



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: CA &R89/2025

In the matter between:

AZOLA DERRICK MDALI

Appellant

and

THE STATE

Respondent

JUDGMENT

APPELS AJ:

[1] This is an appeal against the sentence of life imprisonment imposed on the appellant following his conviction on four counts of rape in the East London Regional Court. The four counts were taken together for purpose of sentence.

[2] The appellant has an automatic right of appeal in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977 by virtue of having been sentenced to life imprisonment by a Regional Court in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“Act 105 of 1997”).

[3] The imposition of a sentence is solely within the discretion of the trial court.¹ An appeal court may not interfere with a sentence merely because it would have imposed a different sentence to the one imposed by the trial court. It will only interfere with that discretion if there is a striking disparity between the sentence and that which the appeal court would have imposed, in other words if it is so entirely disproportionate to what the appeal court would have imposed that it warrants interference.²

[4] In addition to the aforesaid disproportionality, an appeal court may also interfere with a sentence upon a finding of a misdirection by the trial court.³

[5] The appellant in this matter had been convicted of more than two offences of rape and had not yet been sentenced in respect of those convictions. Therefore, in terms of Section 51(1) read with Part I of Schedule 2(a)(iii) of the Act 105 of 1997, the prescribed minimum sentence of life imprisonment applied.

[6] Accordingly, the trial court, upon sentencing the appellant, could only deviate from the prescribed minimum sentence of life imprisonment if it was satisfied that substantial or compelling circumstances existed to justify the imposition of a lesser sentence. The trial court found that no such circumstances existed and therefore sentenced the appellant to life imprisonment.

[7] The approach in determining whether substantial and compelling circumstances exist which justify deviation from the prescribed minimum sentence, was set out in *S v Malgas*.⁴ The court held that the traditional factors used to

¹ *S v Rabie* 1975 (4) SA 855 (A) at p857D-E

² *S v Malgas* 2001 (2) SA 1222 (SCA) at para 12

³ *S v Malgas*, *supra* at para 12

⁴ *S v Malgas*, *supra*.

determine an appropriate sentence should still be considered when deciding whether substantial and compelling circumstances exist.⁵

[8] The appellant submits that the trial court erred in not giving due weight to his personal circumstances. It was made clear in *S v Malgas*,⁶ that in sentencing an accused, a court has an “*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 exist which ‘justify’...it*”.

[9] In this matter, the appellant’s personal circumstances are that he is a 32-year-old man, married with three children aged twelve, six and three years. The children reside with the appellant’s mother in Durban. The appellant was previously employed as a security guard when the offence in respect of count 1 was committed and thereafter he was employed as a taxi driver when the offences in respect of counts 2, 3 and 4 were committed. He was unemployed at the time of sentencing. He had no previous convictions.

[10] In *S v Malgas* the court held that the prescribed sentences ought not to be departed from lightly and for flimsy reasons.⁷ In *S v Vilakazi*,⁸ the court held as follows regarding personal circumstances of an accused and departing from prescribed minimum sentences for “*flimsy reasons*”:

“The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. 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.”

⁵ *S v Malgas*, *supra* at para 25F

⁶ *S v Malgas*, *supra* at para 14

⁷ *S v Malgas*, *supra* at para 9

⁸ *S v Vilakazi* 2012 (6) SA 353 (SCA) at para 58

[11] There was nothing remarkable about the personal circumstances of the appellant which could have persuaded the trial court to deviate from the prescribed sentence. I therefore do not agree that the trial court erred in not giving due weight to the personal circumstances of the appellant.

[12] The appellant submitted that the trial court placed too much emphasis on the seriousness of the offence. I do not agree. In my view, the trial court in sentencing the appellant placed appropriate emphasis on the seriousness of the offences, and gave due consideration to all the other circumstances impacting on the appellant. There is no doubt that rape is a serious offence. In *S v Chapman*⁹ the Supreme Court held as follows regarding the nature and seriousness of the crime of rape:

“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.”

