"... the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection"*

According to counsel for the respondent, the trial court [5]sentenced the appellant in terms of section 51(1)[6] instead of section 51(2) of the Act, which calls for a lesser sentence. Accordingly, the learned magistrate should have imposed a minimum sentence of 10 years imprisonment because the appellant was treated as a first offender. Furthermore, in terms of the same section, the trial court can impose a maximum sentence of 15 years imprisonment.

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[4] See section 51(2)(b) of Act 105 of 1997.

[5] Section 51(2) of Act 105 of 1997.

[6] Section 51(1) of Act 105 of 1997 provides: "*Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.*"

[45] It is trite that a Regional Court has the discretion to sentence the accused within the boundaries of the minimum sentences framework. The trial court will have jurisdiction in sentencing according to the provision triggered in section 51 of the Act. After evaluating all the evidence, the learned magistrate handed down his sentence and, during his sentence, stated as follows: *"Ten aansien van aanklag 3 en 11word hy aan diefstal skuldig bevind. Ten aansien van aanklag 7 is hy onskuldig bevind. Verder wat aanklag 1,2,4,5,6,8,9 en 10 betref, word hy* ***skuldig bevind soos aangekla****"* (emphasis added) (Translated - With regard to charges 3 and 11, he is found guilty of theft. With regard to charge 7, he was found not guilty. Furthermore, regarding counts 1,2,4,5,6,8,9 and 10, the accused is found **guilty as charged-**).

[46] It is very clear what the learned magistrate stated that the appellant was *"skuldig bevind soos aangekla"* (Translated - guilty as charged). The Appellant was charged with 11 counts. For purposes of the appeal, I will focus specifically on the 5 counts of rape as referred to in the heads of argument of both the counsels for the appellant and respondent. All 5 counts of rape were read with the provisions of section 51(2) of the Act. This is also reflected in the charges, which form part of the trial record. This means that the appellant was convicted of offences referred to in Part III of Schedule 2 and not offences referred to in Part I of Schedule 2.[7]

[47] Upon evaluation of the trial record, and specifically the sentence, it is clear that the learned magistrate distinguished between the different crimes and

[7] Also see **S v Ndlovu** 2017 *(2)* SACR 305 (CC).

possible minimum sentences it could impose. Though it is not specifically mentioned in terms of which section of the Act the appellant was sentenced, the magistrate indicated that the appellant could receive life imprisonment for a count of rape. This leads this Court to believe that the trial court was moved to pass sentence for the 5 counts of rape, in terms of section 51(1) of the Act.

[48] It is not clear to this Court, when browsing the trial record, if the charges, as contained in the annexures, were read out to the accused, as is. The transcript only indicates as follows: "*Prosecutor puts charges to the accused*" and then "*Accused pleaded not guilty to eleven charges.*" I already indicated that the appellant enjoyed legal representation during trial proceedings. The legal representative of the appellant confirmed that the plea was in accordance with his instruction and offered no plea explanation.

[49] During the testimony of the complainant on count 9, she indicated that she was raped twice by the appellant. This testimony would have triggered the sentence contemplated by the legislature in section 51(1), read with Part I of Schedule 2 of the Act. – "Rape in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice." What is concerning to this Court is that neither the State or the learned magistrate was moved to amend the charge sheet at this stage. Section 86 of the Criminal Procedure Act 51 of 1977, empowers a

court to amend a charge at any stage before judgement.[8] Section 86 should be read with section 88[9] of the Criminal Procedure Act 51 of 1977.

[50] Victims of crime rely on the prosecutors to perform their functions properly and competently. The power to prosecute is vested in the National Prosecuting Authority (NPA).[10] The court in **S v Ndlovu** 2017 (2) SACR 305 (CC) [58] stated as follows:

"When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf.39 This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers."

It is clear that the State and court, failed the complainant in this regard.

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[8] Section 86 provides:

"(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit."

[9] Section 88 provides:

Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred.

[10] Section 20(2) of the National Prosecuting Action

[51] In light of the above, this Court finds that the trial court misdirected itself in that it did not have jurisdiction to impose a life sentence. The prosecutor should have amended the charge in terms of count 9, and the learned magistrate should have amended the charge sheet accordingly. The evidence regarding counts 2, 4, 6 and 10 did not lean itself to a sentence in terms of section 51(1) of the Act. As indicated above, the maximum sentence the trial court can impose for a charge of rape in terms of section 52(2) of the Act, is 15 years imprisonment.

