



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

**CASE NO: AR250/12
HIGH COURT CASE NO: CC66/05**

In the matter between:-

MLUNGISI PATRICK MABASO

APPELLANT

VS

THE STATE

RESPONDENT

APPEAL JUDGMENT

Date of hearing: 06 February 2013

Judgment delivered: 10 May 2013

D. Pillay J

[1] The appellant appeals against the sentence of life imprisonment for two counts of rape, and fifteen years imprisonment for robbery. The trial commenced in the regional court where the appellant was convicted. The matter was referred to the High Court for sentencing. The High Court refused leave to appeal against conviction but granted leave to appeal against sentence.

[2] On the facts, on 18 April 2004 the complainant, a working woman of twenty eight years had alighted from a taxi and was walking along Helpmekaar Road and

Pieters Road, Kwazulu-Natal. The appellant approached her purportedly to propose love. She rejected his advances. He grabbed her arm, took out an Okapi knife, pointed it at her and steered her in the direction of the forest nearby. He took her straight to a spot where there were dense trees, grass, soil and stones. He instructed her to undress and to lie down on the ground. The thorns pierced her shoulders. She complained. He put her jacket underneath her. He climbed on top of her and had sexual intercourse with her against her will.

[3] Then he instructed her to get dressed. They continued walking. After a while he told her to undress again. He raped her once more.

[4] The entire ordeal lasted for about an hour and a half. She did not resist when he raped her as she feared he might stab her. The intercourse was very painful. She did not scream because in the veldt no one was around to assist her. Thorns thick, long and sharp pierced her back and feet. The tips broke into her feet. She had managed to brush off the thorns in her back.

[5] During this encounter the appellant took the complainant's Nokia 5110 cellular phone and her wallet. She also lost her shoes. The complainant reported the matter immediately to her friend and the next day to the police.

[6] As she did not know the identity of her assailant she could not name him to the police. However, about a month later she spotted him and alerted the police. He was arrested. She identified the appellant from the 'bumping' way he walked, his height and his face.

[7] The appellant's defence was that he had an on-going relationship with the complainant and that he had sexual intercourse with her on various occasions with her consent. Allegedly, he confronted her with the allegation that she was sleeping with another man. They argued. He had previously taken her cellular phone to repair it. She demanded its return. He told her that he had sold it for R300. She left after this argument.

[8] In this appeal Mr Butler for the appellant correctly conceded that no misdirection occurred in sentencing the appellant. He also acknowledged that the trial judge, K Pillay J, was alive to the authorities on sentencing. She was one of the three judges who presided in *S v Matyityi* 2011 (1) SACR 40 (SCA). The only ground on which he challenged the sentence was that the trial court placed insufficient weight on the mitigating factors.

[9] As substantial and compelling circumstances he proffered the following: The appellant was thirty-three years. He was in a stable relationship akin to marriage. He was self-employed as the owner of a tuck-shop. He supported his wife and two minor children aged twelve and three years. He did not harm the appellant physically even though he brandished a knife. Notwithstanding the robbery of her purse with cash and a cellular phone, the appellant did not suffer major financial loss. The complainant was a mature woman. This was not the worst form of rape. Between ten years imprisonment for one rape and life imprisonment for two or more, courts must strike a balance, he urged. The sentence for the two rape convictions and fifteen years imprisonment for the robbery should run concurrently. Relying on five appellate decisions,¹ he asked that the sentences be ameliorated.

[10] I begin my analysis by referring to the bases on which the Constitutional Court (CC) endorsed the legitimacy of s 51 (1) of the Criminal Procedure Act 105 of 1997 read with Schedule 2 Part 1 ('the Act' also referred to as 'the minimum sentence legislation'). I summarise the sentences the Supreme Court of Appeal (SCA) imposed in some of the reported rape cases. Thereafter I remind that rape is intrinsically gender and sex discrimination. I consider international law on gender and sex discrimination and the SCA's treatment of race discrimination as an aggravating factor for purposes of sentencing. Lastly, I motivate for maintaining sentences in rape cases that are as tough and long as sentences in murder cases.

¹ *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA) 12 years imprisonment for rape of a daughter; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) eight years and twelve years imprisonment for the two counts of rape; *S v Nkomo* 2007 (2) SACR 198 (SCA) on appeal sentenced to 16 years imprisonment for rape and kidnapping; *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2008 (4) All SA 396) 15 years imprisonment for the rape of a girl under the age of sixteen.

