



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

NOT REPORTABLE

Case no: 30/2022

In the matter between:

THE STATE

and

NKOSIKHONA MADINGA

Accused

JUDGMENT ON SENTENCE

Govindjee J

[1] Mr Madinga was convicted of six counts of rape and one count of housebreaking with the intent to commit rape. The state argued for the imposition of life sentences in respect of each of the rape convictions.¹

¹ The court is alive to changes to the Criminal Law Amendment Act, 1997 (Act 105 of 1997) ('the Act') (including amendment to Part I of Schedule 2 of that Act in respect of the applicability of a prescribed minimum life sentence for rape in certain circumstances) brought about by the Criminal and Related Matters Amendment Act, 2021 (Act 12 of 2021). The latter Act came into operation on 5 August 2022, before this trial started. In approaching the matter on the basis of the legislation in its previous iteration, which is the manner in which arguments on sentencing proceeded in court, the court relies on the majority judgment in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 18, and s 35(3)(n) of the Constitution. Although strictly speaking 'the prescribed punishment' for the offence has not been changed by the amendment, the applicability of the prescribed punishment has been extended (for example to include cases of rape of children older than 16). Adopting an approach in favour of the accused person, and cognizant of the constitutional

[2] The incidents occurred over an extensive period of time. NN, who was 15 years old at the time, was raped during March 2011 after being assaulted and threatened with a knife (count 1). She had been frightened and upset and suffered injuries consistent with forceful sexual penetration. NB (count 2), aged 18, had ended a relationship with Mr Madinga, only to be assaulted with a sjambok in a way that caused her to bruise, threatened with a knife and painfully raped four times on 13 July 2012. SF (count 7) was threatened, dragged from the safety of her home and raped more than once in the early hours of 29 January 2017, first in an open field and then in her home. She was subdued by being grabbed by her throat and shown a fixed-blade knife in the field, causing her to encourage Mr Madinga to take her back to the relative safety of the home where she was raped again, suffering concomitant injuries. Some six months later, Mr Madinga and another man, acting in cahoots, raped MF (count 10) and LT (count 11) after the other man produced a knife in the taxi in which they had travelled. Finally, some ten days later, Mr Madinga raped MM (count 17) on the side of a road, again inflicting injuries typical of forceful sexual penetration on his victim.

[3] Considering the circumstances, a discretionary minimum sentence of life imprisonment is prescribed by legislation for the rape convictions in counts 1, 2, 7, 10 and 11 unless substantial and compelling circumstances justify a less severe sentence.²

rights to a fair trial, the applicability of the prescribed minimum sentence of life imprisonment for rape is considered on the basis of the legislative provisions as they stood at the time of the commission of the respective offences. That being the case, at all material times, the relevant portions of Schedule 2, Part I may be taken to refer to: 'Rape ... (a) when committed (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; ... or (b) where the victim (i) is a person under the age of 16 years ...'

² S 51(1) of the Act, read with Part I of Schedule 2 as at the time of the commission of the offences. In count 1, the victim was a person under the age of 16 years; in counts 2 and 7, the victims were raped more than once by Mr Madinga; in counts 10 and 11, the evidence showed that both victims were raped by more than one person, such persons acting in the execution or furtherance of a common purpose. That the state would seek sentencing according to the Act for these crimes was apparent from the charge sheet and was common cause during argument. In *S v Tshabalala* 2020 (2) SACR 38 (CC) ('*Tshabalala*'), the Constitutional Court confirmed the applicability of the doctrine of common purpose to incidents of rape: paras 57-59, 63. The active association of the perpetrators is detailed in the judgment on conviction. In *M v S* [2016] ZAECHC 32, in analogous circumstances to counts 10 and 11, the court (per Majiki J and Roberson J) was satisfied that the evidence proved rape in furtherance of a common purpose despite the court a quo not expressly making a finding in that respect. As such, the rapes were held to fit in with what was envisaged in Part I of Schedule 2 of the Act. The same approach was adopted in *Luzipho v S* [2016] ZAECHC 153. In that matter, Roberson

[4] In determining whether substantial and compelling circumstances exist to justify the imposition of a less severe sentence than that prescribed, all the factors traditionally considered by courts in imposing sentence must be taken into account.³ Broadly speaking, these involve a consideration and balancing of the nature and seriousness of the crimes, the personal circumstances of the accused and the interests of society.⁴

[5] The nature and seriousness of the crime of rape, and society's disgust at its prevalence, requires little amplification. Rape, as has repeatedly been emphasised by our courts, involves a horrific invasion of the dignity and security of the person of the victim. There are also various other dimensions to be considered. For example, as Mathopo AJ held in *S v Tshabalala*:⁵

'The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of 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 incidence of sexual violence suggests 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 reasserting masculinity and controlling women.'

