IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal Number: **A119/2022**

In the appeal of:

THABANG JOHN METSING **Appellant**

and

THE STATE **Respondent**

CORAM: **VAN RHYN, J *et* BERRY, AJ**

HEARD ON: **13 FEBRUARY 2023**

DELIVERED: **2 MARCH~~28 FEBRUARY~~ 2023**

JUDGMENT BY: **VAN RHYN, J**

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[1] The appellant was arraigned and convicted in the Regional Court, Bloemfontein on a charge of Rape read with the provisions of Section 51(1), Part 1 of Schedule 2 of the Criminal Law Amendment Act,[1] which provisions were duly explained to the appellant at the commencement of the trial.

[1] **Act 105 of 1997.**

[2] Appellant was duly represented during the trial which commenced on 28 October 2019. The appellant pleaded not guilty to the charge. The appellant admitted having sexual intercourse with the complainant, with her consent, on 3 April 2019 and furthermore admitted the identity and age of the complainant. On 29 October 2019 the appellant was sentenced to life imprisonment. Being sentenced to life imprisonment the appellant has an automatic right of appeal.

[3] The appeal is against the sentence only. The grounds upon which the Appellant's appeal rests can concisely be summarised as follows:

3.1 That the court *a quo* erred by disregarding the youthfulness of the appellant and his prospects of rehabilitation;

3.2 That the court *a quo* erred in sentencing the appellant to an inappropriate sentence by disregarding the evidence that he was a first offender and that he had been in custody for six (6) months pending the trial;

3.2 that the court *a quo* erred in over-emphasizing the factors in aggravation and deterrence and by doing so, failed to take proper cognisance of the factors in mitigation.

[4] Prior to imposing a prescribed sentence, it is incumbent upon a court in every case, to assess, upon a consideration of all the relevant factors of the case, whether the prescribed sentence is proportionate to the offence. It is enough for the sentence to be departed from if it would be unjust to impose it.[2] The determinative test set out in **S v Malgas,**[3] is whether or not, when the circumstances of a particular matter are considered, the prescribed sentence would be rendered unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice will be done by imposing that sentence.[4]

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[2] **S v Vilakazi 2009 (1) SACR 552 (SCA) at [15].**
[3] **2001 (1) SACR 469 (SCA).**
[4] **At paragraph 25.**

[5] I now turn to deal with the facts of the present matter as they appear from the record. On Wednesday, 3 April 2019 at approximately 20h00, the complainant, a 29-year-old female from Hobhouse, Free State Province, visited a friend's house while in the company of 5 male friends. When she arrived, the men were already drinking "Pine", an alcoholic drink. The complainant joined the men and consumed alcohol with them. After an argument ensued regarding whose obligation it was to purchase more alcoholic drinks, the complainant and three (3) of the men left.

[6] The complainant then decided to proceed to her aunt's house but when she found no-one home, she agreed to accompany the appellant. He had followed her to her aunt's home and invited her to join him for more drinks. The complainant suggested a place where alcohol is sold, but they found the tavern to be closed. The appellant and the complainant wandered the streets looking for taverns in the area but found all the taverns being locked up as it was already past 23:00 at night.

[7] The appellant indicated that he had to work the following day and that it is time to retreat to bed. He then told the complainant that she should accompany him where after he grabbed her and forced her to accompany him. The complainant fell and the appellant pulled her while she was lying on the tarmac, which caused several bruises and injuries to her face. The complainant screamed for help.

[8] The second state witness, KF Thlabana ("Mabana") a family member of the complainant, who had been awoken by the complainant's calls for help, confirmed the version presented by the complainant that the appellant dragged and assaulted her. When Mabana tried to intervene, the appellant threatened her. The appellant injured the complainant by pressing his fingers into her eye sockets, leaving her eyes red and painful.

[9] It was raining and the complainant's clothes were wet and covered in mud. She decided to stop any resistance. On the way to his place of residence, the

appellant took an empty bottle, broke it and threatened to stab her with the broken bottle if she presented any further resistance.

[10] At their arrival at the appellant's home, the complainant removed her wet clothes, except for some underwear. She testified that since it was wet and muddy, she would not be able to sleep wearing wet clothes. She then got into the appellant's bed. The appellant joined her and they went to sleep. Later, after they both slept for some time, the appellant used one of six available condoms and had sexual intercourse with the complainant. There was a considerable break in between the three times when the appellant had sexual intercourse with the complainant, each time against her will. The complainant explained that she indicated to the appellant that he may do whatever he wanted with her because she had given up any resistance.

[11] The next morning, after they had sexual intercourse for the third time, the appellant asked whether he could accompany the complainant on her way home. The complainant was in a hurry to assist her child who had to attend school. The complainant then immediately went to Lefo. Lefo was one of the other four men who was in the company of the complainant the previous evening. The complainant showed him the injuries that she had sustained due to being manhandled and assaulted by the appellant. Lefo confirmed that he learned from the complainant that she had been raped by the appellant and he noticed the bruises on her neck.

