

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A227/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

DATE:17/7/2023

SIGNATURE

In the matter between:

J P VILAKAZI

Appellant

and

THE STATE

Respondent

JUDGMENT

Tolmay J (Van Nieuwenhuizen J and Barit AJ concurring)

1. On the 10th of February 2014, the appellant was charged with two counts. The first was murder read with the provisions of section 51(1) of the Criminal Procedure Act 51 of 1997 (the Act). The second count was one of rape. He pleaded guilty to both counts and was subsequently convicted and sentenced to 25 years imprisonment on the count of murder and 10 years imprisonment on the

count of rape. The sentences were not ordered to run concurrently. The appeal is only against sentence.

2. In his plea in terms of section 112 (2) of the Act the appellant stated that on Saturday 3 November 2012 at about 17h00 he was on his way home when he stopped at a tavern and drank two Amstel beers. At about 23h00 a certain Maboka, who gave him money for the beer he had consumed, sent him to his home to collect R80,00. On his way there he saw P[...] M[...] (the deceased), she had been his girlfriend, but the relationship ended. He followed her to her home and approached her before she could get into her room. He asked her to go to his house so that they could have intercourse. She refused and he then asked whether he could go with her to her home. She yet again refused. He grabbed her, strangled her and pulled her to a wall, where he raped her. He explained that he strangled her and by the time that he was done raping her she was hardly breathing. He pulled her to a fence and put her in a passage next to a shack. He then carried her into a toilet where he put her on a toilet seat. He said that she was hardly breathing at the time. He left her there and went home to sleep. At about 8:00 o'clock in the evening of 4 November 2012 his uncle woke him up and informed him about the deceased's death and that the police were looking for him. His DNA was obtained, and he was forensically linked to the deceased.
3. The court a quo in the judgment on sentencing, noted that the SAP 69's that were handed up indicated that the accused was convicted on 14 June 2013 on two counts of robbery, and three counts of rape which were committed on 3 September 2010. The two robbery charges were taken together, and a sentence of 15 years imprisonment was imposed. The three counts of rape were also taken together for purposes of sentencing and 15 years imprisonment was imposed. The SAP 69 did not indicate that these sentences should run concurrently. Due to the fact that when the present offences were committed, he was not yet convicted of any offence, the court correctly disregarded these convictions and treated him as a first-time offender.

4. The court considered all the relevant extenuating circumstances, including that the appellant was 21 years old when the crimes were committed, was unemployed at the time and that the deceased previously was a girlfriend of the appellant. The court concluded that the death of the deceased was not premeditated. It was also considered that the accused disclosed his involvement to the police, who were investigating the matter. The court furthermore considered that the accused pleaded guilty and interpreted that as a sign of remorse. The court concluded that substantial and compelling circumstances were proven and deviated from the prescribed minimum sentences.
5. It was argued on behalf of the appellant that this court should take into account the sentences imposed in the crimes committed by him, and for which he was convicted and sentenced to 30 years by the regional court on 14 June 2013. These offenses were committed two years prior to the commission of the offences before this court and the sentence was imposed seven, months prior to the conviction and sentence on the matter before us. If the regional court's sentence is taken together with the sentence imposed by the court a quo, the appellant will effectively serve 65 years imprisonment, if he is not considered for parole. It was argued that where separate sentences are imposed for multiple offenses the cumulative effect should be taken into account.
6. The argument went that seeing that the appellant was convicted and sentenced in the present matter not long after being sentenced for the other offenses he will have to first serve the sentence that was previously imposed on him, prior to him starting to serve the sentence in the current matter and accordingly, so the argument went it will not be in the interest of justice if this is allowed to happen. It was pointed out, that seeing that the accused's age, when he was convicted, was 23 years, he will be 95 years old before his release, if he is not considered for parole. The state supported the argument that the court of appeal should intervene and argued that an effective combined sentence of 65 years

imprisonment is excessive and suggested that the sentences in the present matter should run concurrently.

7. It is trite that a court should take into account the personal circumstances of the offender, the seriousness of the offense and the interest of society when determining an appropriate sentence ¹. It is also trite that a court sitting on appeal may only interfere with the sentence imposed by the trial court if there was a misdirection by the trial court, or if the sentence is shockingly inappropriate ². This court must keep these principles in mind when determining whether it is appropriate to interfere with the sentence imposed by the trial court.
8. Section 280(1) and (2) of the Act make provision for a court to order that sentences may run concurrently where a person is convicted of two or more offenses, or where a person under sentence, or undergoing sentence is convicted of another offence. In *S v Mothibi*³ it was held that the correct interpretation of section 280 is that a court is not permitted to order that a suspended sentence ,which is being put into operation should be served together with a subsequent sentence, but that the court can order that the new sentence should run concurrently with the suspended sentence. It was subsequently also confirmed that section 280 allows a sentencing court to impose a custodial sentence, which will run concurrently with another sentence which the offender is already serving ⁴.
9. In this instance the trial court was aware of the sentences imposed by the regional court, as well as the fact that they were not ordered to run concurrently. The court found that compelling and substantial circumstances exist which allowed for a deviation from the prescribed minimum sentence. The appellant in my view should count himself fortunate that the court did find that such

¹ *S v Zinn* 1969 (2) SA 537 (A) 540 at F-H.

² *S v Malgas* 2000 (1) SACR (SCA) 469.

³ 1982 (4) SA 49 (NC).

⁴ *S v Motlaung* 2015 (1) SACR 310 (GJ) at para 27 also see *S v Mokela* 2012 (1) SACR (SCA) 431 at para 11.

circumstances existed. In this regard it must be considered that the court found that this was not the worst kind of rape, even though the deceased died. The court also found that the appellant showed remorse, because he pleaded guilty and cooperated with the police. In my view the accused pleaded guilty because he was forensically linked to the rape and no indication of true remorse could be found on a perusal of the record. The court also seemingly found it relevant that the accused and the deceased were previously in a relationship. The uncomfortable inference that can be drawn is that in some way or another this made the rape less serious. The court a quo also emphasized the fact that the appellant cooperated with the police, but did not mention the fact that the appellant callously left the deceased on a toilet seat and went to sleep, when he himself noticed that she was barely breathing. He only cooperated with the police after his uncle woke him up and told him that the police were looking for him.

10. I am of the view that the trial court was obviously aware of and considered the 30-year sentence imposed by the regional court and that there are no grounds for this court to interfere with the trial court's discretion in not applying section 280 of the Act. However, taking into consideration that the rape and the murder occurred at the same time and place, and are inextricably linked the court should have let the sentences run concurrently ⁵. As a result, the court a quo misdirected itself in not ordering that the sentences should run concurrently. This approach will also alleviate the cumulative effect of the previous sentences imposed on the appellant.

The following order is made:

1. The appeal is upheld.
2. The sentence of 10 years on the count of rape and 25 years on the count of murder is confirmed.

⁵ S v Belelie 1997 (2) SACR (W) 79, supra note 4.

3. It is ordered that the sentence of 10 years imprisonment on the count of rape will run concurrently with the 25 years imprisonment on the count of murder.

R TOLMAY

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

N JANSEN VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

L BARIT

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicant:	MMP Mase
Attorney for applicant:	Legal Aid South Africa
Counsel for respondents:	GJC Maritz
Attorney for respondents:	State Attorney
Date heard:	8 May 2023
Date of Judgment:	17 July 2023