[11] In *Dodo* the CC refused to confirm the invalidity of the Act. In conferring constitutional legitimacy² it made four points relevant to my analysis in this case:

- a. The legislature and executive share an interest in the nature and severity of punishment the courts impose.³
- b. The CC 'respect(ed) the legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51',⁴ which the 'legislature doubtless(ly) intended', but not 'sentence(s) which (are) inconsistent with the Constitution'.⁵
- c. The interpretation of 'substantial and compelling circumstances' in s 51(3)(a) of the Act by the SCA in *S v Malgas* 2001 (1) SACR 469 SCA is 'an overarching guideline, ... a practical method to be employed by all judicial officers faced with the application of section 51.
- d. The length of punishment must be proportionate to the offence because proportionality between the offence and the period of imprisonment 'lies at the very heart of human dignity'.⁶

I deal first with a-c to recount how the CC and the SCA have applied the legislation before turning to the proportionality test in d.

[12] The 'severe, standardised and consistent' sentences that *Malgas*⁷ advocated did not imply an inflexible imposition of the prescribed minimum sentences. Although life imprisonment was the prescribed minimum sentence in that case, the SCA imposed 25 years. By 'standardised' the SCA therefore did not mean 'identical', 'same' or 'unvarying' sentences in every case of murder. More likely 'standardised' meant 'consistent' or 'harmonised' with 'consistent' meaning 'reliable' and 'coherent'.⁸

[13] Again more recently in *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) para 45 the CC reminded that 'the minimum sentencing regime makes for tougher and longer sentences.'

² *Dodo v S* 2001 (1) SACR 594 (CC) para 41, 43, 52.

³ *Dodo* para 23-24

⁴ *Dodo* para 11

⁵ *Dodo* para 33.5

⁶ *Dodo* para 38

⁷ *Malgas* para 481

⁸ *Thesaurus English* (U.K.) (electronic)

Evidence of this development emerges in *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2008 (4) All SA 396) para 51 in which the SCA noted that between 1998 to 2008 prisoners serving sentences of life imprisonment increased over nine times. Although the legislation has resulted in dramatically higher sentences being imposed overall, the decisions of the SCA in rape cases vary significantly. The variances in sentencing and the reasons for them emerge from the cursory survey below.

[14] In *Malgas* the appellant shot the deceased in the head while he slept. The deceased's wife instigated the shooting. The appellant tried unsuccessfully to resist but eventually pulled the trigger on the wife's instruction. She confessed spontaneously. She manifested remorse. Her youthfulness (twenty-two years⁹) counted as a substantial and compelling circumstance in so far as it held out prospects of rehabilitation even after a long period of imprisonment.¹⁰ Four judges of the SCA reduced her sentence of life imprisonment to twenty-five years.

[15] The SCA reconstituted with three judges in *Matyityi* was faced with a rapist, twenty-seven years, married with three children ranging between ten years and one month. His highest level of education was grade nine. He was one of three men who attacked the complainant and her boyfriend whilst they were parked along the beach. They stuffed her boyfriend in the boot of the motor vehicle. Driving off they took turns to rape the complainant. The boyfriend died later. On appeal the SCA increased the terms of imprisonment of twenty-five years imposed by the trial court to life imprisonment for both murder and the rapes. *Matyityi* found that the trial court misdirected itself by failing to consider previous convictions against the assailant. It criticised the court *a quo* for not fully appreciating that the starting point in murder and rape convictions was not a 'clean slate ... but imprisonment for life.'¹¹ In so doing *Matyityi* added its weight to the unanimous decision of four judges of the SCA in *Malgas*.

[16] Unanimously, the bench in *Matyityi* rejected the trial court's finding of remorse which it said should be characterised as a 'gnawing pain of conscience for the plight of

⁹ *Malgas* para 26

¹⁰ *Malgas* para 34

¹¹ *Malgas* para 8

another¹² as a substantial and compelling circumstance because it was not manifested by a plea of guilty and an apology, but rather an address by counsel from the bar.¹³ The SCA criticised the trial court for using the terminology ‘relative youthfulness’ without attempting to define it in relation to that assailant. It did not rule out altogether youthfulness as a mitigating factor favouring, say, a teenager. However, the viciousness of the offence could rule out immaturity as mitigation.¹⁴ A person of twenty-seven years could hardly be described ‘as a callow youth’, the SCA found.¹⁵

[17] Another misdirection to emerge in *Matyityi* was that the trial court accepted that the complainant sustained no permanent physical injuries. The SCA criticised this as fundamentally misconstruing the ‘profound physiological, emotional and symbolic significance for the victim’ of the act of rape itself.¹⁶

[18] Recently in *Patrick Clive Bailey v State* [2012] ZASCA 154, the SCA composed of five judges confirmed a sentence of life imprisonment notwithstanding a plea of guilty to the charge of raping his daughter of 12 years. The appellant had a previous conviction for attempted rape.

