THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 20108/2014
Not Reportable

In the matter between

JOHANNES MOYA MASHIGO **FIRST APPELLANT**

MANKGE RAKOLOTA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mashigo & another v The State* (20108/2014) [2015] ZASCA 65 (14 May 2015)

Coram: Bosielo, Majiedt and Pillay JJA

Heard: **02 March 2015**

Delivered: **14 May 2015**

Summary: Criminal appeal –first appellant appeals against sentence only whilst second appellant appeals against both conviction and sentence – multiple contradictions in the State's case – effect thereof – whether the evidence of identification sufficient and reliable to justify a conviction of second appellant – whether a sentence of life imprisonment in respect of the first appellant in terms of s 51 of Act 105 of 1997 is appropriate.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Goodey and Omar AJJ sitting as court of appeal):

1. The appeal against the sentence of imprisonment for life imposed in respect of the first appellant is dismissed.

2. The appeal against both conviction and sentence of imprisonment for life imposed in respect of the second appellant is upheld. The conviction and the sentence are set aside.

3. The Registrar of this Court is directed to send a copy of this judgment to the Judge President, North Gauteng High Court, Pretoria.

JUDGMENT

Bosielo JA (Majiedt and Pillay JJA concurring):

[1] This is an appeal against the judgment of the North Gauteng High Court, Pretoria (Goodey and Omar AJJ) in respect whereof they dismissed the appeal by both appellants against their conviction and sentence imposed on them by the regional magistrate in the Regional Division of Gauteng, sitting in Pretoria on a count of rape on 19 February 2009. The appeal is with the leave of the court below.

[2] The State relied on the evidence of three witnesses whose evidence can be broadly set out as follows:
In the early hours of 18 November 2006, the complainant, Ms Pamela Plaatjies (Pamela) was returning from her sister's home en route to her home. The two houses are situated in the same yard, approximately 15 metres apart. Whilst on her way home, she was accosted by the first appellant who was accompanied by two other men. She knows the first appellant as Johannes Moya Mashigo (Moya) as he used to frequent the yard where she stayed and they also reside in the same street in the same location. She had known him for approximately three months before this incident. She did not know the second appellant and was seeing him for the first time on that night nor did she know the third person, who managed to flee.

[3] Regarding the actual incident, Pamela testified that the first appellant enquired from her about the whereabouts of a lady called Thulisiwe. When she responded that she did not know, the three of them started to assault and pelt her with stones. The first appellant, who had a broken bottle with him, scratched her with it on her face. All three of them then forced her to the ground and raped her in turn.

[4] Although she did not know the third person who managed to flee and was therefore not an accused at the trial, she testified that he was referred to as Gilbert at the crime scene. She testified that he was the first to rape her. However, later in her evidence she changed and stated that it is the second appellant who undressed her and raped her first, followed by Gilbert, and then the first appellant, whom she testified further that he raped her twice. As fate would have it, he was arrested by the people

whilst still on top of her. The second appellant was arrested at the gate not far from the scene. It is unclear whether he was arrested inside or outside the gate.

[5] I pause to observe that Pamela did not fare well in cross-examination. She gave conflicting versions on the sequence of the rape. First, she stated that it was, Gilbert who raped her first, followed by the second appellant and the last being the first appellant. Much later she changed her version to state that it was the first appellant (Moya) who raped her first and then repeated himself. However she was adamant that the person who raped her first, raped her twice. To compound the problem, she then changed again and stated that it is Gilbert, who raped her first, then the second appellant followed by the first appellant who raped her twice.

[6] It is clear that Pamela was confused in her recollection of the events of the ill-fated night. She not only contradicted herself in evidence in chief and in cross-examination, she also contradicted the statement that she had made to the police.

[7] The contradictions in her evidence are so material that, to my mind, they render her evidence unreliable when it stands alone. However, this should not be misconstrued to mean that she is a dishonest witness who lied to the court deliberately. I ascribe her confusion about the events of the fateful night to the trauma which she must have experienced as a victim. She was accosted by three hostile and violent men in the early hours of the morning who assaulted her severely and then gang-raped her. To expect her to give a clear and meticulous account of who did what

first, is to expect the impossible. Her confusion is, to my mind understandable. She is only human. Unfortunately, much as she has my sympathy, these contradictions render her evidence unreliable. On its own it does not pass muster.

