Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **CA & R 14/2023**
Heard on: **02 October 2023**
Delivered on: **27 October 2023**

In the matter between:

DAWID HENDRICKS **FIRST APPELLANT**

RICARDO ARENDS **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **Mamosebo, J *et* Olivier, AJ**

JUDGMENT

Olivier, AJ

1. The Appellants approach this Court with an appeal against sentences of life imprisonment that were imposed on them on 04 February 2020 by Regional Magistrate A. Venter in the Regional Court De Aar, Northern Cape Province (hereinafter "the Court *a quo*"), after having acquired the necessary leave to do so.

2. It is common cause that both the Appellants were found guilty and convicted on a count of rape[1] and it appears to be common cause that the complainant was in fact raped by five male persons, two of which were the First and Second Appellants.

3. The parties' legal representatives were *ad idem* about the fact that the crime of which the Appellants were accused and on which they were eventually convicted and sentenced, carried the minimum sentence of life imprisonment.[2]

4. Both the Appellants' appeals were essentially based on the fact that the Court *a quo* misdirected itself in that the said Court *a quo* did not find that substantial and compelling circumstances existed to deviate from the aforesaid prescribed minimum sentence of life imprisonment.

   It should be mentioned, for the sake of completeness, that the record of the proceedings in the Court *a quo* was found to be incomplete, but that both the representatives appearing for the Appellants as well as the representative for the State had agreed that the parts of the record that did in fact come to hand, were sufficiently complete for the appeal to proceed.

5. I deem it prudent to firstly mention the personal circumstances of the Appellants as at date of sentencing and it is confirmed from the record of the proceedings in the Court *a quo* that the First Appellant was 39 (thirty-nine) years old at the

---

[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, **Section 3**.
[2] See **Section 51(1)** of the Criminal Law Amendment Act, Act 105 of 1997 read with Part 1 of Schedule 2 to said Act.

time of the incident and that he was not married but had two minor children, one of whom was still at school.

It appears that the First Appellant was, however, not the primary caregiver in respect of these minor children as they resided with the First Appellant's mother.

The First Appellant's highest level of education is Grade 12 and he was employed at the time of his sentencing, earning an amount of R150.00 (One Hundred and Fifty Rand) per day.

The State proved during the trial (and this was admitted to by the First Appellant) that he had seven previous convictions, the last four of which had elements of violence.

6. The Second Appellant was 22 (twenty-two) years of age at the time of his sentencing, had a Grade 10 qualification, was not married and had no children and/or dependants.

The Second Appellant was employed at the time of his arrest and he was and had remained incarcerated from the time of his arrest pending the finalization of the matter in the Court *a quo*.

At the time of sentencing, the Second Appellant had only one previous conviction[3], but it appears from the record of the proceedings in the Court *a quo* that at the time of sentencing, he had also been found guilty on a charge of murder for which he was sentenced to ten years' imprisonment.

It should be stated that the Second Appellant apparently committed the crime of murder approximately two months prior to committing the rape which forms the subject of this appeal.

---

[3] It appeared to be stock theft.

7. Ms. Stellenberg, who appeared on behalf of the Respondent in this appeal, relied on ***S v Vilakazi***[4], pointing out that when the question is considered as to whether substantial and compelling circumstances for deviation from a prescribed minimum sentence did in fact exist, the Court of appeal should, in cases of serious crimes, deem an Appellant's personal circumstances to effectively recede into the background.[5]

7.1 It does however appear from the record of the proceedings that the Appellants' personal circumstances were considered by the learned Regional Magistrate before sentencing.

8. The crime of rape, as has been found and described in various past matters, is perhaps one of the most heinous crimes to be committed against another person[6] and the seriousness of this crime is in my view underlined by the attempts by the South African Government to highlight the protection of the rights of especially women and children in this country.

Khampepe J correctly pointed out that the crime of rape "*… is an inescapable and seemingly ever present reality and scourge on the nation …*"[7]

9. There is therefore little doubt in my mind that the learned Regional Magistrate was correct in her findings that the crime of which the Appellants were found guilty is serious and it should be mentioned that the seriousness of the crime to which the complainant in this instance was subjected, was, in any event, not denied by the legal representatives who appeared on behalf of the Appellants.

