THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1192/2018

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA **APPELLANT**

and

MFANIMPELA NTOKOZO ZULU **RESPONDENT**

Neutral citation: *DPP, Pretoria v Zulu* (1192/2018) [2021] ZASCA 174 (10 December 2021)

Coram: SALDULKER ADP and MATHOPO, NICHOLLS and MABINDLA-BOQWANA JJA and KGOELE AJA

Heard: This appeal was disposed of without an oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand-down are deemed to be 09h45 on 10 December 2021.

Summary: Sentence – Appeal by the State in terms of s 311(1) of the Criminal Procedure Act 105 of 1977 – whether the issue raised is a question of law or fact – whether sentence disproportionate to the crime – sentence imposed by Regional Court reinstated.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J and Nair AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court in respect of the sentences on the three counts of rape is set aside and replaced with the following order:

'1. The appeal against the sentences in respect of the three counts of rape is dismissed.

2. The judgment of the Ermelo Regional Court in the Regional Division of Mpumalanga in respect of the life sentences imposed on counts 1, 2, and 3 are confirmed. The sentences will run concurrently.'

JUDGMENT

Kgoele AJA (Saldulker ADP and Mathopo, Nicholls and Mabindla-Boqwana JJA concurring):

[1] This is an appeal by the Director of Public Prosecutions, Pretoria (the appellant), against the sentence imposed on 1 June 2018 by the Gauteng Division of the High Court, Pretoria, wherein Davis J and Nair AJ (the high court) partially set aside the sentence of Magistrate Jonker sitting at Ermelo, Mpumalanga Regional Division (the regional court). The appeal is brought in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] On 12 May 2016, Mr Mfanimpela Ntokozo Zulu (the respondent), was convicted of three counts of rape read with the provisions of s 51(1) of the

Criminal Law Amendment Act 32 of 2007 (the CLAA) and two counts of common assault, by the regional court. He was sentenced to life imprisonment on each of the rape counts and to three months imprisonment in respect of both the assault counts. All of the sentences were ordered to run concurrently.

[3] He successfully obtained leave from the regional court against his conviction and sentence. The appeal was heard by the high court, which dismissed the appeal against conviction. However, the high court upheld the appeal against sentence, and the life imprisonment imposed on each count of rape was set aside and substituted with a sentence of 20 years imprisonment on counts 1, 2, and 3 respectively. The concurrency of the sentences remained intact with the result that the respondent's effective sentence is 20 years.

[4] It bears mention that the sentences of life imprisonment imposed by the regional court in respect of the rape counts, were in consequence of the finding that no substantial and compelling circumstances were present that could warrant a deviation from the prescribed minimum sentences of life, prescribed by the CLAA. The high court, even though it did not find any reason to interfere with this finding by the regional court, including the concurrency of the sentences imposed, concluded that the sentence of life imprisonment was disproportionate to the offences of rape the respondent was convicted of. In arriving at its conclusions, it relied on the judgments of *Abrahams*, *Mahomotsa*, *Nkomo*, *GN*, and *Ganga*,[1] where it was found that, even when a life sentence is a prescribed minimum sentence, as an ultimate sentence, it must not be imposed lightly. It considered itself bound by those judgments on the basis that they were the precedents and found that the regional court misdirected itself in that it did not consider the approach adopted by our courts in those cases.

[1] *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA); *S v GN* 2010 (1) SACR 93 (T) and *S v Ganga* [2015] ZAWCHC 171; 2016 (1) SACR 600 (WCC).

[5] Aggrieved by these findings, the appellant launched this appeal against the reduced sentences. As already indicated, the appellant raised what it termed a question of law in terms of s 311 of the CPA, which was formulated as follows:
'Did the court a quo correctly weigh the cumulative factors in aggravation and mitigation of sentence against the accused's criminal liability, in terms of the Criminal Law Amendment Act 105 of 1997, in accordance with the principles enunciated in *S v Malgas* 2001 SACR 496 (SCA) inter alia?'

[6] Before turning to the requirements of section 311, a brief summary of the background facts that led to the respondent's conviction is necessary. The complainant, who was a minor at the time, started staying with her mother and the respondent, who is her stepfather, in 2010. She testified that during the periods November 2011, August 2012, and February 2015, she was raped on numerous occasions by the respondent. She was 12, 13, and 15 years old, respectively, at the time. The respondent would usually approach her after school when no one else was present at home. He gained her trust by telling her that he would show her what boys do to girls. He would then smear Vaseline on his penis and gradually, over a period extending over weeks and months, penetrate the complainant vaginally.

