

SOUTH AFRICA / JUDGMENT

S v Morotolo (Sentence) (CC 17/2022)

[2024] ZANWHC 130 (5 April 2024)

[2024] ZANWHC 130**COURT**

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

CC 17/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: CC 17/2022

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO In
the matter between:	THE STATE And JAFTA THABO MOROTOLO ACCUSED

JUDGMENT

ON SENTENCE

REDDY AJ

Introduction

- [1] On 24 March 2023 this Court convicted the accused of the following: contravening section 3 read with the provisions of section 1,2, 50, 55, 56A , 58 and 60 of Criminal and Related Matters Amendment Act 12 of 2021, (“ SORMA”) in that the accused unlawfully and intentionally committed an of act sexual penetration with MGK, a 28 year old female at the time, whereby he penetrated her vagina by inserting his penis therein without her consent. Thereafter, the accused unlawfully and intentionally removed a Nokia cell phone and R100-00 of MGK. Both these offences were committed on 12 November 2012.
- [2] It was my duty to impose suitable sentences. The imposition of sentence is an arduous task..”
- [3] The delicate balance that centres on a trilogy of factors as enunciated in *S v Zinn* 1969 (3) All SA 57 (A) at 540 G-H, namely, the personal circumstances of the accused, the crimes that he has been convicted of and the interests of society must be considered. The mitigating factors of the accused and the aggravating evidence of MGK accentuates the opposing interests and the tension that exists in our criminal law.
- [4] In the imposing of a suitable sentence I must be cognizant of the element of mercy. Mercy is a balanced and humane state of thought. It tempers one’s approach to the factors to be considered in arriving at an appropriate sentence. It has nothing to do with maudlin sympathy for the accused. It recognizes that fair punishment may sometimes have to be robust. It eschews insensitive censoriousness in sentencing a fellow mortal and so avoids severity in anger. Critically, the measure of the scope of the mercy depends upon the circumstances of each case. See: *Rabie* supra at 862 E-F.

The triad

- [5] I now turn to deal with each of the factors forming the triad.

The personal circumstances of the accused

- [6] The accused testified in mitigation of sentence. He was 40 (forty years old), born on 23 April 1983 at Odendaalsrus, Free State Province. He was married with two wives although he indicated that his relationship with one of them had soured significantly since his convictions. From one the marriages one child was born. Further the accused indicated that he was the father of another 8(eight children). It was difficult for me to follow the veracity of these details given his uncertainty as regards the personal information of these children. Notwithstanding this, I accepted that the accused was

the father of these children. Initially his children had spurned him due to these criminal matters. The accused testified that his children have undergone a change of heart and now support him.

- [7] The accused completed Grade 12. Thereafter he intended to pursue a qualification in Business Management. The completion of this career path was short-lived as he was compelled to assist in the family business empire. As a result of a brain injury sustained in a motor vehicle accident in 2008, the accused suffered from epilepsy and depression which still requires that he be medicated. At the time of his arrest in this matter, the accused had been serving a sentence. The accused bemoaned the fact that had the current matter been dealt with expeditiously he would have been released on 13 June 2023.
- [8] Whilst serving the current sentence the accused attempted suicide on two occasions. These attempts were inextricably linked to the rape matters. On a positive note, the accused attempted to complete the Business Management Qualification but same was interrupted by the Covid-19 pandemic that had made its way to our shores.
- [9] By the accused's own admission he harboured a lot of resentment towards women. During his incarceration, the programmes offered by the Correctional Facilities assisted him to learn life skills, to equip him to deal with substance abuse and anger management.
- [10] The accused had several previous convictions which were relevant to both counts which were proven before this Court. On 26 June 2010 the accused was convicted of rape, which was committed on 27 September 2003. In respect of this conviction, the accused was sentenced to 4 (four) years imprisonment which was wholly suspended on condition that "beskuldige nie weer aan soortgelyke klagte skuldig bevind word."
- [11] On 14 June 2016, the accused was convicted of contravening section 3 of SORMA, committed on 13 December 2012, identical to the first count that the accused was convicted for before this Court. Notably, the offence that this Court was to impose sentence was committed on 12 November 2012. The relevance of expiating these dates was apposite for the purpose of determining the application of the Criminal Law Amendment Act 105 of 1997, ("CLAA").