[19] In contrast to the authorities cited above the three-bench split decision in *S v Nkomo* 2007 (2) SACR 198 avoided imposing life imprisonment. Notwithstanding the appellant’s conviction for raping his victim five times during the course of a night, slapping, kicking and forcing her to perform oral sex on him, and holding her captive after she injured herself when she attempted to escape, the majority found that there were substantial and compelling circumstances. These circumstances were the relative youthfulness of the appellant who was twenty-nine years; he was employed; there was a chance of rehabilitation even though the appellant showed no remorse and no evidence was lead on the prospects of rehabilitation. The majority reduced the sentence of life imprisonment to sixteen years imprisonment. The decision is

¹² *Matyityi* para 13

¹³ *Matyityi* para 12 and 13

¹⁴ *Matyityi* para 14

¹⁵ *Matyityi* para 14

¹⁶ *Matyityi* para 10

controversial.¹⁷ Although *Matyityi* did not refer to *Nkomo* it is diametrically different on the questions of youthfulness and remorse.

[20] In contrast to the hefty sentences in *Malgas*, *Matyityi*, and *Bailey*, *Edson Ndou v S* [2012] ZASCA 148,¹⁸ reduced a sentence of life imprisonment to a 15 year term of imprisonment. The complainant was 15 years and the appellant was a first offender of 47 years. The five judges who composed the *Ndou* court found that a sentence of life imprisonment was disproportionate to the crime. They held that the court *a quo* had misdirected¹⁹ itself in finding that the appellant had raped the complainant continuously because:

‘(t)he appellant was charged and convicted of one count of rape only. The evidence of the complainant was that it was not for the first time that the appellant had had sexual intercourse with her and she testified under cross-examination about one previous occasion. She said that it happened when her mother was away and came back the following day. This suggests that when the appellant was apprehended it was the second time. It is therefore incorrect, as the court below found, that the ‘rape was continuous’ and that there had been ‘previous occasions’ on which the appellant sexually abused the complainant. It was this reasoning that led to the misdirection that entitles this court to consider the sentence afresh.’

[21] Although the rape was not ‘continuous’, on the SCA’s findings it nevertheless amounted to two rapes upon a child. The legislation prescribes life imprisonment for a single rape upon a child.

[22] Even though no victim impact evidence was led, the court acknowledged that the complainant would have endured post-traumatic stress. However, it accepted the submissions for the appellant in the following extract:

‘On the other hand the complainant did not suffer any serious physical injuries. She submitted to the sexual intercourse on the occasion in question without any threat of

¹⁷ S van Der Merwe et al DuToit: Commentary on the Criminal Procedure Act (Revision Service 47 – 2011) 18D; S Terblanche ‘Sentencing’ (2008) SACJ 119 125; JD Mujuzi ‘The prospect of rehabilitation as a ‘substantial and compelling’ circumstance to avoid imposing life imprisonment in South Africa: A comment on *S v Nkomo*’ (2008) SACJ 1.

¹⁸ Delivered on 28 September 2012, two days before the life sentence issued in *Bailey* by five judges other than the *Baily* court.

¹⁹ *Ndou* para 10

violence. The fact that she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse.²⁰

[23] Added to the above are the list of cases to which Mr Butler referred. Without detailing the circumstances of each case which differ vastly, I set out the sentences below purely for the purposes of demonstrating the degree of variance in rape sentences.

1. *S v Abrahams* 2002 (1) SACR 116 (SCA) 12 years imprisonment for rape of a daughter;
2. *S v Mahomotsa* 2002 (2) SACR 435 (SCA) eight years and twelve years imprisonment for two counts of rape;
3. *S v Nkomo* 2007 (2) SACR 198 (SCA) 16 years imprisonment for rape and kidnapping;
4. *S v Vilakazi* 2009 (1) SACR 552 (SCA) 15 years imprisonment for the rape of a girl under the age of sixteen.

[24] The variances are a predictable and natural consequence of democracy at work. They evidence judges exercising their judicial discretion independently of other arms of government and of each other. It frees the discretion of the lower courts which then have a wider choice of appellate authorities on which to peg their decisions.

