



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: CA&R 102/2025

In the matter between:

W[...] N[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

RUSI J

[1] The appellant was convicted and sentenced to life imprisonment on 11 June 2021 by the Bizana Regional Court. His conviction and sentence followed his plea of guilty upon a charge of rape. The plea proceedings, during which the appellant was legally represented, were in terms of section 112 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The sentence of life imprisonment is the minimum sentence prescribed by section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) where the victim of rape is below the age of 16 years. The victim in the present matter was 7 years of age when the rape took place. The prescribed minimum sentence for the offence could, in terms of section 51(3) of the same Act, be departed from where the court was satisfied that there existed compelling and substantial circumstances justifying the imposition of a lesser sentence.

[3] The court a quo found that no compelling and substantial circumstances existed in the appellant's case. Hence, the sentenced of life imprisonment. This appeal, for which the appellant did not require leave of the court a quo, is against that sentence.¹ In this Court, the appellant was legally represented by Mr *Madywede*, and Ms *Bodlo* appeared for the respondent.

The factual background

[4] In the court a quo, the prosecution had alleged that on or about 11 May 2017, the appellant raped [A.N.] then a 7-year-old girl, *per vaginum*. It became a common cause fact that the complainant is the appellant's niece. After the rape, the complainant was forced to relocate to Durban, KwaZulu-Natal Province to live with her mother. For reasons that will become clearer later in this judgment, it is necessary to reproduce the material portion of the appellant's plea explanation statement where he stated as follows:

"I wish to state as follows; on the 11th day of May 2017, I enjoyed myself with my friends in a local tavern. Late I went home (sic). On arrival I went to watch television at the lounge. I then undressed [A], her thighs (sic). She was sleeping on the mattress with other children at the lounge. I also lowered my trouser to the knees. I then inserted my penis into her vagina. I admit that [A] at that time was 7 years old. I admit that my conduct on this day was against the law. I am also remorseful for what I did."

¹ Section 309(1) of the CPA provides for the automatic right of appeal to a person who has been sentenced by a Regional Court to life imprisonment in terms of section 51(1) of the CLAA.

[5] It is on the strength of these facts that the appellant was convicted of rape. Evidence of the complainant's examination by Dr Sokoya was presented in the form of the medico-legal report (the J88). The complainant's examination took place on 13 May 2017, two days after the rape incident. Dr Sokoya's clinical findings were that the complainant had *'purulent vaginal discharge with a wound in the vagina'*. He concluded that these findings were in keeping with 'pediatric sexual assault'.

[6] Following his conviction, the appellant contented himself with submissions that his legal representative made from the bar in mitigation of sentence. It was submitted on his behalf that he was 25 years of age. His highest standard of education was Grade 10. He had no children and worked as a builder and both his parents were deceased. He pleaded guilty to the offence without wasting the court's time and this was a sign of remorse notwithstanding the fact that the available evidence overwhelmingly established his guilt. His remorse became evident when he broke down during consultation in preparation for the trial of his case. He had consumed liquor which impaired his faculties.

[7] The appellant's legal representative acknowledged, however, that being under the influence of intoxicating alcohol when he committed the offence was no excuse and would not exonerate the appellant from being punished in keeping with the seriousness of the offence that he committed. The court a quo was asked to consider as compelling and substantial circumstances warranting a deviation from the prescribed sentence of life imprisonment the fact that the appellant was a first offender and pleaded guilty to the charge.

[8] Apart from this, it was submitted that since the appellant was a first offender there were prospects that he may be rehabilitated. According to the defence, it would not be in the interests of justice to impose a lengthy term of imprisonment which would 'seriously damage the appellant.'

[9] In aggravation of sentence, the prosecution highlighted the seriousness and prevalence of the offence in society, and the fact that in committing the rape, the appellant breached the trust that the young complainant reposed in him as his uncle and he breached the moral duty to protect her as a young child. The prosecution submitted, further, that since the complainant was raped, her performance at school dropped and she is suffering from urinary incontinence. This was according to the information that was placed before the prosecutor concerning the victim. The information went on to suggest that the victim was isolating herself and that the traumatic effects of the rape were visible when she cried during consultation with the prosecutor in preparation for the trial of the matter. It was the prosecution's submission that the complainant would continue to suffer from the psychological effects of the rape. He invited the court to decline the invitation to deviate from the prescribed sentence of life imprisonment. In this regard, the prosecution submitted that the appellant's submissions in mitigation of sentence were bereft of compelling and substantial circumstances that would justify that deviation.