[6] Certain features of the offences already described escalate the seriousness of some of the offences committed. In particular, the wielding of a sjambok or display of

J (Makaula J concurring) considered the position where a magistrate had not expressly made a finding in the judgment on conviction as to rape by more than one person acting in execution or furtherance of a common purpose. The court was nonetheless satisfied that the state had proved that the complainant was raped by more than one person acting in furtherance of a common purpose, so that the minimum sentence legislation was applicable. Absent authority to the contrary, this court is bound by that approach. The relevant counts were also argued by both counsel on the basis that the Act was applicable.

³ *S v Malgas* 2001 (1) SACR 469 (SCA) ('*Malgas*') paras 9 and 25.

⁴ *Ibid* para 22.

⁵ *Tshabalala* above n 2 para 1. At para 61, the learned judge concludes: 'The statistics sadly reveal that the minimum sentences have not had [the] desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation.'

a knife, and the associated threat was a feature of some of the offences. All of this was designed to induce submission to the sexual act(s) that followed.

[7] The effect of the crimes on those victims who testified emerged during the trial. All had suffered pain and injuries typical of forceful, sometimes repeated, sexual penetration. Sadly, considering the prevalence of the offence in the country, little needs to be said about the well-documented psychological impact of being subjected to this grotesque form of violation and infringement of dignity, bodily integrity and security of the person. In the case of the complainant in count 1, this included violation of her rights as a child. Despite her attempts to resist Mr Madinga, she was assaulted with the branch of a tree, threatened with a knife and raped without a condom while she cried. The complainant in count 2 was effectively held hostage on the evening in question, during which time she was raped four times. This after having been assaulted with a sjambok and threatened with a knife. The complainant in count 7 was threatened, thrown out of a window, held by her throat and dragged to a veld where she was raped, with a knife placed on the ground close by. In counts 10 and 11, a knife had been wielded by a person acting in concert with Mr Madinga, and he took his turn to rape each of the complainants after the other man had finished.

[8] The personal circumstances of Mr Madinga were placed before me by *Mr Erasmus*, who appeared for him. He was born on 10 December 1989 and had completed grade 8. Unmarried, he had fathered two children aged 3 and 12, and ran his own business selling meat at the time of his arrest. Mr Madinga's mother passed away when he was only 14 years of age. He has managed to maintain a close relationship with his father and bore the responsibility of taking him to the doctor when necessary. Being in custody for some two years, since his arrest, has adversely impacted this arrangement. Sadly, that is an unavoidable consequence of his own conduct.

[9] Strange as it may appear, it is accepted that Mr Madinga was a first offender and had no prior convictions at the time he committed each of the offences for which he was convicted. He has been treated as such for purposes of sentence in respect

of all counts, although there is authority that immediately negates this consideration based on the extent of the criminal spree under consideration.⁶ This, together with his relative youthfulness (by my calculation he was 21 years of age when he raped NN and 22 years of age when he raped NB, but over 27 years of age when he committed the remaining rapes), and testimony that he was unaware of the age of his first victim, are the only factors cited as substantial and compelling. Indeed, little more could be said in Mr Madinga's favour.

[10] As *Mr Mgenge* noted, the argument in respect of possible consensual intercourse, the second time around, in count 7, has already been rejected in the judgment on conviction. Counsel did try to suggest that the state was at least partly to blame for what followed, by not acting with due alacrity in prosecuting the first charge. In the absence of any authority in support, that argument clutches at straws and ignores the realities of criminal prosecution in this country. While I agree that there is no place for heavy-handed sentences to be used to punish one criminal excessively in order to deter others, the state's failure in apprehending and prosecuting Mr Madinga sooner cannot count in his favour in the present proceedings.

[11] I am mindful that Mr Madinga has been in custody for a two-year period. He pleaded not guilty, resulting in all but one of his complainants being required to testify and relive their experiences at his hands, and displayed no remorse for his conduct or its impact. I have also again given consideration to the question of the modicum of mercy, and its place, if any, in the present circumstances.

