



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

CA&R 64/25

In the matter between:

S[...] F[...]

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT ON APPEAL

NGOQO AJ

[1] The appellant appeared in the Regional Court, Aliwal North on one count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and

Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). Upon conviction, the regional magistrate sentenced the appellant to one term of life imprisonment. The appellant now appeals against that sentence.

[2] On 6 March 2024 in Thembisa Location, Burgersdorp, the complainant and appellant, who are customarily married, were at the home of the appellant's brother where they consumed liquor together and retired to bed. Two of their three children were at the house, though it is not clear where or in which room they were sleeping. At some stage the appellant asked the complainant for permission to have sexual intercourse with her. The complainant agreed, and the appellant proceeded and had vaginal sexual intercourse with her.

[3] However, at some stage while the two were having sexual intercourse, the appellant instructed the complainant to suck his penis and stated that he wanted to have sexual intercourse with the complainant with her back facing him. In the words of the complainant, "he wanted to have sexual intercourse with me like a dog". The complainant indicated to the appellant that she did not want to. This angered the appellant. He was aggressive and pulled her and continuously assaulted her by strangling and kicking her while she was on the bed.

[4] He then touched her anus, inserted his penis into it, and proceeded to have sexual intercourse with her anally. He did so without her consent. She was traumatised by what she described to have been the appellant's "weird" and "strange behaviour".

[5] At some point during the night, the complainant asked the appellant for permission to go to the bathroom. She was bleeding. Parenthetically, the J88 medical report reflects abrasions and blood stains on both the vagina and anus of the complainant. The appellant agreed. She was on her way to the bathroom when she was seen by the appellant's brother, who observed that she was injured. He reported the matter to the police. The appellant continued to have sexual intercourse with the complainant right through the night.

[6] In the early hours of the following morning, the police descended on the appellant's brother's house where the incident took place. The complainant was taken to hospital because of the injuries she had sustained on her head and body. The appellant, who fled after the police's arrival, was later arrested and detained.

[7] This court must decide whether the sentence of a term of life imprisonment in the circumstances of this case ought to be interfered with.

[8] Firstly, sentencing, in its entirety, is a unitary task and is often not without considerable difficulty since it involves a multi-faceted approach entailing consideration of the overarching factors traditionally taken into account, namely: the nature and seriousness of the crime, the interests of society, and the personal circumstances of an accused.¹ These are frequently referred to as the triad of factors that were pronounced in *S v Zinn*.² The degree of emphasis on any of these factors, as well as the ultimate impact of all circumstances relevant to sentencing, is ordinarily a matter of judicial discretion. A court sitting on appeal on sentence should interfere only where the discretion was not exercised judiciously and properly³. The ground rules upon which a court of appeal can exercise its discretion to interfere with the sentence were set out in the case of *S v Petkar*,⁴ where the court said:

‘The court’s power to interfere with an appeal is circumscribed. It may only do so if the sentence is vitiated by [1]. Irregularity, [2] misdirection, [3] is one to which no reasonable court could have come; in other words, one where there is a striking disparity between the sentence imposed and that which it considers appropriate.’

However, it is trite law that sentence is a matter of discretion of the court burdened with the task of imposing the sentence⁵.

¹ In determining whether or not substantial and compelling circumstances may exist, *S v Vilakazi* 2009 (1) SACR 40 (SCA) makes it plain that a court must consider: ‘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.’; See also generally *S v Malgas supra* para 25.

² *S v Zinn* 1969 (2) SA 537 (AD) at 540 F-H.

³ *S v Barnard* (469/2002) [2023] ZASCA 63 par 9.

⁴ 1988 (3) SA 571 (A) at 574 C.

⁵ *S v Kgasimore* (635/98) [1999] ZASCA 63 63 para 10.

