

NOT REPORTABLE



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

CASE NO: CA&R23/23

In the matter between:

VISAGIE, PATRICK ELRICO

Appellant

and

THE STATE

Respondent

Neutral citation: *Visagie v The State* (Case No: CA&R23/23) (31 January 2025)

Coram: Williams J et Nxumalo J

Heard: 04 March 2024

Delivered: 31 January 2025

Summary: Automatic appeal — Criminal Procedure Act 51 of 1977 — prescribed minimum sentence — Criminal Law Amendment Act 105 of 1997 — no substantial and compelling circumstances — life imprisonment confirmed—appeal dismissed.

ORDER

1. The appeal is dismissed.
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JUDGMENT

Per: Nxumalo J (Williams J concurring)

INTRODUCTION:

[1] This is an automatic appeal in terms of Section 309(1)(a) of the **CRIMINAL PROCEDURE ACT 51 of 1977** ("the **CPA**") against two concurrent life sentences pertaining to the appellant's convictions on two counts of rape (counts 1 and 4) *contra* Section 51(1) of the **CRIMINAL LAW AMENDMENT ACT 105 of 1997**.¹ The impugned sentences were meted against the appellant by the Kimberley Regional Magistrate Court on 08 April 2019 after pleading guilty to the said counts in addition to others. The latter Section grants Regional and High Courts discretionary powers to sentence persons convicted of offences referred to in Part I of Schedule 2 to imprisonment for life. The former, for its own part, expressly permits a person sentenced to imprisonment for life by a Regional Court, under Section 51(1) of Act 105 of 1997, to note an appeal without having to apply for leave in terms of Section 309B of the CPA.

[2] One of the serious offences referred to in Part 1 of Schedule 2 of Act 105 of 1997 is rape, as contemplated in Section 3 of the **CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT**

¹ Act 105 of 1997

32 of 2007,² *inter alia* when committed: (a) in circumstances where the victim was raped more than once, whether by the accused or by a co-perpetrator or accomplice; or (b) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.

Ground of Appeal:

- [3] The appellant's sole ground of appeal is that the Court *a quo* erred in not finding substantial and compelling circumstances to exist to deviate from the prescribed minimum sentences of imprisonment for life.
- [4] Section 51(3)(a) of Act 105 of 1997, clearly limits the Courts' discretion to impose lesser sentences than the sentences prescribed only to those instances where it is satisfied that substantial and compelling circumstances exist. Thus, where prescribed sentences are imposed or departed from, the approach on appeal is whether the facts that were considered by the sentencing Court are indeed substantial and compelling or not.³

Brief overview of the salient facts:

- [5] The appellant, a 25-year-old male person who resided in Barkly West Road, Kimberley, handed up two Section 112(2) of the CPA statements on which he pleaded guilty with regard to both counts, in the Court *a quo*.⁴ This Section expressly provides that if an accused or his legal advisor hands a written statement by the accused into Court in which the accused sets out the facts which he admits and on which he has pleaded guilty, the Court

² Act 32 of 2007

³ *S v PB* 2013 (2) SACR 533 (SCA) para 20.

⁴ See *Exhibits A and D*, pp102-104; pp121-123, of the Record.

may, in lieu of questioning the accused under Section 112(1)(b),⁵ convict the accused on the strength of such a statement and sentence him as provided in the said subsection, if the Court is satisfied that the accused is guilty of the offence to which he has pleaded guilty.

Ad Count 1:

- [6] Exhibit A, in relevant part, reveals that the appellant admitted that on 17 March 2018 at or near Galeshewe, he and his co-accused unlawfully and intentionally committed an act of sexual penetration with one Ms G, the complainant, by inserting his penis into her vagina and having sexual intercourse with her, without her consent.
- [7] They accosted the complainant with a knife in the early hours of 17 March 2018 near Kimberley, whilst the complainant brought her car to a halt at a traffic light-controlled intersection to await her right of way. He wielded the said knife at her and threatened to stab her if she did not co-operate with them. He and his co-accused then jumped into the complainant's vehicle and drove off with the complainant squashed between them. They drove down the street, past the AR Abass Stadium and into a field where they stopped. He thereupon ordered the complainant to alight and board at the back of the vehicle which was covered with a canopy. The complainant did as she was told.
- [8] There and then he had sexual intercourse with her by inserting his penis into her vagina whilst she was lying on her back until he ejaculated. Thereafter, he put on his underwear and pants and left her there. His co-accused thereafter also had sexual intercourse with the complainant. The appellant also admitted that he, at all material times hereto, never had any