[25] Although sentencing cannot be such that it amounts to inflexible rubber stamping of the legislation, it cannot undermine the legislative intent to impose consistently tougher sentences. Furthermore, the degree to which a sentence deviates from the prescribed minimum correlates with the extent to which the sentence serves to assuage the harm to the complainant. Consequently, an inconsistently low sentence could trivialise the trauma of the complainant arising from the crime itself and in participating in the prosecution.

[26] However, the genesis of the Act adds another reason for not imposing low sentences. The memorandum accompanying the Act explains that its purpose was to create 'a legal regime of discretionary minimum sentences in respect of certain serious

²⁰ *Ndou* para 13

offences' which it 'categorised in terms of their degree of seriousness' and listed them in the four parts of the Schedule to the Act. Amongst the parties consulted in developing the response to problems with the practical application of the Act was the Western Cape Consortium on Violence Against Women.²¹ The legislation was also informed by International law and the application of such law by the CC.

[27] By the time the Act was promulgated Parliament had already elevated rape as a violation of fundamental constitutional values and rights by ratifying the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 15 December 1995. CEDAW, otherwise known as an international bill of rights for women, was adopted by the United Nations in General Assembly Resolution 34/180 on 18 December 1979 and signed on 29 January 1993. The relevant extract states:

'Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men,...

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'²²

[28] As international law binding on South Africa the CC applied it in *Carmichele v Minister Of Safety And Security And Another (Centre For Applied Legal Studies Intervening)* 2002 (1) SACR 79 (CC) para 62 to observe that:

'[f]ew things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae*

²¹ <http://www.info.gov.za/view/DownloadFileAction?id=72027>; See Also Sa Law Commission Report Project 82 Sentencing (A New Sentencing Framework) December 2000

²² Preamble and Article 1 of CEDAW available at <http://www.polity.org.za/polity/govdocs/reports/nongov/sexviolence/scared09.htm>, accessed on 1 March 2013.

“Sexual violence and the threat of sexual violence go to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.”

She referred in that context to the following statement by the SCA in the *Chapman* [1997 (2) SACR 3 (SCA), 1997 (3) SA 341] case:

“The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.’

[29] The CC also considered CEDAW in *Omar v Government, RSA and Others* 2006 (2) BCLR 253 (CC) para 17. It did not do so in *Dodo* probably because *Dodo* was about determining the constitutional legitimacy of the Act from the perspective of the separation of powers. In applying the proportionality test it focused on balancing the rights in s 12(1)(e) of the Constitution with the offence and the length of the punishment²³ to ensure that the minimum sentences legislation did not amount to cruel and unusual punishment. Its focus was not on the specific crimes.

[30] All this information about the nature of rape as gender and sex discrimination would have informed the legislature when it promulgated the Act. The next four cases exemplify the palpable repugnance with which our courts respond to race discrimination post-apartheid.

[31] In *S v Salzwedel And Others* 2000 (1) SA 786 (SCA) and *S v Van Wyk* 1992 (1) SACR 147 (NmS) discrimination as an aggravating factor in sentencing was introduced. In a poignant plea for transformation the highest courts in Namibia and South Africa at the time urged:

‘But there comes a time in the life of a nation, when it must and is able to identify (discriminatory) practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. ...

²³ *Dodo* para 34, 37-38

Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which must now 'permeate the processes of judicial interpretation and judicial discretion' including sentencing policy in the punishment of criminal offences.²⁴

And

'It cannot properly be said that a substantial term of imprisonment, in the circumstances of this case, 'would serve no purpose other than retribution'. It would also give expression to the legitimate feelings of outrage which must have been experienced by reasonable men and women in the community when the circumstances of the offence were disclosed and appreciated. A lengthy term of imprisonment sanctioned by the Court would also serve another important purpose. It would be a strong message to the country that the courts will not tolerate the commission of serious crimes in this country perpetrated in consequence of racist and intolerant values inconsistent with the ethos to which our Constitution commits our nation and that courts will deal severely with offenders guilty of such conduct. As the highest Court of the country in such matters, the Supreme Court of Appeal must project this message clearly and vigorously.'²⁵

[32] *S v Combrink* 2012 (1) SACR 93 (SCA) and the full bench in *S v Botes* 2011 (1) SACR 439 (GNP) applied *Salzwedel*. *Combrink*, in which the minimum sentence applied, broadened the scope thus:

