

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR118/14

In the matter between:

CELIMPHILO WELCOME ZONDO

Appellant

and

THE STATE

Respondent

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**JUDGMENT**

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**Vahed J (Chetty J concurring):**

[1] I have had the privilege of reading the judgment prepared by my brother Kruger. Regrettably, I do not agree with his conclusion.

[2] The facts of the matter are set out in my colleague's judgment and, subject to what follows, I will not repeat them here.

[3] Rape is a vile and despicable deed. It is something no woman ought to endure and it is particularly horrendous when it is perpetrated upon a child, like in this case, who was at the tender age of 10 when it happened. I too agree with the sentiments expressed by Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 at paragraph 57, and which my brother has referred to in his judgment. The complainant in this case must indeed have been traumatised. Added to the trauma, it is clear from the

evidence that unfolded in the regional court that she lost her virginity during the incident in question. One cannot even begin to imagine what impact these events must have on the complainant as she matures into adolescence and later into adulthood. To my mind, it does not redound to the appellant's benefit that there was no extraneous violence and no physical injury other than the physical injury occasioned by the rape itself.

[4] Having said that, however, I agree with Kruger J when he says that the sentence of life imprisonment imposed by Hurt J was disproportionate and inappropriate, marred by misdirection, and one that calls for interference by this court. This court is consequently at large and is entitled to approach the question of sentence afresh. I disagree that a sentence of 15 years imprisonment is appropriate in the circumstances.

[5] On two occasions during the course of his judgment Kruger J refers to what he regards as the regional court magistrate's finding that the incident in question had no adverse effect on the complainant's school work. I do not agree with that observation. In my view no such finding was positively made by the regional magistrate and the excerpt my brother refers to appears at that portion of the regional magistrate's judgment where he was in the process of recounting and summarising the complainant's evidence. The particular sentence reads thus:-

“Had no previous problems, the incident had no adverse effect on her school work, the incident took place on a Sunday but she was unable to remember when exactly it took place.”

[6] The evidence itself in this regard is troubling. The complainant, a 10 year old girl, was testifying through an intermediary and towards the conclusion of her

evidence the magistrate put a number of questions to the complainant which commenced with an observation by the magistrate that the complainant might be tired. She refuted the suggestion and the questioning continued. Thereafter the prosecutor commenced questioning the complainant and the question put to her reads thus:-

“Did this incident have an adverse effect on your schoolwork?”

She responded in the negative and then the questions went on to deal with something else.

[7] I have some misgivings with the testimony itself and whether any significant reliance can be placed thereon. Quite how a child of some 10 years of age could have fully understood and appreciated the import of the question, through an intermediary, and had sufficient insight to be able to respond to it in any appropriate fashion escapes me. In any event, as I have pointed out, the magistrate did not make any finding in that regard but was merely recounting the evidence received by him. He made no comment in that regard.

[8] The sentencing phase of the trial that unfolded before Hurt J in the court *quo* was, as Kruger J pointed out, extremely short. Admittedly, Hurt J’s judgment on sentence was terse, as my colleague has found, but that followed upon an address in mitigation of sentence that was even shorter.

[9] Before Hurt J, counsel for the appellant addressed the court as follows:-

“In mitigation, the accused is presently twenty-nine years. At the time of the commission of the offence he was twenty-seven years. He is a first offender, unmarried, no children, prior to his arrest he was doing piece (sic) time jobs from which he earned about R500 a month. It appears that the complainant

did not suffer any other injuries than reflected in the J88 which are common in these types of cases. And the assault on the victim had no effect on her schoolwork, as shown on page 61 of the judgment. I would request the Court to give him a rehabilitative sentence and then – so that he can reintegrate into society.”

That address occupied a mere nine lines of typed transcript.

[10] Against that backdrop I cannot agree with the submission made by counsel for the appellant that the appellant's actions on the day amounted to a singular brief lapse of behaviour on his part. There is simply no evidence to support that submission.

[11] As has been said repeatedly in this judgment the complainant was a mere 10 years of age at the time she was raped by the 27 year old appellant. I am mindful of the fact that the legislature has seen fit to put into a single category all rapes where the victim is a girl under the age of 16 years. No graduations are provided for. It seems to me however that the offence can be regarded as being more serious where the victim is younger than 16. The more youthful the victim the more must the rape be regarded as being an aggravating feature.