⁵ *Ibid.*

permission of the complainant to have sexual intercourse with her; that he acted unlawfully and intentionally in so doing and knew that what he was doing was wrong. However, he also pleaded for mercy.

- [9] It is against this backdrop that the appellant pleaded guilty to count 1, of the raft of charges proffered against him.

Ad Count 4:

- [10] Regard being had to Exhibit D, in relevant part, the appellant also admitted that on 25 March 2018 in the early hours of the morning, at or near Galeshewe, he unlawfully and intentionally committed an act of sexual intercourse three (3) times on one Ms K, the complainant, by inserting his penis into her vagina until he ejaculated into her three (3) times. Prior to the foregoing he had accosted the complainant and her friend, one Ms M (the second complainant) near a nightclub called Kim-by-Nite, wielding a knife, while the complainant was getting into a vehicle. He instructed the complainant to sit in the front passenger seat and the second complainant to cross over to the back seat. The accused threatened to stab the complainants if they did not co-operate.
- [11] The appellant thereafter started the said vehicle and drove down the road past the AR Abass Stadium into a certain field where he stopped, alighted and ordered the complainants to do so too. He then instructed the complainant to undress. He then took off his pants and underwear and demanded that the complainant sit on top of him. He there and then penetrated her vagina with his penis, had sexual intercourse with her without her consent, until he ejaculated inside her for the first time.

- [12] Thereafter, he instructed her to face him and she did so. He then penetrated her again and ejaculated inside her for the second time. He then demanded that she lay down on the back seat of the car whilst he got on top of her and penetrated her with his penis in her vagina and had sexual intercourse with her until he ejaculated for the third time. Thereafter they both got dressed. At all material times hereto, he did not use any condom.
- [13] He also admitted that at all material times hereto, he never had any permission from the complainant to have sexual intercourse with her; that he acted unlawfully and intentionally; and knew what he was doing was wrong.
- [14] It is against this backdrop that the appellant also pleaded guilty to count 4, of the raft of charges proffered against him.

The remainder of the charges:

- [15] The remainder of the charges to which the appellant pleaded guilty and was convicted are *to wit*: 5 counts of robbery with aggravating circumstances, *contra* Section 51 of Act 105 of 1997;⁶ 5 counts of kidnapping;⁷ and rape, *contra* Section 51(2), of the same Act.⁸
- [16] For the 5 counts of robbery with aggravating circumstances *contra* Section 51 (*ibid*), the appellant was sentenced to 15 (fifteen) years respectively; for the 5 counts of kidnapping, he was sentenced to 1 (one) year respectively; and in respect of count 13, he was sentenced to 10 (ten) years imprisonment.

⁶ Counts 2,7,8,11 and 12

⁷ Counts 3,5,6,9 and 10

⁸ Count 13

Issues for determination:

[17] This Court has been called upon to determine the following issues in this appeal; *to wit*: (a) whether the personal circumstances of the appellant were properly considered; (b) whether the seriousness of the relevant offences were overemphasised; (c) whether the interests and needs of the society were overemphasised; (d) whether the Court *a quo* placed too little emphasis on the remorse of the appellant; and (e) whether the facts and circumstances of this case cumulatively evince any exceptional and compelling circumstances. Each of these issues must be considered hereunder, albeit out of turn.

