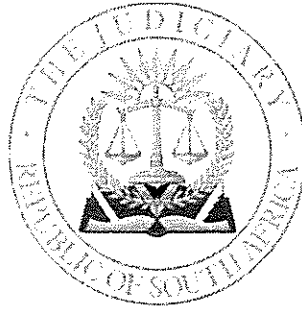


Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

[Signature] 16/4/2024



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH-WEST DIVISION, MAHIKENG)

CASE NO.: CA 63/2019

REGIONAL COURT CASE NO.: F 74/2014

IN THE APPEAL OF:

KHOLOFELO FRANS LESO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

CORAM: REID J et LAUBSCHER AJ:

LAUBSCHER AJ

BACKGROUND RELEVANT TO THIS APPEAL:

[1] This is an appeal against the sentence imposed upon the Appellant on two charges of rape in the Temba Regional Court in the North-West Province on 20 June 2018.

[2] According to the record availed to this Court the Appellant was charged with the following two counts:

(a) Count 1: That the Appellant is guilty of the contravention of the provisions of section 3 read with section 1, 55, 56 (1), 57, 58, 59, 60 and 61 of the **Criminal Law Amendment Act (Sexual Offence and Related Matters), Act 32 of 2007** (hereafter "the SORM Criminal Law Amendment Act") read with section 256, 257 and 281 of the **Criminal Procedure Act, Act 51 of 1977** (hereafter "the Criminal Procedure Act") and the provisions of section 51 and Schedule 2 of the **Criminal Law Amendment Act, Act 105 of 1997** (hereafter "the Criminal Law Amendment Act") as amended as well as section 92 (2) and 94 of the Criminal Procedure Act, in that on or about the 25 day of December 2013 and at or near Sekampaneng in the district/regional division of Moretele the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit PM of 16 years by inserting his penis into her vagina without her consent and the Respondent was alleging that the Appellant penetrated the victim more than once.

(b) Count 2: That the Appellant is guilty of the contravention of the provisions of section 3 read with section 1, 55, 56 (1), 57, 58, 59, 60 and 61 of the SORM Criminal Law Amendment Act read with section 256, 257 and 281 of the Criminal Procedure Act and the provisions of

section 51 and Schedule 2 of the Criminal Law Amendment Act as amended as well as section 92 (2) and 94 of the Criminal Procedure Act, in that on or about the 25 day of December 2013 and at or near Sekampaneng in the district/regional division of Moretele the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit SN of 14 years by inserting his penis into her vagina without her consent, and the Respondent was alleging that the Appellant penetrated the victim more than once.

[3] The Appellant pleaded not guilty to the charges levied against him and the matter proceeded to trial.

[4] The Respondent and the Appellant adduced the testimony of several witnesses.

[5] On the evidence before the court *a quo*, the court *a quo* found the Appellant guilty on the two charges of rape, the details of which can be summarised, for the purposes of this appeal, as follows, that:

(a) on 25 December 2013 and at or near Sekampaneng in the Regional Division of Mertele, the Appellant raped SN, who was at time of the rape 14 year old, more than once; and

- (b) on the same day, at or near Sekampaneng in the Regional Division of Mertele, the Appellant also raped PM who was at time of the rape 16 year old, more than once.

[6] The Appellant was sentenced to:

- (a) life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act in respect of both charges of rape;
- (b) the Appellant was declared unfit to possess a firearm in terms of section 103 of the **Firearms Control Act, Act 60 of 2000**; and
- (c) it was ordered by the court *a quo* that the Appellant's name be entered into the register of sex offenders in terms of section 50(2) of the Criminal Law Amendment Act.

[7] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act, as amended by the provisions of section 10 of the **Judicial Matters Amendment Act, Act 42 of 2023** the Appellant is entitled to an automatic right of appeal once the court *a quo* has imposed a sentence of life imprisonment.

[8] The crisp issue in this appeal is whether the court *a quo* was correct in its finding that there are no “...*substantial and compelling circumstances justifying the imposition of a lesser sentence...*” than life imprisonment.

