

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: KS 14/15

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

In the matter between:

DAVID BUYS

Applicant

and

THE STATE

Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an application to condone the late filing of an application for leave to appeal on sentence, and that leave to appeal the three life sentences imposed on the applicant be granted to the full bench of this division.
2. The applicant was convicted of two counts of rape and one charge of murder. All three of these convictions were based on the fact that the charges were read with

the provisions of section 51(1) of the Criminal Law Amendment Act¹ (the CLAA or colloquially known as the Minimum Sentencing Act). The upshot of the conviction under the said charges was that in respect of each conviction the minimum sentence to be imposed was life imprisonment, unless the court found 'substantial and compelling' reasons to depart from the statutorily prescribed minimum sentences.

3. On the 12 October 2015 I sentenced the applicant to life imprisonment on all three convictions, the sentences to run concurrently with each other and with a sentence the applicant was already serving at the time he was sentenced.
4. The basis for the application for condonation was that within seven days of being sentenced he signed certain forms with a female legal representative whose name he does not recall, to prosecute an appeal in respect of the sentences imposed. Applicant was then transferred from Kimberley to a correctional centre in Bloemfontein. He heard nothing from this legal representative.
5. From 2019 he started corresponding with the High Court in Kimberley to find out the status of his application for leave to appeal. Legal Aid first allocated the file to Mr Van Tonder who retired from Legal Aid in 2022 when the matter was transferred to Mr Steynberg.
6. Further, the applicant contends that the national lockdown during the response to covid further delayed the prosecution of this application for leave to appeal. Then, applicant contends that Mr Steynberg requested copies of the judgments, presumably both on the convictions and sentence, the transcripts of the judgments were provided to Mr Steynberg.
7. The application for leave to appeal and condonation was filed on the 30 November 2023. Mr Barnard for the State filed the State's Heads of Argument on the 21 December 2023. The States Heads of Argument did not find their way into

¹ Act 51 of 1997.

the court file. Ultimately, a copy was sought from Mr Barnard, which copy was received on the 11 June 2024.

8. The State opposes the condonation application on the basis that the application for leave to appeal has no prospects of success.
9. Having regard to the fact that the applicant alleges he signed papers within the 14-day period he had to lodge an application for leave to appeal and the fact that the covid lockdown period intervened, taken together with the fact that the applicant was transferred to another facility in a different province, I think the circumstances warrant a consideration of the merits of the application for leave to appeal the sentences imposed on the applicant. In these circumstances, I am willing to condone the late filing of the application for leave to appeal.
10. Both the applicant and the respondent requested me to deal with this application on the papers alone. Given the history outlined above and the nature of the application I believe it is appropriate in the circumstances to consider both the application for condonation and the application for leave to appeal on the papers filed.
11. The application for leave to appeal is in respect of the three life sentences only. There is no application for leave to appeal on the convictions for the two rape charges and the conviction for the murder.
12. Turning now to the merits of the application for leave to appeal itself.
13. Mr Steynberg on behalf of the applicant submitted that: "...the sentences of life imprisonment are shockingly harsh and inappropriate, and a result of the following misdirection: That the court erred in finding that there aren't any substantial and compelling circumstances to deviate from the prescribed minimum sentences of life imprisonment."²

² Applicant's Heads of Argument p 4 para 12.

14. Mr Steynberg then goes on to quote the determinative test as set out in *S v MALGAS*³, which essentially states that if the court is satisfied that the sentence prescribed is so unjust that it would be disproportionate to the crime, the criminal and the needs of society, then such court would be justified in imposing a lesser sentence.
15. Mr Steynberg then goes on to concede that insofar as the commission of the relevant offences are concerned, there are no mitigating features. Mr Steynberg concedes from the evidence adduced that the crimes for which the applicant was convicted and sentenced were carried out by the accused in a manner that was both brutal and callous that led to the death of the victim B[...] M[...].
16. Mr Steynberg further concedes that the public should be protected against such offences.
17. Mr Steynberg then points out that the personal circumstances of the applicant are as follows: The applicant had a difficult childhood; the applicant had a strained relationship with his father; the applicant's father and mother are separated; the applicant did not finish his primary schooling due to brushes with the law; the applicant was a few days shy of turning twenty-two years old when he committed the offences concerned; and the applicant was twenty-five years old at the time of sentencing.
18. Mr Steynberg then submits that the personal circumstances of the applicant coupled to the fact that he was 21 years old at the time he raped and murdered B[...] M[...] makes the three life sentences imposed disproportionate to the crime.
19. Mr Barnard who appears for the State submits that: The assault on the deceased B[...] M[...] was brutal and inhumane; the deceased had injuries all over her body; the deceased was raped both vaginally and anally; the applicant had previous criminal convictions and showed no respect to for law abiding citizens and the community; the victim impact report showed a tremendous long lasting and

³ *S v MALGAS* 2001 (1) SACR 469 (SCA) at para 25 sub-paragraph I.

devastating impact on the family of the deceased; and that viewed holistically the aggravating circumstances heavily outweigh the mitigating factors.

20. Finally, Mr Barnard submits, that there is no reasonable prospect that another court will come to a different conclusion.
21. On re-reading the pre-sentence report and the victim impact report, it is clear that B[...] M[...] (the deceased), played a meaningful role in both her family and her community: She was a breadwinner in her family; her father suffered a stroke and his health deteriorated after her murder; her older sister's son was falsely accused of being the murderer; in the community the deceased organised activities for indigent children; and she taught at her church's Sunday school.
22. The applicant never took responsibility for his actions. His previous convictions show a pattern of criminal conduct and contempt for his community.
23. Usually being convicted and sentenced at a relatively young age leaves scope for the prospects of rehabilitation. However, this in and of itself is not sufficient. There can be no rehabilitation without an honest appreciation of what you have done and an acceptance of responsibility for the actions that led to convictions and the consequences that flow from such crimes.
24. The applicant accepts no responsibility for his crimes and the consequences that flow from such crimes. There is no sign of any remorse on the part of the applicant. In these circumstances, there is no realistic expectation of rehabilitation.
25. Looking at the evidence holistically, there is a pattern of criminal conduct. Without any acceptance of responsibility for his actions and the consequences that flow from such actions, society at large remains at risk for a repetition of his violent conduct.
26. Having regard to all the evidence adduced at the trial, the only appropriate sentence for each of the convictions is a life sentence to run concurrently with the

other life sentences imposed as well as the sentence that applicant was already serving when this court originally sentenced the applicant. Accordingly, on the determinative test set out in the Malgas case there can be no substantial and compelling reasons to depart from the prescribed sentence. There is no reasonable prospect that another court will come to a different conclusion.

Accordingly, the following order is made:

- 1) The late prosecution of this application for leave to appeal is condoned.
- 2) The application for leave to appeal is dismissed.

Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

Applicant: Mr H Steynberg oio Legal Aid SA, Kimberley

Respondent: Adv T Barnard oio The Director of Public Prosecutions, Kimberley.

Date of Judgment: 14 June 2024