[7] The repeated rapes did not only cause the complainant to lose her virginity, but also to fall pregnant several times. The respondent influenced her to tell her mother that she was impregnated by her boyfriend on each occasion. When the complainant's mother wanted to approach the boy's parents, the respondent convinced her not to, saying it was unnecessary as boys nowadays always deny impregnating girls. The multiple pregnancies were terminated by the use of pills from shops allegedly run by Nigerian citizens. These were procured for her at the

insistence of the respondent. The complainant's mother rejected her at some stage believing that this young boy impregnated her.

[8] The respondent also isolated the complainant because he did not want to see her with her male school friends. He often followed her after school to check on her. On one of the days, he assaulted the complainant with an open hand when he found her with one Thabo Dludlu after school. He also threatened to stab Thabo with a knife, but Thabo outran him. These are the allegations informing the two counts of assault he was convicted of.

[9] Coming back to the jurisdictional requirements of s 311, it is now settled that essentially, s 311 provides the prosecuting authority with an appeal opportunity directly to this Court under the following conditions:

(a) There was an appeal to the high court (it is irrelevant which party brought this appeal);

(b) That court of appeal (ie the high court) found in favour of the convicted person on a question of law.[2]

This section confers an automatic right of appeal when the conditions set out above are satisfied.[3]

[10] The first jurisdictional requirement does not pose any problem in this appeal. The second one, whether the question raised by the appellant is a question of law is one of the issues pertinently raised by the respondent. This Court can only entertain the merits if it is satisfied that the appellant's ground of appeal involves a question of law.

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[2] *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 32. See also a Du Toit et al *Commentary on the Criminal Procedure Act* [Service 60, 2018] p 30-67.

[3] *Ibid* paras 35, 45 and 47. See also *Director of Public Prosecutions, Gauteng v MG* [2017] ZASCA 82; 2017 (2) SACR 132 (SCA) para 16.

[11] Before us, the respondent relied on several decisions of this Court to support the contention that the nature of the question formulated by the appellant is simply a question of fact clothed as a legal question to provide it with legitimacy.[4] Most of these authorities were thoroughly analysed by this Court in *MG* and need no further emphasis. It suffices to state that the finding in *Mphaphama*, upon which the respondent heavily relied, was qualified therein as follows:[5]

'Although the facts in *Mphaphama* are at first blush not materially distinguishable from the facts of this case, the issues raised in the two cases are different. Hence the different outcomes. Accordingly, the dictum in *Mphaphama*, that "the exercise of a judicial discretion in favour of a convicted person in regard to sentence . . . cannot be a question of law", is cast too wide. In particular, it does not deal with the position where that discretion has been exercised on an incorrect legal basis. An exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person. This also distinguishes the present matter from that of *Mosterd* because it is not the nature of the sentence, but the legal basis on which it was approached, which places this matter within the ambit of s 311 of the CPA.'

[12] To substantiate the fact that the question raised involves a question of law, the appellant argued that 'the high court failed to properly assess the respondent's criminal liability against Schedule 2, Part 1 of the CLAA, in that the offences the respondent was convicted of resorted under item (a)(i), since the complainant had been raped more than once and further under item (b)(ii) in that the complainant was a minor under the age of 16 years. Further that, its 'maudlin sympathy' for the respondent is against the principles enunciated by this court in *Malgas*.'[6]

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[4] *Director of Public Prosecutions, Gauteng, v Mphaphama* [2016] ZASCA 8; 2016 (1) SACR 495 (SCA) para 11; *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA) paras 21-22; *Director of Public Prosecutions, Western Cape v Kock* [2015] ZASCA 197; 2016 (1) SACR 539 (SCA) para 9; *Director of Public Prosecutions: Gauteng Division, Pretoria v Mbonani* [2020] (SCA) ZASCA 115 para 31.
[5] Para 29 *MG* (fn 3 above).
[6] *S v Malgas* 2001 SACR 496 (SCA).

[13] As to the question of whether the issues raised in an appeal are a question of law or facts, *Magmoed*[7] remains a good authority on how to approach this question. The approach has been widely accepted and applied by this Court in various judgments[8] and needs no further emphasis.

[14] Although the high court concluded, that 'to impose an imprisonment for life in the present matter would be disproportionate to the life sentences in such other matters which would deserve the ultimate penalty', it confirmed the regional court's finding that there were no substantial and compelling circumstances that warranted the court to deviate from the prescribed minimum sentence prescribed, which is life imprisonment. However, the high court bemoaned the fact that the regional court did not consider the issue of proportionality as one of the principles a court must take into consideration when imposing a sentence of life imprisonment.

[15] There is no doubt that the facts and circumstances of this case bring the respondent's rape convictions within the ambit of the prescribed minimum sentence of life imprisonment. First, the complainant is a minor, and second, she was raped more than once. The provisions of the CLAA are implicated as being the law applicable to the conduct of the respondent.