'I am not suggesting by any means that the murder committed in this case was racially motivated. However, I am saying that courts must be conscious and sensitive to cases which on the facts appear to have a racial or discriminatory connotation, especially when dealing with the question of sentence.'²⁶

And

'... The public interest and discrimination are not necessarily between black and white but rather between people in general who perceive others, with

²⁴ *Salzwedel* para 13

²⁵ *Salzwedel* para 18

²⁶ *Combrink* para 24

prejudice, to be different or inferior to them. It is this perception that the judiciary should address.'²⁷(my underlining)

Combrink increased the sentence of 10 years for murder to the minimum sentence of 15 years' in terms of s 322(6) of the Criminal Procedure Act 51 of 1977.²⁸

[33] In noting that sentences should give expression to legitimate feelings of outrage against the 'evil of racism',²⁹ *Botes* insightfully observed:

'[22] The gravity of the offence committed by the appellant and his *socii criminis* does not lie only in the killing of an innocent person, and/or the severity and the brutality in the commission thereof, but more in the motive which propelled them to commit it — racism! Racially motivated offences, committed by whomever, offend against the ethos and aspirations of the peoples of this nascent democracy.'

And

'I am of the view that the further away we move from 1996, there is a need to deepen and strengthen the ethos of the Constitution. There is equally a duty on the courts to impose harsher sentences in racially motivated crimes, because there is no room for racist bigotry in this democracy. There is no need to be sympathetic to those who are fixed in the past, when the majority of the people of this country are forging ahead with reconciliation. *In casu*, the crime was committed seven years into the democracy. There was no need for the commission of this offence, and it warrants that severe sentences should be imposed.'³⁰

[34] *Botes* dismissed the appeal against the sentence of 15 years' imprisonment imposed on the appellant, who was 17 years when he committed murder.³¹

[35] The courts found that in all these cases the deceased were killed simply because they were black. The crime was murder. The motive and aggravating factor was racism. In this case the complainant was raped because she was female. Rape is inherently and automatically sex and gender discrimination. Gender and sex are the

²⁷ *Combrink* para 25

²⁸ *Combrink* para 26

²⁹ *Botes* para 22

³⁰ *Botes* para 28

³¹ *Botes* para 6, 31

recognised grounds of discrimination because of the prevalence of rape by men of women. As inherently discriminatory, rape is distinguishable from other crimes for which minimum sentences are prescribed. Discrimination will count as an aggravating factor for those crimes only if it is found to exist in a particular case. The aggravation will always exist in every rape case. Hence it is built or priced into the minimum sentence. Deviating from the minimum sentences for rape should therefore be slow.

[36] Another consequence of rape that distinguishes it from the other serious crimes for which minimum sentences are prescribed is the propensity of the victim to become suicidal. *S v Ntaka* 2008 (2) SACR 135 (SCA) is one of the many cases in which the complainant attempted suicide and testified to being suicidal and depressed. Others simply do not make the law reports. Few crimes are as dignity and soul destroying as rape is.

[37] The socialisation of the offenders in all four racism cases above was to treat other human beings who were different and vulnerable as inferior. The same is true of every rapist and his victim. The total and absolute abhorrence of racial discrimination must apply with equal and uncompromising vigour to all forms of unfair discrimination and especially to gender and sex which rank second and third after race in s 9(3) of the Constitution, 1996. For these reasons too sentences must be constantly, consistently, coherently and reliably high.

[38] Proportionality in applying the minimum sentence legislation is not only about balancing the offender's rights with the sentence to be imposed.³² In our constitutional jurisprudence it is also about balancing all rights in the Bill of Rights in order to arrive at a just decision.³³ As the CC pointed out in *The Citizen 1978 (Pty) Ltd And Others v McBride (Johnstone And Others, Amici Curiae)* 2011 (4) SA 191 (CC) para 148 our Constitution knows no hierarchy of rights. Just as in that case in which freedom of expression was held to be just as important as human dignity, in this case the appellant's rights to a fair trial and not to be subjected to cruel and unusual punishment rank equally with the complainant's right to equality.

³² *Dodo v S* para 26, 30, 31, 38,39

³³ *Ntaka v S* [2008] 3 All SA 170 (SCA) para 15

[39] In *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para 41 the CC reminded that

‘the Constitution, in its opening statement, and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom.’³⁴

[40] Both the appellant and the complainant are entitled to the right to human dignity, equality and freedom. However, once the appellant has infringed these rights of the complainant he cannot expect to enjoy them to the same extent as she is entitled to or in the same way he did before his conviction. His rights must yield in favour her rights. Consequently, sentencing in rape cases cannot be so low as to trivialise or dilute not only the complainant’s rights, but importantly, our constitutional values of human dignity, equality and freedom. Nor can the court default on the responsibility it shares with other arms of government in imposing consistently higher sentences as the collective strategy to combat serious crimes.