Whether the seriousness of the offences was overemphasised:

[18] The State correctly pointed out that the offences the appellant was convicted of were very serious in nature. According to the victim impact reports pertaining to the complainants, whilst both victims did not suffer any physical injuries, the victim in count 1, was diagnosed with depression as a result of being raped by the appellant. The victim in count 4 had to seek psychiatric treatment after being raped and was hospitalised for a period of three weeks due to post-traumatic stress, she suffered panic attacks and developed a dependency on opioid and zolpidem. The State therefore submitted that the Court *a quo* correctly noted that even though the anguish suffered by the complainants cannot be measured, it is evident that the victims' and their families' trauma could not have been trifling.⁹

[19] The appellant, for his own part, correctly conceded that he has been convicted of serious crimes. The appellant also conceded that Section 51(3)(aA)(ii) of Act 105 of 1997, expressly enjoins our Courts when

⁹ *S v Ngcobo* 2018 (1) SACR 479 (SCA) para 09

imposing sentences in respect of the offence(s) of rape, not to consider the apparent lack of physical injury to the complainant as constituting any substantial and compelling circumstances justifying the imposition of a lesser sentence.¹⁰

[20] The foregoing notwithstanding, it was submitted for the appellant that the injuries sustained by the complainants during the offences in question are not life-threatening in nature and this should be considered as a mitigating factor when the seriousness of the offences are determined. It was also submitted for the appellant that the Court *a quo* overemphasised the psychological and emotional trauma that was suffered by the complainants and relied too much on the victim impact reports.

[21] In this regard this Court was referred to *S v Ganga* 2016 (1) SACR 600 (WCC), without for a moment evincing how the impugned impact reports fell short of the kind of evidence that was required to be placed before the Court *a quo* to enable it to make a proper assessment of the emotional and psychological harm that the victims suffered in this case for purposes of deciding on the impugned sentence.

[22] It is so that almost every crime has its own inherent set of factors which aggravate that crime and therefore call for a more severe sentence. It is also so that in crimes of violence major factors which may aggravate the crime include the degree of, and extent of the violence used; the nature of any weapon; the brutality and cruelty of the attack; the nature and character of the victim; whether the victim was unarmed or helpless, etcetera.¹¹

¹⁰ *S v Radebe* 2019 (2) SACR 381 (GP) para 46

¹¹ See SS Terblanche *A Guide to Sentencing in South Africa*, 3rd ed (2016) at 211

- [23] The crime of rape is repulsive. Rapists invade the most private and intimate zone of a person and strike at the very core of his or her personhood and dignity.¹² Rapists humiliate, degrade and brutally invade their victims' privacy, dignity and personhood.¹³ It is an appalling and utterly outrageous crime, attaining nothing of any worth for the perpetrators but inflicting terrible and horrific suffering and outrage on the victims and their families.¹⁴ Rape is indeed a crime that not only violates the body and mind of the complainant, but also profoundly vexes and wounds the soul.¹⁵
- [24] The complainants in these matters were all relatively young, economically productive female students and employees in the prime of their lives. They were unarmed, helpless and vulnerable, at all material times hereto. The fear of being murdered, contracting sexually transmitted diseases and infections, and falling pregnant aggravated the trauma of the rapes. Significantly, it is common cause that the victim with regard to count 1 was raped more than once by the appellant and by his co-perpetrator or accomplice.
- [25] Even if the appellant was correct that no adequate evidence was presented in the Court *a quo* with regard to the psychological trauma that the complainants would have endured, it is inherent in the nature of rape that the trauma they suffered, respectively, could not have been trifling.¹⁶ I take inspiration from the SCA in *S v Vilakazi*¹⁷ at paragraph 56, thereof:

“In this case there is very little upon which to measure the emotional impact of the offence upon the complainant. It would not be possible to encapsulate in this

¹² *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 1

¹³ *S v Chapman* 1997 (3) SA 341 (SCA) at 344I-J

¹⁴ *S v Ncheche* 2005 (2) SACR 386 (W) para 35

¹⁵ *S v Ndlovu* 2017 (2) SACR 305 (CC) para 53

¹⁶ *S v Ngcobo* (*supra*) fn 7

¹⁷ *Ibid* fn 10

*judgment the range of emotional responses that rape might evoke as it is described in the considerable literature on the topic and I make no attempt to do so. It is sufficient to say that it is evident from the literature that emotional distress and damage that accompanies rape might be extensive even if it is not manifested overtly and even more is that so in the case of young girls. What also needs to be borne in mind is that the literature shows that emotional responses vary as is demonstrated by a revealing empirical study of the impact of violence (including sexual violence) against women in the metropolitan areas of this country. But while a Court must inform itself sufficiently to be alive to the range of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample."*¹⁸

- [26] In the premise, I am unable to agree with the appellant, without more that the Court *a quo* relied too much on the impugned reports or the seriousness of the offences was overemphasised.

