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

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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 28/2023

In the matter between:

JOHANNES MOAGE MAKGOBE **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen ADJP, Khan AJ

Heard: 17 November 2023

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **19 December 2023** at 10h00am.

Summary: Criminal Appeal against sentence imposed in the Regional Court –minimum sentence on each of three charges of rape 10 years imprisonment – sentence increased to 12 years imprisonment equating to 36 years imprisonment – Principles in *Mthembu v S* (206/11) [2011] ZASCA 179; 2012 (1) SACR 517 (SCA) restated - Appeal against sentence dismissed.

ORDER

On appeal from: Regional Court Madikwe, North West Regional Division, (Regional Magistrate R H Motsomane sitting as court of first instance):

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against sentence is dismissed.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an appeal, with leave granted on petition by Honourable Judge President Hendricks and Judge Snyman on **3 December 2021** against sentence only.

[2] The appellant was arrested on **24 February 2013**, being the date on which he raped three different complainants during one incident, in contravening section 3 read with sections s1, 55, 56(1),

57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) – counts 1 to 3. The charge is further read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA').

[3] The appellant initially appeared in the District Court until his appearance in the Regional Court, Madikwe on **23 July 2014**. The appellant remained incarcerated from the date of his arrest, as an awaiting trial detainee until he was ultimately sentenced.

[4] The trial commenced on **07 July 2014**, with the appellant pleading not guilty. He was duly convicted as charged on all three counts on **30 July 2014**, on which date he was sentenced to Twelve (12) years imprisonment on each of the three counts, equating to an effective thirty-six (36) years imprisonment.

Condonation

[5] The appellant failed to prosecute his appeal timeously following the granting of leave to appeal against sentence, on petition; and seeks condonation for the late noting of the appeal.

[6] The authorities on an application for condonation are trite. The factors ordinarily considered by the court include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

[7] The main reason advanced for the delay in prosecuting the appeal is attributed to delays occasioned by his legal representatives from Legal Aid South Africa. The nub being the resignation of the legal aid practitioner assigned to attend to the appeal around September 2022 and the newly allocated practitioner only being allocated around February 2023. The appellant contends that the delay in prosecuting the appeal cannot be attributed to fault on his part and implores this Court to consider that there are reasonable prospects of success on appeal against the sentence imposed.

[8] The respondent does not oppose the application for condonation for the reasons advanced by the appellant. This Court is satisfied that good cause has been shown to grant the application for condonation, which condonation is accordingly granted.

The grounds of appeal

[9] The appellant assails the sentence imposed on a very narrow ground that the effective sentence of thirty-six (36) years imprisonment is shockingly inappropriate and out of proportion to the totality of accepted facts in mitigation, in that the court *a quo* failed to consider that the cumulative personal circumstances of the appellant constitute substantial and compelling circumstances.

Conviction

[10] The appeal against sentence cannot be considered without having regard to the facts which underscore the convictions. In brief, the three complainants, M[…] B[…], N[…] M[…] and R[…] M[…], aged 17 and 16 years old respectively, at the time of the rapes, were at a small shop and Tavern where they enjoyed some soft drinks. As they were leaving at around 21h30pm, in the company of one Lucky Magoleng, the appellant approached them and spoke to Ms B[…] about her grandmother and aunt. Although not clear from the record, the appellant told Ms B[…] that he was in possession of a firearm belonging to one Ado and that he would lock her up in cell one for four days. The three complaints left in the company of Mr Magoleng.

[11] The appellant followed them and harassed Ms M[…] wanting to talk to her. Ms M[…] remonstrated and requested Mr Magoleng to reprimand the appellant. They proceeded on their way, with the appellant still following them. Upon reaching a certain point along the way, the appellant insisted on talking to Ms M[…] who also remonstrated. The appellant assaulted Ms M[…] by striking her with his cellular phone. The cellular phone fell and was lost in the grassy area where the assault occurred. The appellant instructed them to assist in looking for his cellular phone, but only the battery cover was found. As a result, the appellant instructed the three complainants to accompany him to his parental home to get a torch to continue the search for his cellular phone. Along the way the appellant threatened once again to assault Ms M[…] with a hose pipe which he found lying along the way.