[52] As stated above, the counsel for the appellant listed two grounds of appeal pertaining to sentence.[11] Upon evaluation of the trial record, it is clear that the learned magistrate considered the triad of factors as stated in **S v Zinn** 1969 (2) SA 537 (A), namely the personal circumstances of the accused, the nature of the offence as well as the interest of society.[12]

[53] It is preferable for the trial magistrate to impose a new sentence once the court of appeal sets it aside.[13] In **S v Ndlovu** 2017 (2) SACR 305 (CC) [49], the court indicated that due to the time passed between the sentence by the trial court and the appeal, it is in the interest of justice for the appeals court to impose a new sentence. This should be done in the limitations of the Regional Courts' jurisdiction in terms of section 51(2) of the Act.

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[11] See [34] above.

[12] Also see **S v Rabie** 1975 (4) SA 855 (A) at 862G – H.

[13] **S v Ndlovu** 2017 *(2)* SACR 305 *(CC)*.

[54] The appellant was convicted of 5 counts of rape,1 count of attempted rape, 2 counts of robbery with aggravating circumstances and 2 counts of theft. He was treated as a first offender. He was 23 years old when he committed the offenses and 26 years old when he was convicted and sentenced by the trial court. He is one of 7 children. He is unmarried and has no dependents. At the time of the offenses he was working and earning R1600 per month. His highest level of education is Standard 4 (Grade 6). This court also takes into consideration the fact that the appellant was in custody from 25 January 2005 until 21 August 2008, awaiting trial.

[55] As indicated above, for the purpose of the appeal, this Court will focus on the 5 counts of rape. Rape is a serious crime and *in casu* the circumstances in which these crimes were committed was especially cruel. The appellant was in a position of trust *vis-à-vis* the complainants in that he promised them an opportunity of employment. He would then lure them to a location where he would rape them. In most of the cases, he threatened the complainants with weapons. In 4 of these counts, the appellant used a knife, a screwdriver, a rope, and a firearm, respectively. One of the complainants was raped twice. The offences happened over the period of 7 months, from May 2004 until January 2005.

[56] The record shows that the trial court was alive to the fact that rape is a heinous offence. The learned magistrate described the conduct of the appellant as a "sexual thug."[14] The magistrate also noted that the

[14] **S v Mahomotsa** (85/2001) [2002] ZASCA 64; [2002] 3 All SA 534 (A).

appellant did not show any remorse and had the attitude of someone who had not committed any crime.

[57] Taking into consideration all the evidence, this Court share the sentiments of the court in **S v Ndlovu** 2017 (2) SACR 305 (CC) [51-52], where it stated:

> *"These circumstances elevate the seriousness of the offence so that the minimum sentence of 10 years' imprisonment is grossly inadequate. Indeed, the legislature has indicated in perspicuous terms, by the enactment of section 51(1) of the Minimum Sentencing Act, that a sentence of life imprisonment is most appropriate in comparable cases. The above finding of this court vitiates the grounds listed in above heads of argument.*
> *Accordingly, the appropriate and proportionate sentence to be imposed in the circumstances is the maximum sentence that the Regional Court could have imposed following the conviction of rape read with section 51(2) of the Minimum Sentencing Act: 15 years' imprisonment."*

[58] Taking all the factors into consideration, the aggravating circumstances by far outweigh the mitigating factors and personal circumstances of the appellant. To guard against a too severe sentence it is ordered that some of the sentences are to run concurrently.

ORDER

[59] Resultantly, the following order is made:

[1] The appeal against the conviction is dismissed.

[2] The appeal against the 5 life imprisonment sentences on counts 2, 4, 6, 9 and 10 is hereby upheld.

[3] The life imprisonment imposed on counts 2,4,6,9 and 10 by the court *a quo*, is set aside a replaced with the following:

a) Count 2 - the accused is sentenced to 15 years imprisonment.
b) Count 4 - the accused is sentenced to 15 years imprisonment.
c) The sentence on count 2 and count 4 are ordered to run consecutively.
d) Counts 6, 9 and 10 - the accused is sentenced to 15 years imprisonment, respectively on each of these counts.
e) The sentence on counts 6, 9 and 10 is ordered to run concurrently with the sentence on count 2 in terms of section 280 of the Criminal Procedure Act 51 of 1977, as amended.
f) The sentence imposed by the court *a quo* on counts 1, 3, 5, 8 and 11 is ordered to run concurrently with the sentence on count 4 in terms of section 280 of the Criminal Procedure Act 51 of 1977, as amended.
g) The effective sentence to be served is 30 years imprisonment.
h) The sentence is ante-dated to 21 August 2008.

R.H.C. KORAAN
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION

I concur

R. HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION

APPEARANCES:

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JUDGMENT RESERVED	:	**19 JUNE 2024**
JUDGMENT HANDED DOWN	:	**18 JULY 2024**