[41] An academic commentator observes:

‘Mention has been made of the fact that life imprisonment prescribed for rape is more controversial than it is in the case of murder.’³⁵

And

‘When murder is attended by aggravating features the imposition of the ultimate punishment, life imprisonment, is seldom controversial. The same is not true of rape. The Act prescribes life imprisonment for rape in many instances where such sentence would not have been contemplated before. Our courts have found this situation problematic and have, on many occasions, overturned life imprisonment for rape when the crime could not be “classified as falling within the worst category of rape”’.³⁶

[42] He also submits that attempts to supersede previous judicial attempts at describing the horrific nature of rape as a crime in general have nothing to be gained.

³⁴ *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para 41

³⁵ SS Terblanche *The Guide to Sentencing in South Africa* 2ed (2007) 67

³⁶ SS Terblanche *The Guide to Sentencing in South Africa* 2ed (2007) 53

'Eventually, nothing describes the seriousness of a crime as well as the gravity of the punishment that is imposed.'³⁷

[43] I agree. The clearest demonstration of how serious rape is lies in the sentence itself. At the same time rapists as human beings 'ought to be treated as ends in themselves, never merely as means to an end.'³⁸

[44] Turning to the facts in this case, a long custodial sentence is unavoidable. This is an overriding factor in considering the appellant's personal circumstances.

[45] Youthfulness and family responsibility have been held to constitute substantial and compelling circumstances in some of the cases above. Youthfulness is not such a circumstance in this case because at 33 years the appellant's crime was not driven by immaturity. Family responsibility would count as a mitigating factor if the appellant took these responsibilities seriously. As an adult with responsibilities to Ms Bongiwe Mpinga, a woman he considered to be his wife and to the minor children who were dependent on him for their livelihood and welfare, he showed scant regard for these obligations when he raped the complainant.

[46] Ms Mpinga testified in mitigation for him. During his incarceration she tried unsuccessfully to run his tuck-shop. Thereafter she depended on R350 she received as the proceeds of an unemployment insurance fund. That was the situation in May 2005 when the appellant was sentenced. He awaited trial as a prisoner from 13 August 2004 to 30 November 2004 when he was convicted. By the time he was sentenced there was no tuck-shop to return to. As a long custodial sentence is inevitable his family's needs could not be a compelling consideration.

[47] The appellant also admitted to having three previous convictions for possession of unlawful arms and ammunition and unlawful abduction.³⁹ He was legally represented when he admitted his previous convictions. The court questioned Ms Mpinga as follows:

³⁷ SS Terblanche 'Sentencing' (2009) *Annual Survey of South African Law* 1158 at 1189 commenting on *S v Kearns* 2009 (2) SACR 684 (GSJ)

³⁸ *Dodo* para 38

³⁹ Page 214

‘And he did something similar years ago as well, he abducted someone. Now when one talks of abduction, one usually abduct(s) as opposed to kidnapping when one wants the person for sexual favours. That was in 1997, I think.’ (*sic*)

Her response was:

‘The sentence was in 97 and he did it in 96 May.’

The trial court found:

‘Now as far as the accused is concerned he is no stranger to these courts. The fact that he was convicted of abduction suggests that he has some sort of kind of propensity for committing sexual offenses.’⁴⁰ (*sic*)

[48] The SAP 69’s for his previous convictions were omitted from the record probably inadvertently. However, the appellant was legally represented and could have objected if the evidence about his previous convictions and the SAP 69’s were false or inadmissible. His counsel might also have re-examined Ms Mpinga if the sentence for abduction was not long or if he disagreed about any other aspect that was put to her. She also did not dispute that the sentence for abduction was for a sexual offence. Therefore, when the appellant raped the complainant on 18 April 2004 he had recently (after 1997) been released from prison after serving a long sentence for a sexual offence. The appellant could also have testified in mitigation and to correct any aspect of the previous convictions that the court put to his witness. His silence leads to the inference that he did not disagree with the evidence led or the court’s observations.

