

SOUTH AFRICA / JUDGMENT

Tsage and Another v S (CA 32/23)
[2024] ZANWHC 144 (20 June 2024)
[2024] ZANWHC 144

COURT

North West High Court, Mafikeng

BEFORE

A Reddy, JT Djaje

CASE / FILE NUMBER

CA 32/23

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE NO: CA 32/23
Regional Court Case
no: RC 162/18

Reportable:	YES/NO
Circulate to Judges:	YES/NO Circulate to
Magistrates:	YES/NO Circulate to Regional
Magistrates:	YES/NO
In the matter between:	ABEL TSAGE 1ST APPELLANT KEAORATA PATRICK MOKGATLA 2ND APPELLANT and THE STATE RESPONDENT Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the

judgment is deemed to be
handed down is 20 JUNE 2024 at 10h00.
APPEAL

JUDGMENT

REDDY J

- [1] On the afternoon of 25 February 2014, NHSH, locked the back door of his abode, placing the key on top of the security gate for his wife who would be able to access same on her return from school where she was an educator. NHSH, then left for horse-riding. Returning some thirty (30) to forty (40) minutes later, after he had bathed his horse, NHSH noticed two (2) males in his living room.
- [2] Of the two males, the first appellant was immediately identifiable due to his frequent interaction with NHSH and his wife, EH. The presence of the two males in his living room was disconcerting to him. NHSH attempted to confront the first appellant. The first appellant pointed a pistol at NHSH gesturing that he should remain silent. The second appellant then pushed an unidentifiable sharp object into his ribs, echoing a similar caution as that of the first appellant. NHSH was ushered into another bedroom where his hands and feet were tied behind his back. A piece of cloth was forcefully inserted into his mouth which was also secured.

Repeated requests were made for money.

- [3] NHSH was then steered into his office where a huge safe was positioned. This safe not belong to him. The appellants changed tack and demanded that the keys to this safe to be handed over. NHSH attempted to explain that he did not have the keys to this safe. The appellants were toing and froing between requesting the keys for the safe, cash or anything of value. NHSH was escorted to the spare bedroom again. There the second appellant attempted to strangle him by standing on his back and tightening the belt around his neck. At some point the first appellant positioned the pistol that was in his possession against his head. The trigger was compressed but the pistol jammed.
- [4] NHSH was taken back to the office where the demand for the keys to the safe was repeated. NHSH was returned to the spare bedroom. He was tied strategically which made any attempt to loosen himself impossible.
- [5] Unexpectedly EH returned earlier than anticipated by NHSH. The first appellant went to confront her, whilst the second appellant stayed with him. NHSH heard his wife scream and thereafter did not see her. The second appellant would leave him intermittently, during which time NHSH persisted with attempting to untie himself.

[6] Meanwhile in another bedroom, the first appellant with the aid of a pistol ordered EH to undress. She did not acquiesce. The first appellant then proceeded to unbutton her jeans whilst still pointing the pistol at her. EH was coerced to complete the removal of her jeans and undergarments, whereafter EH was ordered to lie down. The first appellant undressed his trouser and attempted to penetrate her vagina using his penis. Any thoughts of resistance from EH was eliminated by the first appellant positioning the pistol that was in his possession at the head of EH. As a last gasp attempt to dissuade the first appellant, EH uttered that the first appellant should be cautious that she does not infect him with Aids. The first

appellant was unable to follow through with the intended penetration of her vagina. Even with the second appellant's best attempts to assist with the rape of EH, the first appellant could not penetrate EH's vagina. Eventually, the first appellant used his finger and the firearm that he had in his possession to penetrate EH vaginally.

[7] What NHSH recalls was that the second appellant, communicating with the first appellant in Setswana, (which NHSH had a limited understanding of), enquired as to what was to become of NHSH. From the conversation that was occurring between the appellants, NHSH extracted that the first appellant had made some mention of a fridge. The second appellant then started to strangle NHSH around the neck. NHSH then surmised that it was the intention of the appellants to place him into the refrigerator. The appellants then disappeared. On their return they checked if he was awake, NHSH pretended that he was unconscious. The second appellant then inflicted a forceful kick directed at the ribs of NHSH, to which he did not wince. It was then quiet.