[12] The youthfulness of the victim was also a factor in *Vilakazi's* case. In the court *a quo* in *Vilakazi* there was a suggestion that the complainant there was 11 years old. In dealing with that submission on appeal Nugent JA said the following (footnotes omitted):-

“[26] The complainant was not 11 years old when the offence was committed. According to the complainant she was 15 when she gave evidence, which places her age at between 14 and 16 when the offence was committed. (In

answer to a question the complainant, who had no formal schooling, said that she could not remember the date of her birth). A witness who encountered the complainant for a short time on the day the incident occurred said that he 'estimated her age to be about 11 or 12 years' but that evidence naturally carries no weight. The district surgeon who examined the complainant on the day of the incident recorded her age as 13 years. The source of that information was not disclosed and nobody bothered to enquire nor to query its inconsistency with the evidence of the complainant. The magistrate estimated her age to be below 16 years and her own evidence of her age was accepted by the prosecution and the defence alike both at the trial and in the proceedings before us. The age of the complainant at the time the offence occurred was clearly a material factor to be taken account of in sentencing. To take account of the fact that she was 11 when in fact she was at least 14 and might have been over 15 was a misdirection."

[13] That passage suggests to me that there is indeed a difference in approach to sentencing when regard is had to the youthfulness of the victim. To my mind the fact that the complainant in this case was 10 years old at the time of the incident is a significantly aggravating feature.

[14] In *McLaggan v S* (084/13) [2013] ZASCA 92 (3 June 2013) the Supreme Court of Appeal said the following (footnotes omitted):

"[37] I come now to the State's appeal against the sentence. At the commencement of the trial, the accused was aware that in the event of a conviction, the State would seek to invoke s 51(2) of the Criminal Law Amendment Act 105 of 1997. The sub-section provides for the imposition of a minimum sentence of 10 years' imprisonment if no substantial and compelling circumstances as envisaged in subsection 51(3), which would otherwise allow for a deviation of the prescribed sentence, are found to exist.

...

[43] It seems that the court below found that, (a) the accused had the ability to contribute to society; (b) that he was not an obvious threat to society; (c) the rape was not accompanied by additional violence; (d) there was no threat of violence during or after the rape and (e) this kind of conduct was not expected of a person of the character and background of the accused, taken cumulatively, constituted mitigation which would render the imposition of the minimum sentence of 10 years' imprisonment an injustice, destructive of his person and would defeat the overriding interest of society to rehabilitate the offender back into society. In light hereof and the fact that the learned judge in the court below deviated from the prescribed minimum sentence, it is obvious that he found substantial and compelling circumstances to exist. There are two other factors which the learned judge in the court below mentioned viz that he was a first offender and that he had expressed some remorse to his mother in regard to his conduct. The court accepted that he took responsibility for the situation he found himself in. I will assume in his favour that these two factors were also considered as mitigating.

[44] Ms Turner for the State contended that the court below had misdirected itself in taking into account as mitigating factors that (a) there was a lack of additional violence other than that inherently involved in the rape (b) regarding his character and his background as a mitigating factor and (c) the remorse attributed to the accused was not related to the crime but more self pity.

[45] On the other hand Mr Price submitted that the court below had taken everything into account and that this court should be loathe to interfere therewith and punish the accused even more than he has already been.

[46] The approach to substantial and compelling circumstances was dealt with in *S v Malgas* 2001 (1) SACR 469 (SCA). At para 25 Marais JA, writing for the court set out what has essentially become a guideline approach to sentences for listed offences as follows:

'[25] What stands out quite clearly is that courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the preciously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment

are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A. Section 51 has limited but eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other part of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

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

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

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

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

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

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

[47] It is noteworthy that in part 'D', it is clearly stated that specified sentences should not be departed from lightly and for flimsy reasons. It further sets out which types of factors should be excluded from consideration. On the other hand, in part 'E', the approach also allows for all the factors traditionally considered in respect of sentence, to be included in the overall consideration in the sentencing process. The general approach as set out in *Malgas* found support and approval in *S v Fatyi* 2001 (1) SACR 485 (SCA) and has been followed since.