The findings of the court a quo on sentence

[10] In imposing life imprisonment on the appellant, the learned Regional Magistrate found that the blood relations between the appellant and the complainant aggravate the offence in that as the complainant's uncle, he was her *in loco parentis* with a duty to protect her from harm. In rejecting the contention that the appellant's conduct was influenced by his intake of alcohol, the court a quo reasoned that from the appellant's ability to recount the events that led to the rape incident it must be inferred that his consumption of alcohol did not impair his mental faculties as submitted by her legal representative.

[11] The learned Regional Magistrate further found that the appellant's plea of guilty is not in and by itself, indicative of remorse and of the fact that he has potential to be rehabilitated. In this regard he found that the fact that the

appellant considered a 7-year-old child as a person he could have sexual intercourse with, put paid to the contention that he was a candidate for rehabilitation.

[12] The court a quo found that none of the factors stated on the appellant's behalf in mitigation of sentence stood out as compelling and substantial circumstances that would justify the imposition of a lesser sentence. Furthermore, the court a quo found that the appellant's youthful age, when considered in conjunction with the facts of the case, was no sufficient ground for deviation from the prescribed sentence.

The grounds of appeal

[13] In appealing against his sentence, the appellant contends that:

- (i) The sentence is so severe that it induces a sense of shock.
- (ii) The court a quo erred in finding that the personal circumstances of the applicant do not constitute compelling and substantial circumstances.
- (iii) The court overlooked the fact that the appellant was a first offender and therefore capable of being rehabilitated; it overlooked the fact that he pleaded guilty, which a sign of remorse; and
- (iv) It further erred 'in overemphasizing the 'triad' of sentencing.'

Counsel's submission in this appeal

[14] Even though in the appellant's heads of argument it was submitted that the plaintiff's personal circumstances cumulatively considered constituted compelling and substantial circumstances, Mr *Madywede* was constrained to concede that there is nothing compelling and substantial about them.

[15] While he acknowledged the seriousness of the offence of which the appellant was convicted, Mr *Madywede* submitted that the court a quo ought to

have considered the proportionality of the sentence of life imprisonment to the offence committed. He took the view that the sentence of life imprisonment was disproportionate to the offence committed by the appellant.

[16] I interpose to mention that disproportionality as ground of appeal was not pertinently set forth in the notice of appeal but only in the appellant's heads of argument. As a general rule, an appellant is confined to the grounds of appeal that he or she set forth in the notice of appeal.² However, newly raised questions of law may, as an exception, be allowed. The disproportionality contention is a question of law, and there was no objection by the respondent to the issue being raised. For these reasons, we exercised our discretion in favour of hearing the argument newly raised.³

[17] Mr *Madywede* further submitted that the court a quo ought to have considered the appellant's young age and the fact that he had room for rehabilitation. He went on to submit that the prospects of the appellant's rehabilitation were discernible from the fact that this was his first conviction and he pleaded guilty promptly. Mr *Madywede* was at pains to explain the paucity of the facts that the appellant presented in his plea explanation as to the circumstances in which he committed the rape, a matter I will deal with when it is opportune to do so in this judgment.

[18] In persisting with the respondent's opposition of the appeal, Ms *Bodlo* submitted that the appellant had an opportunity to take the court into confidence in his guilty plea by presenting more facts which would aid the understanding of what motivated the offence and his plea of guilty. Such extrinsic facts, she said, would assist in the court's determination whether life imprisonment was just despite the absence of compelling and substantial circumstances. Ms *Bodlo* emphasized as aggravating factors the blood relations that exist between the

² Du Toit's Commentary of the Criminal Procedure Act [Service 69, 2022] at 30-28.

³ *S v Nel* 1987(4) SA 276 (O) 279F-I.

appellant and the complainant, and fact that the offence left the complainant with an injury. She further submitted that in the absence of any facts regarding the quantity of alcohol that the appellant had consumed in relation to the time he committed the rape, no weight should be attached to his alleged intoxication as being what influenced his conduct.

The legal principles

[19] It is by now trite that an appellate court cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. But even where there is no material misdirection an appellate court may be justified to interfere with the sentence imposed by the trial court where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking” and “startling” or “disturbingly inappropriate”.⁴

[20] Explaining this principle in the context of sentences which are imposed under the CLAA, the Court in *S v Bailey*⁵ said the following:

‘What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore, that a proper enquiry on appeal is whether

⁴ *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (19 March 2001) (*Malgas*), para 12.