[9] The appellant's personal circumstances placed on record are that he was thirty-five (35) years old at the time of sentence. At the time of committing the offence, the appellant was gainfully employed. His income varied between R4 000 and R5 000 a month. With his salary, he supported his wife and three children. He was still paying off their recently purchased house. It was further submitted on his behalf that he had no previous convictions and had apologized to his wife for his actions, which he said would never be repeated. It was further submitted that the appellant knew what he did was wrong. These factors, it was argued on behalf of the appellant, ought to have persuaded the magistrate to find that substantial and compelling circumstances in this case do exist.

[10] It was further submitted on behalf of the appellant that the prescribed sentence of life imprisonment is disproportionate to the appellant's personal circumstances, the seriousness of the offence and the interests of society and therefore unjust, justifying interference with the magistrate's discretion.

[11] Contending that this court ought to dismiss the appeal, the State submitted that the circumstances of this case brought the imposed sentence within the purview of section 51(1) of the CLAA, as indicated in the charge. This is because the appellant assaulted the complainant, leaving her with bruises, abrasions, and marks on her neck and back, as well as abrasions on her vagina and anal area. The injuries are documented in a J88 medical report that is

contained in the record on appeal. The appellant and the complainant were also in a domestic relationship as they were married. The appellant was in a position of trust and authority over both his wife and children. The appellant gave no reason for his conduct.

[12] The State submitted that, in sentencing the appellant, the court *a quo* carefully considered the appellant's personal circumstances, the nature of the offence, the interests of society and the type of sentence to be imposed as prescribed by the legislation and did not misdirect itself.

[13] In the matter of *S v Scott Crossly*⁶ The court in dealing with the aspect of sentencing had the following to say;

‘Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishment, they are not the only ones, or for that matter, even the overriding ones. Against that must be weighed the appellant's prospects of reformation and rehabilitation... It is true that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’ [sic]

[14] *In Casu*, the State invoked section 51(1) of the CLAA. This position was crystallised in the case *S v Malgas*⁷ where the court held that

⁶ 2008 (11) SACE 223 (SCA at 241 para 35.

⁷ [2001] ZASCA 30.

‘Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment... as the sentence that should be imposed for the listed crimes in the specified circumstances.’

[15] The appellant not only forcefully had intercourse with his wife against her will, but he also brutally assaulted her to subdue her so he could have his way with her anally, something that the complainant had expressly and unequivocally stated that she was opposed to and by which she felt repulsed. When the appellant did that, his criminal behaviour and conduct transcended that of an ordinary man and a husband to the complainant. His behaviour was disgusting and heartless. He showed her no mercy and traumatised her in the worst possible way that a man can humiliate his wife.

[16] Section 12(1)(c) of the Constitution⁸ guarantees to every citizen of this country the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. Women, children, and elderly persons are regarded as particularly vulnerable members of society, and in that context, this right must be safely and jealously guarded by the courts.

⁸Act 108 of 1996.

[17] Rape in its very nature is an invasive, degrading and humiliating offence.

In the case of *S v Crawford*⁹ Govindjee J wrote:

‘Courts have reflected on the horrific nature of the offence of rape, given that it constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim.’

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 a 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 prescribed 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.’

[18] What is disturbing about this case is the fact that the appellant was not a stranger to the complainant, his victim. They were married and had children together. Further disturbing about this case is the fact that instead of taking full responsibility for his actions, the appellant not only fled when the police arrived, but he also pleaded “not guilty” to the rape charge in a case where evidence was overwhelming and clearly strong against him, thereby making the complainant recount the appalling ordeal that she went through on the night of the incident. That does not speak to the appellant’s alleged remorse.

⁹ (B 98 of 2014) [2014 ZWHHC 64 (06 February 2014).

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

[19] His apology after his arrest cannot in any way be seen to be a sign of remorse. Had he been remorseful, he would have apologised immediately after realising that he had hurt his wife and would not have fled the scene like a common criminal. His apology only demonstrates his regret for having been caught and prosecuted for his actions. It demonstrates no remorse.