[8] The state then called Morris Maluleka (Morris), ostensibly to corroborate the version of Pamela. Unfortunately, instead of corroborating Pamela, he contradicted her on material aspects of the case as I will demonstrate hereunder. Morris testified that he heard someone screaming whilst at his home in the same yard at approximately 01h00. He peeped through a hole in the door and saw Moya and two other men with Pamela. They were making noise and saying that they will take Pamela as they did not find Thulisiwe. He testified further that the second appellant and the one called Gilbert, forced Pamela to go with them. As they were assaulting Pamela, he telephoned one Victor Mampuru (Victor) who apparently stays nearby, for assistance. He also called Pamela's sister. According to Morris, it is Gilbert who raped Pamela first, followed by the second appellant. Contrary to Pamela, Morris testified that all three persons (the two appellants and Gilbert) each raped Pamela twice. However, Morris corroborated Pamela that he is the one who caught the first appellant whilst still raping her, whilst the second appellant was caught at the gate by Victor.

[9] Dr Carel Grovè Kleynhans is the medical doctor who examined Pamela on 18 November 2006. He prepared a J88 medical report, which was handed in as an exhibit by the appellant. He testified that as Pamela was bleeding profusely from her vagina ostensibly due to menstruation, and further that she had had three previous deliveries, he could find no

signs of injury to her genitals. As a result he was unable to make any conclusive findings regarding the alleged rape. However, he observed an injury on the right side of her face consistent with a human bite mark. He recorded further that Pamela had reported to him that she was threatened with a bottle. I hasten to comment that this is contrary to Pamela's evidence that she was scratched with a broken bottle on her face.

[10] The two appellants testified in their defence. It suffices to state that, although they both admitted to having been with Pamela later that night, they both denied having assaulted or raped her. As the first appellant is not appealing against his conviction, I will not comment about his version.

[11] In a nutshell, the version of the second appellant is that he was with the first appellant and Pamela earlier that evening. He later parted with them to go home. Whilst on his way home he heard some noise coming from where he had left the first appellant. He then went to where the noise came from to investigate. He found people assaulting the first appellant. As he tried to intervene, he was also assaulted. Whilst walking away, someone caught him. He denied that he raped Pamela.

[12] It suffices to state that the second appellant kept to his version even under cross-examination. No contradictions or inconsistencies emerged from his evidence.

[13] The vexed legal question is whether the State's evidence passed the legal test or threshold of proof beyond reasonable doubt.

[14] The following facts are not in dispute: that Pamela and the two appellants were together at some stage at about 01h00 on the morning of 18 November 2006; that Pamela was assaulted and raped by three men and that both the appellants were arrested by neighbours at or near the scene.

[15] The issue which this Court has to decide is whether the State's evidence, given its imperfections, deficiencies and contradictions was of such a calibre that it could satisfy the trial court that the guilt of the appellants had been proved beyond reasonable doubt.

[16] I regret to state that contrary to a plethora of case law on the point, the regional magistrate adopted a wrong judicial approach to the evaluation of evidence. The regional magistrate expressed himself in the judgment as follows:

'The evidence of both accused is improbable and contradictory, and the court cannot find that it is truthful beyond reasonable doubt'.

Undoubtedly, the regional magistrate misdirected himself.

[17] It is trite that in a criminal trial, the State bears the onus to prove the guilt of an accused beyond reasonable doubt. There is no onus on the part of an accused to prove his innocence or to convince the court of the truthfulness of any explanation that he or she gives. *S v Jochems* 1991 (1) SACR 208 (A) at 211E-G. It is not enough or proper to reject an accused's version on the basis that it is improbable only. An accused's version can only be rejected once the court has found, on credible evidence, that it is false beyond reasonable doubt. *S v V* 2000 (1) SACR

453 (SCA) para 3. In other words, if the appellants' version is reasonably possibly true, he is entitled to be acquitted.

