THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1571/2024

In the matter between:

RAMESA JOHANNES RATHEBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rathebe v The State* (1571/2024) [2025] ZASCA 73 (30 May 2025**)**

Coram: MOCUMIE, KEIGHTLEY and BAARTMAN JJA and PHATSHOANE and HENNEY AJJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: 30 May 2025

Summary: Criminal Law – Criminal Procedure Act 51 of 1977 (the CPA) – the proper approach to adopt where an accused person whose erstwhile co-accused was found not guilty and discharged in a separate appeal on the same facts – convictions based on the uncorroborated evidence of a single witness – s 208 of the CPA.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baloyi-Mere AJ with Davis J concurring, sitting as a court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

'Accused 2 is found not guilty and discharged on all 11 counts of rape.'

JUDGMENT

Mocumie JA (Keightley and Baartman JJA and Phatshoane and Henney AJJA concurring):

[1] This is an appeal against the judgment and order of a full bench of the Gauteng Division of the High Court, Pretoria (the high court) with special leave having been granted by this Court under the extraordinary circumstances which will become apparent. The crisp issue for determination is whether the appellant, Mr Ramesa Johannes Rathebe (Mr Rathebe), is entitled to an acquittal on all 11 counts of rape on which he was convicted by the trial court. His appeal follows on an acquittal, in an earlier appeal to this Court, of his erstwhile co-accused on the same charges and on the same set of facts. The appeal is unopposed and the parties agreed that it be disposed of without oral argument on Mr Rathebe's papers, as contemplated in s 19*(a)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act).[1]

[2] First, I dispose of the application for condonation for the late filing of the appeal which had lapsed. Mr Rathebe was released, on warning, from a correctional facility on the directive of this Court in November 2023, after considering his co-accused's appeal.

[1] Section 19*(a)* of the Superior Courts Act 10 of 2013 provides that the Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any other powers, dispose of an appeal without the hearing of oral argument.

After Mr Rathebe and his erstwhile co-accused had had their sentences increased in an appeal to the high court, he had not earlier applied for special leave to appeal to this Court. However, on being advised of this Court's directive, and assisted by the Legal Aid Board, he pursued the new opportunity to seek special leave to appeal in earnest. Special leave to appeal was granted. Several problems occurred while the appeal was on the Legal Aid Board's desk, resulting in the late filing of the notice of appeal. Consequently, the appeal lapsed. The reasons for the period of delay have been sufficiently explained, and the State does not oppose condonation being granted. I can conceive of no reason why condonation ought not to be granted and it is so ordered. The appeal is reinstated.

[3] This appeal is a sequel to an appeal which served before this Court in September 2023, *Sekoala v The State* (*Sekoala*).[2] Mr Rathebe is serving 20 years' imprisonment, albeit he was released on warning pending this appeal. The conviction and sentence of his erstwhile co-accused, Mr Sekoala, were overturned by this Court in February 2024. He is similarly circumstanced as Mr Sekoala.

[4] The Constitutional Court in *Molaudzi v S* (*Molaudzi*)[3] highlights the difficulties that can occur when former co-accused persons separately seek leave to appeal with different outcomes. There, the accused persons were found guilty of murder and robbery based on common purpose by the North West Division of the High Court, Mafikeng. The high court and this Court on appeal, grounded on the inadmissibility of the extra-curial statements, dismissed their appeal. In the Constitutional Court, Mr Molaudzi, who was not legally represented, unsuccessfully applied for leave to appeal on the basis that he was seeking leave to it on essentially an attack on the factual findings of the trial court. That did not raise a proper constitutional issue for the Constitutional Court to entertain it.

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[2] See the unreported judgment of this Court, *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024) (*Sekoala*).
[3] *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC).

[5] In *Mhlongo v S; Nkosi v S*,[4] Messers Mhlongo and Nkosi, the erstwhile co-accused of Mr Molaudzi applied for leave to appeal against their convictions and sentences. Their application differed from that of Mr Molaudzi (in *Molaudzi*) in that they raised constitutional arguments pertaining to the admissibility of extra curial statements of an accused person against a co-accused in a criminal trial. The Constitutional Court considered the challenge to raise a meritorious constitutional issue which engaged its jurisdiction; the Court granted the applicants leave to appeal; and subsequently overturned their convictions and they were released from prison.

[6] Under directions by the Constitutional Court, Mr Molaudzi brought a further application for leave to appeal to the Court. He raised the same arguments as Messers Mhlongo and Nkosi. The question that arose was whether the refusal of his first application for leave to appeal rendered his second application *res judicata*. Mr Molaudzi argued that it did not. This was because the first application was an attack against the factual findings of the trial court. It did not raise a constitutional issue and accordingly did not engage the Court's jurisdiction. Mr Molaudzi argued that the second application dealt with the constitutional tenability of the admissibility of extra-curial statements by an accused against a co-accused was not raised in the first application.