[48] In this case, the lack of evidence that the accused did not have a propensity for such conduct is of no moment. While the legislature has essentially left it for the courts to deal with sentence, it has ordained prescribed sentences. In particular, it has provided a sentence for first offenders and consequently, being a first offender does not justify taking into account the fact that he may or may not have a propensity to commit a crime of this nature. Indeed sentence for second and subsequent offenders are specifically provided for in the subsection. The court below clearly misdirected itself in adopting this approach in regard to this factor. It similarly misdirected itself by concluding that the absence of additional violence constituted a mitigating factor. The fact of the matter is that rape is itself a violent intrusion of the rights of the victim. The lack of a threat of violence or aggression afterwards also does not favour the accused. Such factors if they existed, may well have led to a harsher sentence. However their absence cannot serve to benefit the accused in deciding whether substantial and compelling circumstances exist.

[49] It is not clear from the judgment whether the learned judge in the court below actually put all the factors, both aggravating and mitigating, into the melting pot as suggested in *Malgas*.

[50] The accused, a stranger to the complainant, raped her soon after she had multiple seizures and when she was, at best for him, asleep. He did so when he was in a position of trust and indeed betrayed that trust. The complainant has been traumatised by the rape and is likely to have long-term residual effects as alluded to by Ms Smit.

[51] On the other hand, it is true that the accused had the potential to contribute to society and that he has a good family and social background.

However, the accused's remorse was not directed at either the complainant or the actual crime itself. It was more a matter of apologising for being in the predicament. To the extent that it was used to favour the accused, it should not have been considered as a mitigating factor in the circumstances.

[52] The mitigating factors and the aggravating circumstances, especially the residual effects on the complainant as explained by Ms Smit, ought to have been balanced against each other in assessing whether substantial and compelling circumstances existed or not. Even if all the mitigating and aggravating factors were balanced by the court below, measured against the guidelines as set out in *Malgas*, it was wrong to conclude that substantial and compelling circumstances do exist. Neither would the imposition of the prescribed minimum sentence be disproportionate to the offence itself and the circumstances in which this offence was committed. The court below therefore misdirected itself in concluding that substantial and compelling circumstances indeed exist and ought to have found that none existed.

[53] The effect of this is that the accused must be sentenced in terms of s 51(2) of Act 105 of 1997. The minimum period of imprisonment in the case of a first offender, as is the accused, is 10 years.

[54] The State contented itself with the minimum prescribed sentence of 10 years' imprisonment and did not suggest a harsher period of imprisonment. The appeal against sentence therefore succeeds"

[15] In *S v Nkunkuma and Others* 2014 (2) SACR 168 (SCA) the Supreme Court of Appeal said (footnotes omitted):

"[9] In *S v Malgas* the correct approach to establishing whether or not substantial and compelling circumstances exist was set out as follows:

'[7] . . . 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.

[8] In what respects was it no longer to be 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 recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] 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 time 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.' (See also *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* 2009 (2) SACR 361 (SCA); *S v Fatyi* 2001 (1) SACR 485 (SCA).)

[10] In arriving at his conclusion that a departure from the minimum sentence was warranted, the learned Judge stated: '[u]nder all the circumstances, and bearing in mind the "predictable outcomes" mentioned in *Matyityi*, I am satisfied that the prescribed minimum sentences would be so disproportionate to the sentences which would normally be imposed that it constitutes substantial and compelling circumstances permitting me to impose a lesser sentence.' It is however unclear what exactly the learned judge intended to convey by that statement. The phrase 'predictable outcomes' does not appear in *Matyityi*. Apart from that, if he intended to follow *Matyityi*, its import militates

against the conclusion arrived at by the court below. The court below was clearly alive to the provisions of the Act, but instead of starting its enquiry with the Act, as it ought to, it sought guidance in a range of disparate cases. Those cases were however decided on their own peculiar facts. The starting point in a matter such as this is the prescribed minimum sentences ordained by the legislature. To have approached the matter as if the sentencing yardstick was the sentences imposed in those cases and to then ask whether the applicable minimum sentences could be considered too severe against that benchmark constituted a misdirection. This court is thus at large to consider the question afresh.