⁵ 2013 (2) SACR 533 (SCA), para 20.

the facts which were considered by the sentencing court are substantial and compelling or not.”

[21] The absence of substantial and compelling circumstances from the personal circumstances of the appellant is not in and of itself the end of the inquiry. As held in *Vilakazi*,⁶ a prescribed sentence cannot automatically be assumed to be proportionate in a particular case. The court is enjoined in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the offence in question.

Discussion

[22] The right to human dignity is a right without which the rest of the rights and freedoms espoused in the Constitution are rendered illusory. Rape is one of the devastating violations that a person can endure. It strips the victim of his or her dignity, and sense of self. Apart from being an act of cruelty and violence, it constitutes profound betrayal of trust and humanity.⁷

[23] The prevalence of the offence of rape in society is a fact beyond controversy. Its damaging effect on the lives of the victims, coupled to the need to curb the insidious thirst of the perpetrators for control, power and humiliation, their sense of entitlement, and the need to protect its victims, must have been among the considerations that gave rise to the offence of rape being singled out as one of the offences that are punishable by harsh sentences which the CLAA prescribes.

⁶ *S v Vilakazi* 2009 (1) SACR 552 (SCA) (*Vilakazi*), para18.

⁷ See also, *S v Chapman* 1997 (3) SA 341 (SCA), paras 3-4; *Vilakazi*, para 1.

[24] Since the absence of compelling and substantial circumstances from the appellant's personal circumstances was conceded by his legal representative, I will limit this Court's inquiry to whether the sentence that the court a quo is disproportionate to the offence committed by the appellant. In this regard, 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; and the culpability of the offender must be considered.⁸ This accords with the principle that the traditional factors that are to be considered in passing sentence remain relevant in the consideration of sentence under the minimum sentence regime.⁹

[25] There is a fundamental point to be made regarding the facts that the appellant presented in the court a quo in pleading guilty to the rape charge. I have quoted those facts above. By any standard of cogency, the facts that were placed before the court a quo leave one in the dark regarding what motivated the offence. In as much as in his plea explanation the appellant merely mentioned that 'he had earlier on the day of the rape enjoyed himself with his friends at the local tavern,' no details were given regarding what this entailed. That he was intoxicated emerged in vague terms when submissions were made on his behalf in mitigation of sentence. Mr *Madywede* readily acknowledged these difficulties and in his words 'they stood as weaknesses in the case of the appellant'.

[26] The use of the phrase that 'a sentence induces a sense of shock', without more, amounts to no more than an expression of unfounded disapproval of how the court's sentencing discretion was exercised. More is entailed in saying that the sentence induces a sense of shock – there must be a consideration of what society requires or expects of the law in punishing crime. The interests of society are never well served by too harsh or too lenient a sentence. Circumstances vary and punishment must ultimately fit the true seriousness of

⁸ *S v Dodo* 2001 (3) SA 382 (CC) para 37; *Vilakazi*, footnote 6 supra, at para 15.

⁹ *Malgas* para 9-10.

the crime – a balance has to be struck.’¹⁰ Thring J once cautioned in *S v Sunday & another*,¹¹ that ‘a sentence which is shockingly or strikingly or disturbingly too light is as much a miscarriage of justice as one which is shockingly or strikingly or disturbingly too heavy.’¹² In this regard, the learned Judge emphasized the Court’s duty on appeal to ensure that proper and adequate sentences are imposed, so that society can be appropriately protected against criminal activities, inter alia, by the deterrent effects of those sentences.

[27] Is this case the kind for which life imprisonment is proportionate to the offence committed? The starting point is that rape is a serious offence. The Supreme Court of Appeal, has recently re-iterated in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*,¹³ that rape has become a scourge or cancer that threatens to destroy both the moral and social fabric of our society.¹⁴

[28] From the scant facts that the appellant presented in his plea explanation, it is difficult to fathom how it came about that in his eyes, a 7-year-old child could have been an appropriate person to perform a sexual act on. In the same way that this question was mind-boggling to the trial court, it continues to trouble our minds in this Court. Apart from this fact, the complainant must have trusted the appellant as her uncle and considered him a figure of authority. The appellant misused this trust and took advantage of her.

[29] It is by now trite that the sentence of life imprisonment in the context of rape cases ought to be reserved for the most gruesome cases of rape. The dictum of the Court in *Mudau v S*¹⁵ is instructive, where it said:

¹⁰ 2011 (1) SACR 9 (SCA), para 9.

¹¹ *S v Sunday & another* 1994 (2) SACR 810 (C).