[9] The initial notice of appeal dated 3 July 2018 states that the Appellant appealed against both his conviction and sentence, but from the contents of a later notice of appeal dated 1 November 2023, a practice note delivered on behalf of the Appellant dated 1 November 2023 and the written heads of argument delivered on behalf of the Appellant it is evident that the Appellant persists only with his automatic right of appeal against the sentence of life imprisonment imposed by the court *a quo*.

[10] The State, the Respondent in this appeal, opposed the Appellant's appeal.

[11] The Appellant in this appeal was represented by Mr T G Gonyane of Legal Aid South Africa and the Respondent was represented by Mr I Mabudisa of the Office of the Director of Public Prosecutions. Written heads of argument were submitted to this Court on behalf of both the Appellant and the Respondent, the contents of which assisted this Court in the adjudication of this appeal. This appeal is adjudicated in terms of section 19(a) of the **Superior Court Act, Act 10 of 2013**, by agreement between the parties on the documents filed in the court file without the presentation of oral argument.

GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON SENTENCE:

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

[13] An appeal court is loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others¹ stated that:

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

[14] In S v Barnard² the Supreme Court of Appeal stated: *"A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably."*

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

¹ 1920 AD 56 at 57.

² 2004 (1) SACR 191 (SCA) at para [9].

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

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

“It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or

³ 2017 (1) SACR 309 (SCA).

⁴ At paragraph [8].

⁵ 2013 (1) SACR 1 (CC) at para [41].

the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

[18] Consequently, the court in the present matter can only interfere with the sentence where the trial court’s exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.

[19] This principle was also echoed by and phrased by Du Toit⁶ as follows: “*The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.*”⁷

[20] The court *a quo* “...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same.”⁸ A court of appeal will not interfere lightly with the trial court’s exercise of its discretion.⁹ In S v Singh¹⁰

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

⁷ Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).

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

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

¹⁰ 2016 (2) SACR 443 at para [23].

Tshiqi JA held that: *“The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate.”*

[21] In the matter of Chitumbura and Another v S¹¹ the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal matter of S v Kgosimore¹² and stated the following: *“Regard may be had also to the judgment of Scott, JA in S v Kgosimore, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.”*

[22] *Cadit quaestio.*

THE EVIDENCE BEFORE THE COURT A QUO

[23] Guided by the general and overarching principles applicable when a court adjudicates an appeal on sentence, this Court has regard to the evidence adduced before and accepted the Court *a quo* as set out in the court transcripts and the judgment of the Court *a quo* on conviction and sentence.

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

¹² 1999(2) SACR 238 (SCA).

The contents of the evidence accepted by the court *a quo* in convicting the Appellant on the two counts stand uncontested as this appeal only relates to sentence.

[24] The Appellant pleaded not guilty to the two charges levied against him and raised an alibi defence, which defence was later on rejected by the court *a quo*.

[25] Both victims of the rape testified during the trial before the court *a quo* as well as a number of other witnesses the detail of which witnesses is not relevant for the purposes of the adjudication of this appeal which only lies against sentence. It is however important to note that the conviction of the Appellant on the charges was supported by DNA evidence adduced by the Respondent. If one has regard to the extent of the DNA evidence produced by the Respondent against the Appellant, the Appellant got his comeuppance in the court *a quo*'s guilty verdict and the Appellant wisely elected to abandon his appeal in this matter on the said conviction.

[26] The Respondent proved that the victims SN was 14 years, 5 months, 23 days and the victim PM, 16 years, 2 months, and 18 days old at the time when the Appellant raped them. The age of SN is of importance when it comes to the application of section 51(1) of the Criminal Law Amendment Act, as will be dealt with in more detail below.

[27] The Appellant forced the two victims at knife point to the house wherein he proceeded to rape them. The Appellant, once inside the brick house where he took the two victims, forced them to undress and lay on a bed, where he committed acts of sexual penetration with them each in turn on more than one occasion. In an even more macabre turn of events the Appellant during him taking turn to rape the victims at one point instructed the victims to insert carrots into their vaginas.

