



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MAKHANDA]

[KOMANI CIRCUIT COURT]

NOT REPORTABLE

CASE NO: CC 28/2026

In the matter between:

THE STATE

vs

THULANI MGODELI

ACCUSED

JUDGMENT ON SENTENCE

Mjame AJ

- [1] I convicted Mr Mgodeli, the accused on three counts of Kidnapping, three counts of Rape read with provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 and one count of Theft.
- [2] The accused 's conviction is based on the court's finding that he did unlawfully and intentionally deprived the three complainants of their freedom of movement by forcefully pulling them to his house and did then engaged in sexual intercourse with complainants without their consent. These incidents happened on different occasions.

- [3] The court is at a stage to determine an appropriate sentence to impose on the accused which is the most difficult stage of the proceedings.

In **S vs MM**¹, the SCA having remarked that the vexed question of sentence is always an extremely difficult exercise, stated that:

“Sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case .it is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgement and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.

Sentencing involves a very high degree of responsibility which should be carried out with equanimity.”

- [4] When considering an appropriate sentence, the Court should have regard to all relevant factors as well as the circumstances of a case, especially the factual matrix which underpins such facts against the aims of punishment and triad.
- [5] A court is required to consider the four objectives of punishment. (that is, deterrence, prevention, retribution and rehabilitation), in view of the triad of factors as set out in **S vs Zinn**². These factors are the nature and seriousness of the offence committed, personal circumstances of the offender and interest of the society.
- [6] A judicial officer should not approach punishment in a spirit of anger because, being a human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and objects of punishment demand him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not

¹ S vs MM [2013] ZASCA 56, 2013(2) SACR 292 (SCA) @ par 13 @297.

² S vs Zinn 1969(2) SA 537 (A).

flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality³ .

NATURE AND SERIOUSNESS OF THE OFFENCE

- [7] Kidnapping is a serious offence. The right to freedom is a precious right which is the basic ethos of the Constitution (Act 108 of 1996)

Furthermore, it constitutes humiliating, degrading and invasion of the privacy and dignity of the victim. In Hunt SA Law and Procedure 2nd edition at 509, Kidnapping was also defined as unlawful and intentional deprivation of a person of liberty of movement and or his custodian of control.

The Court has to consider the degree of seriousness depending on the period of detention, condition of detention and circumstances general.⁴

Rape is unquestionable a despicable crime. In S vs C⁵ has been said that a rapist does not murder his victim, he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts the victim and subjects her to mental torment for the rest of her life, a fate often worse than loss of life.

Also, in S vs Makatu⁶, the SCA emphasising the seriousness of this kind of offence said:

“For some time now, this country has witnessed an ever-increasing wave in crimes of violence notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the very social and moral fabric of our society. As a result, our society is seriously fractured. The majority of our people particularly the vulnerable and the defenceless which include women and children, the elderly and infirm live under constant fear. It is no exaggeration to say that every living woman or a girl in this country is a potential victim of either rape or murder. This is said because these heinous crimes happen against the

³ S vs Rabie 1975 (4) SA 855 A @ 866 A-C.

⁴ S vs Morgan & Others 1993(2) SACR 134 A

⁵ 1996 (2) SACR 181 (C) @ 186 E-F

⁶ 2014(2) SACR 539 SCA par 30

backdrop of our new and fledging Constitutional democracy which promises a better life for all.

These crimes have spread across the length and breadth of our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be exterminated with their roots.”

PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [8] He is twenty-six (26) years old. He is single with one boy child who is three years old. The child stays with his grandmother. He is self-employed selling liquor and runs a loan shark business. His level of education is Standard seven (7).

INTEREST OF THE SOCIETY

- [9] In *S vs Falo*⁷, Plasket J, described the interest of society in such cases in the following eloquent terms:

“In a case such as this, the legitimate interest of society come strongly to the fore, right thinking members of the society-who I venture to suggest, make up the overwhelming majority want to see the attachment of the type of society envisaged by our Constitution where everyone can live without the fear that is currently ever-present for so many women as a result of this scourge of rape. In the criminal context, that interest includes an interest in effective sentences being imposed by the courts to punish wrongdoers appropriately and to deter those who may wish to follow the same path.”

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

- [10] The offences which accused has been convicted attracted a prescribed minimum sentence as envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997.

Section 51(1) of the Criminal Law Amendment Act 105 of 1997 dictates that if an accused has been convicted of an offence which falls under Part 1 of

⁷ [2019] ZACGHC 37 par 25

Schedule 2 shall be sentenced to Life Imprisonment unless there are substantial and compelling circumstances for deviation from the prescribed sentence.

