



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

**Not Reportable**  
Case no: 15/2022

In the matter between:

**THE STATE**

and

**PHUMLANI TELEKE**

**Accused**

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**SENTENCE**

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**Govindjee J**

[1] Mr Teleke was found guilty of housebreaking with intent to commit rape and rape. He broke into the home of the complainant, an elderly woman, on 7 November 2021 before pushing her into her bedroom and raping her twice, once *per vaginam* and once *per anum*. He also struck her with his fists while demanding money from her during the time of the intercourse.

[2] In respect of the rape conviction, the Director of Public Prosecutions relied on the provisions of s 51(1), read with Part I of Schedule 2, of the Criminal Law

Amendment Act, 1997,<sup>1</sup> ('the Minimum Sentences Act') in seeking life imprisonment. The basis for this relates to the age of the complainant, who is defined as an older person in s 1 of the Older Persons Act, 2006,<sup>2</sup> that she was raped more than once, and that the rape involved the infliction of grievous bodily harm. A court that is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence than that prescribed by the Minimum Sentences Act must impose a lesser sentence, entering the relevant circumstances on the record of proceedings.<sup>3</sup>

[3] Section 276 of the Criminal Procedure Act, 1977<sup>4</sup> provides for the sentences which courts can impose. The imposition of sentence is pre-eminently a matter for the discretion of the trial court, which is free to impose whatever sentence it deems appropriate provided it exercises its discretion judicially and properly. The general purpose of imposing a sentence is fourfold: retributive, preventative, rehabilitative (reformatory) and to act as a general deterrent.<sup>5</sup> While the retributive aspect tends to dominate, courts are enjoined to temper the punishment with a measure of mercy.<sup>6</sup>

[4] In this regard, the sentencing court must attempt to achieve a balance in its sentence, and not approach its task in a spirit of anger, but in one of equity. Hastiness, the striving after severity and misplaced pity are out of place, as are so-called exemplary sentences designed to use the crime to set an example for others in society.<sup>7</sup> Still, more serious cases clearly require severity, with a certain moderation of generosity, for the appropriate balance to be struck. The object of sentencing is not to satisfy public opinion, but to serve the public interest.<sup>8</sup>

[5] In terms of s 280(1) of the CPA, sentencing courts have the jurisdiction to impose a separate sentence for each conviction, as it would have done if all the

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<sup>1</sup> Act 105 of 1997.

<sup>2</sup> Act 13 of 2006.

<sup>3</sup> S 51(3)(a) of the Minimum Sentences Act.

<sup>4</sup> Act 51 of 1977 ('the CPA').

<sup>5</sup> *S v Rabie* 1975 (4) SA 855 (A) ('*Rabie*').

<sup>6</sup> *Rabie* *ibid* at 862G-H. *S v Khulu* 1975 (2) SA 518 (N) ('*Khulu*') at 521-522.

<sup>7</sup> See *Khulu* *ibid*.

<sup>8</sup> *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as *amicus curiae*) 2007 (2) SACR 539 (CC).

offences had been tried separately, before considering the cumulative effect of multiple sentences and the appropriateness thereof.<sup>9</sup> In practice, a court should:<sup>10</sup>

- a. determine the appropriate sentence for each individual offence;<sup>11</sup>
- b. determine what an appropriate total punishment would be for the totality of the criminal behaviour; and
- c. take such measure or measures as are required for the sentence determined in (b) above to become the effective sentence.

[6] The complainant suffered bruising around her left eye and both lips. A gynaecological examination revealed tears around her vagina and anus. She had also suffered shock as a result of her ordeal.

[7] Rape when committed in circumstances where the victim was raped more than once by the accused is listed in Part I of Schedule 2 of the Minimum Sentences Act, as is rape where the victim is an older person as defined in the Older Persons Act, 2006. In these circumstances, the rapes perpetrated on the complainant, who was 79 years of age at the time, result in a prescribed sentence of life imprisonment in terms of s 51(1) of the Minimum Sentences Act. For adult offenders, any exception is based on the court being satisfied 'that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed ...'<sup>12</sup>

[8] The triad of factors to be considered consists of the crime, the offender and the interests of society,<sup>13</sup> and these factors must be applied, in accordance with *S v Malgas*,<sup>14</sup> to consider whether substantial and compelling circumstances exist to

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<sup>9</sup> S 280(1) provides, in part, that 'When a person is at any trial convicted of two or more offences...the court may sentence him to such several punishments for such offences...'

<sup>10</sup> SS Terblanche *A guide to sentencing in South Africa* (3<sup>rd</sup> Ed) (LexisNexis) (2016) 199.

<sup>11</sup> In doing so, the established principles in respect of multiple crimes sharing aggravating features, and the avoidance of a double consideration of aggravation, must be considered: Terblanche *ibid* at 204-205.