[18] I interpose to state that counsel for the respondent was invited to give any acceptable reason why the second appellant's version was rejected by the regional magistrate. To his credit, he conceded that he could find none. It follows ineluctably that the regional magistrate erred in rejecting the second appellant's version in the face of the State's version which is riddled with material contradictions which go to the heart of the case regarding the sequence of how Pamela was raped.

[19] The judgment of the regional magistrate does not show if any caution was exercised whilst evaluating the evidence of Pamela. This is of great significance on the facts of this case as she on numerous occasions became confused regarding who raped her and in what order. When confronted with some glaring contradictions in her evidence, she readily conceded that she was getting 'mixed up'. Furthermore, she was shown to have contradicted her statement which she had made to the police.

[20] The problem is further exacerbated by the contradictions in her evidence and that of Morris regarding the identity of who did what and when. Given these glaring contradictions, one would have expected the regional magistrate to have shown some caution by asking the witnesses about the opportunities available to them to observe and identify the second appellant; to indicate any features with which they identified the second appellant, given the fact that he was unknown to them.

[21] The following facts are relevant to an evaluation of the evidence; that it was in the early hours of the morning; she had been drinking liquor; she was seriously assaulted and raped by three men; that she must have been traumatised; the fact that Morris observed the incident from a distance from a hole in the door and, importantly, the fact that the second appellant was not known to both of them and the reliability of his identification is highly questionable. In my view, these circumstances are such that it cannot be found with certainty that they had sufficient opportunity to make reliable observations and identification of the second appellant as one of the rapists.

[22] I interpose to state that according to Morris, the second appellant was caught by one Victor at the gate. However, Victor was never called to testify. No explanation was tendered. From the evidence it is clear that Victor was an essential witness. In all probability, he is the only person who could have explained to the court exactly where, how and why he arrested the second appellant. The inexplicable failure by the state to call him has had the effect of weakening the State's case even further regarding the identification of the second appellant.

[23] In the circumstances, I am not satisfied that the evidence relating to the identification of the second appellant relied upon by the regional magistrate was sufficiently reliable to constitute proof beyond reasonable doubt. It follows that the conviction of the second appellant cannot stand. What remains for consideration is the sentence imposed on the first appellant.

[24] I have already indicated that the first appellant is appealing against his sentence of life imprisonment only. The main submissions put forward on his behalf is first, as Pamela did not sustain any injuries whatsoever to her genitals, this rape does not qualify as the worst case of rape that warrants the imposition of the ultimate sentence of imprisonment for life; second, it was submitted that the regional magistrate erred in failing to take into account, amongst other factors, the fact that the appellant had already spent two and a half years in jail whilst awaiting trial, and further that he was a first offender; and third, that the regional magistrate, having considered life imprisonment as a real possibility, misdirected himself by sentencing the appellant to life imprisonment without having had the benefit of a probation officer's report and the victim impact report.

[25] The State countered this by submitting that the circumstances under which this rape was committed and the brutal and brazen assault which accompanied it, justified life imprisonment. Furthermore, the respondent argued that the first appellant's personal circumstances do not amount to substantial and compelling circumstances to justify a lesser sentence. As a result, it was contended that this Court, sitting as a Court of Appeal has no right to interfere with the sentence.

[26] It is correct as counsel for the first appellant submitted that imprisonment for life which is the ultimate sentence should not be lightly imposed. It is the kind of sentence that should be imposed only after due consideration of all the facts and circumstances relevant to sentencing, in particular the life history of an accused, his or her upbringing, his or her career if any, prospects of rehabilitation and, of course, the nature, impact

and effect of the offence on the complainant. See *S v Siebert* 1998 (1) SACR 554 (SCA).

[27] The regional magistrate did not obtain a probation officer's report nor a victim impact report. Is this an irregularity as contended for by the first appellant? If so, is it so gross that it can be said that the appellant did not receive a fair trial. The answer must be in the negative as it is clear from the record that the regional magistrate had all the facts relevant to sentencing at his disposal when he sentenced the appellant.

