THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 497/2013

In the matter between:

MAPOSA FRANS MADIBA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Madiba v The State* (497/2013) [2014] ZASCA 13 (20 March 2014)

Coram: Ponnan JA and Swain and Mathopo AJJA

Heard: **5 March 2014**

Delivered: 20 March 2014

Summary*:* Appeal against conviction on charges of attempted rape and rape dismissed – material misdirection by trial court in passing sentence – appeal court at large to impose sentences on all counts – appeal against sentence partially upheld.

ORDER

On appeal from Limpopo High Court, Thohoyandou (Hetisani J sitting as court of first instance):

1 The appeals against the convictions of attempted rape and rape are dismissed.

2 The appeal against the sentences imposed on all counts are upheld, the sentences imposed are set aside and the appellant is sentenced to the following terms of imprisonment:

Count 1 – attempted rape: 5 years' imprisonment

Count 2 – kidnapping: 6 years' imprisonment

Count 3 – rape: life imprisonment

Count 4 – murder: 35 years' imprisonment

3 It is ordered that the sentences are to run from the date when sentence was originally imposed being 4 May 2009.

JUDGMENT

Swain AJA (**Ponnan JA and Mathopo AJA** concurring):

[1] The appellant Mr Maposa Madiba was convicted of the crimes of attempted rape, kidnapping, rape and murder by the Limpopo High Court (Hetisani J) and sentenced to terms of imprisonment of 10 years, 15 years, life and 35 years respectively in respect of each conviction. The sentences were ordered to run concurrently. Hetisani J wrongly added that the appellant had effectively been sentenced to 70 years' imprisonment.

[2] The appellant was subsequently granted leave by Makhafola J to appeal to this court against his convictions for attempted rape and rape, as well as the sentences imposed on all counts.

[3] The salient facts forming the basis for the conviction of the appellant on all of the counts, was that he had broken into the home of L M where she was sleeping with her nine year old son R and her three year old daughter Ratani. The appellant stated 'R's mother, it is long that I wanted to have sex with you', at which stage R ran out of their home. The appellant then held L and attempted to trip her but she in turn managed to trip the appellant causing him to fall down. She then ran out of her home chased by the appellant, leaving Ratani behind lying on the bed. The appellant managed to grab L outside her home and again tried to trip her but she again succeeded in tripping the appellant, causing him to fall. This enabled her to make good her escape. She then saw the appellant re-enter her home but did not see him leave. A short while later in the company of other persons she returned to her home only to find that Ratani was missing. A search was then conducted, the police were called and the appellant was found hiding in the bush. The appellant then pointed out the body of Ratani to the police.

[4] The challenge advanced by counsel for the appellant against the conviction of attempted rape of L was that on the evidence the action of the appellant had not reached a point where it could be said beyond reasonable doubt that the appellant wanted to rape L. Counsel referred to the evidence that the appellant and L were fully dressed, the appellant did not touch L's private parts and L had managed to trip the appellant causing him to fall.

[5] In *R v B* 1958 (1) SA 199 (A) at 204 C-D Schreiner JA stated:

'I apprehend that if a man assaults a woman in order to have intercourse with her against her will he attempts to rape her. In my view, which I believe accords with the general practice, the stage of attempt is reached as soon as the assault takes place and before any direct effort is made to effect penetration.'

It is quite clear on the evidence, namely the attempt by the appellant to subdue the complaint coupled with his utterance, that this stage had been reached and

there is accordingly no basis to interfere with the conviction of attempted rape. When faced with this authority counsel for the appellant fairly and properly conceded that this charge had been proved against the appellant.

[6] As regards the conviction of the rape of Ratani, counsel for the appellant submitted that there was no direct or circumstantial evidence that the victim's vagina was penetrated, alternatively penetrated by a penis. It was submitted that all that was relied upon was the post mortem report conducted on the body of Ratani as well as the photo album containing photos of Ratani's body at the scene.

