



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable

Case no: A102/2024

In the matter between:

SAMPIE JULIUS MAKHETHA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Makhetha v The State* (A102/2024) [2025] ZAFSHC 210 (10 July 2025)

Coram: Daniso *et* Van Rhyn JJ

Heard: 14 April 2025

Delivered: This judgment was delivered by email to the parties and release to SAFLII. It shall be deemed to have been delivered at 11h00 on 10 July 2025

Summary: Criminal procedure – appeal against sentence – substantial and compelling circumstances to justify the imposition of lesser sentences – court duty bound to evenly evaluate all the factors and circumstances for the attainment of a fair and balanced sentence.

ORDER

1 The appeal against sentence is upheld.

2 The sentence of life imprisonment imposed by the trial court is replaced with a sentence of 25 year's imprisonment antedated to 5 July 2024.

3 The consequential orders made in terms of s 103(1) of the Firearms Control Act 60 of 2000 and s 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 31 of 2007 are confirmed.

JUDGMENT

Daniso J (Van Rhyn J concurring)

[1] On 7 September 2023, around 19h00 the complainant, then 25 years old was walking from home to another section referred to as Phase 9 when the appellant called out to her to stop as he wanted to propose love to her. When she told him to leave her alone, he caught up to her, grabbed her by the neck and threatened to shoot her. He then led her to an abandoned building where he ordered her to undress. After she took off her underwear, he penetrated her vagina with his fingers. He then ordered her to suck his penis and thereafter tried but failed to penetrate her anally. Upon failing to penetrate her anally, he again forced her to suck her penis. It was during this time that the complainant bit hard into the appellant's penis, she pushed him away from her and escaped.

[2] The complainant did not report the incident to the police immediately as, according to her, the appellant had not succeeded in his attempt to rape her. Two days later she experienced anxiety attacks and it was then that she realised that the incident has affected her. She went and reported the incident to the police and was thereafter taken to hospital for medical examination. A medical report (the J88) compiled by a nursing sister on 15 September 2023 was handed in by concurrence of the State and the defence. It indicated that no physical or genital injuries were noted and that the absence of the injuries do not exclude 'violent behaviour' or sexual penetration.

[3] The appellant who had pleaded not guilty without tendering an explanation of his defence raised consent as his defence when he testified. He alleged that he was walking down the street carrying alcohol when he met the complainant. They greeted each other and she asked to go with him to drink the alcohol, he agreed. They went to his friend's place where they sat and drank alcohol. He then asked her to have sexual intercourse with him and she agreed but offered to rather perform oral sex with him as she was having her periods. When they were done, she asked him to buy her snuff, he obliged and after using it, he again asked her to suck his penis and she agreed but whilst doing so, Thabo, the owner of the property came and kicked the door opened, startling the complainant with the result that she bit his penis. When Thabo noticed what was happening, he left the room laughing followed by the complainant. The complainant returned later to apologize for biting his penis and went away again. He was surprised when a week later he was arrested for raping her.

[4] He confirmed that, as a result of being bitten by the complainant, he sustained an injury to his penis. A J88 medical report compiled on 19 September 2023 pursuant to his arrest was handed in by agreement and it indicated that he had an infected lesion on his penis which could have resulted from a bite.

[5] After all the evidence was proffered, the appellant was convicted by the Regional Court, Bloemfontein on 5 July 2024 on a charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) in the circumstances where the complainant was raped more than once thereby falling under the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA).

[6] Having regard to s51(1) of the CLAA, the trial court found that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. The appellant was accordingly sentenced to life imprisonment. Consequential orders were made in terms of s 103(1) of the Firearms Control Act 60 of

2000 and s 50(1) of SORMA, in terms of which the appellant's particulars were included in the National Register for Sex Offenders.

[7] This appeal lies against the sentence and it is premised on the grounds that, in sentencing the appellant, the trial court erred by not placing sufficient weight to his personal circumstances namely that: at the time of sentencing, he was a 32 years old unmarried father one minor child, employed as a delivery man earning about R2 500 per month and that he was a first offender who spent about ten months in custody awaiting trial. The fact that, during the incident, he sustained an injury on his penis was also ignored the trial court instead placed too much emphasis on the seriousness of the crime, the interests of the community as well as the impact of the crime on the victim.

[8] The appellant further contends that sufficient weight was also not given to the fact that, at the time of sentencing, he was a provider for his minor child aged 14. The trial court's focus was on the fact that he was not the primary care giver as the child was residing with the grandmother.

[9] It was argued on behalf of the appellant that his mitigating circumstances including his incarceration for a period of ten months whilst awaiting trial constituted substantial and compelling circumstances warranting a deviation from the prescribed sentence of life imprisonment. It is accepted that the offence is deserving of punishment which will convey the gravity of the offence and society's abhorrence however, the sentence of life imprisonment is harsh considering the fact pursuant to the conviction the trial court orders that the appellant's name is on the register of sex offenders, his prospects of employment in future will be affected. A lesser sentence of imprisonment will still meet the objectives of sentencing.