[12] The appellant's application in terms of the provisions of section 174 was refused by the court *a quo* and the appellant testified in his defence. His version of the events was that the complainant in fact followed him to his place of residence and indicated to him that she did not have a place to sleep. He assaulted her because she removed money from his pockets. The appellant testified that they had sexual intercourse at intervals during the night and early the following morning.

[13] In his judgment the magistrate found that the complainant was under the influence of alcohol after spending the greater part of the evening drinking with the five men. From the report by the medical practitioner, handed in as Exhibit "A" it is evident that the complainant suffered extensive superficial lacerations on the forehead, cheeks, chin and nose. Superficial lacerations and abrasions to her neck and swollen upper and lower eyelids to her eyes were noted. Regarding the gynaecological examination no injuries were found.

[14] Rape is a heinous crime and an invasion of privacy of an individual. Due to the escalating levels of serious crime the Legislature considered rape as one of many serious crimes and ordained life imprisonment as the sentence to be imposed in instances where a complainant had been raped more than once, as in the matter at hand. It is evident from the Victim Impact Report that the complainant experienced severe trauma as a result of the appellant's conduct which had a lasting impact upon her.

[15] The Appellant's personal circumstances are as follows: He was 29 years of age at the time of sentencing. He is not married and has a child aged 7 years. The child is residing with her maternal grandmother and is financially being cared for by her mother. The appellant does not pay maintenance in respect of the child. His highest scholastic qualification is Grade 7. Prior to his arrest he was doing odd jobs and earned R80.00 per day. The Appellant was staying with a sibling who he cared for. The appellant had been in custody awaiting trial for approximately 6 months. He has no previous convictions.

[16] The minimum sentences to be imposed are ordained by the Legislature and the courts must not shrink from their duty to impose, in appropriate cases, the prescribed minimum sentences. It is trite that the sentence should reflect the severity of the crime committed, the blameworthiness of the offender and serve the interest of society, as propagated by the **Zinn** triad.[5]

[17] In the **Vilakazi** case, Nugent JA observed that it is "…only by approaching

[5] **S v Zinn 1969 (2) SA 537 (A).**

sentencing under the Act in the manner that was laid down by this court in **S v Malgas** … that incongruous and disproportionate sentences are capable of being avoided".[6] In **S v De Beer**[7] Ploos van Amstel AJA, on behalf of the majority, warned that it is the duty of the courts to avoid injustice and to guard against adhering slavishly to the prescribed minimum sentences. The Supreme Court of Appeal in **S.v. Malgas** held that: "... The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of the consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence".[8]

[18] The Complainant did not suffer from severe physical injuries apart from being dragged on the road surface which left superficial lacerations on her face. The injuries to her eyes and neck seem more serious and consisted of swelling and abrasions. There is no evidence that the injuries to her eyes and neck are of a permanent nature. The Complainant indicated that she was consuming alcohol with the men. From the medico-legal report the presence of alcohol was noted when she was examined the following afternoon at 14h00. The appellant was severely intoxicated and he expressed his regret in what he did by testifying that if he had not been drinking he would not have insisted on having sexual intercourse with the complainant.

[19] With reference to **Fowlie v Rex**[9] it was argued on behalf of the appellant that "…although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened…" In **S v Ndhlovu** [10] it was held as follows: "… intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, an may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and

[6] **S v Vilakazi at [14].**
[7] **2018 (1) SACR 229 at [18].**
[8] **2001 (1) SACR 469 (SCA) at [22].**
[9] **1906 TS 505 at 695 G-H.**
[10] **1965 (4) SA 692 (A).**

thereby to do the things which sober he would not do."

[20] Taking into consideration all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal circumstances relating to the Appellant including the possibility of rehabilitation, I am satisfied that a lesser sentence is called for in this case, thus justifying a departure from the prescribed sentence of life imprisonment.

[21] In my view, the Appellant ought to be sentenced to a lengthy term of imprisonment. As such, I propose that the Appellant's appeal be upheld, and his sentence set aside and be replaced with a sentence of twenty (24) years imprisonment.

[22] **In the result I propose the following orders**.

(1) The appeal against the sentence is upheld.

(2) The sentence imposed by the trial court is set aside and substituted with the following:
The Appellant is sentenced to twenty (24) years imprisonment.

(3) The sentence in paragraph 2 above is ante-dated to 29 October 2019.

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I VAN RHYN, J

I concur.

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A P BERRY, A J

On behalf of the Appellant: Ms S Kruger

Instructed by: LEGAL AID SOUTH AFRICA

Bloemfontein

On behalf of the Respondent: Adv. S Giorgi

Instructed by: DIRECTOR PUBLIC PROSECUTIONS

Bloemfontein