Whether the interests and needs of the society were overemphasised:

- [27] The appellant obviously had to concede that rape is a very serious offence which the public needs to be protected from. It was also conceded that offenders such as the appellant should be removed from society for a substantial period and that the only appropriate sentence, in the circumstances, would be a substantial term of imprisonment. It was also correctly pointed out on his behalf that, whilst society legitimately calls for harsh sentences for this type of offences, public opinion is only but one factor which still has to be balanced with the seriousness of the offence and the personal circumstances of the accused.

¹⁸ Emphasis supplied

- [28] The State, for its own part, submitted that stiff sentences for crimes like these are important for the public to retain confidence in the criminal justice system and the sentences imposed by our Courts. That the Court *a quo* therefore correctly pointed out that it has a responsibility towards the community in considering a sentence because when it fails in its duty, the community may resort to taking the law into their own hands- *S v WV* 2013 (1) SACR 204 (GNP). The State also pointed out that the Court *a quo* was correctly alive to the fact that the community needs to see that it takes their plight seriously.
- [29] In its modern guise, public policy is indeed rooted in our Constitution and the fundamental values enshrined therein. Everybody in our open democratic society founded on *inter alia*, the values of human dignity, the achievement of equality and the advancement of human rights and freedom has a fundamental right to equal protection and benefit of the law entrenched in our Bill of Rights.¹⁹ Also entrenched in the Bill of Rights, is the right to freedom and security of the person, which includes the rights to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.²⁰
- [30] Section 12(2) of the Constitution also grants everyone the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in, and control of, their bodies. Indeed, '*the constitutional principles of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel inhumane and degrading way, should be afforded to the victims of sexual assault*'.²¹ Rapists hideously violate all these rights.

¹⁹ Section 1(a) and 9 of the Constitution of the Republic of South Africa, 1996

²⁰ Sections 12(1) of the Constitution

²¹ *S v Tshabalala and Another* 2020 (2) SACR 38 (CC) para 60

- [31] It has also been well said in *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) that:

*"... rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancements of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. **Our Courts have an obligation to impose sentences for such a crime— particularly where it involves young, innocent, defenceless and vulnerable girls—of the kind which reflects the natural outrage and revulsion felt by law-abiding members of the society.** A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system".²² (Emphasis added)*

- [32] The crime of rape has also been appositely described as a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Indeed, as the SCA, seminally remarked in *S v Chapman*:²³

"The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights. He prowled the streets and shopping malls and in a short

²² para 22

²³ 1997 (3) SA 341 (SCA) at 345

period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and at no stage, did he show the slightest remorse.

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. We communicate that message in this case, by an order that the appeal of the appellant against his convictions and sentences is dismissed. The convictions and sentences of the appellant are confirmed."²⁴

- [33] The facts pertaining to these two counts speak for themselves. They state unequivocally that the appellant showed no respect for the victims' rights. He prowled the streets and raped two young women who were unknown to him. He raped them callously and brutally, after threatening them with a knife.
- [34] It is significant to point out that according to independent reports during the 2022/2023 fiscal year, close to 53 500 South Africans reported having being victims of sexual crimes. Of those, around 80 percent registered being raped, while close to 7 500 South Africans disclosed being sexually assaulted. In the last decade, the total number of sexual offenses peaked in the financial year 2012/2013 at about 60 900 cases.²⁵ These statistics reveal the deeply troubling and pervasive prevalence of rape in our society. It is deeply concerning that Courts across the country are confronted with instances of rape and the abuse of women and children on a daily basis. The media too, is replete with distressing reports of such heinous crimes.

