

SOUTH AFRICA / JUDGMENT

Ntandani v S (CA61/23) [2024]

ZANWHC 243 (18 September 2024)

[2024] ZANWHC 243

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Williams

CASE / FILE NUMBER

CA 61/23

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

Case

no: CA 61/23

Regional Court case

number: RC 83/21

Reportable: NO

Circulate to Judges:

NO

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

In the matter between:

PAPI SEUN

NTANDANI

APPELLANT

AND

THE

STATE

RESPONDENT

CORAM

REDDY J, WILLIAMS AJ

Date

Heard

18 June 2024

This

judgment was handed down electronically by distribution to the

parties' legal representatives by e-mail. The date of hand down of the judgment is deemed to be 18 September 2024 at 14h00.

ORDER

(i) The appeal against sentence is dismissed.

APPEAL

JUDGMENT

REDDY J

- [1] This is an appeal to the Full Bench against sentence, premised on the automatic right of appeal, by virtue of the imposition of a sentence of life imprisonment on the appellant.
- [2] The appellant was arraigned before Regional Magistrate Mabile sitting at Potchefstroom on count 1 (kidnapping) where the state alleged that the appellant unlawfully and intentionally deprived MMM of her freedom of movement; counts 2 and 3 where the state alleged that the appellant committed acts of sexual penetration with MMM, by inserting his penis into her vagina without her consent. Counts 2 and 3 were read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 ('the CLAA').
- [3] On 07 June 2022, the appellant duly represented pleaded guilty to all three counts. A statement prepared in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 ('the CPA'), duly confirmed by the appellant, formed the fulcrum of his admissions. On the latter date, the appellant was convicted on all three counts. On

07 June 2022 the appellant was sentenced as follows:

"Count 1

Kidnapping

You are sentenced to 4 years' imprisonment.

Count 2 and 3

You are sentenced to life imprisonment.

It is ordered that the sentence imposed on count 1, should run concurrently with the sentence imposed on count 2 and 3, therefore the effective term is life imprisonment."

Grounds of appeal

- [4] Mr Gonyane for the appellant assailed the sentence on four pillars. First, he contended that the court a quo erred by failing to appreciate that both counts 2 and 3 amounted to a splitting of charges resulting in a duplication of convictions, and ultimately prejudiced the

appellant. Second, following on the first contention, he asserted that the appellant was prejudiced during sentencing since the mind of the court a quo was fixated on the appellant having been convicted of two (2) counts of rape which would attract the prescribed minimum sentence of life imprisonment on each of the two (2) counts, whereas it should have been one life term. Third, he asserted that the court a quo misdirected itself by not finding that the appellant's cumulative personal circumstances constituted substantial and compelling circumstances justifying a departure from the mandatory sentence of life imprisonment. Fourth, that the imposition of the prescribed minimum sentence is shocking and inappropriately severe when due weight is afforded to the appellant's cumulative mitigating factors.

- [5] Adv Ramakgaphola for the respondent conceded that the court a quo committed a misdirection by sentencing the appellant to life imprisonment in terms of the provisions of section 51(1) of the CLAA on both counts 2 and 3, which warrants interference by this Court. The argument advanced by Adv Ramakgaphola was that the appellant raped MMM twice within the ambit of section 51(1) read with Part 1 of Schedule 2 of the CLAA, and that being so, the appellant had not demonstrated any substantial and compelling circumstances. Put differently, the sentence of life imprisonment imposed in respect of counts 2 and 3 should be set aside and that life imprisonment be imposed separately on counts 2 and 3. Moreover, these sentences run concurrently as ensconced in section 280(2) of the CPA.

The law

- [6] In *S v Malgas* 2001

- (1) SACR 469 SCA at 478 (d) to (e), Marais JA said:

'A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.' (my emphasis)

- [7] The question is whether there was any material misdirection by the court a quo to justify an interference by this Court with the sentence of life imprisonment that was imposed upon the appellant. In casu the crisp issue revolves the construction of the charges. There is no underscoring that the framing of the charges is the prerogative of the prosecutor, and that this duty should be conducted with the utmost care to legitimize the fair trial rights provided in section 35 of the Constitution of the Republic of South Africa, 1996.

- [8] The prosecutor formulated Counts 2 and 3, which were mirror images, as follows:

"That the accused is guilty of the crime of contravening the provisions of section 3 read with section 1, 50, 55, 56A, 57, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and read with the relevant provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1977 and further read with section 256, 261, and 270 of the Criminal Procedure Act 51 of 1977.

In that on or about the 14th day of May 2020 and at or near Ventersdorp in the regional division of North West the accused unlawfully and intentionally committed and act of sexual penetration with the complainant, to wit MMM, 39 years old by inserting his penis into her vagina without her consent.

The provisions of section 51(1) and schedule 2 of Act 105 of 1977 are applicable, in that the complainant was raped more than once.”