The crime

- [12] The crime of rape is a serious one. The rape of women and children has become rampant notwithstanding heavy sentences that courts impose. MGK was at a hiking spot when the accused duped her into believing that he could arrange free transport for her to an intended destination that he would also be traveling to. To this end, the accused carefully executed this devious plan by borrowing the cell phone of MGK. This was to enhance the reliability of the transport by transmitting a please call me. On receiving the call on MGK's cell phone, the accused then directed her to an area where he violated her. Thereafter, the accused searched MGK's bag removing cash and retaining the cell phone.
- [13] The late emeritus Mohammed CJ penned in *S v Chapman* [1997] ZASCA 45; 1997

- (2) SACR 3 (SCA) at 5b where he described rape as ‘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 civilisation.’ Khampepe J quoted the words of Mohammed CJ with approval and added that ‘rape is a serious offence. It is, in and of itself, a deeply destructive and dehumanising act.’ See *Ndlovu v S* (CCT174/16)

[2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017). She penned further that ‘this crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa’.

The interests of society

[14] In *S v Pillay*, unreported judgment of the KwaZulu Natal High Court, Durban, Case No CCD 48/17 (7 May 2018) (7 May 2018) the court referred to *S v Makwanyane & Another* [1995] ZACC 3; 1995

(6) BCLR 665; 1995

(3) SA 391 paras 87-89 where it was said:

‘... public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. . . “righteous anger should not becloud judgment”.’

[15] Notwithstanding the role of society in the triad, sentences imposed serve to protect public interest and must be intertwined with the peculiarities and exigencies of the facts of the matter and not on a concern regarding any likely sense of outrage of the public founded on public perception of the severity of the offence. See *S v Mhlakaza & Another* 1997 (1) SCA at 515 E-F, *BR Southwood Essential Judicial Reasoning* (Lexis Nexis) (2015) 114-115, *S v Makwanyane and Another* [1995] ZACC 3; 1995 (2) SACR 1(CC) at 38 -9 paras 87-9). This should not be interpreted to mean that the natural indignation of the community at large has no

bearing on sentence. See: *R v Karg* 1961(1) SA 231 (A) at 236 B-C, *Reg v Sargent* [1974] 60 CR App Rep at 71.

[16] To put it simply, the imposition of sentence is a subclass of a fair trial. In a constitutional epoch the right of an accused to a fair trial requires fairness to the accused as well as fairness to the public as represented by the State. The sentence process must instil confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror of crime. See: *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 CC at [29]

Submissions on the applicable sentence regime

[17] Mr Kgomongwe submitted that the rape committed on 27 September 2003 for which the accused was convicted on 26 June 2010 and sentenced to four (4) years imprisonment, is more than ten (10) years old. Resultedly, this previous conviction falls away, so the contention ran. In respect of the current conviction, it was committed on 12 November 2012 and therefore does not qualify as a previous conviction. The nub of the contention being that the accused was facing a minimum sentence of ten (10) years imprisonment being a first offender, so the argument ran.

[18] Miss Krause for the prosecution asserted that at the time of the commission of these offences, the applicable penalty for rape (committed under the circumstances the accused has been convicted of) in terms of the provisions of the CLAA was:

- (i) In the case of a first offender, to a term of imprisonment no less than ten (10) years;
- (ii) In the case of a second offender, to a term of imprisonment no less than 15(fifteen) years;
- (iii) In the case of a third offender, to a term of imprisonment no less than 20(twenty) years.

[19] These collective penalties have been amended by the Criminal and Related Matters Amendment Act 12 of 2021. Notwithstanding same Miss Krause avows that the accused's history of criminality warranted him being declared a dangerous criminal and to be sentenced to imprisonment for an indefinite period in terms of the provisions of section 286B of the Criminal Procedure Act 51 of 1977, "the CPA").