[8] Somehow EH managed to escape and assist with the release of NHSH. The appellants had locked all the doors. As EH and NHSH were attempting to find a way out of the house, they heard a motor vehicle approaching. It was driven by the foreman of the owner of the farm. They yelled out that they had been attacked and that the police must be contacted. A spare set of keys was used to open the door for EH and NHSH to exit the house. The police and the members of the farming community promptly arrived.

[9] The appellants removed inter alia three cell phones, a mini laptop, two broken laptops, an external hard drive, video camera, broken cell phones, a .22 Lama pistol, zippo lighter, and a nail file. The total value of which was R17 637.00. The first appellant was arrested on the same day. On 3 March 2014, the second appellant was arrested. Some of the property belonging to the victims were found in the possession of the second appellant. This included a blue bag, a black Transit Nokia cell phone, a Samsung Camera and a USB cable. NHSH positively identified the recovered property as belonging to them.

[10] Arising out of the aforementioned facts, the appellants were charged with seven (7) counts each before the Regional Magistrate Atamaleng, count 1, robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977, ("the CPA"), which was read with the provisions of section 51 (2), 52A and 52B of the Criminal Law

Amendment Act 105 of 1997, (“the CLAA”) as an alternative to count 1, housebreaking with intent to steal and theft, count 2 and count 4 the contravention of section 1, 103, 117, 120, 120 (1) (a), section 121 read with schedule 4 and section 151 of the Firearms Control Act 60 of 2000, pointing of a firearm, antique firearm or air gun, count 3, attempted murder, on count 5, and 6 the contravention of section 3 of the Criminal Law Amendment Sexual Offences Related Matters 32 of 2007, (“SORMA”). On 3 November 2017, the latter two counts were amended to read that the provisions of section 51(1) of schedule 2 of the CLAA found application. In respect of count 7, it was contended that the appellants had contravened section 5(1) read with sections 1, 56 (1) 57, 58, 59 60 and 61 of SORMA, in that appellants unlawfully and intentionally violated the complainant and were thus guilty of sexual assault.

[11] On 20 April 2016, the appellants duly represented pleaded not guilty to all counts, electing to exercise the right to remain silent. On 3 November 2017 the first appellant was convicted on count 1, the main count of robbery with aggravating circumstances, count 3, attempted murder, counts 5, 6 and 7, the contravention of section 3 and 5(1) of SORMA. The first appellant was acquitted on counts 2 and 4, (both counts related to the pointing of a firearm) as the court a quo was of the view that these convictions would transgress on the culture of duplication of charges. The second appellant was convicted

on count 1, the main count of robbery with aggravating circumstances, count 3, attempted murder, and count 7, contravening section 5(1) of SORMA. He was acquitted on counts 2, 4, 5 and 6.

[12] On 28 November 2017, the court a quo reasoned that the appellants had demonstrated the existence of substantial and compelling circumstances in respect of count one where the mandatory sentence of fifteen years was preordained and deviated from imposing same. In respect of the first appellant the court a quo stated the following on the applicability of the mandatory sentence of life imprisonment regarding counts 5 and 6:

“Before judgment the state requested, applied for the amendment of the charges in respect of the two rape counts, that is counts 5 and

6. It was amended to read that it should be read with Section 51(1) of the Criminal Law Amendment Act 105, 1997. Section 51(1) provides for a minimum sentence of life imprisonment. Mr. Tsagae that is only applicable to you and the state has requested that the court should consider impose life imprisonment for these counts. However this court is of the view that because you were not informed of the sentence of life imprisonment that can be imposed when the charges are put to you it would not be fair to impose the sentence”

[13] The Regional Magistrate’s departure from the mandatory sentences of life imprisonment seems to have been anchored on the guidelines as provide in *S v Malgas* 2001 (3) All SA 220 SCA at paragraph [22], where Marais JA enunciated the following at paragraph [25]:

“If the sentencing court on consideration of the circumstances of 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.”

