



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

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 10 April 2026

SIGNATURE:

CASE NUMBER: CA &R 174/25

In the matter between:

PHELISILE NONGWANA

Appellant

and

THE STATE

Respondent

Summary: Appeal – rape – consent – sentence – shocking - life imprisonment-Criminal Procedure Act 51 of 1977-Criminal Law Amendment Act 105 of 1997 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Appeal dismissed.

JUDGMENT

Ntlama-Makhanya AJ (Jolwana J concurring)

- [1] On 27 February 2024, the appellant was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) and was declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000. This followed his conviction on four (4) charges of rape by the New Brighton Regional Court, Eastern Cape. He pleaded not guilty, thus he was found guilty as charged. This appeal came before this Court as an automatic right to appeal in terms of section 18(4)(a)(ii) of the Superior Court Acts 10 of 2013 against sentence only.
- [2] The appellant submitted that the sentence of life imprisonment was shockingly disproportionate to the crime of rape. He asserted that the Court *a quo* erred by not finding substantial and compelling circumstances that could have enabled it to deviate from the prescribed sentence of life imprisonment.
- [3] In these circumstances, it had been established that the imposition of sentence is within the judicial discretion of the Court *a quo*. The Appellate Court will only interfere if it is satisfied that the Court *a quo* committed a material misdirection in the application of the law.¹ Therefore, this is the context within which this Court will apply and balance the tripartite model of sentencing relating to the nature of the crime, the personal circumstances of the appellant/ victim and the interest of society.²

¹ S v Skenjana [1985] ZASCA 10 para 10.

² S v Dodo 2001 (5) BCLR 423 (CC) para 6.

- [4] Before I deal with the question raised in this case whether the Court *a quo* misdirected itself, it will be prudent that I set out brief facts without exhausting them.

BACKGROUND FACTS

- [5] The appellant was charged with four (4) counts of rape and sentenced to life imprisonment. The complainant is partially paralyzed on her right side after suffering stroke in the year 2021 which left her using a walking crutch to balance her mobility. On the day in question, she was from the clinic to fetch her medication. Thereafter, she passed by her grandmother and uncle's homestead at Yashomati Street on 1 November 2022 where there was going to be a traditional ceremony on Saturday. On that evening, after taking her medication she went to sleep in the room where the traditional beer was stored. She then noticed someone who came through the window into the room, who appeared to be the appellant. She called Liena and Nosisana (appellant's girlfriend) and the appellant responded that there was no one who was going to hear her. The appellant took off his short and went to the complainant and raped her four (4) times by "inserting his "thing" (penis) and did "up and down movement" until he ejaculated". He was about to do the same for the 5th time at around 04h45 when he came and said he wanted the morning's when Liena knocked and disturbed him.
- [6] There are factual disputes relating to what happened when Liena arrived at the house. Thus, of importance, as I do not exhaust the facts, the complainant told Liena that she was raped by the appellant. Thereafter, they went to KwaZakhele Police Station and were taken to Dora Nginza Hospital.
- [7] This background brings me to the gist of this appeal to identify issues that became contentious in this case.

ISSUES

[8] This Court is required to establish whether:

- (i) *the sentence was shockingly disproportionate to the crime;*
- (ii) *the Court a quo misdirected itself in the imposition of the sentence;*
and
- (iii) *this Court should interfere and deviate from the imposed sentence.*

[9] Pursuant to these issues, to what extent do they unearth the substance of this appeal?

PARTIES' SUBMISSIONS

Appellant's submissions

[10] The appellant, following his sentence to life imprisonment and the declaration of his unfitness to possess a firearm, submitted that the sentence was shockingly disproportionate to the crime of rape. He had a consensual intercourse with the complainant. He did not dispute that he had sexual intercourse with the complainant. He submitted that the complainant initiated sexual intercourse and was therefore consensual. In addition, he has a girlfriend whom they sat with that day, and he could have had sexual intercourse with her instead of the complainant. He submitted that the complainant was naked when family members arrived in the morning and hence her allegation that she was raped by him whilst he was fully clothed.