[20] In the case of *S v Gregory*¹¹ the court made the following observation;

‘The scourge of femicide and gender-based violence is reaching astronomical heights and is referred to as a pandemic in our country. It must be addressed and curbed. Many women and children in this country are almost daily faced with such violent crimes where they fall prey and suffer in silence.’

[21] The conduct of the appellant, which was a brazen and appalling display of domestic violence, should not be treated leniently. In the case of *S v Mudau*¹² Mathopo AJA, as he then was, held the following;

‘Domestic violence has become a scourge in our society and should not be treated lightly but should be deplored and also severely punished. Hardly a day passes by without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respect a negation of their fundamental rights to equality, human dignity, and bodily integrity.’

¹¹ 2023 ZAGPJHC 358 (21 April 2023)

¹² 2014 JDR 061 (SCA); (547/13) [2014] ZASCA 13 (13 March 2014) at para 6.

[22] The fact that the appellant is a first-time offender at 35 years of age, and the fact that he had drunk liquor are outweighed by the aggravating factors in the case. In particular, his consumption of liquor cannot obscure the gravity of the offence, particularly where the evidence indicates that he was fully cognisant of his actions. Tritely, if liquor is to be considered a weighty factor in mitigation, it must be shown that the appellant's consumption impaired his faculties or judgment and diminished his moral blameworthiness (see **DPP, Grahamstown v Peli**¹³).

[23] In **Mpongoshe v The State**¹⁴ the court referred to the following excerpt by the author SS Terblanche in his work entitled *A Guide to Sentencing in South Africa*:¹⁵ The learned author states:

‘The intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. The reason for this is that “[liquor] can arouse sense and inhibit sensibilities”, which may diminish the responsibility of the offender. However, 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.’

[24] Whilst there is evidence that the appellant consumed liquor, there is no evidence indicating that it made any appreciable difference to his moral reprehensibility. In the light of the progression of his conduct as events unfolded, it could hardly be contended with justification that his mental faculties or sensibilities were blunted by intake of liquor.

¹³ *DPP, Grahamstown v Peli* 2018 (2) SACR 1 (SCA) at 4g.

¹⁴ Para 24.

¹⁵ 2nd edition, pp 200-201, para 7.3.9.

[25] The fact that the appellant takes care of his family and is in the process of paying off his house cannot solely be the primary justification for leniency either. The Supreme Court of Appeal in the case of *Tsobo v Tsobo*¹⁶ said that the Domestic Violence Act¹⁷ places upon the courts and law enforcement functionaries extensive obligations to assist and protect victims of domestic violence. This obligation is inescapable. In a country that is tainted and plagued by crime, where women and children's rights are trampled on daily, the only message that the courts should be clearly communicating to the general public is that they are intolerant when it comes to domestic violence. This can only be shown by the courts meting out harsh sentences on those who commit domestic violence-related offences.

[26] In the case of *Aliko v The State*¹⁸ Dambuzza JA, as she then was, had the following to say;

‘It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed, and that the cardinal principle that the punishment should fit the crime should not be ignored.’

¹⁶ 2022 (2) SACR 233 (SCA)

¹⁷ 116 of 1998

¹⁸ (552/2018) [2019] ZASCA 31 (28 March 2019).

[27] Taking all the factors mentioned above, I am not persuaded that the sentence imposed by the lower court ought to be interfered with.

[28] In the result, I make the following order

1. The appeal is dismissed, and the sentence imposed by the trial court is confirmed.

DN Ngoqo

Judge of the High Court (Acting)

I agree

S Rugunanan

Judge of the High Court

APPEARANCES

Appellant's Counsel: D. P Geldenhuys, instructed by Legal Aid South Africa, Makhanda;

Respondent's Counsel: T Kaleni, Instructed by the Office of the Director of Public Prosecutions, Makhanda; Tel: 046 602 3000.

Date heard: 18 March 2026.

Date delivered: 18 August 2026