²⁴ Emphasis supplied

²⁵ See:

<https://www.statista.com/statistics/1362370/number-of-sexual-offenses-in-south-africa-by-crime/> Published by Natalie Cowling, 16 August 2024

These statistics reveal a scourge that has reached alarming proportions. It is both disheartening and a stark reflection of our society that, thirty years into our constitutional democracy anchored in a Bill of Rights we continue to grapple with this persistent pandemic. Undoubtedly, joint efforts by the Courts, society and law enforcement agencies are required to curb this pandemic. It is equally so that addressing rape and other forms of gender-based violence requires the effort of the executive, the legislature and the judiciary, as well as our communities.²⁶

[35] It has also been well said that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of the crime.²⁷ It should be so because the imposition of sentence is an integral subclass of a fair trial.²⁸ Furthermore, in *S v Rabie* 1975 (4) SA 855 (A), it was held that punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

[36] Whilst it is so that the object of sentencing is not to satisfy public opinion, it is indeed also so that it needs to serve the public interest- *S v Mhlakaza and Another* 1997(1) SACR 515 (SCA). In *S v Homareda* 1999 (2) SACR 319 (W) at 324B, Cloete J correctly pointed out that “*it is not the function of the Courts slavishly to give effect to public opinion*”. Our Courts thus have to remain determined to protect the equality, dignity and freedom of all women and strappingly deter those who seek to invade those rights- *S v Chapman* 1997(3) SA 341(SCA). Our Courts thus remain under a duty to

²⁶ *S v Tshabalala and Another* 2020 (2) SACR 38 (CC)

²⁷ *S v Jaipal* 2005 (1) SACR 215 (CC) para 29

²⁸ *S v Morotolo* (Sentence) [2024] JOL 64769 (NWM); 2024 JDR 2199 (NWM) para 16

send a clear message to the accused, to other potential rapists and to the community.

[37] In *S v Gardener and Another* 2011 (1) SACR 570 (SCA), it was held that:

“[68] True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence, and why a Court, in loco parentis for society, is responsible for working out the answer.” (Emphasis added)

[38] In the premise, I am of the considered view that regard being had to the facts and circumstances of this case, the Court *a quo* does not seem to have overemphasised the interests and needs of the society at all.

Whether the personal circumstances of the appellant were properly considered:

[39] What is left from the above is the third angle of the sentencing *Zinn triad* i.e. the offender must be looked at through the prism of his personal circumstances on the basis of which the residual discretion to depart from the minimum sentence is, together with the other sentencing considerations are a point of departure.

[40] It is common cause that the personal circumstances of the appellant at the time of sentencing were as follows: He was 24 years old at the time of the offences; he was single but had a girlfriend; he has one minor male child aged seven; he did not contribute towards the maintenance of the child due

to the fact that he is incarcerated; he dropped out of school in grade 10, after his parents separated; his parents died in 2010 and 2012, respectively; he resided with his grandmother and did not contribute to the household financially due to unemployment, although he occasionally did piece jobs; he has two previous convictions for robbery which he committed whilst a minor; he was incarcerated for over a year due to violating the parole conditions of one of his previous convictions and had spent more than a year in custody awaiting the finalisation of his trial. In this regard, the appellant referred this Court to *S v Maphuma* 2021 JDR 0424 (ECG) at paras 11-12, thereof. The State, for its own part, referred this Court to *S v Vilakazi* 2009 (1) SACR 552 (SCA), at para 58, thereof.

[41] I am of the opinion that the appellant's wholesale reference to the dictum in the former case is not helpful. This is simply because the appellant once again fails to specify, and it is also not clear from the impugned judgment, how his personal circumstances did not receive more than a "fleeting glance", or how the Court *a quo* "*unwittingly de-emphasised the perpetrator's interests, more particularly the personal circumstances of the appellant*". It was not even clear from the oral submissions for the appellant how the said Court erred in the consideration of his personal circumstances cumulatively in its conclusion that they were not substantial and compelling.