[49] Indicators of the appellant’s socialisation and consequently, his prospects of rehabilitation are to be found not only in the rape but also in his defence itself. He used a knife to compel the complainant to do his bidding. He robbed her. He chose her only because she was a woman. The robbery was incidental to his primary objective of raping her because he took what little she had after he raped her. Although I reject his version as false, the mere fact that he conjured up such a defence also provides some insight into his mind-set. The appellant has hardly been a model husband and father. Furthermore, on his version he considered himself entitled to multiple sexual relations.

⁴⁰ 225 lines 15- 20

He took umbrage when he suspected that the complainant had sex with another man. To him the complainant was inferior, entitled to less than what he was entitled to. He showed no shame, remorse or the slightest understanding that even on his version he owed the complainant an apology.

[50] These factors all point to confirming the sentence of life imprisonment. However the proportionality test also applies to avoid the 'startling incongruities' identified in *Vilakazi*.⁴¹ Furthermore, strict, inflexible deference to the minimum sentence legislation should be avoided to ensure its constitutional viability.⁴²

[51] Factors that go to ameliorating the sentence of life imprisonment include the maturity of the complainant and the degree of force and violence the appellant used to cow her to capitulate. As a mature woman the impact of the rape on her would, objectively speaking, be less severe than on a child. This inference is manifest from the differing minimum sentences for rape of adults and children. The force and violence the appellant used and the injuries she sustained from being pricked by thorns do not amount to grievous bodily harm. If her injuries did amount to grievous bodily harm then a single rape accompanied by grievous bodily harm would have attracted life imprisonment under Part 1 of Schedule 2.

[51] The only reason this offence qualifies for a Part 1 sentence is that the appellant raped the complainant twice. This elevates the sentence from the minimum of ten years for one rape imposed in Part 2 of Schedule 2 to life imprisonment in Part 1. Both rapes occurred in relatively quick succession. The entire ordeal lasted about an hour and a half.

[52] On the facts, this case is distinguishable from *Bailey* in which the complainant was a child. It is also distinguishable from *Matyityi* in which the violence accompanying that rape was far worse. However, this case is distinguishable from *Nkomo* and other cases in which less severe sentences were imposed for two reasons. Firstly, similar to *Bailey*, the appellant has a previous related conviction for abduction. The conviction was barely eight years before he was convicted again of this offence.

⁴¹ Para 13

⁴² See *Dodo* supra.

[53] Secondly, the proportionality test applies to the facts in this case through the prism of discrimination law. The appellant's socialisation, sheer lack of remorse and acknowledgment of wrong doing diminishes any hope for his rehabilitation. Consequently, his propensity to be a repeat offender is real. As such, he remains a risk to society. Therefore, the appropriate punishment should be imprisonment for twenty-five (25) years for two counts of rape taken together. As regards the robbery count, given the insignificant value of the cell phone, wallet and cash of R18.00 that the appellant stole, the prescribed minimum sentence of fifteen years' imprisonment is disproportionately high. Eight years' imprisonment fits this offence.

[54] I have had the privilege of reading the opinion of my brother Koen J with whom I respectfully disagree about the sentence to be imposed, whether the previous conviction for abduction counts and whether the minimum sentence legislation applies. The first two issues are covered in my judgment. My reasons for holding that the Act applies are based on the case law relating to notice of the Act to an accused as applied to the facts in this case. For the facts on this issue I defer to Koen J's recording of what the charge sheet and transcript contained. In essence, the charge sheet referred sloppily to the Act without specifying the sections, and the transcript does not show that trial court alerted the appellant to its provisions at the outset. However, I respectfully disagree with his analysis of those facts.

[55] The test is whether the accused knew what the charges were and what possible sentence he would get if he was convicted. The charge sheet must not mislead him into believing that the state is relying on a different charge or sentencing regime. Clear proof that he was aware of the possible sentence would be if there was notice in the charge sheet or indictment or in the record of the proceedings. However, these are not the only sources of such proof. *S v Ndlovu* 2003 (1) SACR 331 (SCA) anticipates such notice 'if not in the charge-sheet then in some other form'.⁴³ Where an accused is legally represented and the charge sheet refers to the Act there is no duty on the trial court to ensure that the accused is aware of the gravity of the conviction of a minimum

⁴³ *Ndlovu* para 12

sentence charge.⁴⁴ Conversely, a minimum sentence cannot be imposed where the charge sheet does not refer to the Act and the accused is not forewarned that the Act would apply.⁴⁵

[56] *S v Legoa* 2003 (1) SACR 13 (SCA) para 21 clarified that the matter is one of substance and not form, and refused to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. The court was alive to the 'intolerable complexities in the administration of justice and ...the practical realities under which charge-sheets are frequently drawn'.