[12] As they reached a shack painted maroon, the appellant searched for the key to the shack and when he could not find it, he used a chair to gain access to a window which he opened. He instructed Ms B[…] to enter through the window to find a match and candle and she obliged, but to no avail. The appellant then instructed Ms M[…] to enter the shack to assist in finding a match and candle. When she too could not find anything, Ms M[…] was instructed to enter the shack through the window. The appellant followed suit and closed the window.

[13] Once in the shack with the three complainants, the appellant told them that he was no longer interested in getting a torch but more interested in their vaginas. He instructed Ms B[…], at knifepoint, to get undressed and she did as told. He told them that they should not scream or talk as people in the area knew him and would not assist them. She was aware that people in the area feared him. The appellant summoned her to a bed where he raped her vaginally and only let go of her when she told him that she needed to urinate.

[14] The tyranny of the appellant continued when he summoned Ms M[…] to the bed where he proceeded to rape her vaginally as well. Ms M[…] followed and she too was raped vaginally. The appellant summoned Ms M[…] to engage a second act of rape with her but he fell asleep before he could engage in the second dastardly act. With the appellant asleep, the three complainants made their escape through the window and immediately proceeded to report the incident to the aunt of Ms M[…], who called the police.

[15] The complainants eventually made their way to a Clinic on the advice of the police. The appellant arrived at the Clinic and accused them of robbing him of his cellular phone. The

complainants were taken to Moses Kotane Hospital where they were examined by a doctor.

[16] The medical reports in respect of the gynecological examination of three complainants were all consistent with probable forcible dry penetration. The medical examination of Ms B[…] revealed a small scratch to the posterior fourchette with the hymen already ruptured. That of Ms M[…] a rupturing of the hymen with slight bleeding, a laceration at clock position 13 hours and bruises between the labia majora labia minora. And, that of Ms M[…] a rupturing of the hymen with slight bleeding and a tear at clock position 14hrs and a bruise at the posterior fourchette. These injuries were all consistent with the accounts of rape testified to by the complainants.

The test on appeal against sentence

[17] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. The position is succinctly set out in *S v Malgas* 2001 (2) SA 1222 (SCA) as follows:

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, 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 to be 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. Where 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 doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even 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". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the

> difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."
>
> (emphasis added)

[18] It is apposite to note that the court *a quo* in pronouncing judgment on conviction, simply stated the appellant was found guilty as charged on all three charges. As the State had not pertinently indicated in the charge which jurisdictional fact it relied on as envisaged in section 51(1) read with Part I of Schedule 2 or section 51(2) read with Part I of Schedule 2 of the CLAA, it was incumbent on the court *a quo* to make a finding in this regard, which it did not. Only when regard is had to the judgment on sentence, does it transpire that the court *a quo* approached the imposition of sentence within the ambit of section 51(2) read with Part I of Schedule 2 of the CLAA.

[19] The single ground of appeal assails the sentence on the basis that the court *a quo* failed to find substantial and compelling circumstances to deviate from the mandated sentence, applicable at the time, of ten (10) years imprisonment on each of the three (3) counts, premised solely on the personal circumstances of the appellant. The personal circumstances, of the appellant is not the only factor to consider in assessing whether substantial and

compelling circumstances exist where a minimum sentence is prescribed by the CLAA.

[20] The approach is trite as enunciated in *Malgas* and endorsed in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382; 2001 (1) SACR 594 (CC). In *Malgas* it was said, that *'If the sentencing 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.'*

[21] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at paragraph 15, Nugent JA once again made it clear that the factors ordinarily taken into account for purposes of sentence, whether aggravating or mitigating of sentence, must not be taken individually and in isolation as substantial or compelling circumstances:

> '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.'"
>
> (emphasis added)

[22] The appellant, at the time of sentence on **30 July 2014**, was 28 years old, a first offender, not married, employed as a herdsman earning R1200.00 per month, with a six year old disabled child who was living with her unemployed mother at her parental home. He had spent seventeen months as an awaiting trial detainee before sentence. On his own account he has human immunodeficiency virus (HIV) for which he has been receiving treatment in prison. He concedes the seriousness of the rapes. As the court *a quo* correctly opined the single most aggravating factor inherent in the personal circumstances of the appellant is that he was HIV positive, that he raped the complainants without the use of any protection and placed their lives at risk.