---

[4] 2009 (1) SACR 525 (SCA).
[5] **Vilakazi**, *supra* at paragraph [58].
[6] See *inter alia* the matter of **Chapman v S** [1997] 3 All SA 277 (A) where the crime of rape was described on page 279 of the judgment as "*… a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.*" Also see **S v Ndlovu** 2017 (2) SACR 305 (CC) at paragraph [53].
[7] **Ndlovu**, *supra*.

10. It is trite that, in order for a trial Court to deviate from the minimum sentences prescribed in terms of the Criminal Law Amendment Act[8] (hereinafter referred to as "*the CLAA*") and to impose a lesser sentence than the minimum sentences so prescribed, the said Court must be satisfied that substantial and compelling circumstances exist that justifies such a deviation.[9]

The question therefore to be answered by this Court is whether compelling and substantive circumstances did in fact exist that should have persuaded the learned Regional Magistrate to deviate from the prescribed minimum sentence.

11. The aforesaid question should of course be considered against the backdrop of the view of the Supreme Court of Appeal in the matter of ***Malgas v S***[10] where it was held:

"*… a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers a just and appropriate sentence. 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. When material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh … in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the* ***disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'****."*[11] (My emphasis and omissions)

12. This Court therefore, and if I understand the judgment in ***Malgas*** correctly, needs to determine whether the Court *a quo* had committed a material misdirection when sentencing the Appellants to life imprisonment, alternatively

---

[8]See footnote 2 *supra*.
[9]**Section 3(a)** of the CLAA.
[10][2001] 3 All SA 220 (A).
[11]See **Malgas**, *supra* at paragraph [21].

whether the sentence of life imprisonment, in the circumstances, was shocking, startling or disturbingly inappropriate.

13. In the matter of ***S v Matyityi***[12] to which this Court was referred by both Mr Kambi on behalf of the Second Appellant and Ms. Stellenberg on behalf of the Respondent, it was held by the Supreme Court of Appeal as follows:

> "*… one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the Legislature for the flimsiest of reasons … courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. 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 arms of state. Here parliament has spoken. It 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 such as 'relative youthfulness' or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness."*[13] (My omissions)

14. Ms. Stellenberg, unsurprisingly, argued that the learned Regional Magistrate in this instance did not commit a material misdirection when sentencing the Appellants to life imprisonment, emphasizing the brutality of this particular crime and the impact that it had had on the victim.

15. Mr Steynberg, on behalf of the First Appellant and to his credit, conceded that:

    15.1 the seriousness of the crime on which the Appellants were convicted was exacerbated by the fact that the rape in effect constituted a so-called gang-rape;

---

[12] [2011] 2 All SA 424 (SCA).
[13] **Matyityi**, *supra* at paragraph [23].

15.2 there were no mitigating factors to be found in the facts of the matter and specifically so if cognizance is taken of the fact that:

15.2.1 the complainant was under the influence of alcohol; and

15.2.2 the complainant was small in stature and in actual fact defenseless against five men; and

15.3 the First Appellant's previous convictions did not do him any favours.

I have to agree with Mr Steynberg on the above.

16. Mr Steynberg however implored this Court to find substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment in the First Appellant's personal circumstances and in the fact that he had pleaded guilty to the offence during the course of the hearing of the matter.

Mr Steynberg, again to his credit and responsibly so, was however quick to point out that the fact that the First Appellant had initially pleaded not guilty to the crime with which he was charged and then having changed his mind during the course of the trial, effectively renders moot any argument as to possible genuine remorse shown by the First Appellant.

17. It appears from the relevant parts of the record of the proceedings in the Court *a quo*, that the learned Regional Magistrate did in fact consider all of the required and relevant factors before sentencing the First Appellant and I could find no misdirection from the Court *a quo* on the imposition of a sentence of life imprisonment in respect of the First Appellant.

Given the First Appellant's record, the circumstances under which the crime was committed, the fact that he was the apparent instigator of the crime and the lack of remorse shown from his side, I also do not deem the sentence as shocking,

startling or disturbingly inappropriate and there is, in my view, no reason for this Court to interfere with the sentence imposed on the First Appellant by the Court a quo.

18. Mr Kambi were at pains to convince this Court that substantive and compelling circumstances to deviate from the minimum sentence imposed on the Second Appellant are to be found in that:

18.1 the Second Appellant had already been incarcerated for a period of two years and three months when the life sentence was imposed;

18.2 the complainant did not, based on the physical evidence presented during trial, suffer any serious bodily injuries[14]; and

18.3 the Court *a quo* did not consider any victim impact report prior to sentencing the Second Appellant.

