IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC22/2025

In the matter between:

THE STATE

Vs

THOBILIZWI MAQAM **Accused**

SENTENCE

JOLWANA J

[1] Mr Maqam has been convicted of six offences which involved the rape of three young women, one of whom was 15 years old when the offences in which she is a victim were committed. The second victim's rape involved the infliction of grievous bodily harm. The circumstances and the manner in which these offences were committed implicated the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2 thereof. He was advised about the implications of the State's invocation of section 51(1) at the commencement of the trial. This is the fact that he faced a possibility of life imprisonment, in the event of a conviction. In respect of the third victim, section 51(2) of the Act was invoked by the

State and the implications thereof were also explained to him. This entailed that on conviction, he faced a possibility of a minimum sentence of 15 years imprisonment.

[2] The accused must now be sentenced appropriately for all the offences for which he has been convicted. The three rape cases are indisputably very serious offences. This is not made more clearer than the Legislature's determination that in exercising its sentencing discretion, a sentencing court, while entitled to depart from minimum sentences, it shall only do so only if substantial and compelling circumstances exist justifying such departure. Section 51(3)(a) provides, in part, as follows:

> "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence…."

[3] In describing the seriousness of these types of offences and the wide berth of their debilitating impact on the constitutional rights of women, as well as the craftiness with which they were carefully planned before they were committed, I can do no better than Mahomed CJ in *Chapman*[1] in which he said:

> "Rape is 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. 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 tranquillity 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 period of one week he raped three young

[1] S v Chapman 1997(3) SA 34 (SCA).

women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage did he show the slightest remorse. The courts are under a duty to send a clear message 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."

[4] In this case, it was as if the accused knew that all his victims were in a vulnerable position at the time he attacked each one of them. For example, S[...] lived with her great grandmother who was 83 years old at the time. That explains why, although she was awake and saw her great granddaughter being dragged out of the house by an armed stranger in the darkness of that night or early morning, she could not do anything other than making calls to ask for help and perhaps praying, which was her Christian praxis at about midnight daily. She could not assist S[...] as she tried to fight her armed assailant with admirable courage. Similarly, with S[...]2, on the date of the attack, her room mate and friend, Zimasa had gone home. Therefore, she was all by herself on the night in question. The same applies to A[...], on the day of the attack, she was walking alone in the area of the mealie fields. There was no one else walking there at the time. She was on her way to visit her then boyfriend who is now her husband at about 09:00 in the morning. She was dragged down a slope under a threat of a knife. In all these cases, not only was the accused armed with a knife and/or sword, but he also covered his face with a balaclava. As a result, his victims could not identify him or describe him to the police. This explains why it took about 10 years to solve these horrendous crimes. As Mr Mkentane, counsel for the State proposed, Mr Maqam must have carefully planned each of these attacks which is why he successfully executed them without being identified.

[5] This brings me to the evidence in of the victims with which I start for convenience. S[...] testified that after the incident, she was always afraid especially around 03:00 am fearing that someone would wake her up. Because she lived with her then 83 year old frail great grandmother, she had to be strong for her by hiding the emotional turmoil she was going through in order to protect her. Therefore, she suffered in silence as the only person she lived with and could talk to was vulnerable and

needed protection because of her advanced age. She testified that at the time she was raped, she was already pregnant. Her boyfriend denied that he was the father of the child saying that he could have fallen pregnant during her rape ordeal. He only acknowledged being the father of her child after the child was born and he counted the number of months to realize and accept that she was already pregnant with his child when she was raped.

[6] She testified that hers and her great grandmother's lives changed drastically. When she went to school, her great grandmother would lock the door during the day as she would be left alone the whole day until she came back from school. Before the incident, they switched off the lights at night to avoid attracting mosquitos. They could not do that anymore. They could no longer sleep with lights switched off at night because of fear. After her child was born, she found herself in an emotional roller-coaster and turmoil. She resorted to heavy drinking to numb her emotional pain. At the locality, people from her own community would ask her why she did not scream, and she had to explain herself over and over again because they did not understand rape. S[...] testified that there could be many other young girls who were raped by the accused, who might not have even seen any point in laying criminal charges with the police. This is because they could not describe their attacker due to the fact that the accused always covered his face with a balaclava and therefore, they did not know against whom to lay rape charges.