[14] As I see it, Regional Magistrate intended to follow the guidance as provided in Malgas although he may have not expressed the intention to do so eloquently. The reasoning for this is plain. The question of fairness and prejudice would have been integral to the adjudication of the application for the amendment of the charges. The upholding of application for the amendment of the charges prior to judgment was a conclusive finding by the Regional Magistrate that there was an absence of prejudice. The amended charges remained extant given this successful application. Taking this issue to its logical end, the amended charges triggered the application of section 51(1) of the CLAA into operation. Embarking on a process of rational reasoning, the Regional Magistrate was not clothed with a discretion to disavow his own ruling and conclude that the amendment of the charges had become a live controversy during the sentence process of the trial. The procedural effect of the amendment to the charges in our law resulted in the amendment deemed to have been affected from the stage of the first appellant having pleaded. Resultantly, Malgas was intended to have been applied by the Regional Magistrate notwithstanding the maladroitness of the principled embodied therein.

[15] The appellants were sentenced as follows:

First appellant

Count 1: 12 years imprisonment.

Count 3: 12 years imprisonment.

Count 5: 10 (ten) years imprisonment.

Count 6: 10 (ten) years imprisonment.

Count 7: 5(five) years imprisonment.

It was ordered that the sentences in respect of counts 6 and 7 run currently with the sentence in respect of count 5. An effective sentence of 34 (thirty -four) years imprisonment was imposed.

The second appellant

Count 1: 10(ten) years imprisonment.

Count 3: 10(ten) years imprisonment.

Count 7: 5 (five) years imprisonment.

- [16] As in the first appellant, the court a quo ordered that the sentence imposed in count 7 run concurrently with the sentence in count 3. The second appellant was effectively sentenced to twenty (20) years imprisonment. An ancillary order followed which declared both appellants unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.
- [17] On 1 October 2020, the appellants application for leave to appeal against the conviction and sentence was dismissed. On 3 December 2020, the appellants approached this Court on petition. The appellants' petition against conviction was unsuccessful with leave to appeal granted on sentence.
- [18] It is well established that sentencing lies within the discretion of the trial court and that a court of appeal will not unnecessarily interfere with the exercise of such discretion. See: *S v Romer* 2011 (2) SA SACR 153 (SCA) at paragraph [22]. A court of appeal will thus not, "in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..." See :*S v Malgas* 2001 (3) All SA 220 (SCA) at paragraph [16], *S v Fielies*
- [2014] ZASCA 191 at paragraph [14].
- [19] An appellate court must therefore be satisfied and interfere with the sentence if the court a quo's sentencing discretion was not exercised at all or exercised improperly or unreasonably when imposing its sentence. The fact that a sentence is disturbingly inappropriate or sufficiently disparate has been accepted as sufficient reason for a court of appeal to intervene. See: *S v Mothibe* 1977 (3) SA 823 (A) at 830 D, *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).
- [20] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001(3) All SA where the following was stated, is instructive:

"[12] The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between

the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate." It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[21] In *S v Matyityi* 2011

(1) SACR 40 (SCA) at paragraph 23, Ponnan JA stated as follows in respect of serious crimes, such as the present:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual". And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those

sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature

by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses

that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order. '

(my emphasis)

[22] The fulcrum of the appellants dissatisfaction with the sentence are dealt with independently as set out below.

When regard is had to the time both appellants spent in custody prior to their sentences together with the effective sentence meted out to them, it becomes apparent that the sentence of the first appellant is equivalent to 38 years imprisonment and that of the second appellant would be 24 years imprisonment.