[28] It is certainly desirable that pre-sentencing reports be procured before sentencing, particularly in cases where life imprisonment is a real possibility. However, there is no hard and fast rule that such reports be obtained in all cases. The peculiar facts of each case will determine if pre-sentencing reports are essential. I do not think that this was such a case. Furthermore, it was not argued before us that the regional magistrate failed to exercise his sentencing discretion or exercised it improperly or unreasonably. A failure to call for pre-sentencing reports by the regional magistrate in this case cannot without more constitute the kind of misdirection which vitiates its decision on sentence.

[29] However, as appellants' counsel conceded, correctly in my view, the facts of this case prove beyond doubt that this rape falls squarely within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). The evidence paints a horrid picture of three men waiting in the dark for the poor and vulnerable complainant. As she emerged they pounced on her like hungry wolves. All three of them assaulted her with stones. One of them bit her whilst another one scratched her with a

broken bottle on her face. This behaviour shows lack of respect for the complainant's right to life, her physical integrity, freedom of movement and importantly, her human dignity. The appellant has proffered no explanation for this egregiously barbaric behaviour. To my mind, there are no facts that could qualify as substantial and compelling to justify a lesser sentence than imprisonment for life.

[30] Nearly 18 years ago, this Court sounded a clear warning to rapists and men who abuse women in *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345B as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[31] It is sad and a bad reflection on our society that 21 years into our nascent democracy underpinned by a Bill of Rights, which places a premium on the right to equality (s 9) and the right to human dignity (s 10), we are still grappling with what has now morphed into a scourge to our nation. It is clear that this salutary warning expressed by this Court in *Chapman* went unheeded. Needless to state that courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. Our media in general is replete with gruesome stories of rape and women and child abuse on a daily basis.

[32] In 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and introduced the Act, colloquially called the Minimum Sentences Act which prescribes severe minimum sentences for certain serious crimes. Self-evidently, the Government's intention and hope was that such severe sentences would serve as an effective deterrent whilst at the same time taking those who have proved to be a danger to society out of circulation for long periods including life. Sadly, statistics prove that the Minimum Sentences Act has not had the desired effect. Violent crimes like rape and abuse of women and children in various guises still occur unabated. What then can the courts do to help stem this tide which has the potential to destroy the very fabric of our society? This Court answered this question in *Chapman* at 345 D (supra) with the following clear message to the courts:

'The Courts are under a duty to send a clear message to the accused to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade these rights.'

[33] Unlike at the time of *Chapman*, the Courts now have an effective tool in the form of the severe sentences prescribed in the Minimum Sentences Act to fight this scourge. As stated in *S v Malgas* 2001 (1) SACR 469 (SCA) the courts must, where there are no substantial and compelling circumstances in crimes like this one, which fall under s 51(1), not hesitate to impose the ultimate sentence prescribed. No court should permit flimsy reasons, undue or maudlin sympathy with an accused, personal doubt regarding the effectiveness of the sentence to deflect it from executing its task to impose appropriate sentences. Courts must accept that as the Legislature has decreed, these crimes warrant a

severe, standardised and consistent response from the courts. *S v Malgas* (supra) at para 25.

[34] Although the appellant's counsel was hard-pressed to concede that rape has become endemic in the country and that Parliament has identified it as one of those crimes which must be visited with severe minimum sentences, he submitted that the regional magistrate erred in proceeding to sentence the first appellant to life imprisonment without having had the benefit of a probation officer's report, and a victim impact report. The nub of the contention was that as life imprisonment is the ultimate sentence, no sentencing officer should impose it without being satisfied that he or she has been placed in possession of all facts relevant to a consideration of an appropriate sentence. I can find no fault with this submission.

[35] It is axiomatic that the sentencing stage is different to the trial stage where the issue of the burden of proof is crucial in determining the guilt or innocence of an accused. Where sentencing is involved no sentencing officer can remain supine and leave the fortunes of an accused to the vagaries of trial lawyers. A sentencing court must be proactive to ensure that he or she is fully informed of all the facts which impact on the accused, like his/her family history, upbringing, career, his psycho-emotional wellbeing, his moral and ethical standards and any other factors which may have had an influence on him or her committing the crime for which he or she is convicted. This is normally done through reports by expert witnesses like a probation officer. Equally, to have a complete and balanced picture, a sentencing officer will require a victim impact report, essentially to inform him or her of the victim; her family

history, upbringing, career and, crucially, the impact and effect of the offence on her and her family. Self-evidently, such reports will enable a sentencing officer to explore a whole range of sentencing options to be able to decide on a sentence which is balanced, fair to both the accused and the victim, whilst taking appropriate account of the moral indignation engendered in the right thinking members of the community.

