

SOUTH AFRICA / JUDGMENT

Nyalenda v S (CA 71/2019) [2024] ZANWHC 117 (16 April 2024)

[2024] ZANWHC 117

COURT

North West High Court, Mafikeng

BEFORE

Reid, Laubscher

CASE / FILE NUMBER

CA 71/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH-WEST

DIVISION, MAHIKENG)

CASE

NO.: CA 71/2019

REGIONAL

COURT CASE NO.:F 119/2011

Reportable:

YES/NO

Circulate

to Judges:

YES/NO

Circulate

to Magistrates:

YES/NO

Circulate

to Regional Magistrates: YES/NO

IN

THE APPEAL OF:

NONO

HERBERT

NYALENDA

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

CORAM: REID J et LAUBSCHER AJ:

LAUBSCHER AJ

BACKGROUND**RELEVANT TO THIS APPEAL:**

[1] This is an appeal against the sentence imposed upon the Appellant on a charge rape in the Temba Regional Court in the North-West Province on 19 August 2015 (the sentencing proceedings as encapsulated on the record was however reconstructed on 25 January 2019). The Appellant was found guilty by the court a quo on a charge of kidnapping and a charge of rape. The Appellant's appeal to this Court is only against the sentence imposed by the court a quo on the charge of rape and the Appellant is not appealing the sentence which was imposed by the court a quo on the charge of kidnapping.

[2] The Applicant launched an application for condonation to this Court of appeal, applying for condonation for the "late filing" of the appeal. The facts as set out by the Appellant indicates that the Appellant was from the time of sentencing desirous to appeal the sentence which he has received on the charge of rape. The facts as stated by the Appellant indicate why the appeal was delivered out of the prescribed time, the reason being that the record and documents were missing. The record availed to this Court of appeal supports the Appellant's version that documents were missing as large portions of the record

required to be reconstructed. This application stands unopposed by the Respondent and this Court is satisfied that the Appellant is, under the prevailing circumstances and for the reasons as set out under oath by the Appellant in his application for condonation,

entitled to be afforded condonation for the late noting of this appeal, which is hereby granted to the Appellant. This appeal

stands to proceed on the merits thereof.

[3] The charge of rape levied against the Appellant was as follows: That the Appellant is guilty of the contravention of the provisions of section 3 read with section 1 and 55 to 61 of the Criminal Law Amendment Act (Sexual Offence and Related Matters), Act 32 of 2007 (hereafter "the SORM Criminal Law Amendment Act") read with section 256, 257 and 281 of the Criminal Procedure Act, Act 51 of 1977 (hereafter "the Criminal Procedure Act") aa amended in that upon or about 16 until 18 April 2011 and at or near Nokaneng in the regional division of Moretele the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit SM of 27 years old by penetrating her vaginally and also per anus with his penis and without her consent. The Respondent also as part of the charges alleged that the victim was raped more than once, thus bringing into

contention the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 (hereafter “the Criminal Law Amendment Act”) as amended as well as section 92

(2) and 94 of the Criminal Procedure Act.

[4] The Appellant pleaded not guilty to both the charge of kidnapping and rape levied against him and the matter proceeded to trial. After evidence has been adduced, the court a quo found the Appellant guilty on both charges. As stipulated above the Appellant does not appeal his conviction, nor the sentence

imposed by the court a quo on the charge of kidnapping.

[5] The only issue on appeal before this Court being the sentence imposed by the court a quo on the charge of rape. The Respondent proved that in respect of the charge of rape, the Appellant had raped the victim more than once – in fact four times over three days.

[6] The Appellant was sentenced:

(a) on the first charge of kidnapping to two years imprisonment;

(b) on the second charge of rape, to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act, in that the court a quo could not find any substantial and compelling circumstances justifying the imposing of

any other sentence than the prescribed maximum sentence;

(c) the sentence on the first charge was to run concurrently with the sentence of the second charge;

(d) the Appellant was declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act, Act 60 of 2000.

[7] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act, as amended by the provisions of section 10 of the Judicial Matters Amendment Act, Act 42 of 2023 the Appellant is entitled to an automatic right of appeal once the court a quo has imposed a sentence of life imprisonment. In an instance such as this where a person is sentenced to life imprisonment as per the provisions of section 51(1) of the Criminal Law Amendment Act, no leave to appeal from the court a quo is required. Although the Appellant did not advance this appeal within the prescribed timeframes set for noting such an appeal, this Court of appeal has already granted condonation for this non-compliance.

[8] From the contents of the notice of appeal dated 12 August 2019 it is evident that the Appellant relies on the following grounds of appeal:

“1. The learned presiding officer erred in not taking the following factors cumulatively to be substantial and compelling circumstances.

- 1.1 That the Appellant spent a period of about two (2) years eight (8) months in custody awaiting the matter to be finalised.
- 1.2 That the Appellant was not beyond rehabilitation.
- 1.3 That the Appellant had consumed alcohol which may have reduced is moral blameworthiness.
- 1.4 That the complainant did not suffer any serious physical injuries or gynaecological injuries.
- 1.5 The age of Appellant was not taken into consideration.
2. The Learned presiding officer overemphasized the following factors:
 - 2.1 The seriousness of the offence
 - 2.2 The interest of the society
 - 2.3 The prevalence of the offence
 - 2.4 That the Appellant did not show any remorse.
3. The sentence is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence.”
- [9] The State, the Respondent in this appeal, opposed the Appellant’s appeal.
- [10] The Appellant in this appeal was represented by Mr Matlawe and the Respondent was represented by Mr Mzamo of the Office of the Director of Public Prosecutions. Written heads of argument were submitted to this Court on behalf of both the Appellant and the Respondent, the contents of which assisted this Court in the adjudication of this appeal. This appeal is adjudicated in terms of section 19(a) of the Superior Court Act, Act 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument.
- [11] Having regard to the contents of the record and the submissions made by counsel on behalf of the Appellant and the Respondent in this Court, the crisp issue in this appeal is whether the court a quo was correct in its finding that there are no “...substantial and compelling circumstances justifying the imposition of a lesser sentence...” than life imprisonment. In this regard it is it is stated on behalf of the Appellant in Mr Matlawe’s heads of argument that: “...the ultimate impact of all the circumstances relevant to sentencing in this case must be measured against the composite yardstick (“substantial and compelling”) and must be taken cumulatively to justify a departure from the prescribed minimum sentence of life imprisonment.” Mr Mzamo emphasised in his argument that: “...the sentence of life imprisonment is appropriate, taking into consideration the circumstances under which the offence was committed. The Respondent further submit that there is no irregularity and misdirection on the part of the court a quo which vitiated the

sentence proceedings, and it cannot be said at all that an effective term of life imprisonment could induce a sense of shock.”

GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON SENTENCE:

[12] First and foremost, in the adjudication of an appeal against sentence this Court must have regard to the general and overarching principles which have been laid down in this regard by the Supreme Court of Appeal.

[13] An appeal court is loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of *R v Maphumulo and Others*[1] stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

[14] In *S v Barnard*[2] the Supreme Court of Appeal stated: “A court sitting on appeal on sentence should always guard against eroding the trial court’s discretion ... and should

interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.”

[15] The above quoted phrase succinctly states the general and overarching principle which must be adopted by this Court in the adjudication of appeals on sentence and hence in this appeal.

[16] In *S v Hewitt*,[3] *Maya DP* held that: “It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.”[4]

[17] In *S v Bogaards*,[5] *Khampepe J* in the Constitutional Court held the following, that:

“It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

- [18] Consequently, this Court of appeal can only interfere with the sentence imposed by the court a quo where the trial court’s exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.
- [19] This principle was also echoed by and phrased by Du Toit[6] as follows: “The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.”[7]
- [20] The court a quo “...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same.”[8] A court of appeal will not interfere lightly with the trial court’s exercise of its discretion.[9] In *S v Singh*[10] Tshiqi JA held that: “The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate.”
- [21] In the matter of *Chitumbura and Another v S*[11] the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal

matter of *S v Kgosimore*[12] and stated the following: “Regard may be had also to the judgment of Scott, JA in *S v Kgosimore*, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.”

- [22] Therefore, the principles to be applied by this Court of appeal in this appeal are clearly stated above.

THE EVIDENCE BEFORE THE COURT A QUO

- [23] Guided by the general and overarching principles applicable when a court adjudicates an appeal on sentence, this Court has regard to the evidence adduced before and accepted the Court a quo as set out in the court transcripts and the judgment of the Court a quo on conviction and sentence. The contents of the evidence accepted by the court a quo in convicting the Appellant on the two counts stand uncontested as this appeal only relates to the sentence in respect of the charge of rape. It must be stated that due to the fact that a large portion of the record and documents in the file of the trial court went missing, the record was reconstructed by the court a quo, with the assistance of the Respondent and the

Appellant, as represented by his legal representative, Mr Modise.

- [24] Subsequent to being found guilty of kidnapping and raping the victim SM more than once over a period of three days the court a quo proceeded to the process of sentencing the Appellant. The following evidence was placed before the court a quo:
- (a) The Appellant was inebriated when the crimes were committed, and this factor reduced the culpability of the Appellant.
 - (b) The Appellant is not a first offender and has two previous convictions for assault and a previous conviction for rape.,
 - (c) The Appellant was at the time of sentencing 52 years old and a widower with three children who were aged at the time of sentencing 26, 23 and 13 years.
 - (d) He was one of 11 children, and he received no school education past standard 5, he became a farmworker until he was arrested for the offences which comprise his previous convictions.
 - (e) The Appellant is in good health apart from headaches from he suffers from time to time.
 - (f) The Appellant was in custody awaiting trial for a period of two years and eight months.
 - (g) The Respondent submitted to the court a quo that the offences of which the Appellant were convicted were serious offences and that the prescribed maximum sentence of life imprisonment applies due to the fact that the rape of the victim took place more than once over a number of days.
- [25] It is clear from the aforestated facts that the rape of SM over a period of days by the Appellant, that the Appellant formed the clear intent of raping SM more than once.[13] The importance of this fact, as will be evident below, is that this brings the actions of the Appellant within the purview of section 51(1) of the Criminal Law Amendment Act. This fact stands uncontested.
- [26] The court a quo considered the personal circumstance of the Appellant in detail. The court a quo remarked that the Appellant was arrogant and had a no-care attitude. The court a quo also weighed the seriousness of the crimes and the interest of society into the equation of coming to a just and fair sentence, proportionally balancing all the aforementioned elements.
- [27] The court a quo found that there were no substantial and compelling circumstances present to warrant the departure from the prescribed minimum sentence as per the provisions of section 51(1) of the Criminal Law Amendment Act, for the offences of which the Appellant was found guilty, i.e., the rape of SM, as contemplated in section 3 of the SORM Criminal Law Amendment Act and more than once by the Appellant as contemplated in the provisions of Schedule 2, Part 1 (Rape) to the Criminal Law Amendment Act,

[28] The court a quo accordingly proceeded to sentence the Appellant to the prescribed maximum sentence of life imprisonment.

THE PRESCRIBED MINIMUM SENTENCE

[29] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:
“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person:—

(a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... to imprisonment for life.” (own emphasis)

[30] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and states the following: “If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence

referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.” (own emphasis)

[31] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase “substantial and compelling circumstances” by stating which facts shall not constitute “substantial and compelling circumstances”. This provision reads as following: “When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused.” (own emphasis)

[32] The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part of Schedule 2 is the part which deals with “rape”. This part reads as follows:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —

(a) when committed—

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b)

where the victim—

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c)

involving the infliction of grievous bodily harm.”

[33] The court a quo accordingly having regard to the fact that SM was raped more than once by the Appellant, applied the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant on the charge of rape to life imprisonment, having found no “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act, to trigger the redeeming effect of the last-mentioned section.

[34] Having regard to the fact that the court a quo, following and implementing the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant as aforesaid, this Court of appeal has to determine whether the court a quo was correct in its finding that there were not substantial and compelling circumstances to justify imposing the minimum legislative sentence of life imprisonment.

[35] Accordingly, one needs to turn to the content and interpretation which was given in the past by the courts to the phrase “...substantial and compelling circumstances...”.

[36] Apart from his person circumstances and the fact that the Appellant was inebriated at the time when the offence was committed, no other evidence was placed before the court a quo to compel the finding that there were indeed substantial and compelling circumstances present to warrant a departure from the prescribed minimum sentence. If anything, the trial court remarked that the Appellant attitude was arrogant and nonchalant.

[37] Turning to the prescribed minimum sentence imposed by the court a quo. In the matter of S v Malgas,[14] the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, 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. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, ‘a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not’. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative

hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation

of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante

omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...”[15] (own emphasis)

[38] In the matter of S v GN,[16] Du Plessis J stated in respect of the Malgas judgment:

“...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society”...”[17]

[39] The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an accused and even the fact

that an accused person is a first offender, which is not the case in casu, do not constitute “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act. The SCA in the matter of Mthanti v The State[18] of which the facts to a limited extent resonates with the facts in this matter, stated the following:

“[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present when committing the crimes by far outweighed the mitigating factors. The high court was correct in considering that the appellant’s criminal conduct was not ‘fleeting and impetuous’; that it was ‘calculated and callous’, and that there was no reason to deviate from the prescribed minimum sentences.

[20] The only submission made on appeal was that the appellant’s mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant’s favour, his personal circumstances

- that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him 10 a ‘good and warm upbringing’ until he abandoned his post matric studies without telling them’. The court considered that the appellant was a first offender.

[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places at night. This he did repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences.”

- [40] The above referred to case (as confirmed in the Malgas matter) confirms that certain mitigating factors from the Appellant's personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. The court a quo in casu applying a rational and reasoned approach to sentence, did not find substantial and compelling circumstances to deviate from the minimum prescribed sentences.
- [41] The usual triad of the crime, the offender, and the interests of society, as enunciated in *S v Zinn*[19] were considered also by the court a quo and this Court of appeal.
- [42] With regard to the offence of rape, which are disturbingly prevalent in our country, this Court deems it appropriate to make reference to the following:
- (a) The court in the matter of *Vilakazi*[20] held as follows:

"...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound."

- (b) Most recently, in the matter of *Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu*[21] the Supreme Court of Appeal Stated:

"Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, [22] aptly remarked that: '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. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. 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.'

In similar vein Nugent JA, writing for a unanimous court[23], in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'

- (c) In *Tshabalala v S* (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); *Ntuli v S*[24] the Constitutional Court stated "...rape is not rare, unusual and deviant. It is structural and systemic..."
- (d) In *Masiya v Director of Public Prosecution Pretoria and Another* (Centre for Applied Legal Studies and another as Amici Curiae)[25] the Constitutional Court said the following of rape:

"Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in Chapman,

the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory."

- (e) In recent times, this "...upwards trajectory.." referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.
- (f) It is not only this Court that is saying this. In the matter of *Director of Public Prosecutions, Grahamstown v T M*[26]

"The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionately high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute." (footnotes omitted and own emphasis)

- [43] Against this background, the courts in this country must not shy away from its role to address and discount the fact that violence committed against woman and children must be condemned in the strongest terms, eradicated and the seriousness of this task must be reflected in the manner in which the courts address same. This must be done whilst striking a balance with the court's compelling duty to ensure that the punishment fits the crime and, of course, the offender. In the view of this Court of appeal the court a quo did so in this instance.

- [44] In the matter of *Ndou v S*[27] Shongwe JA stated that:

“Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence”

[45] If one has regard to the manner in which the court a quo dealt with the sentencing of the Appellant it is evident that a proportioned, balanced and all-inclusive approach was adopted by the court a quo, taking into account all the relevant evidence placed before it. The court a quo was clearly alive to the fact that there must be a separate and distinct enquiry as the absence of any substantial and compelling

circumstances before the court can proceed to impose the prescribed minimum sentence, in casu, life imprisonment.

[46] The imposition of life imprisonment is, however, the most severe sanction available to the court. It is imperative, therefore, that this Court is satisfied that the sentence is indeed proportionate in casu.

[47] In *S v Dodo*[28] Ackermann J dealt with the “concept of proportionality” and stated the following:

“...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly

where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the

very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent

and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's

dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy

imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.”[29]

[48] The principle of proportionality was also addressed in *Vilakazi v S*,[30] where Nugent JA observed that a prescribed sentence cannot be assumed, a priori, to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter. In casu, the court a quo did so, and there is no reason for this Court to interfere with the sentence imposed by the court a quo.