[57] *S v Mseleku* 2006 (2) SACR 574 (D) at 581 A-E elaborated on how *Ndlovu* should be applied. However, the court concluded that

'if any reference is made in the indictment to the state's reliance on the "minimum sentence Act", a court may well be justified in assuming that counsel would have drawn that to the accused's attention.' (my underlining)

[58] In *S v Tshidso* 2002 (1) SACR 207 (W) a failure to explain the implications of the Act was held not to vitiate the conviction or the sentence when there was clear evidence of robbery, obvious aggravating circumstances and the taking of a motor vehicle. In contrast, in *Maake v DPP* [2011] 1 All SA 460 (SCA) it was clear that although the appellant was represented, there was no indication at all that the magistrate considered imposing the maximum sentence. Consequently, the appellant's legal representative could not have been invited to make submissions on the sentence.⁴⁶

[59] In *S v Makatu* 2006 (2) SACR 582 (SCA) the appellant was charged and convicted of murder which would have attracted a sentence of 15 years' imprisonment. However, he was sentenced for premeditated murder for which s 51(1) of the Act opened him to imprisonment for life. The SCA summarised the reasons for notifying an accused as follows:

⁴⁴ *S v Nkadimeng* 2008 (1) SACR 538 (T)

⁴⁵ *S v Tshabalala* 2008 (1) SACR 486 (T)

⁴⁶ *Maake v DPP* [2011] 1 All SA 460 (SCA)

[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment - the most serious sentence that can be imposed - must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial.

[60] The reasons for providing information to an accused is not to enable him to falsify his defence by, for instance, contending that there was one rape and not two or that he believed the complainant was over the age of 16. No doubt these elements of the offence will focus his mind on what needs to be proved but it is not an invitation or opportunity to be untruthful.

[61] The facts of this case are distinguishable from those cases in which the accused's substantive fair trial rights were impaired for the following reasons:

- a. The appellant was legally represented throughout.
- b. The charge sheet set out two counts of rape of the same complainant at the same place and the same time.
- c. Although the references to the Act are sloppy, the appellant and his legal representative could not have been misled or in any doubt that Part 1 of Schedule 2 of the Act applied.
- d. When the matter was about to be transferred to the High Court for sentencing in terms of s 52 (1)(B)(i) of the Act, the prosecutor pointed out that the complainant was raped twice and that the matter fell under Part 1 of the Schedule 2 of the Act. The learned magistrate invited the appellant's legal representative but he declined to make submissions. If he was unaware that the Act applied he would have protested.
- e. On appeal, the appellant was ably represented by Mr Butler who has proven competence and experience in minimum sentences cases.

- f. Mr Butler conceded that there was no misdirection, as there would have been if the appellant was unaware that he faced life imprisonment.
- g. The shortcomings in the charge sheet were not raised as grounds of appeal.
- h. Having regard to the appellant's defence of a love affair with the complainant whose surname and address he did not know, and a bald denial of the rape, there was little more he could say or do to have helped himself.

[62] For all these reasons I am satisfied that the appellant had a fair trial. Even if I am wrong on this issue, and the Act does not apply, sentencing is entirely a matter for the discretion of the court, as long as the sentence is not one that no reasonable court would impose.⁴⁷ Furthermore, whatever sentence is imposed must be proportional to balance all the rights and values. In a constitutional democracy based on rights and values of human dignity, equality and freedom, a sentence of twenty-five years for raping the complainant twice is proportional.

[63] I propose the following order:

The appeal against the sentences is upheld and substituted with the following:

- a. For the two rape counts, taken as one for the purposes of sentencing, the appellant is sentenced to a term of twenty-five (25) years imprisonment.
- b. For the robbery count the appellant is sentenced to a term of eight (8) years imprisonment.
- c. Both counts are to run concurrently.
- d. In terms of s 276B (2) of the Act, a non-parole period is fixed at 16 years of the effective sentence of 25 years.

D. Pillay J

Appearances: //

⁴⁷ *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

Appearances

Counsel for the Appellant	:	Advocate J BUTLER
Instructed by		Legal Aid SA
		Pietermaritzburg Justice Centre
		Tel: 033 394 2190
		Fax : 033 342 2576
 Counsel for the Respondent	 :	 Advocate Y Gangai
Instructed by	:	Director Public
		Prosecutions
		Pietermaritzburg
		Tel: 033 845 4400
		Fax : 033 394 6891