[28] During this nightmarish ordeal for the victims, the Appellant forced the victims to wash themselves before Appellant again proceeded to commit further acts of rape on them. It is important to note that the court *a quo* accepted the evidence of the victims that they were raped by the Appellant taking turn between the two of them to rape them and that after an interpose during whereby the Appellant forcing the two victims to wash themselves he proceeded to again rape them in turns.

[29] It is clear from the aforesaid facts that the rape of the victims by the Appellant that the Appellant formed the clear intent after raping the victims for the first time, to rape each of them again.¹³ The importance of this fact, as will be

¹³ See S v Ncombo 2017 (2) SACR 683 (ECG), S v Tladi 2013 (2) SARR 287 (SCA) par [13] and S v Blaauw 1999 (2) SACR 295 (W) at 300a-d wherein the following was stated by the Court: *“Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on*

evident below, is that this brings the actions of the Appellant within the purview of section 51(1) of the Criminal Law Amendment Act in respect of both victims.

[30] During the course of the ordeal the Appellant also assaulted one of the victims with a piece of wood on her back and burnt her with warm water. This assault on the one victim was corroborated by facts as set out in the medical examination report pertaining to this victim.

[31] After the ordeal the Appellant offered the victims money, but they refused to accept it. The victims within hours reported the rape to a friend and then to the police.

[32] Certain attributes of the inside of the brick house where the victims were raped by the Appellant were testified to by a police officer, thus providing the court a *quo* also with independent verification of the truthfulness of the victims' versions.

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

- [33] The medico-legal evidence led by the Respondent in respect of the medical examinations conducted on the victims, the details of which were meticulously and in detail set out in the judgement of the court *of quo*, and need not be repeated herein, also supported the victims' versions that they were subjected to sexual penetration. The genitals of both victims evidenced blunt force injuries and penetration.
- [34] The medical examinations conducted on the victims and the samples collected during these examinations course also formed part of the chain DNA evidence which proved that the Appellant's DNA was present in/on the victims.
- [35] The Appellant testified that he spent the specific Christmas day with his wife and that he did not rape the victims. The Appellant's wife corroborated the Appellant's version.
- [36] The court *a quo*, stating that "*...alibi defence cannot be considered in isolation...*" and that the court "*...must consider the totality of the evidence by the identifying witnesses and that evidence must be honest, and reliable...*" found that the Appellant's alibi evidence cannot, in view of the conspectus of evidence adduced by the Respondent, be accepted and the court *a quo* found the Appellant guilty as charged.
- [37] In dealing with the task of sentencing the Appellant the court *a quo* was provided with evidence that:

- (a) The Appellant has a previous conviction for theft committed in 2008 and assault in 2011 which the court *a quo* found to have little to no impact on the current matter.
- (b) The Appellant is 36 years old (at the time of sentencing in 2018) and has 2 children aged 3 and 1 month respectively.
- (c) The Appellant was employed washing cars at Themba City and earned about R800.00 per week. He also did temporary work in the construction industry.
- (d) The Appellant was one of five children and attained standard 6 level of education and dropped out of school due to poverty.

[38] The court *a quo* considered the personal circumstance of the Appellant and also referred to the following:

- (a) The Appellant showed no remorse for the crimes committed by him.
- (b) The crimes of rape of which he has been found guilty are “*extremely serious*” in scarred the victims for life both physically and more significantly, mentally.
- (c) The tender age of the victims.

[39] The court *a quo* found that there were no “...*substantial and compelling circumstances present...*” to warrant the departure from the prescribed minimum sentence as per the provisions of section 51(1) of the Criminal Law Amendment Act, for the offences of which the Appellant was found guilty, i.e., rape as contemplated in section 3 of the SORM Criminal Law Amendment Act, in respect SN the rape of person under the age of sixteen and in respect of both the victims, being raped more than once by the Appellant as contemplated in the provisions of Schedule 2, Part 1 (Rape) to the Criminal Law Amendment Act,

[40] The court *a quo* accordingly proceeded to sentence the Appellant as set out in paragraph [1] above.

