Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No.: CA191/2014

In the matter between:

KHAYALETHU MADYO Appellant

and

THE STATE Respondent

Coram: *Tshiki, Goosen JJ and Malusi AJ*

Heard: *11 May 2015*

Delivered: *28 May 2015*

Summary Sentence: *Prescribed sentences – Minimum sentences to be imposed in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1977 – Substantial and compelling circumstances – Proper approach to such determination re-iterated. Appellant herein raped and murdered deceased – Trial Court sentenced appellant to 20 years for rape and life imprisonment for murder – On appeal against sentence to the full bench – sentence imposed by trial court confirmed.*

FULL BENCH APPEAL JUDGMENT

TSHIKI J:

[1] On the 25th April 2013 before the Eastern Cape Local Division held in Port Elizabeth the appellant pleaded guilty and was subsequently convicted of the following crimes:

[1.1] Rape in contravention of section 3 read with section 1, 56(1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 read with sections 256 and 261 of the Criminal Procedure Act 51 of 1977 and further read with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.

[1.2] Count 2 – Murder read with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.

[2] The appellant was legally represented during the proceedings. In respect of count one (rape), he was sentenced to twenty (20) years imprisonment and in respect of count two (murder), he was sentenced to life imprisonment.

[3] The appellant sought leave to appeal against his sentence, which was granted by the Court *a quo.*

[4] Before I deal with the issues in this appeal I have to give a background of how appellant committed the offences against the deceased. The appellant, after he had a few intoxicating drinks with two of his friends they decided to proceed to a tavern in Walmer where they enjoyed themselves. It is where the appellant met the deceased who was 17 years old. The appellant later left the tavern and on the way he met the deceased. He then tried to take the deceased to the railway line in Walmer where he asked her for sex which she refused. He then attempted to force her to have sex

with him but was interrupted by about four men who passed nearby and he decided to leave the deceased. He proceeded to another tavern, had a few more drinks and later on again met the deceased in the street near an old graveyard in Walmer location. At that time it was already late at night. He offered to walk the deceased halfway home and in the process asked her again for sex which she again refused. He then forcefully undressed and raped her. Deceased cried and the appellant covered her mouth with his hand to prevent her from crying. When she continued to make noise appellant strangled her to prevent her from making noise. He, however, did appreciate that his action could cause her death and he continued with his action notwithstanding his appreciation. After finishing raping her he realised that she was no longer moving and was dead. The appellant became afraid and left her body in the bushes. He was later arrested. The post-mortem report revealed that the deceased died as a result of "laceration of the upper lips mucosa causing aspiration of blood into the lungs and manual ligature strangulation". She had sustained abrasions on the neck, a haematoma that extended from the right parotid gland towards the right onto the sternum and onto the mastoid muscle. Deceased had also sustained a haematoma on the left eye around the orbit of the eye, a bruised scalp, a 1 cm laceration on the vaginal wall. There was blood in the pharynx and in the airways. Her lungs were swollen and she also had aspirated blood into her lungs.

[5] During the appeal proceedings the appellant was represented by *Ms J M Coertzen* whilst *Ms I Cerfontein* represented the state.

[6] In her argument on behalf of the appellant *Ms Coertzen* made emphasis on the fact that the following circumstances of the appellant amount to substantial and compelling circumstances, which are:

[6.1] That the appellant was […] years old at the time of the offence. He has one minor child and is a first offender. He showed true remorse and gave a well-intended apology. The offences were committed and the injuries were sustained in the same event.

[6.2] Lastly, that the appellant was under the influence of liquor and his moral blameworthiness was therefore reduced. Counsel submitted further that notwithstanding the undeniable fact that the crimes committed by the appellant are very serious and deserving of long term and direct imprisonment but the sentence of life imprisonment in this matter is unjust, shockingly inappropriate and severe. Therefore, such mitigating factors are weighty enough to entitle the court to deviate from the prescribed sentence. This is so specially when one has regard to the remorse shown by the appellant. She mentions the fact that the appellant had co-operated from the outset of his arrest, thus indicating his willingness to confess to a magistrate which he did. I must say though that the confession was not part of the High Court record. She relied on the decisions in **Gerber v S** [2006] 4 All SA 423 (SCA) at 425 para [11] and **S v Makatu** 2014 (2) SACR 539 (SCA). She concluded that in view of the decisions in the above cases the sentence of 20 years imprisonment on the count of murder should be

ordered to run concurrently with the sentence in the crime of rape and that will serve the purpose of punishment.