- [23] In my view the calculation that is proposed by the appellants is not beneficial. See: *S v Seboko* 2009 (2) SACR 573 (NCK) at paragraph [22]. A scientific formula to determine the extent to which a proposed sentence should be reduced by virtue of the time spent in pretrial detention is unhelpful.
- [24] In *Radebe v S* (726/12) [2013] ZASCA 31 (27 March 2013) Lewis JA (Leach JA and Erasmus AJA concurring) stated as follows regarding pretrial detention:
- [14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.
- [15] That general principle was expressed, first, in relation to the way to assess whether substantial and compelling circumstances exist where a minimum sentence has been prescribed by the Criminal Law Amendment Act, in *S v Malgas* 2001
- (2) SA 1222; 2001
- (1) SACR 469 (SCA) where Marais JA said (para 25):
- '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.'
- That approach was endorsed by the Constitutional Court in *S v Dodo* [2001] ZACC 16; 2001
- (3) SA 382; 2001
- (1) SACR 594 (CC). More recently, in *S v Vilakazi* 2012
- (6) SA 353; 2009
- (1) SACR 552 (SCA) this court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Nugent JA said (para 15):

‘It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.’

[25] The Regional Magistrate’s judgment on sentence unmistakably disavows this contention. At the genesis of his judgment, the Regional Magistrate states as follows:

“ To impose a sentence in which all the different purposes are embodied , the court must consider the personal circumstances and the nature and seriousness of the offences and recognition must be given to the interest of the community ...” (my emphasis).

[26] The Regional Magistrate continued after setting out the first appellant’s personal circumstances:

“ You did odd jobs before you were arrested. You were arrested on 25 February

2014. You were in custody for nearly four years awaiting trial. You may have contributed for the delay in finalising the matter, but the fact remains that you have been in custody for about four years....” (my emphasis).

[27] The record emphatically reinforces that the Regional Magistrate was acutely aware of the second appellant’s personal circumstances inclusive of the period that he had spent in custody as a pretrial awaiting detainee. In this regard the Regional Magistrate stated as follows:

“ In respect of both of you the court must take into account the fact that you have been in custody for nearly four years awaiting trial....”

[28] The mathematical formula that the appellants seek to promote as to the addition of the approximately four years that the appellants spent being incarcerated as trial awaiting detainees to the effective sentence is misguided. No such calculation exists in our law. The Supreme Court has spoken out in this regard. Pretrial incarceration is but one of the factors which a sentencing court, must consider as part of an accused personal circumstances. There are instances where

the personal circumstances of an accused would be usurped by the serious of the crime/s that an accused had been convicted of. This ground is without merit.

Doubt must exist whether the trial court indeed considered the cumulative effect of sentences imposed upon the appellants. The sentences are disturbingly excessive and do not serve public interest but to satisfy public opinion.

[29] This averment is not borne out by the record. Section 280 of the CPA legislates the concurrency of sentences. It provides as follows:

- (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”
- [30] In making a finding on the concurrency of sentences, putting it differently whether the sentences ought to be ordered to run concurrently, is - whether the sentences are appropriate; whether there is an inextricable link between the offences in the sense that they form part of the same transaction or were committed as part of the overall criminal conduct. See: *S v Nthabalala* [2014] ZASCA 28 (unreported, SCA case no 829/13, 28 March 2014); *S v Nemutandani* [2014] ZASCA 128 (unreported, SCA case no 944/13, 22 September 2014). Referring to *S v Mokela*, 2012
- (1) SACR 431 (SCA) at [9] Mbha JA stated the following in *S v Nemutandani* in this regard:
- “[T]he murder committed by the appellant was inextricably linked to the robbery of the deceased during which deceased’s canvas shoes were removed and taken. It is trite law that an order for sentences to run concurrently is always called for where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent”.*
- [31] The Regional Magistrate was fully conscious of the discretion that he had been clothed with in terms of section 280(2) of the CPA. His judgment fortifies this, where the following was posited:
- “In respect of both of you the court must take into account the fact that you have been in custody for nearly four years awaiting trial. The state has requested that the court should not consider or give undue weight the cumulative effect of sentences but that is also a factor that the court must consider. The court cannot ignore the cumulative effect of the sentences. The cumulative effect of the sentences is considered as well as the fact that you have been in custody for four years the court is of the view that a sentence of less than 15 years’ imprisonment may be imposed in respect of count 1”.*
- [32] The Regional Magistrate give life to the principle of the concurrency of sentences as can be observed from the sentences that were imposed. Taking this ground of appeal to its ultimate conclusion, it remains unmeritorious.