[13] The appellant also submitted that the sentence induced a sense of shock with reference to the personal circumstances of the accused.

[14] As stated above, there is nothing remarkable about the personal circumstances of the accused and in light of the seriousness of the offences, his personal circumstances must recede into the background.

[15] Furthermore, there are number of aggravating circumstances which in my view make the imposition of life imprisonment entirely appropriate and justified in this matter.

[16] Firstly, the accused is a serial rapist. He committed four rapes over a period of seven months. He committed the offences in respect of count 2, five months after he was arrested in respect of count 1. The offences in counts 2, 3 and 4 were committed over a period of two months while he was out on bail in respect of count 1.

[17] Secondly, the accused raped the complainant in respect of count 1, by pointing a firearm at her and threatening that he would shoot and kill her if she resisted.

⁹ *S v Chapman* 1997 (3) SA 341 (SCA) at para 3

[18] Thirdly, all the offences were carefully planned. The accused lured the complainant in respect of count 1 with the promise of a job interview, and in respect of counts 2, 3 and 4 he offered the complainants lifts in a motor vehicle while he worked as a taxi driver. In all four cases he took the complainants to secluded bushy areas where he raped them.

[19] Fourthly, two of the complainants were very young. In this regard, it is notable that the complainants in respect of counts 2 and 4 were in high school at the time and only 16 years old when the offences were committed. The complainant in respect of count 4 was in grade 11. The rape affected her to such an extent that she failed grade 11. During the ordeal, she begged and pleaded with the appellant not to rape her and even told him she was 12 years old in the hope that he would take pity on her and decide not to rape her.

[20] Finally, the appellant showed no remorse. He pleaded not guilty to all four counts and made the complainants re-live the trauma of the events by testifying in court and subjecting them to cross examination. He persisted in presenting a false version in court, even in the face of overwhelming evidence.

[21] The test for when the prescribed sentence may be departed from was expressed as follows in *S v Malgas*:¹⁰

“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.”

[22] In *S v Vilakazi*¹¹, the court held that the test set out in *S v Malgas* essentially means that *“it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.”*

[23] Given the seriousness of the offences committed by the appellant and the aggravating circumstances set out above, I do not find that the sentence was

¹⁰ *S v Malgas supra* at para 25

¹¹ *S v Vilakazi, supra* at para 15

shocking and disproportionate to the crime or disproportionate to any sentence that this court would have imposed on the appellant.

[24] The appellant also submitted that the trial court did not give due regard to the fact that the accused has been in custody since his arrest on counts 2, 3 and 4 in 2022 and has spent three years in custody while awaiting trial. The time spent in custody prior to conviction and sentence was raised as a compelling and substantial circumstance justifying a deviation from the prescribed minimum sentence.

[25] In dealing with a sentence of life imprisonment, the Supreme Court of Appeal held in *Ngcobo v S*,¹² that the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence imposed is disproportionate and unjust. It was further held that two years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.¹³

[26] The trial court therefore did not misdirect itself when it found that the period spent in custody before sentencing did not amount to substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.

[27] I am therefore not of the view that the court *a quo* misdirected itself in relation to the sentence imposed on the appellant.

Order

[28] Accordingly, the following order is issued:

[1] The appeal against sentence is dismissed.

[2] The sentence imposed by the court *a quo* is confirmed.

G APPELS

ACTING JUDGE OF THE HIGH COURT

¹² *Ngcobo v S* 2018 (1) SACR 479 (SCA) para 14.

¹³ *Ngcobo v S*, *supra* at para 21

J LAING
JUDGE OF THE HIGH COURT

Heard: 3 September 2025
Delivered: 9 September 2025

APPEARANCES:

For the appellant: Mr. H. Charles
Instructed by: Legal Aid South Africa
MAKHANDA

For the respondent: Ms. H. Obermeyer
Instructed by: The Director of Public Prosecutions
94 High Street
MAKHANDA