[7] However, several witnesses including Martha Tshirana, inspector Tshikudo and inspector Tshisudzungwane all stated that they had seen the body of Ratani and that blood was flowing from her vagina or 'private parts'. This evidence appears on the photos taken of Ratani's body contained in the photo album. The post mortem report which was handed in by consent and which in terms of s 212(4) of the Criminal Procedure Act 51 of 1977 (the Act) constituted proof of its contents, states 'large amount of blood in vulva' and that one of the causes of death was 'sexual homicide'.

[8] If the State had taken the trouble to call the doctor who had performed the post mortem to explain the contents of the report, this issue would probably have been clarified. There appears to be a disturbing tendency on the part of the representatives of the State not to call the doctor who conducted the post mortem or performed an examination and completed the report, to testify. However, there are many cases where this evidence is essential to the just determination of a case and in many cases is of great value in assessing guilt.

[9] When regard is had to the totality of the evidence – that the appellant wanted to rape Ratani's mother and violently attempted to do so, but when this failed immediately kidnapped Ratani, who was thereafter found dead, bleeding from her vagina – taken together with the appellant's mendacity as a witness, and the medical evidence the only reasonable inference to be drawn is that the appellant raped Ratani. There is accordingly no basis to interfere with the conviction of rape. Counsel for the appellant, again, when faced with these

facts, fairly and properly conceded the charge of rape had been proved against the appellant.

[10] Turning to the issue of the sentences imposed. This court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed, had it been the trial court, is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate' (see *S v Malgas* 2001 (1) SACR 469 SCA at 478 E-H).

[11] It is quite clear that Hetisani J misdirected himself when he stated that the cumulative effect of the sentence imposed was that the appellant was sentenced to 70 years' imprisonment. Regard being had to the fact that one of these sentences imposed was life imprisonment, it is incomprehensible how Hetisani J came to this conclusion.

[12] This court is accordingly at large to reconsider the sentences imposed. As regards the sentences imposed for the convictions for attempted rape and kidnapping of 10 years' and 15 years' imprisonment respectively, counsel for the appellant and the State were agreed that these sentences should be reduced to five and six years' imprisonment respectively. I agree that these are appropriate sentences in all of the circumstances.

[13] As regards the sentence of life imprisonment for the rape of Ratani, counsel for the appellant sought to persuade us that substantial and compelling circumstances were present, which circumstances justified the imposition of a lesser sentence. He referred to the fact that the appellant had been assaulted by the community at the time the appellant had pointed out the body of the deceased and had spent one year and five months in detention awaiting trial. He also sought to rely upon a statement made by Hetisani J when passing sentence that the appellant was under the influence of liquor when he perpetrated the crimes. No evidence, however, was led in this regard to justify this conclusion. In any event, all of these factors pale into insignificance when the brutality of the rape perpetrated by the appellant on Ratani, a three year old

girl, is considered. I am accordingly satisfied that no substantial and compelling circumstances are present to justify the imposition of a sentence less than the prescribed minimum sentence of life imprisonment.

[14] I turn to the sentence of 35 years imprisonment imposed by Hetisani J for the murder of the three year old girl, Ratani. Hetisani J furnished no reasons for imposing a lesser sentence for the murder of Ratani than he imposed for her rape. Her murder was undoubtedly deserving of a sentence of life imprisonment. The State, however, did not seek leave to appeal against this sentence and in fact asked for the sentence to be confirmed. This court is accordingly not entitled to increase the sentence (see *Frank Nabolisa v The State* 2013 (2) SACR 221 (CC)).

[15] The following order is made:

1 The appeals against the convictions of attempted rape and rape are dismissed.

2 The appeal against the sentences imposed on all counts are upheld, the sentences imposed are set aside and the appellant is sentenced to the following terms of imprisonment:

Count 1 – attempted rape: 5 years' imprisonment

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3 It is ordered that the sentences are to run from the date when sentence was originally imposed being 4 May 2009.

K G B SWAIN

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	M Madima
	Instructed by:
	Thohoyandou Justice Centre
	Bloemfontein Justice Centre
For the Respondent:	N R Nekhambele
	Instructed by:
	The Director of Public Prosecutions, Thohoyandou
	The Director of Public Prosecutions, Bloemfontein