[23] The circumstances under which the rapes were perpetrated, committed in the presence of each of the three complainants under threat with a knife outweigh the only mitigating factor of substance in the personal circumstances of the appellant, that he was a first offender.

[24] The interests of the complainants similarly far outweigh the personal circumstances of the appellant. Of the three complainants, two were seventeen years old and one was sixteen years old at the time of the rapes. Notably and mentioned in

passing, under the present sentencing dispensation, the appellant would be faced with life imprisonment on each of the three rapes.

[25] The personal circumstances of the appellant highlighted as the single ground of appeal, do not constitute substantial and compelling circumstances when weighed against the circumstances of the rapes and the interest of the complainants.

[26] Accordingly, there was no basis for the court *a quo* to deviate from the mandated sentence of ten (10) years imprisonment on each of the three counts of rape. Inherent in the ground of appeal is that the effective sentence of thirty-six (36) years imprisonment is shockingly inappropriate. The difference between the mandated sentence of ten (10) years imprisonment on each of the three counts of rape which is an effective sentence of thirty (30) years imprisonment, and the sentence of twelve (12) years imprisonment which is an effective sentence of thirty-six (36) years imprisonment, is therefore an effective six (6) years. Does an effective sentence of thirty (30) years imprisonment as opposed to thirty-six (36) years imprisonment, constitute a shockingly inappropriate sentence?

[27] The court *a quo* indeed imposed sentences higher than the prescribed minimum sentence of ten (10) years imprisonment for a first offender for rape in the circumstances perpetrated by the appellant. A Regional Court may impose a higher sentence not exceeding five years in addition to the prescribed minimum sentence.

[28] The court *a quo* failed to provide reasons in its judgment why it deviated incrementally from the ten years imprisonment prescribed as a minimum sentence. In *Mthembu v S* (206/11) [2011] ZASCA 179; 2012 (1) SACR 517 (SCA) (29 September 2011), the SCA dealt with this question as follows:

> "[4] At the heart of this appeal therefore is the correctness of *Mbatha*. In *Mbatha,* Wallis J (Van der Reyden and Niles-Duner JJ concurring), held (para 26):
>
> 'Consistent with what I have already said about the proper approach to sentence when the court contemplates a sentence greater than the statutory minimum, and consistent also with those cases that have held that if the State intends to rely upon the minimum sentencing legislation the accused must be forewarned of that fact, preferably in the indictment, I think that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings. What makes that defect of greater significance is that the way in which Badal AJ put his questions to Mr

Govender meant that the latter may have been misled. In my view there was a substantial risk of him having been lulled into a sense of false security, in the belief that the court was only concerned with the question whether there were substantial and compelling circumstances justifying the imposition of a sentence less than the minimum, and was not entertaining the possibility of a sentence greater than that. That is particularly so in a case such as the present where the fact that the appellant chose to advance a dishonest defence, which had been correctly rejected by the court, and did not then give evidence, meant that there was little point in advancing a submission that substantial and compelling circumstances were present justifying the imposition of a sentence of less than 15 years' imprisonment. In my view, the court contemplating the imposition of a sentence greater than the statutory minimum should make it apparent to the accused and his or her legal representative, as that may well alter their entire approach to sentence.'