It seems with respect that the court paid lip service to taking the pre-sentence incarceration into account. The sentences imposed are not appropriate at all. The learned Regional Court Magistrate alluded that the first appellant played a role in prolonging the trial, if that is so however, it should not be used against the second appellant.

[33] This contention is misplaced. The Regional Magistrate was alive to the fact the appellants were arrested on 25 February 2014 and had been in custody for approximately four (4) years. Notwithstanding the Regional Magistrate's comment that the second appellant may have contributed to the delay in the disposal of the matter, he accentuated that the irrefutable fact was that the second appellant had been a trial awaiting detainee for about four (4) years. I have in some detail set out supra the law on pretrial detention and its application in the sentencing process. For my money there is no need to embark on a process of regurgitation.

It is common cause that some of the properties belonging to the complainants were recovered from the second appellant. The value of the recovered items and those of the unrecovered items remain unknown. The honourable trial court did not deal with the fact that some properties were recovered and therefore there was no actual loss in respect of the recovered items. Bear in mind that the second appellant was linked through the properties found on him when he was arrested.

[34] No judgment is all encompassing. The fact that the Regional Magistrate had not categorically dealt with the recovered property of the victims, does not equate to an irregularity that vitiates the sentence process.

Concluding remarks

[35] Regarding count 1, which both the appellants were convicted of, the Regional Magistrate found that there were substantial and compelling circumstances present to justify a departure from the prescribed sentence of fifteen years imprisonment. Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is directed at three prominent factors, the crime, the offender, and the interests of the community. (See *S v Zinn* 1969

(2) SA 537 (A) at 540G-H). In *S v RO and Another* 2000

(2) SACR 248 (SCA) at paragraph [30] Heher JA stated the following in this regard:

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions. "

[36] I now turn to deal with the triad as enunciated in *Zinn*.

The personal circumstances

The first appellant

[37] At the date of sentence, the first appellant was twenty-eight (28) years old, and the father of a four (4) year old son. His son resided with his biological mother but would voluntarily return to his paternal grandmother. Prior to his arrest, the first appellant was employed on a casual basis. There was no indication as to the income that the first appellant accrued, other than

that he was the sole breadwinner at home. The siblings of the first appellant were aged fifteen (15), nineteen (19) and twenty (20) years of age but still learners. The mother of the first appellant was aged and suffered from chronic conditions which made her unemployable. The first appellant was arrested on 25 February 2014 and had been a trial awaiting detainee since. The first appellant conceded that he had led an unaccomplished life but implored the court to consider a suspended sentence. The first appellant was a repeat offender. On 30 September 2003, the appellant was convicted of theft and housebreaking with intent to steal and theft. Sentence was postponed. In 2006, the appellant was convicted of murder and sentenced to eight (8) years imprisonment. In 2011, the appellant was convicted of theft and sentenced to a fine of R300.00 or in default of payment to undergo five (5) months imprisonment. Again in 2011, the appellant was convicted of housebreaking with intent to steal and theft and was sentenced to nine (9) months imprisonment.

The second appellant

[38] The second appellant was twenty-seven years old at the date of sentencing. Prior to his incarceration as a trial awaiting detainee, he had secured temporary employment using skills in the steelwork and carpentry. He was paid a monthly salary of R 5000.00 per month. The second appellant is the father of two children aged five (5) and seven (7) years old respectively. The elder of the two children was enrolled for Grade 2, whilst the youngest was due to begin schooling. From the monthly salary that was accrued the second appellant supported both his children. Notwithstanding that the minor children were the recipients of state assisted grants, although the financial assistance provided was not insignificant it was inadequate to cater for all the needs of the minor children. This was exacerbated by the mother of the children being unemployed and being

unsuccessful in the securing of same. The second appellant was a first offender and was a trial awaiting detainee from 03 March 2014.