[7] *Ms Cerfontein* for the state holds a contrary view and submitted that the trial court correctly considered the appellant's personal circumstances, the nature and seriousness of the offence itself, the crime and the interest of society. Therefore, the trial court had taken due regard of the issue of substantial and compelling circumstances and found that in respect of count 2 they are not weighty enough for the trial court to deviate from the prescribed sentences.

[8] I must say even at this stage that the facts of the two cases referred to us by *Ms Coertzen* for the appellant are distinguishable from those of the case in issue herein. In both cases **Gerber v S** and **S v Makatu** quoted *supra* the provisions of section 51(1) and Part one of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, did not apply in those cases.

[9] It has been an established principle that when the appeal court is dealing with an appeal against sentence it should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court. A court exercising appellate jurisdiction 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. To do so, would be to usurp the sentencing discretion of the trial court. [**S v Malgas** 2001 (1) SACR 469 (SCA); (2001 (2) SA 1222; [2001] 3 All SA 220, [2001] ZASCA 30.]

[10] It follows therefore that the appellate court can only interfere with the sentence if it has found that the trial court committed an error in determining or applying the facts for assessing the appropriate sentence. In **S v Pillay** 1977 (4) SA 531 (A) Trollip JA at 535E-G held as follows:

> "…As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the (trial) Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh"…".

[11] Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 provides that if the death of the deceased was caused by the accused person in the course of committing the offence of rape the minimum sentence the trial court should impose in such circumstances is imprisonment for life. This should be so as a matter of course, unless the court dealing with the case has found the presence of substantial and compelling circumstances which would render the particular prescribed sentence unjust in the circumstances of that particular case. If such circumstances as are described above are present in a given case the court sentencing the accused is entitled to impose a lesser sentence. The guiding principle is not, in my view, the discretion to be exercised by the sentencing court but the presence or absence of such circumstances which justify the deviation. The sentencing court should deviate from imposing the prescribed sentence only if it is

satisfied that the imposition of the prescribed sentence would render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence. [**S v Malgas**, *supra*.]

[12] *Ms Cerfontein* in her argument contended that there can be no justification for the interference with the sentence imposed by the trial court. In her view the appellant did not testify during his trial and therefore the trial court could not find any explanation as to what drove the appellant to commit the offences. She referred the court to the judgment in **S v Matyityi** 2011 (1) SACR 40 (SCA) a judgment that emphasizes the correct application of the guidelines stated in **S v Malgas**, *supra*.

[13] It should also be noted that in **S v Malgas** *supra* at 50 para [8] Marais JA stated:

> "In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may."

[14] Lastly, it should be noted that the courts should note that the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained. [**S v Malgas** *supra* at 482 para G. See also **S v Matyityi** *supra*.]

[15] In this case and much as what happened in **Matyityi's** case *supra* the appellant was 27 years old and that the offences committed were, *inter alia*, rape and murder in circumstances where the provisions of section 51(1) of Act 105 of 1997 were applicable. In **Matyityi's** case similarly even in this case the appellant did not testify and therefore refused to give reasons why he committed the offences. Therefore the trial court did not have the appellant's explanation to show whether or not the appellant was sincerely remorseful, and not simply feeling sorry for himself at having been seen with the deceased shortly before the deceased was raped. The trial court therefore did not have the opportunity to explore the proper appreciation of what motivated the appellant to commit the deed and whether or not he had a true appreciation of the consequences of his actions. The court did not also receive evidence from the appellant to show whether or not he was immature to the extent that the immaturity was a mitigating factor. I must say though that the appellant had the opportunity to explore that avenue and explain to the court in view of him being legally represented during the trial but he decided not to do so. This is so, notwithstanding that the appellant has an evidential burden to show substantial and compelling circumstances which would justify the imposition of a lesser sentence than those prescribed. There was therefore no explanation why the deceased had