[9] It is indisputable that the appellant had committed more than one act of sexual penetration on MMM, within the purview of section 51(1) read with Part I of Schedule 2 of the CLAA. The prosecutor elected to charge the appellant with two separate counts of rape. As part of our legal landscape, the National Prosecuting Authority is enjoined with an unfettered discretion on the charges to be preferred against an accused. The prosecutorial discretion on the constitution of the charges is the domain of the National Prosecuting Authority. It is akin to the delivery of a verdict which is the exclusive territory of the court. It is, however, the duty of a court to prevent a duplication of convictions brought about by an impermissible splitting of charges by the prosecution.

[10] In *Lesang Samuel Modise v S*, Case No: CA 44/2021, NWHC, delivered on 07 March 2022, the Full Bench postulated as follows:

“[15] The formulation of the charge by the State in respect of counts 2 and 3 and the terminology used by the court a quo in sentencing the appellant on counts 2 and 3, is problematic. The court a quo found that counts 2 and 3 emanate from the same incident and ordered that the two counts be taken as one for sentence. The appellant should not have been charged separately on counts 2 and 3, but with one count of rape. In S v Maxabaniso 2015 (2) SACR 553 (ECP), an analogous matter to the present appeal, which are apposite, Plasket J said the following:

[4] The issues that arise for determination are: (a) Whether the appellant was adequately warned of the applicable provisions of the Criminal Law Amendment Act 105 of 1997 relating to the relevant applicable prescribed minimum sentence; (b) whether he ought to have been charged with two counts of rape, rather than one count; (c) whether the evidence establishes that he raped the complainant more than once; and (d) whether the magistrate misdirected himself in respect of the sentence he imposed.

The charge: One count of rape or two?

...

[20] It was argued by Mr Renaud, who appeared for the appellant, that he was charged with one count of rape and that the state, if it wanted the sentence of life imprisonment to apply, ought to have charged him with two counts of rape.

[21] I am aware of cases in which an accused has been charged with more than one count of rape involving the same victim. *S v M* and *S v Senyolo* are cases in point. In both cases the accused had raped the same victim once on two different occasions, a few months apart in

the former, and 15 days apart in the latter. Both accused were charged with two counts of rape and, in both, the court held that a prescribed sentence of life imprisonment applied because the accused had raped the same victim more than once. In *S v M Satchwell J* sentenced the accused to ‘one term of life imprisonment in respect of both counts one and two’. In *S v Senyolo*, however, Van Eeden AJ, having found substantial and compelling circumstances to be present, set aside the sentence of life imprisonment imposed by the trial court and replaced it with a sentence of 10 years’ imprisonment in respect of each count.

- [24] There are occasions when a person accused of raping a victim more than once in the course of a single encounter is charged with more than one count of rape. It appears to be practice in this division, however, to charge such an accused with one count of rape. In my view, in the normal course, that is the correct way to charge such an accused. It avoids potential difficulties highlighted by the sentences imposed in *S v M* and *S v Senyolo*, namely whether (in the absence of other factors dealt with in part 1 of sch 2) each count attracts a potential life sentence, or whether the first rape attracts a 10-year minimum sentence while the second attracts a life sentence, or whether both counts have to be taken together for purposes of sentence.
- [25] In my view the legislature envisaged an accused being charged with one count of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item (a)(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): Even when the prescribed minimum sentence for a rape is 10 years' imprisonment, courts have common-law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances.”

(my emphasis)

- [11] As was alluded to in *Modise and Maxabaniso*, the present appeal demonstrates the conundrum that an appellate court is faced with when an accused is charged with two counts rather than one count, in circumstances where the victim was raped more than once. The Regional Magistrate took counts 2 and 3 together for the purposes of sentence and imposed life imprisonment.
- [12] In *DPP, Free State v Mashune (675/17) [2018] ZASCA 60 (18 May 2018)*, Rogers AJA, in albeit in a different context, but equally applicable in the present appeal, postulated as follows:

“[10] Strictly speaking, each count in the present case involved two distinct offences, namely (a) housebreaking with intent to commit rape; and

(b) rape (S v Zamisa 1990 (1) SACR 22 (N) at 23d-e.) However, since the indictment was framed as if each housebreaking and the ensuing rape constituted a single offence, and since the contrary was not argued, I shall approach the case as if the respondent was convicted of two offences, not four. This is what the court a quo did.”

[13] There is clearly an impermissible splitting of charges. The effect of any prejudice was ameliorated by the Regional Magistrate imposing a cumulative life sentence on counts 2 and 3. It, however, remains a salutary practice as evinced in Modise and Maxabaniso, that in circumstances analogous to the present matter, that the prosecution avoids an impermissible splitting of charges, and that judicial officers remain alive to avoiding a consequent duplication of convictions.

[14] The Regional Magistrate in a terse judgment impliedly found that there existed no substantial and compelling circumstances to deviate from the imposition of the mandatory sentence of life imprisonment.