[36] Having said this, I agree with the regional magistrate that the appellants' circumstances do not qualify as substantial and compelling as envisaged by s 51(3) of the Act. Furthermore, I am unable to find any misdirection on the part of the regional magistrate in regard to sentencing the first appellant. This being a Court of Appeal, our powers to interfere with a sentence properly imposed by the trial court are strictly circumscribed. *S v Kgosimore* 1999 (2) SACR 238 (SCA). This is so as the prerogative to impose an appropriate sentence resides with the trial court. We cannot be seen to be usurping the sentencing discretion of the trial court.

[37] There is an aspect of this matter which warrants some comment. Having been convicted by a regional magistrate of rape which falls within the purview of s 51(1) of the Act, both appellants were sentenced to life imprisonment after the regional magistrate had found that there were no substantial and compelling circumstances to justify a lesser sentence. Aggrieved by this judgment, they both appealed to the North Gauteng High Court, Pretoria. Two Acting Judges heard this appeal.

[38] On 5 July 2010, they delivered a judgment dismissing this appeal. Regrettably, this is no judgment at all. It is merely an order which is

paraded as a judgment. It is cryptic and comprises five lines only. Contrary to established and salutary judicial tradition, it neither deals with the facts nor the law. Even more disconcerting is the absence of reasons for the decision. The entire 'judgment' reads as follows:

'We once again thank the advocates for the heads and the argument of each counsel in this regard. After having carefully considered this case, I have no doubt that there is no reason to interfere with the judgment of the magistrate on conviction and neither on sentence. Therefore I am of opinion that the appeal should be dismissed.'

[39] Dealing with a failure by a judicial officer to give reasons for his or her decision, this Court held as follows in *S v Mokela* 2012 (1) SACR 431 (SCA) paras 12 and 13:

'I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it un-judicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefore. In *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) (2009 (10) BCLR 1046) para 15 the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision, stated that:

"Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process".

See also *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28.

[13] Regarding the duty of judicial officers to give reasons for their decisions, it is instructive to have regard to what the Right Honourable Sir Harry Gibbs, GCMG, AC,

KBE, the former Chief Justice of the High Court of Australia, stated in the 1993 (67A) *Australian Law Journal* 494 where he said at 494:

"The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view…".

See also *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) (1999 (3) BCLR 253) para 12; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) paras 28-30.'

[40] It suffices to state that this is a serious dereliction of duty by the two judges. As one can see from the record, it assists neither the appellants nor the Appeal Court to understand the basis on which the appeal was dismissed. This failure becomes even more important in the light of the fact that having read the record, we found that the regional magistrate had no reasons to reject the version of the second appellant as it could not be said to be false beyond reasonable doubt. As this judgment shows, there were serious issues surrounding the identification of the appellants which the court below failed inexplicably to deal with.

[41] To my mind, the conduct of the two judges is so egregious that it cannot be countenanced. It has the potential of eroding the public confidence in the judiciary. It is for this reason that we believe that a copy of this judgment should be sent to the Judge President, North Gauteng High Court, Pretoria for his urgent attention.

[42] In the result:

1. The appeal against the sentence of imprisonment for life imposed in respect of the first appellant is dismissed.

2. The appeal against both conviction and sentence of imprisonment for life imposed in respect of the second appellant is upheld. The conviction and the sentence are set aside.

3. The Registrar of this Court is directed to send a copy of this judgment to the Judge President, North Gauteng High Court, Pretoria.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellants	:	JM Mojuto Instructed by: Legal Aid South Africa, Pretoria Bloemfontein Justice Centre, Bloemfontein
For Respondent	:	HA Thenga Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein