

SOUTH AFRICA / JUDGMENT

S v Maseko (Sentence) (CC 21/2018) [2018] ZAMPMBHC 4 (28 September 2018) [2018] ZAMPMBHC 4

COURT

Mbombela High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

CC 21/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS THE GAUTENG DIVISION MBOMBELA]

Case number: CC 21/2018

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED ; YES

DATE: 28 September 2018

SIGNATURE

In the matter between

The State

And

PARIS TERRENCE MASEKO

ACCUSED

SENTENCE

JANSEN VAN RENSBURG AJ

The record of the proceedings referring to the conviction is attached hereto.

1. Request for pre-sentencing reports of the accused
2. The sentencing regime and the requirements thereof
3. The principles of imposing a sentence
 - 3.1. The accused
 - 3.2. The society
 - 3.2. The offence or misconduct
 - 3.4. The severity of the sentence will be tempered by mercy.
4. Substantial and compelling circumstances – section 51(3) of the CLAA 1051997.
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REQUEST FOR PRE-SENTENCING REPORTS OF THE ACCUSED

[1]. The accused before the court is Swazi speaking and stand accused of three serious offences of which section 51(1) and (2) of the Criminal Procedure Amendment Act 105 of 1997 [the CPAA 105 of 1997] read with Criminal Law Amendment (Sexual Offences and Related Matters) Amendment Act 32 of 2007 [CLAA 32 of 2007] is applicable.

[2]. 'Section 51 of the CLAA 105 of 1997 reads as follows –

- (1). Notwithstanding any other law but subject subsection) and (6) a regional court or High Court a person it has convicted of an offence in Part I of Schedule 2 to imprisonment for life.
 - (2). Notwithstanding any other law but subject to subsection (3) and (6) a regional court or a High Court shall –
 - (a). if it has convicted a person of an offence referred to in Part II of Schedule 2 sentence a person in the case of –
 - (i). a first offender to imprisonment of a period not less than 15 years ;
 - (ii). a second offender of any such offence, to imprisonment of a period not less than 20 years;
- and

(iii). a third or subsequent offender of any such offence to imprisonment for a period not less than 25 years.

(b). if it has convicted a person of an offence referred to in Part III of Schedule 2 sentence a person in the case of –

(i). a first time offender to imprisonment for a period of not less than 10 years;

(ii). a second offender of any such offences, to imprisonment for a period not less than 15 years; and

(iii). A third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years.

.....

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that 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 must thereupon impose such lesser sentence : Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

[3]. In terms of the contents of offences included in schedule 6 of the CPA 51 of 1977 referring to rape read with sections 3 or 4 of the CLAA (Sexual Offences and Related Matters) 2007 respectively, when committed in the circumstances referred to in (b)(i) read with section 51(1) of the CLAA 105 of 1997, this court is obliged to sentence an accused, if found guilty of offences which would fall under the above categories, accordingly to life imprisonment unless substantial and compelling circumstances would render a lesser sentence. Such a deviation must be recorded and motivated by the trial court based on the submissions made by the defence at the end of the trial, should the accused be convicted.

[4]. At the time of the judgment, there was no evidence of the accused before the court. Having in mind the seriousness of the offences that the accused was found guilty off, the court then requested ‘victim impact reports’ and ‘pre-sentencing reports’ to shed some light on the circumstances of the accused and the victims in this matter. The accused stand to be sentenced to life

imprisonment and the court is of the view that these reports might be requested in the interest of justice, not only towards the accused but also towards the victims.

[5]. The court based this view on the following where it is required from a trial court to adhere to the principle of ‘trial fairness’ and taking into consideration pre-sentencing and victim reports. The court is mind full of the failure to call for such reports where the accused must be sentenced to life imprisonment, bearing in mind that such reports might disclose compelling and substantial factors which might favour the accused. [1] A victim impact report forms an integral part of the trial. This report forms an important part in arriving at a decision which is fair to the

victim, the offender and the public at large. It serves a greater purpose than contributing only to the quantum of punishment. The purpose thereof is as follows –

[i]. Its contents serve to promote fairness to the offender in the decision to impose a well-balanced and appropriate sentence.

[ii]. Giving him or her voice and the only opportunity to participate in the last phase of the trial.

[iii]. The report gives the victim an opportunity to say in his or her own words how the crime has affected him or her. This is particularly so where expert evidence has been lead and to indicate the impact of the crime on the victim.

[6]. A court should not underestimate the power of a pre-sentencing report which might shed some light on the accused's background and upbringing and on a reason for the committing of the offence that the accused is charged with. Such a report could serve as an indication of remorse and might contain substantial and compelling circumstances which the court did not have at its disposal at the time of arguments regarding an appropriate sentence to be imposed on the accused. The value of such a request would adhere to the purposeful enquire about section 51(3) of the CLAA 105 of 1997 where a diligent, conscientious and punctilious search for substantial and compelling circumstances must be dealt with which, if not done, might end up in a sentence which is disturbingly inappropriate and would amount to an injustice, unfairness and a serious misdirection by the trial court.

[7]. That the name of the accused in terms of the CLAA 32 of 2007 is entered into the sexual offences register.

[8]. In terms of section 103 of the Fire Arms Control Act 60 of 2000, the accused might be declared unfit to possess a firearm.

[9]. These are all aspects that a court must take into consideration when considering a sentence to be imposed.

[10]. The court must also be aware of the prospects of rehabilitation and reintegration of the accused into society after serving a sentence of imprisonment.

THE SENTENCING REGIME AND THE REQUIREMENTS THEREOF

[11]. Sentencing is the most difficult aspect of any trial. In this phase of a criminal trial, the court has to deal with human beings, each with its own requirements and expectations. The main requirement is that a trial court should be balanced in its reasoning and actions at the end of the trial.

[12]. Some important aspects to consider is found in the following case law –

[i]. In *S v Rabie* [2] Holmes JA held the following -

‘The main purposes of punishment are deterrent, preventive, reformatory and retributive; and 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’.

[ii]. In *S v Swart* [3] Nugent JA held the following –

‘What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight,

but instead, proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution

and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.’

[iii]. Shongwe JA held the following in *S v EN*

[4] –

‘...sentencing is the most difficult stage of any 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....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’

[13]. The structure of a sentence should be determined by a requirement for the balancing of the nature and circumstances of the offence, the characteristics and circumstances of the offender and the impact of the crime on the community, its welfare and concern. A court should strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.

[14]. There must be a balance between the interest of society, the victim and the offence and no court should accentuate the interest of one of the parties, especially not that of the victims to a level which would inevitably have the effect where a court has both eyes on the victims and none on the remainder of the role players or factors in the criminal trial. Regarding the compulsory minimum sentences to be imposed read with section 51(3) of the CLAA 105 of 1997 the case of *S v Malgas* [5] held as follows –

‘[T]he sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime the criminal and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence’.

[15]. The test in *S v Malgas* supra was held to be the following -

‘The test is whether the prescribed minimum sentence would be disproportionate to the crime, the criminal and the needs for society’.

[16]. In *S v Malgas* [6] Marais JA held –

‘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 the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts. The specified sentences are not to be departed from lightly 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 degrees of participation between co-offenders are to be excluded’.

[17]. It follows in *Malgas supra* where the court held that all factors traditionally taken into account in sentencing continue to play a role. Deviation from the prescribed sentences in the CLAA 105 of 1997 should not be done for flimsy reasons -

‘Specific sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the defender, undue sympathy; aversion to imprisoning first time offenders; personal doubts as to the efficacy of the policy underlying the legislation and underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excused’.

[18]. The importance of sentencing lies in the following aspects –

[i]. Sentencing is imposed only with regard to the factors and circumstances known at the time of sentencing.

[ii]. Courts are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoyed not to depart from them unless they are satisfied that there is weight justification for doing so.

[iii]. The SCA confirmed the stance in *Malgas supra* that the minimum sentences should be imposed where there are no substantial and compelling circumstances to deviate from the minimum sentence.

[iv]. A sentence should not be disproportionate but proportionate with the offender – not less or more.

[v]. A sentence should be fair to the offender, society and blend in with mercy according to the circumstances.

[vi]. The personal circumstances of the accused must not be over-emphasised without balancing the seriousness of the crime, the aggravating circumstances of the crime and the consequences of the victims and the interest of society.

[vii]. Sentencing serves not to satisfy the opinion of society but to serve the public's interest.

[viii]. Criminal procedure needs to restore the public confidence in the criminal justice system with the public close to the accused, including those distressed by the horror of the crime.

[ix]. A sentence must be tailored to the seriousness of the offence and one expressing the natural indignation of ordinary citizens would compensate for the seriousness of the crime committed.

[19]. As an introduction, the trial court should be aware of the consequences of imposing a shockingly and inappropriate sentence. The aggregation of a sentence and the effect of effective punishment [imprisonment] should always be borne in mind of a trial court and where appropriate, ameliorated.

[20]. These factors should be measured against a 'composite yardstick' which includes substantial and compelling circumstances. It is required that a sentencing court must, therefore, take into account the cumulative effect of the sentence(s) and the reason for departing from the minimum sentences imposed by the legislature. The value judgment is that of fairness and to bring the administration of justice into disrepute. A court should be alerted to circumstances which would entitle the court to characterise these factors as being substantial and compelling and as to justify the imposition of a lesser sentence. The sentencing court must be proactive to ensure that the court is fully informed of

the facts of the case which would have an impact on the convicted person.

[21]. This court is therefore obliged to impose the minimum sentence prescribed by the Legislator unless substantial and compelling circumstances favour the accused to serve a lesser sentence.

THE PRINCIPLES OF IMPOSING A SENTENCE

[22]. A sentence has the aim of prevention, deterrence, rehabilitation and retribution. The aim of retribution and deterrence has been held in *S v Swart* [7] as being the following –

'In our law retribution and deterrence are the proper purpose of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight but instead, proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a relatively smaller role'.

[23]. The principles have been confirmed in *S v Deblase*

[8] where the court held the following –

‘The punishment should not only reflect the shock and indignation of the interested person and that of the community at large and also serve as a just retribution for the crime but also should deter others from similar conduct’

[24]. The principles which have been followed in sentencing procedures have been laid down in R v Zinn [9] which reads as follows –

‘Punishment must fit the criminal as well as the crime be fair to society and be blended with a measure of mercy according to the circumstances’.

[25]. A sentence is made out of three important aspects -

[i]. The accused

[ii]. Society

[iii]. The offence

The accused

[26]. The accused before the court is Patis Maseko. The personal circumstances were placed before the court to be considered as factors in imposing a sentence on the accused.

Accused gave evidence before the court -

[27]. The accused confirmed that he did commit the offences that he was charged with. The accused regret what he did and asked for forgiveness. The accused could not provide a reason for having committed the offences he is charged with.

[28]. The accused testified about the following personal aspects –

[i]. He is 26 years of age.

[ii]. Has spent 5 years awaiting trial. However, the SAPS docket shows that the accused was in custody for 3 years and 3 months.

[iii]. The accused completed grade 7.

[iv]. The accused is not married.

[v]. He resides at Pienaar Trust Mosokwaba.

[vi]. His mother and father are still alive.

[vii]. The accused is healthy.

[viii]. The accused worked at Witrivier on a part-time job and got paid R 400 – 00 to R 800 – 00 per week depending on the work he has done.

[ix]. The accused is not a first time offender as he was convicted of malicious damage to property and sentenced to 6 months imprisonment or a fine of R2000- 00 which he paid.

[x]. The accused feels that his actions were disgraceful and he is ashamed thereof.

Cross-examination by the State

[27]. The accused was questioned why this court should not impose the minimum sentence as there is no substantial and compelling circumstances. The accused did not answer thereto.

[28]. Re-examination - None

[29] The court has been provided with a pre-sentencing report regarding the accused in this trial. [10] The court has perused the report and the following are important –

[i]. The father of the accused was a truck driver and it was the mother of the accused who was responsible for the upbringing of the accused.

[ii]. The accused took part in criminal activities from the early age of 16 years and stole to make a living for himself.

[iii]. The accused manifested uncontrollable behaviour from an early age and the accused was ill-disciplined from an early age and the SASPS was requested to discipline the accused.

[iv]. The accused was drinking alcohol and engaged in stealing from the people.

The society –

[29]. The attitude of society is one of the pillars of sentencing. Society expects the courts to impose a sentence which will serve to protect the society against the offender. The pendulum of punishment swing from a harsh sentence which would remove the convicted person for good from society, to a more lenient sentence which would be a balancing of the three pillars of a sentence to a total disregard of the principles of sentence which would result in a failure by the court to uphold the Legislator, the CLAA, the proper administration of justice and the other factors to be taken into account prior to and during the sentencing of a convicted person.

[30]. The following was held in S v Rabie

[11] –

‘The court has to balance the interest of the accused with the nature and the seriousness of the crime of which he has been convicted and the interest of society’.

[31]. The courts have indicated the following aspects regarding the values and expectation of society in S v Banda

[12] –

‘The courts operate in society and its decisions have an impact on individuals in ordinary circumstances of daily life. It covers all possible grounds. There is no space in life which does not include. The court must by its decisions and imposing of sentence promote the respectful law and in doing so must reflect the seriousness of the offence and provide just punishment for the offender well taking into account the personal circumstances of the offender. The feelings and

the requirements of the community the protection of society against the accused and the other potential offenders must be considered as well as the maintenance of peace and tranquillity in the land needs to be taken into account’.

[32]. The attitude of society plays a role in sentencing.

[i]. The courts must look at the interest and outrage of society in any criminal activity and criminal trial by imposing the appropriate and if necessary harsh sentence.

[ii]. The frequency of a specific crime and the repugnance of the society have continuously expressed in this regard calls for the interest of the accused to be yielded to the interest of society which includes the deterrence component.

[iii]. The seriousness of the offence and the interest of society would therefore, be more important so that a would-be offender would be deterred from committing the same offence.

[iv]. When the court imposes a sentence the court must impose a sentence which is balanced, sensible and motivated by sound reasons and which will therefore, meet the approval of the majority of law-abiding citizens of the country.

[v]. Failure of the above will result in the failure of the administration of justice which will lead to the loss of confidence of society in the judiciary.

[vi]. Courts are always urged to strive for a proper balance that has due regard to all the objects of sentencing.

[33]. In *S v Karg*

[13] the court held as follows –

‘It is wrong that the natural indignation of interested persons and to the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and persons may incline to take the law into their own hands’.

The offence or misconduct

[34]. In *S v Malyityi*

[14] the following passage is found -

‘...the crime pandemic that engulfs our country has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fir the particular sentencing officer’s personal notion of fairness ought to be eschewed’.

[35]. The sentence must include mercy to the extent that it warrants. It might require a trial court to impose a sentence which demands a stern and decisive sanction but not so harsh to destroy the convicted person. A sentence should be balanced and appropriate read with the evidence and

the 'type of offence' committed by the accused. Punishment should be aimed at the accused and at society's outrage at such a conduct. It is required that a balance is struck between these three pillars of sentencing; the one not to be emphasised unnecessarily over the other without reason or motivation.

The severity of sentence will be tempered by mercy.

[36]. When dealing with multiple offences, the court must to the totality of the offences and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery it must be remembered as Holmes JA pointed out that mercy, and not a sledgehammer is the concomitant of justice. The judicial officer should not hesitate to be firm when necessary...the offence should not be sacrificed on the altar of deterrence.

Arguments by the State -

[37]. The court heard extensive arguments by the state on the applicable legislation and the CLAA 105 of 1997 with regard to minimum sentences and the applicability thereof.

[i]. The state argued in favour of the minimum sentences to be imposed based on the trust of society, the accused and the offences committed.

[ii]. The state argued as to how the sentences when imposed should be served.

[iii]. The state argued against any deviation of the minimum sentences as indicated by the CLAA 105 of 1997.

[iv]. The state referred to the occurrence of the offences and the effect on society.

[v]. The state argued that the court must uphold the interest of society and the faith of society in the judiciary and the criminal justice system. Any deviation of the minimum sentences would be detrimental to the interest of society and the administration of justice.

[vi]. The state argued that the basic rights of the victims which are protected by the Bill of Rights were seriously violated. It was arrogant and callous offences that were committed.

[vii]. That the convicted person pre-planned the offences using threats, assault of victims a weapon [a knife in one of the offences] which should be regarded in a more serious light as offences committed in the spur of the moment.

[viii]. The state referred to the frequency of the occurrence offences which occur on such a frequent scale, that these offences have become the 'order of the day'.

[ix]. The state argued that the society has the right to be protected against any form of criminal activity, the present offences form part of the requirements of the society to put a stop thereto or any sentence to serve as a deterrent to would-be criminals.

[x]. Public outcry against rape and failure to enforce the minimum sentences would not be in the interest of the good administration of justice.

[38]. Rape has become a cancer of our society and men do not respect females any more. Rape has a negative effect on females which include the following –

[i]. Infringement on self-respect.

[ii]. Physical and psychological effects.

[iii]. Restriction of future family life.

[iv]. Breach of trust relationships.

[v]. Fear of security and resentment by community and family.

[vi]. Disqualified to get married.

[vii]. Loss of credibility.

[viii] Humiliation by the offender.

[ix]. Acts against Constitutionally protected rights such as privacy, dignity and respect.

Victim impact reports –

[39]. There were two sets of these reports handed up –

[i]. Victim 1: Z[...] N[...]

This victim was a minor at the time when she was raped by the accused. She was locked in a room whilst the accused forced her to sleep over. The victim suffered from trauma as a result of the rape. She was robbed of her childhood and she never enjoyed her teenage years as a young girl. She would collapse in school and be sad.

[ii]. Victim 2: N[...] M[...]

The victim was asleep at home when two male persons were inside her house. She was threatened with a gun where after the accused took off her clothes and raped her. She was traumatised and received some counselling sessions.

The victim is married and fears for her daughter when she leaves her with her husband. She has flashbacks of the rape when being intimate with her husband.

[iii]. Victim 3 : L[...] D[...]

This victim passed away and no report was compiled.

Arguments by the defence –

[40]. The court heard extensive arguments by the defence on the applicable legislation and the CLAA 105 of 1997 with regard to minimum sentences and the applicability thereof -

[i]. The court heard arguments not to impose the minimum sentences prescribed in the CLAA 105 of 1997.

[ii]. The court took note on the one side of humanity towards the accused but did not close its eye on society, its requirements, faith in the judiciary and the seriousness and frequency of the offences.

[iii]. The court also reminded itself that punishment must also serve the purpose of deterrence, but that the convicted person must not be placed on the altar and be sacrificed just to make a point.

[iv]. The court is also mindful of the so-called 'Metusalem sentences' where the convicted person is locked up and the keys are thrown away; that is not the purpose of a sentence. Reference is made to the so-called 'Metusalem sentences' in *S v Nkosi* [15] –

'[97] Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one-half of the sentence. Such a sentence will amount to the cruel, inhuman and degrading punishment which is prescribed by s 12(1)

(e) of the Constitution of the Republic of South Africa Act 108 of 1996...'

[v]. The court must also be mindful of the personal circumstances of the convicted person, the prospects of rehabilitation where imprisonment is imposed as well as the possibilities of re-integration into society.

[vi]. The court must also be mindful of the huge number of prisoners and the restricted space which results in overcrowding, unhealthy and unfavourable conditions in prisons.

[vii]. However, this is not a reason to tilt the scale of justice in favour of the convicted person; there must be a balance struck between all the factors before the court in its evaluation and motivation of the punishment to be imposed.

[40]. The court gave weight to the arguments by both the defence and the State in its valuation of an appropriate sentence and the manner in which it should be served.

[i]. The court took note on the one side of humanity towards the accused but did not and is obliged not to close its eye on society, its requirements, faith in the judiciary and the seriousness and frequency of the offences.

[ii]. The court also reminded itself that punishment must also serve the purpose of deterrence, but that the convicted person must not be placed on the altar and be sacrificed just to make a point.

[iii]. The court must also be mindful of the personal circumstances of the convicted person, the prospects of rehabilitation where imprisonment is imposed as well as the possibilities of re-integration into society.

[iv]. The court must also be mindful of the huge number of prisoners and the restricted space which results in overcrowding, unhealthy and unfavourable conditions in prisons.

[v]. However, this is not a reason to tilt the scale of justice in favour of the convicted person; there must be a balance struck between all the factors before the court in its evaluation and motivation of the punishment to be imposed.

[41]. Society expects the court to impose a proper sentence and should it be necessary, such a sentence should be 'harsh' notwithstanding the person before the court is a human being. The Legislator clearly indicated that any deviation from the prescribed

sentences must be done carefully, diligently and with responsibility and should not be deviated just for the sake thereof, for flimsy reasons or not out of sympathy for the convicted person.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES – SECTION 51(3) OF THE CLAA 105 OF 1997

[42]. In terms of section 51(3) of the CLAA 105 of 1977, the court is obliged to inquire regarding the existence and the possibility of substantial and compelling circumstances. Failure

which would render the trial unfair and the judgment and sentence to be set aside. This court has referred to substantial and compelling

circumstances when it referred to the request for victim impact and pre-sentencing reports in this matter. The court has dealt with the judgment of Malgas *supra*. There is no definition for substantial and compelling circumstances other as case law in this regard. Reference is made to *S v Madikwane*

[16] which reads as follows –

'In circumstances such as this, the court is required to impose the sentence that is prescribed unless substantial and compelling

circumstances as contemplated in section 51 (3) of the Act are present and justify a less severe sentence. Such circumstances may be comprised of any of the factors that the courts traditionally take into account in mitigation and may be the accumulative effect of a number of such factors. Furthermore if the imposing of the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society that on its own constitutes a substantial and compelling circumstance justifying and indeed require the imposition of a less severe sentence'

[43]. There is a number of case law referring to in terms of substantial and compelling circumstances such as *S v Mofokeng*

[17] where the honourable Stegman J held the following –

‘For substantial and compelling circumstances to be found that facts of the [particular case must be present some circumstances that is so exceptional in nature and that so obvious exposes the injustice of [indistinct] prescribed sentence in the particular case that it could rightly be described substantial and compelling. The conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.’

[44]. Substantial and compelling circumstances need not be exceptional but must provide truly convincing reasons or weighty justifiable or for flimsy reasons to deviating from the prescribed minimum sentence.

[My underlining]

[45]. The value of the accused’s personal factors as substantial and compelling circumstances -

[i]. A first time offender does not constitute a sufficient basis for finding that he is a good candidate for rehabilitation. [18]

[ii]. Accused’s personal circumstances do not constitute special or outstanding qualities.

[iii]. The fact that an accused is married or single, with or without children, employed or not, it is largely immaterial to what the period should be as this is flimsy aspects for an attempt to reduce the time of imprisonment.

[iv]. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisonment of first-time offenders are to be excluded. Other factors to be considered are the following -

[i]. Upbringing.

[ii]. School qualifications.

[iii]. Family and relationships.

[iv]. Emotional well-being.

[v]. Moral and ethical standards.

[vi]. Factors and influences in committing the crime.

[46]. This court is of the view that the accused did not place any substantial and compelling circumstances before it to deviate from the minimum prescribed sentences in section 51 of the CLAA 105 of 1997.

AGGRAVATING FACTORS IN SENTENCE

[47]. The following aggravating factors were present in this matter –

[I]. Rape is a serious offence read in light of the CLAA 32 OF 2005 and CLAA 105 of 1997.

[ii]. The offences in this matter seem to have been planned and executed by

the accused.

[iii]. Victims were threatened, assaulted and a knife and firearm was used to commit the act of rape of victims.

[iv]. The accused not having been satisfied with one sexual encounter, proceeded to commit two more sexual encounters before being apprehended.

[48]. In the evaluation of the evidence contained in the accused's 'plea of guilt,' the court is of the view that the actions by the accused were a contravention of the dignity and privacy of the victims. It is clear that the offences were serious, pre-planned actions, the infringement of the physical integrity of the victims and in some instances the restriction of the freedom of movement of the victims.

[49]. The frequency with which the type of crime occurs and its repugnance that society has continuously expressed call for the interest of the accused to yield to the interest of society which includes the deterrence component. Courts must not deviate from the min sentences for flimsy

reasons.

[50]. Sentences must reflect mercy but also reflect the seriousness of the crime was its execution demand stern and decisive sanction which is not so harsh as to destroy the accused. The sentencing of offenders must be done taking into account offences related to the same time and place, where possible.

REMORSE AS A FACTOR

[51]. The defence argued that the accused had shown remorse for the offence he committed. However, remorse is a gnawing pain of conscience for the plight of another.

[52]. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court into his or her confidence. [19]

[53]. In *S v Matyiti* [20] the court held as follows –

‘There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of the. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless this happens, the genuineness of the contrition alleged to exist cannot be determined’.

[54]. The view that the accused did not show remorse and that his testimony is rather an attempt to influence the court to impose a lesser sentence.

MOTIVATION OF THE SENTENCE IMPOSED ON THE ACCUSED

[55]. It is required for a trial court to motivate the sentence it stands to impose on the accused person. For this reason, it is important to read the above-mentioned aspects herewith as it would complement the motivation of the trial court in its decision to impose a specific sentence on an accused.

[56]. In *S v Abrahams* [21] Cameron JA held the following regarding minimum sentences –

‘Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as 'ordinarily appropriate' is a consideration that the courts are 'to respect, and not merely pay lip service to'. When a sentence is ultimately imposed, due regard must, therefore, be paid to what the Legislature has set as the 'benchmark'.

[57]. In *S v Immelman* [22] Corbett JA held the following –

‘In my view, difficulty can also be caused by an appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.’

[58]. In *S v de Kock* [23] Van der Merwe J held –

‘By vonnisoplegging is dit die vonnisoplegger wat met alle moontlike ervaring en wysheid in pag vir die eerste en laaste keer met 'n besondere individu werk. Daarom moet alles wat 'n invloed op die pleging van die misdrywe gehad het oorweeg word ten einde 'n korrekte besluit te kan neem oor die toekoms van daardie besondere individu.’

[59]. In *S v Dodo* [24] Ackermann J held –

‘[38] 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.’

[60]. *S v Holder* [25] Rumpff CJ held the following –

‘Die konstatering van die feit dat die Republiek se gevangenis oorvol is, en dit 'n ekonomiese las op die Staat plaas, is feite wat niks te doen het met die vraag wat 'n gepaste vonnis in 'n besondere geval is nie. Die oorvol gevangenis mag te wyte wees, oa, aan die groei van stedelike bevolking met meegaande vermeerdering in ernstige misdade en 'n versuim om voldoende gevangenis te bou. Dit is 'n ernstige mistasting in die meerderheidsuitspraak om in 'n besondere geval op hierdie feite staat te maak.’

[61]. In *S v Johaar* [26] Griesel AJA held –

‘Waar 'n veelvuldigheid van misdade bestraf moet word, moet die hof ag slaan op die totaliteit van die betrokke misdadige optrede en sigself afvra wat die gepaste vonnis is vir al die misdade gesamentlik. Waar die vonnis ten opsigte van aanklag dus moontlik gekritiseer mag word dat dit te swaar is, is die vonnisse op ander aanklagte (bv die aanklagte van roof met verswarende omstandighede), aan die ander kant, op die oog af aan die ligte kant.’

[62] In this regard the court refers to the so-called ‘Metusalem sentences’ which is unjust and not in the interest of fairness towards an accused.

[63]. In *S v Rabie* [27] Holmes JA held the following –

‘Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society.’

[64]. Imposing a sentence must also serve as deterrence to anyone who would consider engaging in any offence. Goldstone JA in *S v Dlomo & others*

[28] held the following –

‘Offenders must be made aware that except in exceptional cases, courts will impose severe sentences on them’.

[65]. Factors to be considered are the following -

[i]. Significant callousness acts by accused.

[ii]. Repeated rape of victims.

[iii]. The offence is classified as ‘serious offences’.

[iv]. Disregard of constitutionally protected rights of victims.

[v]. Feelings of the victims, including social behaviour, acceptance, rejection and more.

[vi]. The welfare of the victims after being put through the ordeal of being raped.

[vii]. Impact of actions on complainant being it emotional or social.

[viii]. No remorse was shown by the accused.

[ix]. The psychological state of mind of the victims and the trauma thereof.

[x]. No relationship in the future with any male person, boyfriend and the constant mistrust of the opposite sex.

[xi]. Fear of being alone or in the company of male persons/

[xii]. Loss of comfort, protection and confidence.

IN SUMMARY

[66]. The accused before the court is charged with three counts of rape; one charge being that of a young female less than 16 years of age. Being found guilty of raping this victim, the accused is squarely placed within the ambit of section 51(1) of the CLAA 105 of 1977.

[67]. Following the first 'rape expedition', the accused then went on to commit two other 'rape expeditions' to make it a total of three 'rape expeditions'.

[68]. The victims have been threatened with violence if they did not comply with the requests of the accused. Even a knife and firearm was used to threaten victims to have forced intercourse with the accused. This is even more aggravating as plain threats of some other kind. Fortunately, the victims were not seriously harmed or dealt with in any other manner.

[69]. Rape is one of the most harrowing and malignant crimes confronting society. It is the most horrifying and dehumanisation violation that a person can live through and it not only violates the mind and the body of a complainant but also one that vexes the soul. It includes the cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim and it's considered to be a serious offence. It is appalling and preserves abuse of male power which strikes at the very core of our claim to be a civilised society. Society, therefore, demands that harsh sentences be imposed on offenders of this type of offence.

[70]. It is a pity that a young woman [20 years old], one incident a female child [15 years old] and another being younger than 16 years were the victims in this matter. All three victims were subjected to unwanted, inhumane and degrading actions by the accused being abused in the cruelest and inhumane way. Even the Constitutional Court in *S & another v Acting Regional Magistrate Boksburg ; Venter & another* [29] held the following –

'Our Constitution sets its face firmly against violence, and in particular sexual violence against vulnerable children, woman and men. Given this and the Acts emphasis on dignity, protection against violence against the person, and in particular the protection of woman and children, it is inconceivable that the provisions could exonerate and immunities from prosecution acts that violated these interests'.

[71]. Returning to the act of rape it is described as a very serious offence, no matter how it was committed. In *S v Chapman* [30] the SCA held the following –

[344]] Rape is a very serious offence, constituting as it does a humiliating,

degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person, are basic to the ethos of the Constitution and to the defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminish the quality and employment of their lives.

[345D] The court is under the duty to send a clear message to the accused to other potential rapists and to the community: We are determined to protect the equality, dignity and the freedom of all women, and we shall show no mercy to those who seek to invade these rights’.

[72]. In N v T

[31] the court held the following –

‘Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim’.

[73]. The sentence imposed on the offender should reflect the blameworthiness of the offender. Where there is no substantial and compelling circumstance the courts must not hesitate to impose minimum sentences – not to deviate for flimsy reasons, undue sympathy, and personal doubt regarding the effectiveness of the sentence to deflect from executing the task to impose an appropriate sentence. Life imprisonment is the ultimate – a trial court should be placed in possession of all the relevant facts and information to consider an appropriate sentence.

[74]. A factor to consider in imposing a sentence in his circumstances is the serious interpersonal problems, trauma, sexually vulnerable individuals, and dysfunctional behaviour depression, emotional and psychological deficiencies that a victim of rape might experience. One could ask whether life imprisonment would be as brutal as rape and whether it would balance the scale between the experience of the victim and that of the offender in prison; then life imprisonment would be appropriate.

[75]. The wave of rape cases has been increasing at an alarming rate and it is a crime that calls for long-term imprisonment. It is clear that a trial court has the duty to motivate its sentence based on precedents set and the requirements of informing the accused of the reasons why a certain sentence or sentences have been imposed. Without reasons, the accused will not be able to take the matter any further and no other court will be in a position to follow the reasoning of the court in reaching its verdict.

[76]. Following the offences that the accused has committed, this court is of the view that this is precisely the kind of matter the Legislature had in mind for the imposition of the minimum sentence of life imprisonment. As case law has indicated, a court must not shrink from their duty to impose, in appropriate cases the prescribed minimum sentences ordained by the Legislature.

Societies' legitimate expectation is that an offender will not escape life imprisonment – which has been prescribed for a specific reason – simply because substantial and compelling circumstances are unwarrantedly held to be present. In our constitutional order, woman is entitled to expect and insist upon the full protection of the law.

[77]. The court has provided the reasons for imposing a sentence which is required to meet the aspects and factors to be taken into account in imposing a sentence namely the accused, the offence and the interest of society read with the proper administration of justice. The court has motivated the reasons for the sentence to be imposed on the accused. However, from the pre-sentencing report, no substantial and compelling circumstances have been disclosed to this court. Plain personal circumstances of an accused do not constitute substantive and compelling circumstances.

[78]. The period that the accused spent awaiting trial is might be considered as a factor in imposing a sentence of imprisonment. In *S v Mqabhi* [32] the court formulated the following guidelines in determining whether the period spent in custody ought to be considered a substantial and compelling circumstance justifying the imposition of a sentence less than the minimum prescribed sentence –

'After considering argument the court formulated the following guidelines:

- (a) pre-sentence detention was a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of CLAA;
- (b) Such a period of detention was not to be isolated as a substantial and compelling circumstance but had to be weighed as a mitigating factor; together with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed was justified in the sense of it being proportionate to the crime committed. If it were not then the want of proportionality constituted the substantial and compelling circumstances required under section 51 (3);
- (c) The reason for the prolonged period of pre-sentence detention was a factor. If the offender were responsible for unnecessary delays then this might redound to his detriment;
- (d) There was no mechanical formula or rule of thumb to determine the period by which a sentence was to be reduced. The specific circumstances of the offender, which might include the conditions of his detention, were to be assessed in each case when determining the extent to which the proposed sentence should be reduced;....
- (e) Where only one serious offence was committed and assuming that the offender had not been responsible for unduly delaying the trial, then a court might more readily reduce the sentence by the actual period in detention prior to sentencing'.

[79]. In the light of the above, this court has taken note of the 'dead time' spent by the accused awaiting trial.

[80]. In the final analysis of the evidence and the offences committed by the accused the court has no reason whatsoever to deviate from the prescribed minimum sentences imposed by the CLAA 105 of 1977 as there are no substantial and compelling circumstances favouring the accused.

[81]. Having regard to all the aspects and factors read with the circumstances of the offences committed and the legislator's aim with the CLAA 105 of 1997, the court is satisfied that the convicted person before this court should be sentenced as follows –

[i]. Count 2 – Life imprisonment in terms of section 51(1) of the CLAA 105 of 1977 read with the CLAA 32 of 2007 [Rape of a minor female being 15 years old].

[ii]. Count 4 – 15 years imprisonment in terms of section 51(2) of the CLAA 105 of 1997 read with the CLAA 32 of 2007.

[iii]. Count 7 – 20 years imprisonment read with section 51(2) of the CLAA 105 of 1997 read with the CLAA 32 of 2007.

Read with the following -

[iv]. The accused is declared unfit to possess a firearm in terms of section 103 of the Fire Arms Control Act 60 of 2000.

[v]. The name of the accused will be entered into the register of sex offenders in terms of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007.

RIGHT TO APPEAL

[82]. The accused is informed that he has the right in terms of section 309 B of the CPA 51 of 1977 to apply for leave to appeal against the sentence within 14 days of the date of the handing down of this sentence.

Date of hearing: 25 September 2018.

Date of sentence: 28 September 2018.

[1] Mashigo & another v The State (20108/2014) [2015] ZASCA 65 (14 May 2015) RA [28]; For victim reports see Mhlongo v The State (140/2016)

[2106] ZASCA 153 (3 Oct 2016) at [22].

[2] 1975

(4) SA 855 (A) at 862 A – B

[3] 2004

(2) SACR 370 (SCA) at 378

[4] 2014

- (1) SACR 198 (SCA) at para 14
- [5] [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) at para 25.
- [6] 2001
- (1) SACR 469 (SCA)
- [7] 2004 (2) SACR 370 (SCA) at 378.
- [8] 1996 (1) SACR 1A 10 (G).
- [9] 1969 (2) SA 539 A.
- [10] See exhibit E.
- [11] 1975 (4) 855 A.
- [12] 1991 (2) SACR at 325 B.
- [13] 1961
- (1) SA 231 (A) at 236 B – C.
- [14] 2011 (1) SACR 40 (SCA) at 53 c – g.
- [15] 2003
- (1) SACR 91 at 95
- [16] 2011 (2) SACR 11 (ECG) at page 13 para 3.
- [17] 1999
- (1) SACR 502 (T).
- [18] Dube v The State (89/2016) [2016] ZASCA 123 (22 Sept 2016) at para [12].
- [19] S v Volkwyn [1994] ZASCA 175; 1995 (1) SACR 286 (A) at 289h
- [20] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) at para 13.
- [21] 2002
- (1) SACR 116 (SCA)
- [22] 1978
- (3) SA 726 (A) at 728 - 729
- [23] 1997
- (2) SACR 171 (TPA)
- [24] 2001

(1) SACR 594 (CC)

[25] 1979

(2) SA 70 (AA)

[26] 2010

(1) SACR 23 (SCA) at para 14.

[27] 1975

(4) SA 855 (A) at page 861.

[28] [1991] ZASCA 94; 1991 (2) SACR 473 (A) at 477 h – 478b.

[29] (CCT 109/10) [2011] ZACC 22 ; 2011 (2) SACR 274 (CC) at para 23

[30]

[1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 344 J – 345 B.

[31] 1994

(1) SA 862 (C) at 864 G.

[32] 2015 (1) SACR 508 (GJ).

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