<sup>12</sup> S 51(3)(a) of the Minimum Sentences Act.

<sup>13</sup> *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H.

<sup>14</sup> *S v Malgas* 2001 (1) SACR 469 (SCA) ('*Malgas*').

deviate from any prescribed minimum sentence.<sup>15</sup> In *S v Matyityi*,<sup>16</sup> Ponnann JA held that Parliament:

'...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...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, [are] foundational to the rule of law which lies at the heart of our constitutional order'.

[9] A court must exercise a reasoned discretion in determining an appropriate sentence. The approach to be applied in imposing a sentence when the Minimum Sentences Act applies has been set out by Nugent JA in *S v Vilakazi*:<sup>17</sup>

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* 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 indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in the context ... "consists of 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 the 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.'

[10] Personal aversion to life imprisonment or doubts as to the efficacy of the policy implicit in the Minimum Sentences Act cannot be elevated to 'substantial and compelling' factors. The prescribed minimum sentences must be imposed unless there are 'truly convincing reasons' for departure.<sup>18</sup> These are sentences to be imposed 'ordinarily and in the absence of weighty justification'.<sup>19</sup> If the sentencing

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<sup>15</sup> See *Radebe v The State* [2019] ZAGPPHC 406 at para 12.

<sup>16</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 23. Also see *Malgas supra* fn 14, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 at para 21.

<sup>17</sup> *S v Vilakazi* 2009 (1) SACR 552 (SCA) ('*Vilakazi*') para 15.

<sup>18</sup> *Malgas supra* fn 14 para 23.

<sup>19</sup> *Vilakazi supra* fn 17 para 16.

court, on consideration of the circumstances of the particular case, is satisfied that they 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, it is entitled to impose a lesser sentence.<sup>20</sup>

[11] Mr Teleke is a first offender, aged 35. He has been in custody since November 2021. He is unmarried with one child, aged six. He has passed grade seven and was employed as a general worker at a funeral parlour prior to his arrest, earning R800 per week. R500 per month is paid for his child's support. Mr Solani argued that the alcohol and drugs consumed by Mr Teleke may have played a major role in giving him courage to proceed with his crimes. It was submitted that, cumulatively, this amounted to substantial and compelling circumstances justifying deviation from the prescribed minimum sentence.

[12] By contrast, the state highlighted the serious nature of the offence of rape. The complainant had also been assaulted and threatened. While no victim impact statement was submitted, the evidence during the trial was that the complainant remained fearful. There can be little doubt that this experience will remain with her. It was submitted that the manner in which the defenceless complainant had been attacked demonstrated that Mr Teleke was a danger to society and that there was a flimsy basis for deviating from the prescribed minimum sentence for rape.

[13] Rape is a scourge in South Africa. It violates a range of constitutionally-entrenched human rights and causes irreparable harm to its victims and society as a whole. In this case, the victim was a woman who was 79 years of age at the time. She was raped twice and beaten by a person known to her. In determining whether the prescribed minimum sentence is proportionate, all of the traditional mitigating factors are to be considered and the court is required to assess whether there are substantial and compelling circumstances to depart from the sentence prescribed.

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<sup>20</sup> Ibid para 14.

[14] In *S v Weideman* ('*Weideman*'), Goosen J reflected on the appropriateness of life imprisonment in the case of a first offender who was under the influence of alcohol, as follows:<sup>21</sup>

'Life imprisonment is the most severe sentence that can be imposed by a court. For this reason it is, generally speaking, reserved for the most serious and egregious criminal acts. It is also reserved for those instances where the criminal poses a clear and present danger to the society and where there is little or no prospect of rehabilitation of the criminal and reintegration of that individual into society. This does not however mean that a court should keep something in reserve on the basis that some more serious manifestation of the crime can be imagined (see *S v Mahamotsa* 2002 (2) SACR 435 (SCA) par 19). It means only that the sentence of life imprisonment must be proportionate to the nature of crime for which it is imposed.'

[15] As in *Weideman*, it is appropriate to note that there is no doubt that life imprisonment is an appropriate sentence to impose upon a criminal who rapes an elderly lady. More so when she is raped more than once. The question, however, remains whether it is the appropriate sentence in this instance.

[16] One relevant factor is that the rape did not 'involve' the infliction of grievous bodily harm, as argued. The court in *S v Thole*<sup>22</sup> noted that one of the dictionary meanings of the word 'involved' is: 'to include something as a necessary part of an activity, event or situation'. In *Rabako v S*, Musi J equated 'grievous' with 'actually serious', as follows:<sup>23</sup>

'In essence then, if the injury inflicted by the accused on the body of the rape survivor is serious, then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalization or result in permanent loss of bodily or mental faculty; at the other, it may include a wound that heals rapidly. It should not be a trivial or insignificant injury...Whether an injury is serious will depend on the facts and circumstances of every case'.