[16] My understanding of the question raised by the appellant is that it requires an inquiry first into whether the high court's view and understanding of the mandatory provisions of the CLAA are correct and second, whether the high court properly appreciated the import of the circumstances of this matter in its determination of the proportionality test as espoused in *Malgas*, together with the

[7] *Magmoed v Janse van Rensburg & Others* 1993 (1) SACR 67 (A); 1993 (1) SA 777.
[8] *Director of Public Prosecutions: Gauteng Division, Pretoria v Pooe* [2021] ZASCA 55; [2021] 3 All SA 23 (SCA); 2021 (2) SACR 115 (SCA); *Director of Public Prosecutions, Western Cape v Schoeman and Another* 2020 (1) 449 SACR (SCA); *Director of Public Prosecutions: Limpopo v Molope and Another* [2020] ZASCA 69; [2020] 3 All SA 633 (SCA); 2020 (2) SACR 343 (SCA).

precedents it quoted. The issue regarding proportionality involves a question of whether the punishment fits the crime, it is, therefore, a question of law. Simply put, the inquiry does not concern the nature of the sentences, but the legal basis on which the reduced sentences were approached. After all, as already quoted above, it is trite that an erroneous view of the law is a question of law. I am satisfied that the question raised is a question of law.

[17] That being so, this Court is empowered to consider the sole question in the appeal as to whether there was any legal basis that entitled the high court to interfere with and reduce the sentences imposed by the regional court. The nub of the appellant's case is that the reduction of the sentences in the rape counts was based on an incorrect application of the accepted legal principles in sentencing and the provisions of the CLAA, including an incorrect finding that the circumstances of this case are not the 'worse kind of rape' that warrants a maximum punishment.

[18] It is important at the outset to re-state the basic principle that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court and that the power of the appellate court to interfere with a sentence imposed by a lower court is limited. I now consider whether this Court is entitled to interfere with the sentences imposed by the high court.

[19] After confirming the order of the regional court that there are no substantial and compelling circumstances in this matter, the high court held in para 10 of its judgment in justifying its decision to interfere with the sentences imposed by the regional court:

'However, that is not the end of the inquiry. Our courts have, in a series of judgments emphasised that one should not lose sight of the fact that life imprisonment is the most severe sentence which a court can impose and that the question whether it is an appropriate sentence in respect of its proportionality to the particular circumstances of a case requires careful

consideration. See: *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Nkomo* 2007 (2) SACR 189 (SCA) and *S v GN* 2010 (1) SACR 93 (T). In *S v Ganga* 2016 (1) 600 (WCC) it was further found that, even when a life sentence is a prescribed minimum sentence, as an ultimate sentence, it must not be imposed lightly. A court must still seek to differentiate between sentences in accordance with the dictates of justice and where a magistrate did not sufficiently give consideration to the approach adopted by our courts in the cases referred to above and simply considered whether the circumstances of the accused displayed substantial and compelling circumstances, such an approach would amount to a misdirection. Unfortunately, this is what happened in this present instance, necessitating interference by this court on appeal.'

[20] In coming to the conclusion that the sentences were disproportionate to the offences of rape the respondent was convicted of, it remarked 'society has given us worse examples of the extent or brutality of crimes against women'. The latter remarks depict that it did not consider the circumstances of this case to fall into the category of 'the worse kind of scenario'. As the latter remarks are inextricably linked with the issue of proportionality, the two will be analysed together hereunder.

[21] In *Malgas*, the issue of proportionality was couched as follows:[9]

'What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetuating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

[9] *S v Malgas* 2001 (2) SA 1222 SCA at 1234H (para 22).

[22] To assess the proportionality of the prescribed sentence in a particular case, the sentencing court must determine what a 'proportionate' sentence would be, considering all the circumstances traditionally relevant to sentencing.[10] The proportionality of a sentence cannot be determined in the abstract.[11] The principle is trite and was couched in *Malgas* as follows:

'To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.'[12]

[23] In *Mahomotsa,*[13] one of the authorities relied upon by the respondent's legal representative, a practical approach of this principle is well illustrated and buttresses the point made above. The court remarked '[whilst] I am persuaded that in respect of the first count the factors mentioned in para 17 above, taken together with the accused's relative youth and his other personal circumstances, the fact that his previous conviction, though of a sexual nature, did not involve non-consensual sex, are such that a departure from the prescribed sentence is justified on the basis that such a sentence would be *disproportionate to the crime, the criminal and the legitimate interest of the society*, the same cannot be said without more about the second count'.