[12] The sentences prescribed by the Act are to be regarded as the sentences that are ordinarily appropriate, unless there are and can be seen to be 'truly convincing reasons for a different response'. While courts are enjoined to temper punishment with a measure of mercy, departures from prescribed sentences are not to be made lightly and for flimsy reasons.⁷ I am also cognisant that a finding of an absence of substantial and compelling circumstances will result in the gravest of sentences

⁶ See *S v Coetzee* 2016 (1) SACR 120 (NCK) para 20.13. As the judgment of Kgomo JP notes, this 'is almost immediately rendered nugatory by the accused's four-year harmful trade'. In the present matter, the crime spree which forms the basis of the various charges lasted in excess of six years.

⁷ *Malgas* above n 3 para 9.

being passed and that the consequences of this are profound, effectively removing an individual from society.⁸

[13] The nature of the offences, including rape of a child (count 1), instances where the victim was 'raped more than once' (counts 2 and 7), the propensity to use force or the threat of force to subdue the victims (counts 1, 2 and 7), and the circumstances of the rapes by more than one person acting in the execution or furtherance of a common purpose (counts 10, 11) has been detailed in the judgment on conviction and summarised, above. These are offences for which the prescribed minimum sentences is life imprisonment.⁹ The circumstances of their commission coupled with the interests of society far outweigh Mr Madinga's personal circumstances, which are, if anything, ordinary mitigating circumstances in terms of our law, rather than 'substantial and compelling' circumstances.¹⁰ I am consequently unable to find that substantial compelling circumstances exist to justify a less severe sentence than life imprisonment in respect of each of counts 1, 2, 7, 10 and 11. I do not consider the imposition of these sentences to be disproportionate to these crimes when considering the relevant factors.

[14] In respect of the conviction of housebreaking with intention to commit rape (count 6), Mr Madinga is sentenced to three years' direct imprisonment, to run concurrently with the sentence in respect of count 7.¹¹

[15] In respect of count 17, a discretionary minimum sentence of 10 years is applicable.¹² Again there are no substantial and compelling circumstances to warrant a lower sentence. Any sentence over and above the prescribed minimum is not to be imposed lightly or without serious reflection. That Mr Madinga had no prior convictions at the time he committed this offence is, following *S v Coetzee*, negated by the overall conspectus of his conduct.¹³ It must also be noted that the victim did not testify in this instance. Considering all the circumstances, including the nature of

⁸ *S v Bull* 2001 (2) SACR 681 (SCA) para 21.

⁹ In respect of counts 2 and 7, see *S v Maxabaniso* 2015 (2) SACR 553 (ECP) paras 24-25.

¹⁰ See, for example, *The Director of Public Prosecutions, Grahamstown v TM* 2020 JDR 0652 (SCA) para 11.

¹¹ S 280(2) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

¹² In terms of s 51(2)(b) of the Act, read with Part III of Schedule 2.

¹³ *S v Coetzee* above n 6.

the crime, the interests of society and the time already spent in custody, I consider a sentence of 20 years' imprisonment to be appropriate in respect of this count. This sentence automatically runs concurrently with the sentences of life imprisonment. Given the nature of the offences, various other consequences emanating from legislation follow. These have been included as part of the order to follow.

[16] The following sentence is imposed:

- a. In respect of count 1 (rape of 'NN'), the accused is sentenced to life imprisonment.
- b. In respect of count 2 (rape of 'NB'), the accused is sentenced to life imprisonment.
- c. In respect of count 6 (housebreaking with intent to commit rape), the accused is sentenced to three years' imprisonment, to run concurrently with the sentence in respect of count 7.
- d. In respect of count 7 (rape of 'SF'), the accused is sentenced to life imprisonment.
- e. In respect of count 10 (rape of 'MF'), the accused is sentenced to life imprisonment.
- f. In respect of count 11 (rape of 'LT'), the accused is sentenced to life imprisonment.
- g. In respect of count 17 (rape of 'MM'), the accused is sentenced to 20 years' imprisonment, to run concurrently with the sentences of life imprisonment.
- h. In terms of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the accused, as a convicted sexual offender, must be included in the National Register for Sex Offenders.
- i. In terms of s 120(4) of the Children's Act 38 of 2005 and s 41 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the accused is declared to be unsuitable to work with children, and it is directed that his particulars be entered in Part B of the National Child Protection Register.

- j. In terms of s 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

A GOVINDJEE
JUDGE OF THE HIGH COURT

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Heard: 30 August 2023

Delivered: 15 September 2023

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