[7] S[...]2 testified that when she was raped, she was doing grade 12. Although she continued with her studies, things changed. It became difficult for her to go to school because people would whisper about her and the fact that she was raped. She started not going to school regularly and ended up failing grade 12. The following year, she decided not to go to school at all. When she eventually returned to school, her former school would not allow her to repeat grade 12. She ended up going to a new school in which she was required to start from grade 10 which she had to do as she needed to put together the broken pieces of her life. Therefore, she lost 5 years of her life in the process. After completing grade 12, she was admitted at the University of Fort Hare for her tertiary education where she graduated in 2024. She got a job as a School Governing Body Educator at Elliot. However, she had to leave that job when she realised that she might not be safe as she was always anxious

about her safety after her rape ordeal. She has just been employed as a tutor in Durban and would have already started in her new job, which she had to delay when she was told that she needed to come to court and testify in this case.

[8] After the incident, her sleeping patterns were detrimentally affected. She started sleeping at 15:00 and waking up at 20:00 fearing that her assailant or another person would come at night and rape her again. She would then stay awake from 20:00 until 05:00 am the following morning. She testified that as a young woman, she had taken a conscious decision to preserve her virginity until she got married. However, she lost her virginity to rape which is not how she had imagined she would lose her virginity.

[9] The court was informed that A[...] had refused to come and testify in aggravation of sentence. Apparently, she explained to the prosecutor that she would not like to see the accused again. I do recall that during her testimony during the trial, she suffered a number of what seemed like panic attacks as a result of which the court had to take a few adjournments for her to regain her composure. I also observed that when she testified, for the most part, she would have her back towards the accused thus avoiding looking at him. Part of her evidence during trial was that when the investigating officer told her that it was the accused who was arrested for her rape, she was shocked as she recalled him from their locality in Sipolweni as his name was associated with criminal activities like stock theft. After her rape incident she would sometimes be walking with her husband in Kokstad and would come across the accused. He would avoid her. All this time, she did not know that he was the actual person who put her through the entire rape ordeal when he evidently knew her.

[10] In mitigation of sentence, the accused testified that he was born at Sipolweni Locality in Mount Ayliff on 12 August 1982. His father is still alive, but his mother passed on in 1999. He went to school up to grade 6 or standard 4. He had to drop out of school because when his father went to the labour centres, he never came back leaving his mother to raise five children alone. After dropping out of school, he started getting odd jobs in which he earned between R500.00 and R600.00 a month. He was married at some stage, but his wife left him in 2015. They had no children

when she left him. He now has two children, a boy who was born in June 2023 and a girl who was born on 16 January 2025. Their mother is unemployed. These children have no birth certificates and therefore do not get the child support grant as their mother is a foreign national from Lesotho. At the time of his arrest, he was employed by a certain Mr Mbotho doing grass cutting along the road where he earned between R1500.00 and R2000.00 a month. He used this money in contributing to the upbringing of these children. The mother of these children now looks after them and provides for them through odd jobs like doing laundry.

[11] He testified that he would like the court to sentence him leniently so that he can go back to his children and assist in raising them while he still has the energy to do so. He was asked by his counsel pertinently that, now that he has been convicted and two of his victims were in court, if would like to say anything to them. Instead of responding to that pertinent question, he repeated his request for a lenient sentence so that he can go to his children. On further prodding by his legal representative, he then apologised saying that he was doing so only because he has been convicted. He still maintained his innocence saying that he never raped S[...] and S[...]2. With regard to A[...], he testified that his DNA which was found in the vaginal swab taken from her on 31 August 2014 which linked him to her rape was from a consensual sexual intercourse he had with her on 16 June 2014. He therefore denied raping any of the complainants.

[12] In light of the accused's personal circumstances, the question is whether they, considered individually or cumulatively, are such as would justify a departure from the prescribed minimum sentences. In *Vilakazi*[2] the applicable sentencing considerations when a sentencing court embarks on the very difficult process of deciding on an appropriate sentence where prescribed minimum sentences are applicable, were explained as follows:

> "It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess upon a consideration of all the

[2] S v Vilakazi 2009(1) SACR 552 (SCA) at 560 g-h to 561 a-b.

circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in that context:

> 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.'

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*, which said that the relevant provision in the Act:

> 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exists which 'justify' … it.'"

[13] The accused watched his three victims breaking down as they narrated in quite some detail during the trial, what he did to them more than 10 years ago as if it had happened recently. He was not moved as he sat there stone faced, showing no emotion at all. At the conclusion of the trial, was convicted and even after conviction, during his evidence in mitigation of sentence, he persisted with the same attitude and stone facedness, further repeating his illogical stance that while his DNA was found in the swabs taken from the vaginal swabs of S[...] and S[...]2, on 13 March 2013 and 20 August 2014 respectively, he did not rape them. In respect of A[...], he persisted with his foolhardy notion that he had a consensual sexual encounter with her on 16 June 2014. That was his explanation for his DNA being found on a vaginal swab that was taken on 31 August 2014 from A[...]. The accused seems to be still in denial that he has been caught for crimes he was convinced he had gotten away with and convicted more than 10 years later. In the process, there was not even a

whiff of remorse, not at all. I have captured most, if not all his evidence as it relates to his personal circumstances. I have found nothing substantial and compelling in all of them. In fact, they are the kind of flimsy reasons referred to in *Malgas*. Therefore, the prescribed minimum sentences are applicable in all the three rape offences.