[11] He further contended that the Court *a quo* misdirected itself and submitted that:

- (i) *the state failed to consider that there was no evidence depicting extent of psychological trauma suffered by the [complainant] because of rape;*
- (ii) *the Court a quo erred in not considering that there has not been extraneous violence and physical injuries other than those inherent to the offence; and*
- (iii) *the court a quo erred in not considering that there were no physical injuries that were inflicted by the appellant.*

[12] In addition, he submitted in mitigation of sentence that the Court a quo could have found substantial and compelling circumstances relating to the fact that:

- (i) *He is 50 years old and passed grade 7;*
- (ii) *He has two minor children of 14 and 8 years who were born of the same mother and receiving a child supporting grant;*
- (iii) *His parents passed away and was currently serving a 5-year sentence for car theft which was unrelated to the current offence of rape;*
- (iv) *The Court should consider the imposition of the sentence which is less than the prescribed sentence;*
- (v) *Further, the Court a quo should have considered that he had consumed liquor and*
- (vi) *His previous convictions were not related to the offences committed in this case.*

[13] It is essential to consider the application of the legal framework in this matter.

LEGAL FRAMEWORK

[14] Rape is defined in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) as follows:

'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'

- [15] The inclusion of sexual penetration as part of the statutory prohibition of the commission of rape consolidates the legislative intention to tighten the grounds that may be used as a gateway in the interpretation of the crime of rape. In this regard, sexual penetration is defined as including:

'any act which causes penetration to any extent whatsoever by:

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person.'

- [16] This definition is of value because it was preceded by section 51(3)(aA) of the Criminal Law Amendment Act 105 of 1997 that provides a foresight into the circumstances that are essential in the imposition of a sentence. This section rejects any form of reason or justification that will be used as a determinant of substantial and compelling circumstances. The said section reads as follows:

'When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;*
- (ii) an apparent lack of physical injury to the complainant;*

- (iii) *an accused person's cultural or religious beliefs about rape; or*
- (iv) *any relationship between the accused person and the complainant prior to the offence being committed.*

[17] I must state that these provisions are designed to protect everyone from any form of violence that undermines their equal worth as prescribed in terms of section 12 of the Constitution of the Republic of South Africa, 1996 (Constitution). In this instance, section 12 upholds the dignity of everyone to ensure that no one is to be treated in a cruel and degrading way. Courts are therefore enjoined in terms of section 39(2) to ensure the promotion of values which underlie an open and democratic society which is based on freedom and equality.

[18] How does this framework address the main issue of non-consensual sexual intercourse that emanates from this matter, particularly on the imposition of a sentence of life imprisonment following the appellant's conviction? How far should the courts go in exercising their discretion in determining a just sentence relating to the commission of the crime of rape? How should they approach the issue of interpretation regarding the imposition of a sentence? It is imperative that I examine the extent to which these questions address the subject of contention herein.

DISCUSSION

[19] It is settled and well established that the appellate court may interfere with the decision of a lower court if there is a material misdirection or the sentence imposed induces a sense of shock. I must state that I will not exhaustively deal with the factual background that was articulated in the Court *a quo* which resulted in the conviction and sentencing of the appellant. I will solely address the grounds put forth by the appellant whether they constituted substantive and compelling circumstances that could have been considered by the Court *a quo*.

This is guided by Maya DP in *S v Hewitt*³ who located the imposition of sentencing and held that:

*'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appeal court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, ... [s]omething more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. ... And in such instances the trial court's discretion is regarded as having been unreasonably exercised. It is against this backdrop that the question, whether the court a quo exercised its sentencing discretion improperly or unreasonably in the circumstances of this case, must be determined.'*⁴

[20] The appellant was charged with four (4) counts of rape and was convicted as charged and sentenced to life imprisonment in terms of section 51(1) of CLAA. It is also worth mentioning that the appellant made an admission in terms of section 220 of the Criminal Procedure Act 51 of 1977 (CPA) and confirmed that he sexually penetrated the complainant and contended that it was consensual. He further said that the complainant “demanded” sexual intercourse with him.

[21] I am of the view that the legislature was not misguided when it prescribed life imprisonment as a minimum sentence for the crime which requires the courts to objectively weigh the circumstances of each case relating to its imposition. It sought to ensure that the imposition of a severe sentence of life imprisonment will not be departed from lightly except for established substantial and compelling circumstances that may justify deviation. Nugent JA in *S v Vilakazi*⁵ cited with approval Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997 the

³ *S v Hewitt* 2017 (1) SACR 309 (SCA).

⁴ *Ibid* paras 8-9, (footnotes omitted).