[15] In determining an appropriate sentence the court must consider the personal circumstances of the accused, the nature of the crimes and the interests of society. The court must impose a sentence incorporating the objectives of punishment, namely deterrence, prevention rehabilitation and retribution. As stated in S v Holder 1979

(2) SA 70 (A), an appropriate sentence entails that the demands of our times be taken into account, together with the mitigating and aggravating factors. In S v Rabie 1975

(4) SA 855 (A) at 862G it was stated that punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

[16] The sentencing process has been affected by the provisions of the CLAA, which provides for the imposition of minimum sentences of imprisonment In Malgas at paragraph 25 the court remarked as follows:

“Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in specified circumstances.”

[17] Further in paragraph 25, the Supreme Court of Appeal continued as follows:

“... the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes, unless there were, and could be seen to be, truly convincing reasons for a different response.”

[18] The meaning of substantial and compelling circumstances is not defined, reason being that when sentencing an offender, a court must

evaluate all the evidence, including the mitigating and aggravating factors to decide whether substantial and compelling circumstances

exist. A court must consider all circumstances and for circumstances to qualify as substantial and compelling, they need not be

‘exceptional’ in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the

moral guilt of the offender. In circumstances where a court is convinced, having considered all the factors that an injustice would

be done if a minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances. See: *S v Lekhooana* (CC 1/2021) [2023] ZAECELLC 8 (19 April 2023).

- [19] In *S v Vilakazi* 2009 (1) SACR 552 SCA the court held that factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial and compelling circumstances. In deciding whether these circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. See: *S v Pillay* 2018
- (2) SACR 192 (KZD) at paragraph 10). Notwithstanding the mentioned factors to be considered by the sentencing court, ‘[t]he specified sentences in the legislation are not to be departed from likely and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degree of participation between co-offenders are to be excluded’. See *Malgas* paragraph 25.
- [20] The appellant had an extensive old book of sins. It is common cause that at the time the appellant committed these offences he was on parole. At the time of sentencing, he was fifty (50) years old. The appellant is the father of two (2) children, one of whom is fourteen
- (14) years old and the other being eighteen (18) years old. Both his children are residing with their paternal grandfather in Cape Town. Prior to his arrest, the appellant was self-employed as a carpenter. The highest level of education that the appellant achieved was Grade 1.
- [21] Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. In *Director of Public Prosecutions v Thabethe*, [2011] ZASCA 186; 2011
- (2) SACR 567 (SCA) at 577G I it was held:

‘Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, and to impose the kind of sentences which reflect the natural outrage and

revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.’

[22] In *Mudau v State* [2013] ZASCA 56; 2013

(2) SACR 292 (SCA) paragraph 17 the effect of rape was described as follows:

‘It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person’s most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person’s fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi*, Nugent JA referred to the study done by Rachel Jewkes and Neema Abrahams on the epidemiology of rape which concluded on the available

evidence that ‘women’s right to give or withhold to consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa.’ (Footnotes omitted.)

[23] The community expects that a serious crime will be punished, but also expects that while mitigating circumstances must be considered, the accused’s particular position deserves thorough consideration. That is sentencing according to the demand of our time. See: *S v Holder* 1979 (2) SA 70 (A).

[24] The conduct of the appellant was reprehensible. He lured MMM, deceptively into believing that he could secure employment for her, well knowing that his intentions were not pure. MMM must have trusted him. After walking a considerable distance with MMM, he entered a farm where he sought food, water and accommodation. In this room the appellant raped MMM more than once. The appellant had premeditated the commission of this offence. In a scant victim impact statement, MMM, stated as follows:

“... I suffered emotional trauma because now I am not free towards any other male persons. I am afraid of them even at work. I am not free, I live in fear and I am just working to support my children. And this incident does not come out from my mind, I am always thinking about it and it disturbs me. I did not suffer any physical injuries and I did not have any medical costs because I was taken to public hospital.”

[25] Notwithstanding, the appellant’s plea of guilty, the appellant’s personal circumstances recede into the background when it is weighed against the aggravating factors. The conduct of the appellant goes against the ethos of the constitutional protection that women and children ought to enjoy. Twenty-seven years ago, in *S v Chapman* (345/96) [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A); (22 May 1997) Chief Justice Mahomed stated the following:

“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.”

[26] In *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023), (Mocumie JA (Carelse and Mothle JJA and Mjali and Salie AJJA concurring), lamented on the increase in rape statistics as follows:

57. Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences which courts impose. South Africa has one of the highest rape statistics in the world, even higher than some countries at war. The country’s annual police crime statistics confirms this: in 2019/2020, there were 42 289 rapes reported as well as 7 749 sexual assaults. This translates into about 115 rapes per day. ((footnotes omitted)

Order

[27] In the result, the following order is made:

- (i) The appeal against sentence is dismissed.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the Appellant:

Mr. M.V Kekana

Attorneys for Appellant

Legal Aid South Africa

No 742 Dr James Moroka Drive

Mafikeng Justice Centre

Mmabatho

For the Respondent:

Advocate C.M Ramakgaphola

Attorneys for Respondent: Director of Public Prosecutions

Megacity Complex

East Gallery

3139 Sekame Road

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