[42] It is so that in our law, in cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Accordingly, in *S v Vilakazi* 2009 (1) SACR 552 (SCA), the following was pointed out:

"... once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves

largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment..."²⁹ (Emphasis added)

- [43] While this Court can never confidently predict whether the appellant can be expected to offend again, it is so that his circumstances might assist in making at least some assessment. It is clear from the brief overview of the appellant's personal circumstances that the appellant had serious brushes with the law before he reached the age of majority. Particularly remarkable are his previous convictions and violation of his parole conditions with regard to same. These are in my opinion indicative of an inherently lawless character.
- [44] In the premise, for this reason also, I am unable to find that the personal circumstances of the appellant are such that there was justification for the departure from the prescribed minimum sentences of life imprisonment.

Whether the Court a quo placed too little emphasis on the remorse of the appellant:

- [45] Mr Fourie, for the appellant, submitted that the Court *a quo* placed too little emphasis on his remorse, despite finding that he indeed was remorseful for his wrongful actions. In this regard, the Court *a quo* found that the appellant was sufficiently remorseful simply because he admitted and pleaded guilty to all 13 counts. It has been held in *S v Matyityi* 2011 (1) SACR 40 (SCA), quite correctly, that:

²⁹ para 58

“[13] ... a plea of guilty in the face of an open and shut case against an accused person is a neutral factor... 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...”³⁰

[46] There is no indication that any of this, all of which was peculiarly within the appellant’s knowledge, was explored in this case other than the plea of guilty and the request that the Court *a quo* should have mercy on him, in his Section 112(2) of the CPA statement, with regard to count 1.³¹

[47] Given the nature of the crime and the circumstances of its commission together with the minimal degree of remorse, if at all, expressed by the

³⁰ Emphasis added and footnotes omitted

³¹ See p104, Record

appellant for his actions, I cannot find that the Court *a quo* placed too little emphasis on the remorse of the appellant.

Whether cumulatively viewed, there are any substantial and compelling circumstances to depart from the prescribed minimum sentences:

[48] It was submitted for the appellant that substantial and compelling circumstances to depart from the prescribed minimum sentences are to be found in the fact that he is still fairly young; he is a first offender for the crime of rape, that he showed remorse for his actions and pleaded guilty; and the absence of any evidence that the appellant cannot be rehabilitated by a sentence other than the ultimate sentence of imprisonment for life.

[49] The State, for its own part, submitted that where a prescribed sentence is imposed, the approach on appeal is whether the facts that were considered by the sentencing Court are indeed substantial and compelling or not.³² Furthermore, that the trial Court did not err in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[50] It is so in our law that circumstances considered to be “*substantial and compelling*” must indeed be so. What the SCA stated in *S v Malgas* 2001 (2) SA 1222 (SCA) is apposite *in casu*; to wit:

“[9] ... whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, **personal doubts as to the efficacy**

³² *S v PB* 2013 (2) SACR 533 (SCA) para 20

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."

[25] *What stands out quite clearly is that the Courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously 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 not 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 parts 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 rôle; 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.”³³

CONCLUSION:

[51] All in all, I am of the opinion that the serious nature of the offences and how they were committed; the interests of society and the personal circumstances of the appellant, have been fully considered by the Court *a quo*. The current legislative framework considered together with judicial pronouncements by our Courts over many years leads me to a similar conclusion reached by the trial Court in this matter. All of those considered together lead to the unavoidable conclusion that the Court *a quo* did not misdirect itself by finding that no substantial and compelling circumstances exist which justify a deviation from the prescribed sentence of life imprisonment imposed on the appellant. The appeal must therefore fail.

[52] In the result, the following order shall issue:

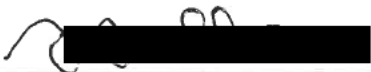
(a) THE APPEAL IS DISMISSED.

³³ Emphasis supplied



APS NXUMALO J
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION,
KIMBERLEY

I concur.



CC WILLIAMS J
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION,
KIMBERLEY

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For the Respondent:

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