⁵ *S v Vilakazi* 2009 (1) SACR 552 (SCA).

listed grounds that justify the imposition of life imprisonment, and which read as follows:

- (i) *'Where the victim is a girl who is under the age of 16 years;*
- (ii) *where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- (iii) *when the crime was committed by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- (iv) *when the crime was committed by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;*
- (v) *when the crime was committed by a person, knowing that he has acquired immune deficiency syndrome or the human immunodeficiency virus;*
- (vi) *where the victim is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;*
- (vii) *where the victim is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973; and*
- (viii) *where the crime involved] the infliction of grievous bodily harm,⁶ (emphasis mine).*

[22] These grounds are essential in this appeal because they constitute a broad framework in determining the justifiability of the imposed sentence of life imprisonment. They are of direct relevance to the mitigating factors that were submitted by the appellant for consideration by this Court.

[23] In this appeal, the appellant sought to persuade this Court that the imposition of the term of life imprisonment was shocking and disproportionate. His submission that the complainant “demanded” sexual intercourse with him amounted to consensual sex was beyond bizarre. Let me reiterate, the appellant’s claim that

⁶ *Ibid* para 12 (footnotes (omitted)).

the complainant did not only consent but “demanded” sexual intercourse is farfetched and false. He misplaced the impact of the seriousness of the crime and lied about the complainant having consented to sexual intercourse with him.

- [24] In addition, appellant’s Counsel sought to persuade this Court that the complainant did not suffer any physical injuries because of the rape. I am perplexed that the absence of violence and non-existence of injuries could be used as a mitigating factor in a sentence relating to the allegations of the crime of rape. I am having difficulty with the appellant’s submission because the absence of physical injuries was long addressed in section 51(3)(a)(A)(ii) of the Criminal Law Amendment Act 105 of 1997. This section dispelled any circumstance that may be used as a ground upon which the absence of injuries may be justified. Madjiet JA in *Mudau v S*⁷ in his endorsement of section 51(3)(a)(A) of the Criminal Law Amendment Act 105 of 1997 held that:

‘[The] absence of physical injuries should not be interpreted literally because it would require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences.’⁸

The injuries might be minor and not out of ordinary as the appellant’s Counsel submitted. The scars and emotional trauma suffered by the complainant because of rape should not be gratuitously thrown out of the scope for the seriousness of the offence and the impact it had on her. This argument about absence of injuries undermines the entire legal framework and the principles of criminal law and is totally misplaced.

- [25] Another submission made on behalf of the appellant was that there was no evidence that the complainant was undergoing therapy. This ground indicated not only lack of remorse but also a complete misunderstanding of the seriousness of

⁷ *Mudau v S* 2013 (2) SACR 292 (SCA).

⁸ *Ibid* para 26.

the crime of rape. The appellant's grounds of appeal regarding the non-existence of evidence depicting the extent of psychological trauma suffered by the complainant was unfortunate. The legislature was not amiss in the promulgation of section 51(3)(a)(A) of the Criminal Law Amendment Act 105 of 1997. It moved beyond physicality to the depth of the impact of the crime of rape relating to psychological and emotional trauma suffered by victims who had been subjected to serious crimes such as rape. There are established facts and undisputed medical evidence that the complainant did not suffer serious physical injuries. These facts do not constitute any justification that the unlawful vaginal penetration should be discarded into a "hollow ring". They do not diminish the fact that the complainant was unlawfully penetrated and therefore violated. The fact that the complainant was vaginally penetrated four (4) times degraded and humiliated her which justified the imposition of the sentence of life imprisonment.

[26] The appellant's personal circumstances and his mitigating factors did not meet the minimum threshold of establishing substantial and compelling circumstances. Rape continues to be classified as an "outrageous crime that is meant to destroy, inflict harm and suffering of the complainant with the consequent result of its effect on the family and societal interests".⁹ The impact of rape leads to the decay of the communal and moral fibre that shackles the foundations of the respect of the humanity of the person.

[27] Non-consensual sexual intercourse was frowned upon even before the attainment of democracy as a despicable, disgraceful and horrible crime that undermined the protection of fundamental rights. Lessons are deduced from Heath J in *S v Ncanywa*.¹⁰ In that case, Heath J considered the principle of consent relating to the rape of the wife by her husband. The application of Ciskeian Law was used as an interpretative legal framework to justify the rape of

⁹ Vilakazi (note 5 above).