A determination of the applicable minimum sentence in terms of the CLAA

[20] The accused's first conviction for rape on 26 June 2010 is indeed a conviction which prima facie by simple calculation is more than ten (10) years old. The applicable law of general application namely section 271A of the CPA provides:

271A Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of

- (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
- (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed, that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment.

- [21] The previous conviction in 2010, is still of force as this offence does not fall within the ambit of S271A (a) or S271A(b) of the CPA. I therefore concluded that the accused sentencing was governed by the provisions of s 51(2)(b)(ii) of the CLAA. To avoid any ambiguity, the accused was a second offender and subjected to a minimum sentence of 15(fifteen) years unless there were substantial and compelling circumstances which warrant a departure from the preordained sentence. See: *S v Jacobs* 2015 (2) SACR 370 (WCC); *S v Matiwane* 2013 (1) SACR 507 (WCC) at 509.
- [22] To restrain the heightened levels of violent crime parliament enacted section 51 of the CLAA. This Act prescribes minimum sentences for a specified category of offences which must be imposed by the courts unless substantial and compelling circumstances exist justifying the imposition of a lesser sentence than the sentence prescribed.
- [23] Wallis JA said in *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) stated as follows:
- [15] “No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act).”
- [24] The approach to sentencing in cases involving minimum sentences which has mustered constitutional approval in *S v Dodo* 2001 (3) 382 (CC) is succinctly set out in *S v Malgas* 2001 (2) SA 1222 as follows:

"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and it is they who are to judge whether or not the circumstances of a particular case are such as to justify a departure. However, in doing so, they are to respect and not pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary-

A Section 51 has limited but not eliminated the court's discretion in imposing sentences in respect of offences referred to in Part 1 of Schedule 2(or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B 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 specifies circumstances.

C 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, standardised and consistent response from the courts

D 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 the marginal differences in the personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of a particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether are not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing framework.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the 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.

J In doing so, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided. "

Analysis

- [25] Mr Kgomongwe contended that substantial and compelling circumstances existed for this Court to depart from the minimum sentence. These were to be found in the accused's personal circumstances, the duration of time that had elapsed before the State had decided to charge him in this matter. The offence before this Court was committed on 12 November 2012, but for unknown reasons it only came to court in 2022. This is notwithstanding the fact that the State was already in possession of the DNA results on 6 April 2016.
- [26] Coincidentally, so the contention continued the accused was convicted of the crime of rape on 14 June 2016, had the current matter also been enrolled during 2016, the accused would have benefited from the application of the principle of the cumulative effect of sentencing. This is a misnomer. The legal reality of this contention is that had the offences been placed in a proper chronology, the accused would have probably been treated as a third offender and been exposed to a higher sentence minimum sentencing regime. To make short shrift of the matter, the delay that founded the institution of the current prosecution has been plausibly explained.
- [27] Miss Krause asseverated that there is a clear absence of substantial and compelling circumstances.
- [28] The accused was not honest with this Court, more appositely he showed no contrition for the offences that he was convicted of. There was clearly no gnawing of the accused's conscience as to the plight of MGK and an acceptance of the abhorrence of the crime of rape. The accused simply paid lip service to the programmes that he attended whilst incarcerated in the Department of Correctional Services, but the accused actions is far divorced from the truism of the error of his ways. A pure and bona fide display of remorse is an indicator that an offender acknowledges the unlawfulness of his/her conduct. It is the foundational stone on which rehabilitation is perched. In *S v Matyityi* (695/09)
- [2010] ZASCA 127; 2011 (1) SACR 40 (SCA), Ponnan JA, had occasion to address the issue of remorse wherein the following was postulated:

"[13]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 another. 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 himself 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 that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of

inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.” Footnotes omitted

[29] In *S v Thole* (2012 (2) SACR 306 (FB) par [13] it was held that “contrition cannot be construed, it must be demonstrated”. Whilst the accused testified in mitigation of sentence, he provided no factual evidence as to what had informed the unlawfulness of his conduct.