THE PRESCRIBED MINIMUM SENTENCE

[41] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner: “*Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court **shall sentence a person**:— (a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... **to imprisonment for life.**” (own emphasis)*

[42] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and states the following: “*If any court referred to in subsection (1) or (2) **is satisfied that substantial and compelling circumstances exist***”

which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years." (own emphasis)

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

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

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

(a) *when committed—*

- (i) *in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- (iii) *by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
- (iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*

(b) *where the victim—*

- (i) *is a person under the age of 16 years;*
- (iA) *is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);*
- (ii) *is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or*
- (iii) *is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

(c) *involving the infliction of grievous bodily harm.*”

[45] The court *a quo* accordingly having regard to the age of the victim SN and the facts of the matter, i.e., the fact that the victims were raped more than once, applied the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant to life imprisonment in respect of both counts of rape, the court *a quo* having found no “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act, to trigger the redeeming effect of the last mentioned section.

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

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

[48] In respect of sentence the Appellant placed the following before the Court: the Appellant was 36 years old at the time, he was single and has 2 children - aged 3 years and one month at the time respectively, he earned an income

washing cars at a shopping complex, he comes from a family of eight persons and he attended school until standard 6. The Appellant was convicted of theft in 2008 and assault in 2011.

[49] In the heads of argument submitted on behalf of the Appellant the personal circumstances of the Appellant were once again highlighted. It was also argued that the rapes did not cause the victims “...*grievous bodily injuries...*” but it was conceded that the offences are “...*more serious...*”. The main point of argument in the heads of argument being that the Appellant’s personal circumstances “...*are persuasive for a departure from the prescribed minimum sentence...*”. It was argued on behalf of the Appellant that a more appropriate sentence will be 25 years imprisonment on each count, the sentences to run concurrently and be ante-dated to 20 June 2018.

[50] The heads of argument delivered on behalf of the Respondent the Court was *inter alia* referred to the matter of S v Rabie¹⁴ wherein it was stated that “...*the sentence should only be altered if the discretion (of the court a quo) has not been judicially and properly exercised...*” and “...*is disturbingly inappropriate...*”. The Respondent also pointed out a number of aggravating circumstances, which include the Appellant forcing the victims to insert an object in their vaginas and also assaulted them. The Respondent submitted that sentences imposed by the court *a quo* were appropriate.

¹⁴ 1975 (4) SA 855 (A) at 857 D to F.

[51] Turning to the prescribed minimum sentences imposed by the court *a quo*. In the matter of S v Malgas,¹⁵ the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

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

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

¹⁵ 2001 (1) SACR 469 (SCA).

recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. **The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...**¹⁶ (own emphasis)

¹⁶ At paragraph [7] to [9].

[52] In the matter of S v GN,¹⁷ Du Plessis J stated in respect of the Malgas judgment:

*“...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society” ...”*¹⁸

[53] The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an accused and even the fact that an accused person is a first offender do not constitute “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act. The SCA in the matter of Mthanti v The State¹⁹ of which the facts to a limited extent resonates with the facts in this matter, stated the following:

“[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present

¹⁷ 2010 (1) SACR 93 (TPD).

¹⁸ At paragraph [6].

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

when committing the crimes by far outweighed the mitigating factors. The high court was correct in considering that the appellant's criminal conduct was not 'fleeting and impetuous'; that it was 'calculated and callous', and that there was no reason to deviate from the prescribed minimum sentences.

[20] The only submission made on appeal was that the appellant's mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant's favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him 10 a 'good and warm upbringing' until he abandoned his post matric studies without telling them'. The court considered that the appellant was a first offender.

[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places at night. This he did

repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences.”

[54] The above referred to case (as confirmed in the Malgas matter) confirms that certain mitigating factors from the Appellant's personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. The court a quo in casu did not find substantial and compelling circumstances to deviate from the minimum prescribed sentences.

[55] The usual triad of the crime, the offender, and the interests of society, as enunciated in S v Zinn²⁰ were considered by the court a quo and this Court.

[56] This case deals with the Appellant raping two tender age girls more than once at knife point and in the most degrading of circumstances before one another whilst held against their will.