¹⁰ *S v Ncanywa* 1992 (2) SA (Ck), 26 November 1992.

the wife by her husband. Heath J had analysed the arguments placed before the Court and held that:

'... the absence of consent to sexual intercourse could not and ought not to be ignored. To withhold consent to sexual intercourse unilaterally, ..., may be contrary to marital obligation, but it did not entitle the husband to take the law into his own hands by having intercourse with his wife against her will,'¹¹ (emphasis mine).

Heath J went on to state that:

'I cannot be party in a judgment which would proclaim to the community that by the law of South Africa and Ciskei in this year 1991, that a man may deliberately, knowingly and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner,'¹² (emphasis mine).

[28] Heath J foregrounded the content of the purpose of sentence by his analysis of the principle of consent which then, through the lens of that background enabled Ponnar JA in *S v Matyityi*¹³ to constitutionalize the substance of the legislative role in sentencing and held that:

'Our courts derive their power from the Constitution, and they like other arms of the state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness"

¹¹ *Ibid*, analysis extracted from Kreigler M "Last month's law reports" May 1992, *Legal Update*, *De Rebus*, 341-343.

¹² *Ibid*.

¹³ *S v Matyityi* 2011 (1) SCAR 40 (SCA).

*or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness- Predictable outcomes. not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.*¹⁴

- [29] It is essential to note that Ponnau JA restated the significance of the imposition of a sentence as it was laid down by Marais JA in *S v Malgas*¹⁵ that it falls within the discretion of the court and should be viewed through an understanding that:

*‘... 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 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. ...’*¹⁶
(emphasis mine).

- [30] I must mention that this Court did not take lightly the impact of the severity of the term of life imprisonment. It was well articulated by Mpati JA in *Rammoko v Director of Public Prosecutions*¹⁷ who held that:

‘Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are,

¹⁴ *Ibid* para 23.

¹⁵ *S v Malgas* 2001 (1) SACR 469 (SCA).

¹⁶ *Ibid* para 9.

¹⁷ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

unwarrantedly, held to be present. In the present matter evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important.”¹⁸

[31] I am encouraged by Mpati JA because the courts are required to be cautious in the exercise of their discretion. This Court will therefore not turn a ‘blind eye’ to the limitations relating to the imposition of justifiable sentences. It acknowledges that sentencing courts are not meant to be “slaughterhouses” of those found to have committed serious crimes. The Court is required to objectively determine the merits of each case relating to sentence to eliminate what may be viewed as a sacrifice of the offender on the altar as a form of deterrence of future crimes.¹⁹

[32] This Court does not view the protection of people living with disabilities through the lens of victimhood. Its approach is its advancement of a survivor centred approach that gives effect to a dignified status of the person and not a continued perpetuation of stigmatization as a “victim” of rape. The infliction of harm and humiliation not only took advantage of the complainant but destroyed her dignity as well. The seriousness of the crime of rape cannot be overemphasised because the complainant was in the sanctity of an environment that is conducive for her to live with no fear of being subjected to cruel treatment. Heath J might have sounded emotional in *Ncanywa* in distancing himself from being part of a community that perpetuated the crime of rape against women. However, his condemnation of the crime of rape in marital relationships was a testimony that courts should protect the rights of vulnerable members of society. The appellant exercised his abhorrent dominance in circumstances where the complainant was supposed to have been in his safe hands. In all the circumstances, the Court *a quo* was correct in its conclusion that the appellant had not established any substantial and compelling circumstances justifying a departure from the

¹⁸ *Ibid* para 13.

¹⁹ See Mthiyane JA in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 35.

prescribed minimum sentence of life imprisonment. It stands to reason that the appellant's appeal against the sentence of life imprisonment is not justifiable.

[34] As a consequence, the following order is made:

[34.1] The appeal against the sentence of life imprisonment is dismissed.

N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
MAKHANDA

I agree

M JOLWANA
JUDGE OF THE HIGH COURT
MAKHANDA

Delivery: *This judgment is issued by the Judge whose name appears herein and is delivered and submitted to the parties /legal representatives by email. Its date of delivery is deemed 10 April 2026.*

Date Heard: 25 February 2026

Date Delivered: 10 April 2026

Appearances:

<i>Appellant:</i>	Advocate DP Geldenhuys SC
Instructing Attorneys:	Legal Aid South Africa
	Makhanda Local Office

Respondent:

Advocate H Mondliwa

Instructing Attorneys:

Director of Public Prosecutions

Makhanda