[30] The offence was committed on 12 November 2012, when MGK was 28 (twenty eight) years old. At the time of her testimony MGK was 38(thirty-eight) years. The passage of time had not healed her from this traumatic experience, which was obvious from MGK’s emotionally charged evidence, yet the accused persisted with rebuffing the honesty of her account. MGK can only be commended for her persistent and unrelenting quest for the attainment of justice.

[31] The rape that the accused was convicted of has a unique character to it. Immediately after MGK was raped, a criminal case was registered. On the same evening the necessary medico-legal examination occurred. This entailed the collection of forensic evidence. The fact that the accused had not used a condom exposed MGK to several risks. This failure had the result of a positive DNA profile of the accused being matched.

[32] This is indeed a rare case which would not ordinarily have found its way into a criminal court had it not been for the DNA profiling. In *Holtzhausen v Roodt*, 1997 (4) SA 766 (WLD) Satchwell J stated the following in the context of an “ordinary rape” and the unique characteristics and nuances underlying the crime of rape:

“Rape has frequently been described as a crime which seldom sees the light of day, let alone comes before the scrutiny of our courts. Rape victims or rape survivors have usually endured their experience in silence, and the particular and somewhat unique character and features of rape have long gone unstudied. They have certainly gone unappreciated by our courts. In the United States of America new legislation pertaining to the admissibility of evidence of previous rape allegations has recently been passed by the US congress. In an interesting article entitled 'Once a Rapist, Motivational Evidence and Relevancy in Rape Law' in the 1997

(110) No 3 Harvard Law Review, Professor Baker of Chicago Kent College of Law commented as follows. The degree to which different kinds of rape adversely affect victims is still an open enquiry, but it is all too obvious that the perpetrators of rape and the public at large view rape along a complex spectrum of permissibility. All rapes are in part about sex and masculinity and domination. But some rapes are predominantly about sex. Some rapes are predominantly about masculinity, and some rapes are predominantly about domination.’ This article argues that we cannot adequately address either the evidentiary problems in rape cases or the issues central to rape reform unless we begin to recognise and incorporate the rather obvious insight that not all rapes are the same. Indeed it is probably trite to say that the capacity for human experience is so infinite and unpredictable that no crime is

quite the same as another. Each case must be assessed, and an attempt must be made to understand it on its own particular and unique facts. However, rape is an experience of the utmost intimacy. The victims or survivors thereof are largely confined to the female sex. I have heard the response of such survivors generically described as 'a scream from silence'. The result has been a paucity of South African legal and judicial understanding and commentary on the full parameters and implications of this phenomenon. Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to

fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.”

[33] In my view these remarks are very pertinent and applicable to this case.

[34] A careful examination of the conspectus of the evidence on sentence inclusive of the written arguments leads me to find that there are no substantial and compelling circumstances that justify a departure from the minimum sentence that is applicable.

[35] In *Maila v The State* (429/2022)

[2023] ZASCA 3 (23 January 2023), Mocumie JA (Carelse and Mothle JJA and Mjali and Salie AJJA concurring), stated as follows in respect of a rape:

“[58] The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic

society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In *S v Jansen*, the court stated it thus:

‘Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised

society. . . . The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.’

[59] Taking into account *Jansen*, *Malgas*, *Matyityi*, *Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be ‘business as usual’. Courts should, through

consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'. (footnotes omitted)

Order:

[36] Resulted the accused was sentenced as follows:

Count 1

Fifteen

(15) years imprisonment.

Count 2

Two years imprisonment.

Ancillary

Orders

(i) In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed in count 2 run concurrently with count 1.

(ii) In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused was declared unfit to possess a firearm.

(iii) In terms of section 50 (1)(a) (i), the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 the particulars of the accused must be entered into the Register of Sexual Offenders.

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA.

APPEARANCES

For the State Advocate R Krause Instructed by Director of Public Prosecutions Klerksdorp For the accused Mr K Kgomongwe Instructed by 18 Delver Street, Kearsney Building Klerksdorp Date judgment reserved 24 February 2024

Judgment

delivered 5 April 2024.

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