…

[14] When then should the defence be apprised by the court of the fact that a sentence in excess of the ordained minimum is contemplated? 'At the outset of the sentencing phase' was counsel's answer to that question. One suspects that it would have to be as early as then. Any later, may in all likelihood render the warning illusory, particularly if the complaint is - and that was the thrust of the complaint - that an accused person may (not would) conduct his or her case differently if forewarned. Notwithstanding the *sui generis* nature of the sentencing phase, the mere notion that a court should be obliged, *ante omnia* so to speak, to disclose its view, even if simply tentative, on pain that

failure to do so would vitiate the proceedings and, moreover, to thereafter be bound to that view (for that is its corollary) is anathema to our law. No such duty existed prior to the coming into operation of the minimum sentencing legislation. And no such duty is to be found in the legislation itself.

…

[18] It may well be a salutary practice for a court, if it holds a view adverse to a particular litigant, to put that to the litigant or such litigant's representative during argument. But we cannot imagine that where a view is just in its embryonic stage, a failure to do so, without more, would constitute a defect in the proceedings. In particular Wallis J's approach, that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes, without more, a defect in the proceedings, cannot be endorsed. In our view such failure in and of itself will not result in a failure of justice, which vitiates the sentence. After all, any sentence imposed, like any other conclusion, should be properly motivated (*S v Maake* **2011 (1) SACR 263** SCA). And we should not lose from sight that our appellate courts have, in terms of long standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate. As both *Legoa* and *Ndlovu* make plain a 'vigilant examination of the relevant circumstances' is required. Here, the indictment was explicit. It stated: '**MURDER** read with the relevant provisions of section 51 and Schedule 2 of the **Criminal Law Amendment Act 105 of 1997**'. Thus, right from the outset, the accused was informed in unambiguous terms that the State intended to

rely on the minimum sentencing provisions. No specific irregularity was alluded to in argument. A careful perusal of the record reveals that there was none.

[19] One further aspect merits mention. *Maake,* in support of the broad hypothesis that conclusions by a court should be properly motivated, called in aid *Mbatha.* It was submitted to us that *Maake* cited *Mbatha* with apparent approval and that that constitutes an endorsement of its correctness on this score. We do not agree. *Maake* did not subject the judgment in *Mbatha* to careful scrutiny nor was the correctness of its conclusion or reasoning properly considered. It sought support from *Mbatha* in a wholly different context.

[20] Turning then to the merits of the present appeal against sentence. Swain J stated (para 11 and 12):

'The learned judge found that the appellant had shown true contrition and regret for what he had done, was a first offender, and accepted that he was a good candidate for reformation "as provided for in the Correctional Services system". The learned judge however, identified the incident as one which fell within what has become known as "road rage". By reference to the decision of Borchers J in the case of *S v Sehlako* **1999 (1) SACR 67** (W), he held that the facts were very similar to the present case, and endorsed the view of Borchers J, that:

"[E]ven where an accused's personal circumstances are extremely favourable, as they are in this case, they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers."

In *Sehlako* the accused was sentenced to 18 years' imprisonment. The learned judge found there was very little to differentiate that case from the present one, and sentenced the appellant to 18 years' imprisonment.'

He accordingly concluded (para 22 and 23)):

'This court can of course only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection, or where 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"—*Malgas* at 478e-h.

The sentence imposed by the learned judge suffers from none of these defects, and accordingly must stand.

The order I make is the following:

The appeal against conviction and sentence is dismissed.'

[21] We can find no fault with the approach of the court below. It follows that the appeal must fail and it is accordingly dismissed.

[29] On the authority of *Mthembu* the court *a quo* cannot be faulted for imposing a higher sentence than the prescribed minimum sentence. See too *Ndlovu v S* (CCT174/16) [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017), where the Constitutional Court, mindful of the most

unfortunate misdirection by the Magistrate, imposed a sentence of fifteen (15) years imprisonment, deviating from the minimum sentence of ten (10) years imprisonment.

[30] The appeal against sentence accordingly stands to be dismissed.

Order

[31] In the result, the following order is made:

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against sentence is dismissed.

_____

A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

_____

J L KHAN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Appellant: Mr R K Thuwe

Instructed by: Legal Aid South Africa

Mahikeng Justice Centre

For the Respondent:	Adv F T Tlatsana
Instructed by:	The Director of Public Prosecutions, Mahikeng