to be killed during and or after she was raped. In cases where the courts are ordained by the Legislature in the form of section 51(1) of Act 105 of 1997 to impose the prescribed sentences they are not free to subvert the will of the Legislature by resorting to vague ill-founded hypothesis that appear to fit the particular sentencing officer's personal knowledge of fairness. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other areas of the state. The courts are obliged to impose the specified sentences unless there are truly convincing reasons for departing from them. [**S v Matyityi** *supra* at page 53 para [23]. See also **Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and Others** 2012 (1) SACR 423 (SCA) paras [19-21].]

[16] I must also emphasize that the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. Rape in this country does not appear to have deteriorated as a crime against women and children. This is so even though the courts are trying their best to impose sentences they believe to be just in the circumstances of each case. It is for that reason that the courts encourage the accommodation of the victim during the sentencing process. [**S v Malgas** *supra* at 481 para 25 D – 482 (a). See also **S v PB** 2011 (1) SACR 448 (SCA).]

[17] When applying the provisions of section 51 a trial court is not in appellate mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is prima facie to be respected. Instead, it is faced with a generalised statutory injunction to impose a particular sentence which injunction rests not upon all the circumstances of the case including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that the substantial and compelling circumstances exist which "*justify*" it. [**S v Chinridze** 2015 (1) SACR 364 (GP).]

[18] In this case apart from the fact that the appellant pleaded guilty to the charge, committed the offences under the influence of liquor and that he is said to have been remorseful for what he did as well as his age (27 years) there is no other mitigating factor which justified the trial court to impose a lesser sentence than the one imposed at the trial. He deliberately and intentionally murdered the deceased, during the time when he was raping her. A plea of guilty by the appellant and his age in circumstances where he committed such a gruesome murder against the deceased cannot, on their own, amount to substantial and compelling circumstances justifying a departure from imposing the standardised and consistent response required from the courts when sentencing persons for committing offences of the same nature as those committed by the appellant in this case.

[19] In this case the trial court appears to me to have considered all the circumstances which were in favour and/or against the appellant. There does not appear to me that in doing so the court *a quo* did not apply her judicial mind to the case as a whole. It cannot be incorrect to conclude that the appellant decided to kill the deceased in order to silence her so that he is not prevented from achieving his objective that is to successfully rape the deceased. Such conduct is specifically prohibited and if committed it is punishable by the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977, as amended. Minimum sentences prescribed for a particular offence should not be departed from easily or for flimsy reasons. In the present case we have not been convinced that the appellant has succeeded in showing the existence of substantial and compelling circumstances which would justify this court to impose a lesser sentence than the one imposed by the trial court. The mitigating factors that were submitted on behalf of the appellant are, in my view, insufficient to persuade us to conclude that there is a weighty justification to impose a lesser sentence. The deceased suffered a painful and terrifying rape and death in circumstances where she did not deserve to be raped and killed by the appellant. I also agree with the trial court that the appellant's apology falls short of amounting to substantial and compelling circumstances herein.

[20] I am, therefore, satisfied that the Court *a quo* carefully considered all the sentencing options and imposed a sentence commensurate with the seriousness of the offence, balancing carefully the personal circumstances of the appellant, the seriousness of the crimes committed by the appellant and the interests of the community. Therefore the appellant has failed to convince this court that the trial court had misdirected itself in imposing the sentence meted out to the appellant.

[21] In the result, I make the following order:

The appeal is hereby dismissed.

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P W TSHIKI
JUDGE OF THE HIGH COURT

GOOSEN J:

I agree.

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G G GOOSEN
JUDGE OF THE HIGH COURT

MALUSI AJ:

I agree.

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T MALUSI
JUDGE OF THE HIGH COURT (ACTING)

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Instructed by : Legal Aid
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Counsel for the respondent: Adv I Cerfontein
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