[14] As I conclude, it would be remiss of this Court not to say something about the how victims of sexual violence sometimes received little to no assistance to cope with the extreme violence that was perpetrated against them. In this case, the little counselling that was done was just discontinued without ensuring that the desired outcomes, whatever they may be, were achieved. S[...]2 testified that after three counselling sessions, she ran out of money to travel from her home to Mount Ayliff offices of the Department of Social Development. That was the end of her counselling support. No follow up was done on her, no attempts were made to visit her at her home at workable intervals when she did not show up for her counselling sessions. While this issue was not raised pertinently in respect of S[...] and A[...], I have no reason to believe that they were treated any better by the same office. As if that was not bad enough, they had to struggle to get witness fees when they attended trial. It was due to the assistance of warrant officer Dlomo, the investigating officer, who, with admirable dedication and sensitivity to them, took the trouble to fetch them from their rural homes and brought them to court and took them back home after court appearances. S[...] now works in fort Beaufort, more than 500 kilometres from Ntabankulu. She had to use her own money to travel for such a long distance, which must be quite substantial. This lackadaisical attitude by the relevant officials amounts to avoidable secondary traumatisation by the relevant government departments and officials, and insensitivity to victims of crime including those who are victims of gender-based violence.

[15] Mrs Nozibusiso Sukani, a social worker based at the offices of the Department of Social Development in Ntabankulu was called to court at short notice for purposes of establishing if her office would not be of assistance to the victims in this case. Thankfully, she was able to come, and she made clear undertakings that she will contact her colleagues in Fort Beaufort and in Durban to ensure that the victims of sexual violence in this matter are assisted with counselling sessions until they are able to live with their ordeal without feeling lonely, fearful or tormented. She

undertook to ensure that her colleagues give her written reports on the counselling sessions they give to these victims. As for A[...], because she is in Kokstad, which is not very far from her office, she undertook to personally handle her case. This is the kind of Ubuntu that both warrant officer Dlomo and Mrs Sukani have shown which must be applauded. This display of compassion and empathy is appreciated. It is to be hoped that they shall deal with all cases that they became aware of with the same compassion and empathy so as to avoid victims of sexual violence feeling that they are made to suffer secondary victimisation even by the offices that have a responsibility to look after such victims. The victims of sexual violence in this case have been left to fight for survival for far too long, and they have, alone, done very well. The courage of the victims in this matter who were literally children when they were brutally violated and were traumatised in the most abhorrent manner is admirable. But they have fought a lonely fight, they have fought courageously nonetheless and have all largely succeeded on their own. I have directed that this judgment be sent to the court manager of Ntabankulu and the head of office at the Department of Social Development in Mount Ayliff and the head of office at the Department of Social Development in Ntabankulu for their attention and corrective actions.

[16] The accused, having failed to satisfy the court as to the existence of substantial and compelling circumstances, is sentenced as follows:

1. Count 1, housebreaking with intent to commit an offence at the home of S[...], you are sentenced to three years imprisonment.
2. Count 2, housebreaking with intent to commit an offence at the place of residence of S[...]2, you are sentenced to three years imprisonment.
3. Count 3, the kidnapping of S[...], you are sentenced to five years imprisonment.
4. The sentences in counts 1 and 2 are ordered to run concurrently with the sentence in respect of count 3.
5. Count 4, the rape of S[...] you are sentenced to life imprisonment.
6. Count 5, the rape of S[...]2, you are sentenced to life imprisonment.
7. Count 6, the rape of A[...] you are sentenced to 15 years imprisonment.
8. In terms of section 50(2) of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007, the particulars of Thobilizwi Maqam, as a

convicted sexual offender, must be entered in the National Register for Sex Offenders.

9. In terms of section 120(4) of the Children's Act 38 of 2005 and section 41 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007, Thobilizwi Maqam is declared to be unsuitable to work with children and it is directed that his particulars be entered in part B of the National Child Protection Register.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State	: C Mkentane
Instructed by	: NDPP Mthatha
Counsel for the accused	: S.T. Kekana
Instructed by	: Legal Aid South Africa Mthatha
Date heard	: 07 August 2025
Date Delivered	: 08 August 2025