[10] On the other side, the appeal is opposed on the grounds that the sentence of life imprisonment is compulsory where the victim was raped more than once. It is the respondent's case that, in sentencing the appellant, the trial court applied its discretion properly as the appellant's mitigating factors were duly considered together with the

seriousness of the offence, its prevalence, the interest of the society and its effect on the complainant. There is thus no reason to interfere with that discretion, the sentence is accordingly supported.

[11] The principles applicable in appeals where the findings of a trial court are attacked, are now established: the appeal court will not interfere with or tamper with a trial court's judgment or decision regarding sentence unless, it (the court of appeal) finds that the trial court misdirected itself or the sentence imposed is disturbingly inappropriate or disproportionate to the crime the appellant has been convicted of.¹

[12] The trite factors to be taken into consideration when deciding whether substantial and compelling circumstances exist warranting a deviation from the prescribed minimum sentence include all factors relating to the nature and the gravity of the crime, the interests of society and both the mitigating and the aggravating factors. To arrive at an appropriate sentence, all these factors must be evaluated evenly.

[13] The traditional mitigating factors such as an accused's personal circumstances is but one of the trite factors to be taken into consideration when deciding whether substantial and compelling circumstances exist warranting a deviation from the prescribed minimum sentence however, they must be evaluated against the aggravating factors to arrive at a fair and balanced conclusion that they do not justify a lesser sentence.²

[14] The record of the proceedings reveals that, in arriving at the conclusion that there were no substantial and compelling circumstances exist warranting a deviation from the prescribed minimum sentence, the appellant's personal circumstances were considered in isolation, the aggravating circumstances were simply ignored.

¹ *S v Romer* [2011] ZASCA 46; 2011 (2) SACR 153 (SCA) para 22-23.

² *Vilakazi v The State* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58 quoting *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

[15] The inadequacy in the evaluation of the evidence relating to the mitigating and aggravating factors is in fact acknowledged by the trial court. In the record of the proceedings, paginated pages 105 to 106 it is stated that:

'... The court then has to ensure that the interest of society are protected. It is easy to say one is to balance the interest of society, the seriousness of the nature of the offence as against the personal circumstances of the accused but that is a very difficult and delicate balancing act for one to do. It is so because even as I am sitting here, I just went on and on about how serious the offence is and how it affects the community, but personal circumstances of the accused is only four lines. So how do you then balance the personal circumstances of the person against this overwhelming information regarding the seriousness of the offence as well as the interest of society?'

[16] I am of the view that the trial court's failure to evenly evaluate all the factors and circumstances required for the attainment of a fair and balanced sentence is an irregularity justifying an interference with its sentencing discretion.

[17] Rape has been aptly described as 'a repulsive crime, an invasion of the most private and intimate zone of a woman striking at the core of her personhood and dignity'. The significant change in the complainant's lifestyle pertaining to the manner in which she now dresses and avoiding being out at night by herself attest to the diminished quality of her mental integrity and enjoyment of life. In *S v Chapman* it was held that:³

'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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[18] It is aggravating that the complainant was sexually violated more than once whilst being threatened with violence. The appellant was not remorseful. Although he ultimately admitted the sexual intercourse but knowing very well what he did, he continued to dispute

³ *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) para 4.

the circumstances under which the sexual intercourse occurred subjecting the complainant to the emotional trauma of having to recount the details of the incident.

[19] It is important to point out that it was the complainant's testimony that she has since managed to deal with the anxiety attacks with the support of her family. As a result, she did not even deem it necessary to continue with the offered counselling services.

[20] Undeniably, the prevalence and nature of the offence the applicant has been convicted of causes an outrage in the community which looks up to the courts to protect it by imposing severe sentences. The court must however bear in mind that, in sentencing of a convicted person, he should not be sacrificed at the altar of deterrence. The sentence must have all the elements and purposes of punishment, prevention, retribution, rehabilitation, individual and general deterrence.

[21] Having regard to the appellant's personal characteristics balanced with the aggravating factors present herein and the interests of society these factors taken cumulatively constitute substantial and compelling circumstances warranting a deviation from the prescribed sentence of life imprisonment. I am in no doubt that a sentence of long-term imprisonment though tampered with a measure of mercy would address the gravity of this offence and give the appellant an opportunity to rehabilitate accordingly. I am of the view that a sentence of 25 years imprisonment will appropriate under these circumstances.

Order

[22] The following order is therefore made:

- 1 The appeal against sentence is upheld.
- 2 The sentence of life imprisonment imposed by the trial court is replaced with a sentence of 25 years' imprisonment antedated to 5 July 2024.
- 3 The consequential orders made in terms of s 103 (1) of the Firearms Control Act 60 of 2000 and s 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are confirmed.

The Honourable Justice
2025-07-10
N.S. Daniso
DANISO J

I concur and it is so ordered.

pp
VAN RHYN J

Appearances

For the appellant:

VC Abrahams

Instructed by:

Legal Aid SA, Bloemfontein

For the respondent:

EB Ontong

Instructed by:

Director of Public Prosecutions, Bloemfontein.