[17] While the provisions of the Minimum Sentences Act have been triggered for other reasons, the facts do not support a finding of rape involving the infliction of

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<sup>21</sup> *S v Weideman* [2014] ZACPEHC 62 para 14. It must be noted that the sentencing outcome in *Weideman* turned on the accused's realisation of the full impact of his criminal conduct, suggesting that rehabilitation and reintegration into society was possible.

<sup>22</sup> *S v Thole* 2012 (2) SACR 306 (FB).

<sup>23</sup> *Rabako v S* [2008] JOL 21549 (O) para 7.

grievous bodily harm. This is confirmed by the judgment of Plasket J in *S v Nkawu*.<sup>24</sup> In that matter, the accused was convicted of housebreaking with intent to rape and rape. A ten-year old had been abducted from her home, taken to a secluded spot and raped *per anum*. The court held that the psychological trauma suffered was as would be expected and that the injuries, which caused some discomfort and pain, followed relatively minor use of force and were impermanent. The court considered this to be significant in finding the existence of substantial and compelling circumstances.<sup>25</sup>

[18] Courts are reluctant to appear to reward those who seek to utilise intoxication as a defence or excuse for their criminal conduct. In this case there was testimony about the excessive consumption of alcohol, combined with the use of drugs. The effects were manifest, resulting in very serious crimes. Mr Teleke fell asleep immediately after raping the complainant, with his pants still down. He was found in that state sometime later and was disorientated. While it has been found that Mr Teleke did not lack criminal capacity, and that his various actions were voluntarily and intentionally performed, his state of mind at the time cannot be ignored for purposes of sentencing, having contributed to spontaneous criminal behaviour. Considering the available facts in their totality, in particular that Mr Teleke is a first offender and that the court has accepted that alcohol and drugs played a major role in his conduct, I am of the view that substantial and compelling circumstances exist. In this instance these considerations are, in my view, not light or flimsy. The retributive dimensions of punishment may be satisfied through imposition of a lengthy period of imprisonment.

[19] It is so that sentencing courts cannot keep on imposing more and more severe sentences simply because the particular crime is prevalent or on the increase.<sup>26</sup> In *Madolwana v The State*,<sup>27</sup> an elderly woman aged 70 was severely assaulted and raped, slipping in and out of consciousness during her attack. Substantial and compelling circumstances existed in the form of a lack of

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<sup>24</sup> *S v Nkawu* [2009] ZAECGHC 21.

<sup>25</sup> The accused was sentenced, in that matter, to twenty years imprisonment for rape and three years' imprisonment for housebreaking with intent to commit rape, to run concurrently.

<sup>26</sup> *S v Qamata* 1997 (1) SACR 479 (E) at 482c-d. Cf *S v Ndou* 2019 (2) SACR 243 (SCA) para 23.

<sup>27</sup> *Madolwana v S* [2013] ZAECGHC 67.

premeditation and the effect of alcohol on the appellant's actions. The appellant was not a first offender, having been sentenced to four years' imprisonment for indecent assault. The trial court's conclusion and the 25-year period of imprisonment that was the outcome were confirmed by the court on appeal. The facts in that matter are a useful starting point in considering an appropriate sentence in this instance.

[20] The nature of the crime and society's interest in protecting vulnerable persons from horrendous experiences, and in tackling rape as an affront to an acceptable way of life, warrants a severe sentence. In addition to the complainant's age, I am particularly cognisant of the fact that the complainant was raped more than once, on the second occasion being forced to turn over, and also being hit with fists.<sup>28</sup> These factors far outweigh Mr Teleke's personal situation and the circumstances that resulted in his criminal behaviour. Bearing in mind the time already spent in custody, I consider a sentence of 22 years' imprisonment to be appropriate for the rape conviction. As to the crime of housebreaking with intent to commit rape, a sentence of five years' imprisonment is appropriate. These sentences are to run concurrently.

## **Order**

[21] The accused is sentenced as follows:

1. Count 1: Housebreaking with intent to commit rape: 5 years' imprisonment;
2. Count 2: Rape: 22 years' imprisonment.

It is directed that the sentence imposed in respect of count 1 shall be served concurrently with the sentence imposed in respect of count 2, giving an effective sentence of 22 years.

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<sup>28</sup> The consequence of conviction of an offence involving sexual abuse of an older person, in addition to constituting an aggravating circumstance in terms of s 30(4) of the Older Persons Act, 2006 (Act 13 of 2006), is that the convicted person's name must appear in the National Register contemplated in s 31 of that Act.



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**A. GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:12 April 2022**  
**Delivered:15 June 2022**

Appearances:

Counsel for the State:       Adv H. Pienaar  
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