¹² *Id.*, at 820d-e.

¹³ *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (main and supplementary judgment) (248/2022) [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) (24 April 2024).

¹⁴ *Id.*, paras 4 and 5.

¹⁵ *Mudau v S* (764/12) [2012] ZASCA 56 (9 May 2013).

[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi*, Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that 'women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa'.

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in *S v Abrahams* that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing."¹⁶

[30] The complainant was left with an injury that must have caused her embarrassment over and above discomfort. She had a wound in the vagina with 'purulent vaginal discharge'. The purulence of the vaginal discharge suggests the presence of pus in the young complainant's private part. There was, furthermore, no contestation of the fact stated by the prosecutor that the rape left her suffering from urinary incontinence. The injury sustained by the young complainant and the sequelae of the rape are by no means slight.

[31] It is furthermore not apparent from the plea explanation when the appellant accepted responsibility for his actions. On the face of the record, the rape took place on 11 May 2017. The proceedings commenced in the Bizana Regional Court on 03 March 2021, with the plea of guilty tendered on 11 June 2021. There is no indication on record why it took the appellant 4 years to plead guilty to the offence. While this lacuna cannot solely be blamed on the

¹⁶ See also *S v Brahams* 2002 (1) SACR 116 (SCA), para 29.

appellant, it militates against him that he did not give any evidence in mitigation of sentence in circumstances where not even his plea explains with any degree of clarity what motivated his actions and what had since led to his plea of guilty. He did not take the court a quo into confidence. This is not indicative of a person who has prospects of rehabilitation and who understands the reprehensibility of his actions.

[32] Even if we were to find that the appellant has prospects of being rehabilitated, in *S v Swart*,¹⁷ the Court pointed out that each of the elements of the purpose of punishment need not be given the same weight, but rather that proper weight must be accorded to each according to the circumstances of the case. It further held that ‘serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.’

[33] Lastly, and in any event, that the applicant’s faculties were impaired by the alcohol he consumed earlier on that day is unavailing to him. There is good reason why legal authority on the effect of intoxication is to the effect that it will not be a mitigating factor in every case. It is instructive to examine some of those authorities. Learned author Terblanche¹⁸ states that the intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. It has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished. These views found expression in *Director of Public Prosecutions, Grahamstown v Mzukisi Peli*¹⁹ where it was said:

‘It is trite that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it must be shown that the consumption of alcohol had impaired or affected the

¹⁷ 2004 (2) SACR 370 (SCA) at para 12.

¹⁸ SS Terblanche (Guide to Sentencing in South Africa, 3rd Ed, (Lexis Nexis) at page 227 para 7.3.9.

¹⁹ *Director of Public Prosecutions, Grahamstown v Mzukisi Peli* (533/2017) [2018] ZASCA 40 (28 March 2018).

respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness.'²⁰

[34] In the matter before us, there is no explanation regarding the type of alcohol he had consumed, its quantity and how it affected him; as well as when he had consumed that alcohol in relation to his arrival at his home where he raped the complainant. The court a quo correctly rejected the contention that his faculties were impaired by his intake of alcohol. Floodgates would be opened if offenders were to be allowed, without more, to justify their reprehensible conduct by stating that it was influenced by intoxication of alcohol. In fact, in the context of the appellant's assertion of intoxication, it is nothing more than his convenient way of avoiding severe punishment.

Conclusion

[35] In the present case the learned Regional Magistrate articulated the legal principles applicable in sentencing under CLAA with commendable clarity. Even though he did not specifically mention the proportionality element of sentencing, the record itself indicates that he carefully weighed the circumstances of the case, the seriousness of the offence and the appellant's culpability. He was alive to the court's duty to consider the interests of society by not imposing an inadequate sentence. There is no basis to fault the court a quo's decision on sentence. The appeal must accordingly fail.

Order

[36] In the result, I would make the following order:

²⁰ Id para 9.

1. The sentence of life imprisonment imposed by the Regional Magistrate, Bizana, is confirmed.
2. The appeal is dismissed.

L. RUSI
JUDGE OF THE HIGH COURT

CENGANI-MBAKAZA AJ:

I agree.

N. CENGANI-MBAKAZA
JUDGE OF THE HIGH COURT
(ACTING)

Appearances:

For the appellant : *A Madywede*
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Mthatha Justice Centre

For the respondent : *N Bodlo*
Office of the Director of Public Prosecutions
Mthatha

Date heard: 04 February 2026

Date delivered: 10 March 2026