[57] With regard to the offence of rape, which are disturbingly prevalent in our country, this Court deems it appropriate to make reference to the following:

(a) The court in the matter of Vilakazi²¹ held as follows:

²⁰ 1969 (2) SA 537 (A) at 540G to H.

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

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

- (b) Most recently, in the matter of Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu²² the Supreme Court of Appeal Stated:

“Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago,

²² (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

Mohamed CJ, writing for a unanimous court,²³ aptly remarked that: 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

In similar vein Nugent JA, writing for a unanimous court²⁴, in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'"

- (c) In Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studie sas Amici Curiae); Ntuli v S²⁵ the Constitutional Court stated "...rape is not rare, unusual and deviant. It is structural and systemic..."

²³ With reference to S v Chapman 1997 (3) SA 341 (SCA) at paras [3] to [4].

²⁴ With reference to S v Vilakazi supra at para [1].

²⁵ 2020 (2) SACR 38 (CC) at para [67].

- (d) In Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)²⁶

the Constitutional Court said the following of rape:

“Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in Chapman, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory.”

- (e) In recent times, this “...upwards trajectory..” referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.

- (f) It is not only this Court that is saying this. In the matter of Director of Public Prosecutions, Grahamstown v T M²⁷

“The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionately high levels of violence against women and

²⁶ 2007 (5) SA 30 (CC) at para [51].

²⁷ (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15].

*children, has immeasurable and far-reaching effects on the health of our nation, and its economy. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. **What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute.***

(footnotes omitted and own emphasis)

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

[59] In the matter of Ndou v S²⁸ Shongwe JA stated that:

“Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance,

²⁸ [2012] JOL 29522 (SCA) at para [14].

where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence”

[60] The information placed before the court *a quo* on behalf of the Appellant, in the discretion of the court *a quo*, did not present substantial and compelling circumstances to have justified the imposition of a lesser sentence than the prescribed minimum sentence. In fact, having regard to the facts in this matter and the manner in which the rapes of the minor victims took place it is difficult to imagine which scenario of facts would have constituted substantial and compelling circumstances to have justified the imposition of a lesser sentence. This is also apparent from a consideration of recent case law that deals with similar facts.²⁹

[61] If one has regard to the manner in which the court *a quo* dealt with the sentencing of the Appellant it is evident that a proportioned, balanced and all-inclusive approach was adopted by the court *a quo*, taking into account all the relevant evidence placed before it. The court *a quo* was clearly alive to the

²⁹ See, for example S v FM 2016 JDR 1564 (GP), S v Mgandela 2016 JDR 1748 (ECM), S v Redebe 2019 JDR 1257 (GP) and S v Daile 2021 JDR 1879 (GP) and Director of Public Prosecutions, Grahamstown v Mantashe supra at para [11] and [12].

fact that there must be a separate and distinct enquiry as the absence of any substantial and compelling circumstances before the court can proceed to impose the prescribed minimum sentence, *in casu*, life imprisonment.

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

[63] In S v Dodo³⁰ Ackermann J dealt with the “concept of proportionality” and stated the following:

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

³⁰ 2001 (5) BCLR 423 (CC) at paras [37] and [38].

*shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence. ...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."*³¹

[64] The principle of proportionality was also addressed in Vilakazi v S,³² where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*,

³¹ At paragraphs [37] and [38].

³² [2008] 4 All SA 396 (SCA).

to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter. *In casu*, the court *a quo* did so, and there is no reason for this Court to interfere with the sentence imposed by the court *a quo*.

[65] The main and evidently only argument raised on behalf of the Appellant to the effect that the person circumstances of the Appellant "...are persuasive for a departure from the prescribed minimum sentence..." cannot be upheld.

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

CONCLUSION AND JUDGMENT:

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

[68] Accordingly, the Appellant's appeal against sentence is dismissed and the sentence imposed by the Court *a quo* remains unaltered.

**N G LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG**

I agree and it is so ordered



**FMM REID
JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG**

DATE OF APPEAL: 1 December 2023

DATE OF JUDGMENT: *16* April 2024

**For the Appellant: Mr T G Gonyane
Instructed by Legal Aid**

**For the Respondent: Mr I Mabudisa
Office of Public Prosecutor**