[7] The Constitutional Court found, *inter alia*, that 'even though a constitutional challenge was not raised and decided in the first application, the second application ought to be considered *res judicata* as the merits of Mr Molaudzi's appeal were considered by [the] Court and ruled on'.[5] However, it found, with reference to foreign jurisdictions and precedents, that:

'The general thrust is that *res judicata* is usually recognised in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognise that this cannot be absolute. This is because "[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience".'[6]

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[4] The matter is reported as *Mhlongo v S; Nkosi v S* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).
[5] Op cit fn 3 para 21.
[6] Ibid para 30. Quoting The Indian Supreme Court in *M S Ahlawat v State of Haryana and Another* 1999 Supp (4) SCR 160 para 15.

[8] The Constitutional Court exercised its powers under s 173 of the Constitution to effect an outcome that served the interests of justice. In doing so, it balanced the rule of law and the need for legal certainty and finality in the administration of criminal justice – which may be adversely affected if parties are allowed to approach the courts on multiple occasions on the same matter – against the necessity to vindicate the constitutional rights of an unrepresented, vulnerable similarly situated accused, who would otherwise be denied relief. The Constitutional Court held, '[a]s in this case, the circumstances must be wholly exceptional to justify a departure from the *res judicata* doctrine'.[7] It concluded that the merits of Mr Molaudzi warranted the same conclusion as his erstwhile co-accused, Messers Mhlongo and Nkosi.

[9] While the present case does not raise the same issue of *res judicata*, as was raised in *Molaudzi*, the approach of the Constitutional Court in that matter, makes plain the importance of the need to serve the interests of justice in cases where co-accused persons have 'split appeals' and unfortunate anomalies consequently occur.

[10] Reverting to Mr Rathebe, it is common cause that he was charged together with Mr Sekoala on 11 counts of rape of one complainant. Both unsuccessfully appealed all the convictions and sentences before the high court. On appeal before this Court, Mr Sekoala was found not guilty and discharged on all counts. In *Sekoala*, this Court said*:* **'**The complainant's evidence that she was raped by both Mr Sekoala and Mr Rathebe must be considered along with the explanation given by both accused. *Mr Rathebe's version is wholly exculpatory. He denied any sexual intercourse with the complainant. He confirmed his knowledge about the troubled relationship Mr Sekoala and the complainant had. This was also confirmed by Ms Baloyi.* His version was that the complainant asked him to talk to Mr Sekoala on several occasions about their relationship, prior to the night in question, which he refused to do. On the night in question, he intervened when Mr Sekoala manhandled the complainant, trying to chase her out of his house. He was present when Mr Sekoala told the complainant he wanted to end their relationship. *After Mr Sekoala told them to leave his bedroom, he and the complainant went*

[7] Ibid para 38.

to the sitting room, where she was sobbing. He fell asleep and when he woke up the next morning, the complainant was not there. He later saw her doing some chores in Mr Sekoala's bedroom.

The evidence of Mr Rathebe, is important in the scheme of how events unfolded on the night in question. The trial court considered the complainant's evidence in isolation. When the strengths and weaknesses of both the State and Mr Sekoala's version are considered, Mr Sekoala's version does not strike as one that could be viewed as being false beyond [a] reasonable doubt. If there is a reasonable possibility of his version being true, he is entitled to an acquittal. The court does not need to be convinced that he is telling the truth. Mr Sekoala's evidence is supported by Mr Rathebe's, whose evidence was hardly disturbed in cross examination.

As regards the bruises found on the arms of the complainant, the trial court concluded that they were sustained during the rape incidents when the two accused held her down. This was not the only reasonable inference that could be drawn from the proven facts. The bruises could equally have resulted from the aggressive manhandling by Mr Sekoala when she was being chased out of the house. Unfortunately, this was neither explored with any witness during the trial**,** nor was the doctor who examined the complainant called to explain which scenario would be consistent with the bruises. Whether the bruises could only have been sustained when the complainant's arms were held to the ground whilst she was being raped was not tested. The trial court erred by finding that they were consistent only with her version of rape by the two men. Since the holding down of the hands while being raped was not the only reasonable inference to be drawn from the bruises on the arms, the trial court materially misdirected itself. The accused ought to have been given the benefit of the doubt.'[8] (Emphasis added.)

[11] *Sekoala* emphasised the basic principles in criminal cases, which apply where the State relies solely on the evidence of a single witness, as envisaged in s 208 of the Criminal Procedure Act 51 of 1977 (the CPA).[9] The principles have been stated and applied in many judgments of this Court[10] and other courts. The trial court and the high court did not follow these authorities.

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[8] *Sekoala* paras 63-65.
[9] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused person may be convicted of any offence on the single evidence of any competent witness as long as the evidence is clear and satisfactory in every material respect.
[10] *Cupido v The State* (1257/2022) [2024] ZASCA 4 (16 January 2024) and authorities cited therein.