...

[13] It is unclear which factors were actually held by the court below to constitute substantial and compelling circumstances. The learned judge held:

'All three pleaded alibi defences in the face of overwhelming evidence against them and it is thus difficult to avoid the conclusion that they are unremorseful and do not appreciate what society demands of them. However, I would be failing in my duties as a sentencing officer if I did not bear in mind their actual youthfulness and the relative gravity of the crimes. Their not guilty pleas were clearly misguided and may not have been so much proof of their lack of remorse as proof of their immaturity.'

[14] Those factors do not without more constitute substantial and compelling circumstances for as Ponnann JA pointed out in *S v Matyityi*:

'[13] . . . There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper

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

[14] Turning to the respondent's age: what exactly about the respondent's age tipped the scales in his favour, was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.'

[15] Here the three respondents breached the sanctity of their victims' home. Having made good their escape when TB returned, they came back first to rob her as well and then to force her into the veld where she was raped more than once by first and third respondents. It must have been a terrifying ordeal for all of the victims. TB testified that she felt forced to co-operate with her attackers as she thought that they were planning to kill her.

[16] Rape and robbery have become serious social problems. It is not difficult to take judicial notice of this phenomenon in the light of the number of such cases dealt with by the regional courts, the High Courts and those which eventually come to this court. The shocking statistics regarding rape (albeit some eight years old), dealt with in *S v De Beer* and referred to in *Matyityi*, are set out in the following quote:

'It is widely accepted that the statistics of reported rape reflect only a small percentage of actual offences. NICRO estimates that only 1 out of every 20 rapes is reported, whilst the South African Police Service puts the figure at 1 out of 35. For the first six months of 1998, 23 374 rapes were reported nationally. As an annual indicator of rape employing the lower 1 out of 20 estimate, the figure was a staggering 934 960. Research at the Sexual Offences Court in the Western Cape, for the same period, reveals that of the reported rape cases: 56.62% were referred to court; 18.67% were prosecuted; and, only 10.84% received guilty verdicts.'

[17] Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the publication of the statistics referred to above. The same can be said of robbery. No matter how they are viewed, society has called, on more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively.

...

[19] The position of second respondent is different. His role appears to have been substantially less than the others. There is no evidence that he actively assisted in taking TB out of the house. He also attempted to re-assure BB, when her grandson was threatened with electrocution. He was barely 19 years old at the material time and has a clean record. He was affected by his mother's wayward lifestyle though this was somewhat balanced by his father's teachings. He also tried to assist in caring for what was left of the family after his father died by obtaining employment. He spent eleven months in custody awaiting his trial. These factors cumulatively constitute substantial and compelling circumstances.

[20] However, the sentence of an effective three years' of imprisonment is woefully inappropriate and is shockingly lenient in the light of the seriousness of the crimes and the manner in which they were committed. The prescribed minimum sentence of 15 years' imprisonment remains the starting point. In my view, taking all the factors into consideration a reduction of 3 years would be justified in his case."

[16] To suggest then, taking all the circumstances of the case into account, that a sentence of 15 years imprisonment is appropriate and proportionate to the crime would to my mind be doing an injustice and would not properly address the triad in sentencing. In this case the message that is required to be sent out demands more attention than the other factors. The sentence called for here must be stern and decisive. The starting point is life imprisonment and against that 15 years imprisonment is simply too much of a deviation. Taking into account all the factors in this case, including the fact that the appellant had spent some time in prison prior to sentencing, I would consider a sentence of 20 years imprisonment to be appropriate and proportionate.

[17] I make the following order:

- a. The appeal against sentence is upheld.
- b. The sentence of life imprisonment is set aside and substituted with one providing for a sentence of 20 years imprisonment antedated to 20 September 2004.

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Vahed J

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Chetty J

## Appearances

For the Appellant: N Nohiya  
(Durban Justice Centre)

For the Respondent: N E S Buthelezi  
(Director of Public Prosecutions)

Date of Hearing: 30 January 2015

Date of Judgment: 19 February 2015