[11] The guidelines to establish the existence of substantial and compelling circumstances were clearly stated in *S vs Malgas*⁸

- It was stated that Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- Unless there, and can be seen to be, only convincing reasons for a different response, the crimes in question are therefore required to elicit severe, standardised and consisted response from the courts.
- The specified sentences are not to be departed from lightly and flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and the marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

[12] In *S vs Vilakazi*⁹, the SCA with reference to *Malgas* case, dealt with the proper approach to determine whether there are substantial and compelling circumstances that warrant a deviation from the prescribed sentence. It said 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 proportionate to the particular offence. In addition, in ultimately deciding whether substantial and compelling factors exist, one must look at the mitigating and aggravating factors and consider crime committed.”

⁸ 2001(1) SACR 469 SCA.

⁹ 2009(1) SACR 552 SCA, par 15.

The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.

[13] In *S vs Nkomo*¹⁰ the following was said:

“Against the backdrop of the unprecedented spate of rapes in this country, courts must also be mindful of their duty to send out clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women. Society’s legitimate expectation is that “an offender will not escape life imprisonment which has been described for a very specific reason—simply because {substantial and compelling} circumstances are, unwarrantedly, held to be present. In our constitutional order women are entitled to expect and insist upon full protection of the law””

[14] The defense argued that the accused’s personal circumstances, taken cumulatively constitute substantial and compelling circumstances warranting the court to deviate from the prescribed sentence. That the court must consider that no injuries sustained by the victims. It was submitted that the accused contributed to the economy of the country, was self-employed selling liquor. Furthermore, that the accused is a first offender in relation to Rape and Kidnapping. Defense also argued that the period spent in custody by the accused, which is almost one year, six months constitutes substantial and compelling circumstances for deviation from prescribed sentence.

[15] The State argued that the personal circumstances of the accused do not constitute any substantial and compelling circumstances for deviation from the prescribed sentence. The accused has previous convictions though they are not for rape cases but they are of violent nature. He committed the offences after he was released from custody. State further argued that the absence of injuries on the complainants cannot be counted as substantial circumstances.

¹⁰ *S vs Nkomo* [2006] ZASCA 139, [2007]3 ALL SACR 596.2007(2) SACR 198 SCA

It submitted that rape itself is violent and traumatic. The accused throughout the trial did not show any remorse.

- [16] I am mindful that accused has been in custody since 2024. The court is also duty bound to consider the period spent in custody when determining an appropriate sentence.

In *DPP vs Gcwala*¹¹, the SCA, held that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that the period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to the conviction and sentence is a just one.

The same court again considered this aspect in *Mfana Ignitius Kubai vs S*¹², that, there must be recognition of time spent in custody in arriving at an appropriate custodial sentence. A failure to do so may result in an unjust sentence that approaches or exceeds the maximum term of imprisonment.

- [17] It is clear from the evidence before Court that the accused does not have any respect in women. The manner he treated them is unacceptable. In *S vs Tshabalala*¹³ Mathopho AJ (as he then was) commented as follows: -

“The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women in in this country to second class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality , human dignity and bodily integrity .The high incidents of sexual violence suggest that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of re-asserting masculinity and controlling women.”

¹¹ 2014 ZASCA page 44

¹² 2024 ZASCA 123 (30/08/24)

¹³ 2020(2) SACR38 CC

[18] I have considered the nature and seriousness of the offence, the manner and trend under which these offences are committed, the personal circumstances of the accused and interest of the society, I found that the prescribed minimum sentence will only be an appropriate sentence to impose in cases of this nature. I am therefore not persuaded that substantial and compelling circumstances justifying a deviation from the prescribed sentence exist for the Court to deviate from the prescribed one.

[18] Consequently; the accused is sentenced as follows:

Count 1: Kidnapping, the accused is sentenced to undergo three (3) years imprisonment

Count 2: Rape, sentenced in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 to Life Imprisonment.

Sentences in count 1 and 2 to run concurrently.

Count 4: Kidnapping, sentenced to undergo five (5) years imprisonment

Count 5: Rape, sentenced in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 to Life imprisonment.

Count 6: Theft, sentenced to undergo twelve (12) months imprisonment.

Sentences in Count 4,5 and 6 to run concurrently.

Count 7: Kidnapping, sentenced to undergo five (5) years imprisonment

Count 8: Rape, sentenced in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 to Life Imprisonment.

Sentences in Count 7&8 to run concurrently.

COURT ORDER:

In terms of section 103 of the Fire arms Control Act 60 of 2000 the accused is declared unfit to possess fire arm.

P C N MJAME

ACTING JUDGE OF THE HIGH COURT

Heard 29 July 2026

Delivered: 30 July 2026

APPEARANCES

Counsel for the State: Advocate Van Rooyen

Instructed by: Office of Director of Public Prosecutions

Makhanda

Counsel for the accused: Mr Charles

Instructed by: Legal Aid South Africa

Makhanda