[12] The basic rights impugned are clear. Section 35(3) of the Constitution, provides for the right to a fair trial. Our criminal judicial system seeks to promote fairness for all accused persons. It emphasises that fairness is a fundamental requirement of the Constitution during a trial, meaning that a trial court must consider what is fair in the circumstances and ensure that the accused person is treated fairly. Where a trial court failed to do so, the appellate court must be extra careful not to repeat the same misdirection. Section 9 of the Constitution provides for the equal treatment of all who appear before the courts.

[13] It follows that, as with Mr Sekoala, the only evidence the State presented against Mr Rathebe did not meet the high threshold of proof beyond a reasonable doubt. For these reasons, Mr Rathebe is entitled to the benefit of the same doubt that Mr Sekoala enjoyed, and on the same basis held by this Court in *Sekoala*.

[14] There remains one issue upon which some observations are appropriate. The heads of argument which were originally filed by the State comprised only three pages which were of no assistance to this Court, nor in line with the Practice Directives of this Court. To demonstrate the point, pages three and four, which comprise the entirety of the submissions made, are quoted *verbatim*:

‘**INTRODUCTION’**

AD Par 1: Correct

MERITS

AD Par 2 and 3

The Respondent cannot refer to evidence that is implicating the appellant that did not implicate his erstwhile co-accused.

CONCLUSION

The Respondent abides by the decision of this Court.

Signed at PRETORIA on this 13th day of October 2024.’ (Emphasis added.)

[15] A directive was issued by this Court for the State to file proper heads of argument. As prompted and in due course, detailed 'Respondent's Supplementary Heads of Argument' were filed. In there, reference was made to authorities not relevant to the issue raised in the appeal. In addition, the author conceded the merits '*cautiously*, acknowledging that the constitution of the Court to decide this appeal is totally different than the Honorable Judges that considered the appeal of the [a]ppellant's erstwhile co-accused, and who will be required to consider the evidence and draw their own conclusions'.[11]

[16] The prosecution represented by its own prosecutors, who are admitted advocates of the high court of the respective divisions in which they serve, play a critical role in the criminal court from the commencement of the trial until the final court of appeal. While it may be so that they act under pressure and tight court schedules, this cannot be an excuse for failing to file proper heads of argument. In this Court, the prosecution is required to file heads of argument a month after the appellant has filed theirs. That is sufficient time to be able to produce well-reasoned and detailed heads of argument which will be of great assistance to this Court. Rule 10[12] read with 10A,[13] remains in place and

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[11] Emphasis added.

[12] *Rule 10* provides:
'(1) Unless the President otherwise directs—
(a) the appellant shall lodge with the registrar six copies of his or her main heads of argument within six weeks from the lodging of the record; and
(b) the respondent shall lodge with the registrar six copies of his or her main heads of argument within one month from the receipt of the appellant's heads of argument.
(2) When the lodging of an application or record of appeal with the registrar does not allow the heads of argument to be lodged and served in terms of subrule (1), the applicant or appellant, as the case may be, shall file the same without delay and the respondent shall thereafter file the argument in answer as soon as possible.
. . . .' (Emphasis added.)

[13] *Rule 10A* provides:
'The heads of argument of each party must be accompanied by—
(a) a brief typed note indicating—
(i) the name and number of the matter;
(ii) the nature of the appeal;
(iii) a concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests;
(iv) if that party wishes to raise a constitutional question relating to the constitutional validity or the constitutional applicability of any law or the constitutional validity or applicability or extension of a common law rule, a concise definition of the question;

must be adhered to. A failure to do so, as occurred with the initial heads of argument filed in this case, amounts to a breach of a professional duty owed by them as representatives of the State in criminal matters, and to the Court.

[17] In the result, the following order issues.

1 The appeal is upheld.

2 The order of the full bench is set aside and substituted with the following:

'Accused 2 is found not guilty and discharged on all 11 counts of rape.'

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B C MOCUMIE

JUDGE OF APPEAL

(v) the issues on appeal succinctly stated (for example "negligence in MVA case", "admissibility of a confession", "interpretation of. . ."); (vi) an estimate of the duration of the argument; (vii) if more than one day is required for argument, the reasons for the request; (viii) which portions or pages of the record are in a language other than English; (ix) a list reflecting those parts of the record that, in the opinion of counsel, are necessary for the determination of the appeal. (x) a summary of the argument, not exceeding 100 words; (xi) if a core bundle is not appropriate for the appeal, the reasons for the conclusion. (xii) that there was due and timeous compliance with rule 8(8) and (9), and if not, why not; and (b) a certificate signed by the legal practitioner responsible for preparing the heads of argument that rules 10 and 10A(a) have been complied with. . .' (Emphasis added.)

Written Submissions

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Instructed by:	Legal Aid South Africa, Pretoria Office
	Legal Aid South Africa, Bloemfontein
Counsel for the respondent:	J P Krause
Instructed by:	Director of Public Prosecutions, Pretoria
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