[49] Returning to the Appellant's notice of appeal and the grounds of appeal as started therein. The mere fact that the complaint did not suffer “...serious physical injuries...” during the rape does not constitute substantial and compelling circumstances to warrant a departure from the prescribed minimum

sentence. The provisions of section 51(3)(aA)(ii) of the Criminal Law Amendment Act are clear in this regard. The court a quo did not overemphasise any factor and having regard to all the facts and circumstances in this matter the sentence of life imprisonment is not “...shockingly severe, disturbingly inappropriate and totally out of proportion to the offence...” as alleged by the Appellant.

[50] In this matter this Court is satisfied that the imposition of the prescribed minimum sentence would most definitely not constitute an injustice, neither would it be disproportionate to the crime, the criminal and the legitimate needs of society.

CONCLUSION

AND JUDGMENT:

[51] Having had regard to the record and the arguments led on behalf of the Appellant and Respondent, respectively, this Court is satisfied that there is no basis upon which to interfere with the sentence imposed by the court a quo.

[52] Accordingly, the Appellant's appeal against sentence is dismissed and the sentence imposed by the court a quo on the charge of rape remains intact.

N G LAUBSCHER

ACTING JUDGE OF THE HIGH COURT

NORTH-WEST DIVISION, MAHIKENG

I agree and it is so ordered.

FMM REID

JUDGE OF THE HIGH COURT

DATE OF APPEAL: 1 December 2023 DATE OF JUDGMENT: 16 April 2024 For the Appellant: Mr Matlawe Instructed by Legal Aid For the Respondent: Mr Mzamo Office of Public Prosecutor

[1] 1920 AD 56 at 57.

[2] 2004

(1) SACR 191 (SCA) at para [9].

[3] 2017 (1) SACR 309 (SCA).

[4] At paragraph [8].

[5] 2013 (1) SACR 1 (CC) at para [41].

[6] Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

[7] Also see *S v Fhetani* 2007 (2) SACR 590 (SCA), *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA), *S v Anderson* 1964 (3) SA 494 (A); *Nevilimadi v S* (545/13)

[2014] ZASCA 41 (31 March 2014) and *S v Asmal* (20465/14)

[2015] ZASCA 122 (17 September 2015).

[8] *Gqika v S* (CA&R 112/2021) [2022] ZAECHGHC 15 (1 March 2022) at para [20].

[9] See *S v Rommer* 2011 (2) SACR 153 (SCA), *S v Hewitt* 2017 (1) SACR 309 (SCA) and *S v Livanje* 2020 (2) SACR 451 (SCA).

[10] 2016

(2) SACR 443 at para [23].

[11] (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

[12] 1999(2) SACR 238 (SCA).

[13] See *S v Ncombo* 2017 (2) SACR 683 (ECG), *S v Tladi* 2013 (2) SARR 287 (SCA) par [13] and *S v Blaauw* 1999 (2) SACR 295 (W) at 300a-d wherein the following was stated by the Court:

“Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in

my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.”

[14] 2001

(1) SACR 469 (SCA).

[15] At paragraph [7] to [9].

[16] 2010

(1) SACR 93 (TPD).

[17] At paragraph [6].

[18] (Case no 859/2022) [2024] ZASCA 15 (8 February 2024) at paras [19] to [21].

[19] 1969

(2) SA 537 (A) at 540G to H.

[20] 2009 (1) SACR 552 (SCA) at para [21].

[21] (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

[22] With reference to *S v Chapman*

[1997] ZASCA 45; 1997

(3) SA 341 (SCA) at paras [3] to [4].

[23] With reference to *S v Vilakazi* supra at para [1].

[24] 2020

(2) SACR 38 (CC) at para [67].

[25] 2007

(5) SA 30 (CC) at para [51].

[26] (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15].

[27] [2012] JOL 29522 (SCA) at para [14].

[28]

[2001] ZACC 16; 2001

(5) BCLR 423 (CC) at paras [37] and [38].

[29] At paragraphs [37] and [38].

[30]

[2008] ZASCA 87; [2008] 4 All SA 396 (SCA).

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