19. In respect of the first issue raised by Mr Kambi, this Court was referred to the matter of ***S v Vilakazi***[15] where the learned Nugent JA (as he was then) in essence remarked that it would be unjust if "*time served*" is not considered when sentencing an accused, as well as to the matter of ***Ntepe v S***[16] where the Free State High Court through the pen of the learned Mocumie J held that the fact that the Appellant in that instance was incarcerated for a year and a half without trial, contributed to the finding that substantial and compelling circumstances did exist to deviate from the prescribed minimum sentence.[17]

It is however significant to note that the Appellant in the ***Ntepe*** matter was a first offender and that he had pleaded guilty to the crime with which he was charged, which, in my view, differs from the matter at hand where the Second Appellant

[14]It should be noted that any serious argument of this point was wisely abandoned by Mr Kambi.
[15]*Supra* at paragraph [60].
[16][2016] ZAFSHC 52 (SAFLII Reference).
[17]See **Ntepe**, *supra* at paragraph [9].

did not plead guilty initially[18] and definitely did not have a squeaky clean record at the time of sentencing.

20. It appears from the record of the proceedings in the Court *a quo* that the learned Regional Magistrate did in fact consider the time that the Second Appellant had spent in incarceration, but nonetheless found there to be no substantive and compelling reason to deviate from the prescribed minimum sentence.

I have to agree with the learned Regional Magistrate in this regard, specifically in view of the seriousness and brutality of the crime, the fact that the Second Appellant initially pleaded guilty only to make certain admissions later during the trial and the fact that the Second Appellant had committed a serious crime only two months prior to the rape.

It should be mentioned, for the sake of completeness, that the learned Regional Magistrate did give consideration to the fact that the Second Appellant was serving a ten year sentence for murder and that she had ordered the murder sentence to run concurrent with the life sentence for the rape.

21. Mr Kambi furthermore argued that the fact that the Court *a quo* did not consider a victim impact report prior to sentencing the Appellants, serves as a substantive and compelling reason for this Court to intervene in the sentence passed by the Court *a quo*.

22. In this regard this Court was *inter alia* referred to the matter of ***Matyityi*** where the Court held that it is "*… important that information pertaining to not just the objective gravity of the offence but also the impact of the crime on the victim be placed before the court.*"[19]

[18]The Second Appellant apparently also changed his plea during the course of the trial.
[19]See **Matyityi**, *supra* at paragraph [17].

It should be mentioned that upon a proper reading of the above quotation from ***Matyityi*** and despite the remark made in the matter of ***Ntepe*** in respect of the submission of a Victim Impact Report[20], I did not form the opinion that a physical written report on the impact of the crime on the complainant was the be-all and end-all of the matter.

I formed the view that evidence in this regard under oath should suffice.[21]

23. Even if I am wrong in my above assessment, it should be mentioned that the Supreme Court of Appeal has, in a more recent decision and in a matter also concerning rape, remarked that "*… common sense dictates that [the trauma] could not have been trifling.*"[22]

24. It appears from the record of the proceedings in the Court *a quo* that the learned Regional Magistrate did in fact consider the obvious emotional trauma that the complainant went through especially when presenting her evidence and I am of the view that common sense would also in this instance dictate, given the circumstances under which the crime was committed, that the complainant's trauma would not be trifling.

25. In view of the above, I also do not deem the sentence in as far as the Second Appellant is concerned as shocking, startling or disturbingly inappropriate.

I could also not find any indication that the learned Regional Magistrate had misdirected herself in this regard and there is, in my view, no reason for this Court to interfere with the sentence imposed on the Second Appellant by the Court *a quo*.

ORDER:

---

[20] *Supra* at paragraph [8].
[21] See **Vilakazi**, *supra* at paragraphs [57] and [58].
[22] **S v Ngcobo** 2018 (1) SACR 479 (SCA).

26. In view of the above, I make the following order:

The appeals of both the First and Second Appellants are dismissed.

_____

OLIVIER AJ
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur.

_____

MAMOSEBO J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

On Behalf of the First Appellant:	Mr H. Steynberg
On instruction of:	Legal Aid South Africa **KIMBERLEY**
On behalf of the Second Appellant:	Mr S.S. Kambi
On instruction of:	Kambi Attorneys **BLOEMFONTEIN** c/o Legal Aid South Africa **KIMBERLEY**
On behalf of the Respondent:	Adv. A. Stellenberg
On instruction of:	The NDPP **KIMBERLEY**