The crimes

[39] The nature of the crimes is of considerable importance. The crimes cannot simply be brushed over by classifying them as serious. What needs to be scrutinized is the moral and ethical nature of the crime. Within these two subclasses the gravity of the offence/s must be afforded due consideration. Critically the crimes must be considered within the factual mosaic of proof as found by the sentencing court.

The interests of society

[40] The interests of society must be afforded due consideration. The role of society should not however be elevated or over-emphasized in this process of proportionality. When the interests of society are being considered, it is not what the society demands that should determine the sentence, but what the informed reasonable member of that community believes to be a sentence that would be just. (*S v Mhlakaza and Another* 1997

- (1) SACR 515 (SCA) at 518). A sentence would, accordingly, not necessarily represent what the majority in the community demands, but what serves the public interest and not the wrath of primitive society. (*S v Makwanyane* [1995] ZACC 3; 1995
- (2) SACR 1 (CC) at paragraph [87]- [89]).
- [41] What is revealing from the evidence presented during the trial and in the sentencing, proceedings is that the appellants were not palpably remorseful or even regretful. The rationale behind the concept of remorse as dealt with in *S v Seegers* 1970
- (2) SA 506 (A); *S v D* 1995
- (1) SACR 2596) at 261 A-C; *S v Volkwyn* 1995
- (1) SACR 286 (A); *S v* 1996
- (2) SACR 378 (W) at 383 G-I; and *S v Mokoena* 2009
- (2) SACR 309 (SCA) at paragraph [9] is succinctly encapsulated in *S v Matyityi* 2011
- (1) SACR 40 (SCA) at paragraph [13] where Ponnann JA stated 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 of the conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself 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 a valid consideration, the pertinence 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 have exist cannot be determined. After all, before a court can find an accused person to be genuinely remorseful, it needs to have an 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 has a true appreciation of the consequences of those actions. "

- [42] The appellants from the inception of the trial were not sincere and had not taken the trial court into their confidence. Their conduct patently displayed that, notwithstanding the gravity of the offences and the overwhelming evidence, weighed against them, they embarked on a deliberate process of self-preservation. The crimes which the appellants were convicted of were serious. Both the victims were savagely attacked in the sanctity of their home. A home is more than a shelter from the elements. It is a zone of personal intimacy and security. The appellants invaded this. The attack on both victims was harrowing and brutal. On the arrival of EH, the first appellant after failing to succeed in penetrating EH with his penis, used his finger and a firearm to penetrate her. The indignity and ignominy of this must have been unimaginable.

[43] The rights to dignity, to privacy and integrity of every person are a basic ethos of the Constitution of the Republic of South Africa, Act 108 of 1996. All its citizenry is entitled to the protection of these rights. Women more particularly, 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 insecurity which constantly diminishes the quality of their lives. See: S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 at paragraph [4]. The gravity of the offences caused the personal circumstances of the appellants to recede into the background. It was overtaken by the crime and the interests of society. A lengthy term of imprisonment was justifiable.

Order

[44] In the premises, I make the following order:

(i) The appeal against the sentence is dismissed.

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree

JT DJAJE

ACTING JUDGE PRESIDENT

NORTH WEST DIVISION

HIGH COURT OF SOUTH AFRICA MAHIKENG

APPEARANCES

For the Appellant : Mr M V Kekana Attorneys for the Appellant: Legal -Aid South Africa No 742 Dr James Moroka Drive Borekelong House Mmabatho For the Respondent : Advocate K J Molefe Attorney for the Respondent : The State Attorneys Megacity Complex East Gallery 3139 Sekame Road Mmabatho Date of Hearing: 08 March 2024 Date of Judgment: 20 June 2024

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