[24] It is therefore clear that there is a contradictory and irreconcilable tension in the findings of the high court. It found no substantial and compelling

[10] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 16.
[11] Ibid para 20.
[12] *S v Malgas* 2001 (1) SACR 469 (SCA) at para 21.
[13] *Mahomotsa* above fn 1 para 20.

circumstances justifying a departure from the prescribed minimum sentences and found no reason to interfere with the concurrency of sentences as ordered by the regional court, yet, after making this finding, it found another reason that justified the imposition of a lesser sentence. In this regard it erred.

[25] Although the legislature's aim in promulgating the minimum sentence regime was to achieve a 'severe, standardised and consistent' response from courts in imposing sentences unless there were truly convincing reasons for a different response' as enunciated in *Malgas*,[14] it is important to always note that it is trite that the invocation of the proportionality test must always be determined on the peculiar facts of each case.

[26] In more recent times and after the guidelines in *Malgas* were confirmed by the Constitutional Court, Petse JA as he then was, remarked as follows in *Kwanape*:[15]

'It was further submitted on behalf of the appellant that this was not the worst rape imaginable. Thus, concluded the argument, that consideration, viewed with other mitigating factors, justifies a lesser sentence. I do not agree. In *S v Mahomotsa* this court made plain that the fact that more serious cases than the ones under consideration are imaginable is not decisive. Mpati JA said:

"[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit there is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the

[14] Para 25.
[15] *S v Kwanape* [2012] ZASCA 168; 2014 (1) SACR 405 (SCA) para 20. (References omitted.)

least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."
Accordingly this case, on its facts, is indeed horrendous enough to justify the imposition of the maximum penalty.'

[27] In this matter, sight should not be lost of the fact that society views the respondent's heinous conduct in a very serious light. This was also borne out by the high court, also referring to the offences the respondent was convicted of as 'abhorrent'. Within the context of this case, the injunction to protect children from these crimes assumes a prominent role. Courts are reminded in *Malgas* that when considering what sentence to impose, 'emphasis was to be shifted to the objective gravity of the type of crime and public's need for effective sanctions against it'.[16]

[28] In this matter, we have a step-father who abused his step-daughter in the early years of her life and not only impregnated her several times but caused her to experience the trauma and pain associated with abortion. Not only once, but many times. That the commission of these offences took place over a protracted period of three years, with the resultant after-effects, are some of the egregious distinguishing features which set apart this case from the cases the high court relied on.

[29] In fact, there are more aggravating factors in this case. This also comes out clearly from the remarks by the high court that '[having] regard to the evidence of the minor, the conduct of the [appellant] could have resulted in many more than the three charges . . .'. In addition, the respondent is not a candidate for rehabilitation. He spurned the mercy he was given by the previous court because five years after he was released on parole, he committed rape again. If

[16] Para 25.

one has regard to the circumstances as to how the rapes were committed including the resultant consequences that flowed from them, there is no doubt that they are horrendous enough to justify the imposition of the maximum penalty. Unlike the regional court, the high court gave insufficient weight to the seriousness of the offences in this case. It is in the interest of society that the respondent's conduct in the circumstances of this case be appropriately sentenced.

[30] Apart from the fact that the reasons given by the high court rested on tenuous grounds, what is disturbing, in this case, is that the sentences imposed by the high court are woefully inadequate when viewed within the context of the circumstances of this case. In finding that the crimes the respondent was convicted of were not the worst kind of rapes, the high court clearly underplayed the circumstances in this matter. The failure by the high court to apply correctly the appropriate provision of the CLAA and the principles as laid down in *Malga*s, coupled with how it underplayed the seriousness of the offences viewed in the context of the circumstances of this matter, is a material misdirection that entitles this court to interfere.

[31] For all the preceding reasons, I am not persuaded that there was misdirection, let alone a material misdirection on the part of the regional court. I conclude that the sentences imposed by the regional court should stand, as they are proportionate to the offences committed by the respondent and the circumstances of this case. The appeal must, accordingly, succeed. The appeal against the reduced sentences in respect of the three counts of rape imposed by the high court should be upheld.

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

1 The appeal is upheld.

2 The order of the high court in respect of the sentences on the three counts of rape is set aside and replaced with the following order:

‘1. The appeal against the sentences in respect of the three counts of rape is dismissed.

2. The judgment of the Ermelo Regional Court in the Regional Division of Mpumalanga in respect of the life sentences imposed on counts 1, 2, and 3 are confirmed. The sentences will run concurrently.’

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A M KGOELE

ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant:	C P Harmzen
Instructed by:	Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein
For the respondent:	M G Botha
Instructed by:	Pretoria Justice Centre Bloemfontein Justice Centre