

## S v Ngcobo 2018 (1) SACR 479 (SCA)

KEY CONCEPTS	
Multiple rape	Need for pre-sentence report or victim impact statement
Substantial and compelling circumstances	Proportionality in sentencing
Life sentence	Detention awaiting trial as a mitigating factor

### Introduction

The regional court convicted the appellant of 2 counts of rape falling under sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the Act) and sentenced him to life imprisonment for both counts taken together. On an automatic appeal, the High Court confirmed the conviction and sentence of life imprisonment. The SCA granted special leave to appeal against sentence.

### Facts of the case

In September 2006 the complainant, then aged 16, was studying in her room. She was expecting her boyfriend (W) to bring her a book. When she heard a knock at the door, she thought it was him and went to open the door. It was the appellant, who grabbed her and covered her mouth with his hand so that she could not scream. He told her that he had returned from prison and hit her with the fist many times, demanding that she call her sister with whom he had previously had a relationship. The complainant refused to do so and he threatened to shoot her. He forced her to the ground and raped her. He then dragged her to his house about 2/3kms away where he raped her again. She sustained bruises on her legs and swelling of her face. When he fell asleep, she escaped and notified her brother-in-law who arrived shortly thereafter with her father. The police were informed and the appellant was arrested. He was 23 years old.

The appellant alleged that he was in a secret relationship with the complainant who did not want her parents to know about their affair. Because her sister was his girlfriend, her parents would have expelled her from the home if they found out. So she lied that he had raped her when they had sexual intercourse.

### Issue before the court

The appellant's grounds of appeal were that the courts below had overemphasised the seriousness of the crime without sufficient regard to his personal circumstances, in particular that he was gainfully employed and supported 2 dependents. They did not emphasise the 2 years he spent in custody awaiting trial. It was contended that the sentence of life imprisonment was disproportionate to the crime, taking into account the age of the complainant.

### Discussion

The evidence before the court is limited and provides very little background into the appellant's reasons for committing the crime. There were no pre-sentencing and victim-impact reports. Such reports, properly prepared, would have give the court deeper insights into the personality and identities of the appellant and the complainant, why he committed the crime and how she reacted to it.

After considering the evidence submitted in mitigation, the trial court did not find that there were substantial and compelling reasons present to justify a deviation from the prescribed minimum sentence, and imposed a term of life imprisonment. On appeal, the High Court found that the magistrate had not committed any misdirection in imposing life imprisonment. Although there was no evidence before the court of physical or psychological trauma that the complainant would have endured, the court accepted that common sense dictates that the trauma could not have been trifling.

The two grounds of appeal relate to:

- the delay of about 2 years before the trial commenced;
- the proportionality of the sentence to the crime, the interests of the appellant and of society.

### ***Delay***

Interference with the sentence will only be justified if the trial court is shown to have misdirected itself in some respects, or if the sentence imposed was so disturbingly inappropriate or disproportionate that no reasonable court would have imposed it. When examining the delays before trial, some delays seem to have been at the instance of the state and others at the instance of the appellant. Primarily the appellant remained in custody because his 3 bail applications failed. The test was not whether on its own the period of detention constituted a substantial and compelling circumstance, but whether the effective sentence proposed was proportionate to the crime committed. The period in detention pre-sentencing is one factor that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified. It is not a substantial and compelling factor on its own.

### ***Proportionality***

The trial court, in sentencing the appellant, highlighted the prevalence of the crime of rape of women and children. It noted the personal circumstances of the appellant to include his age, which was 25 years at the time of sentencing, his having 2 minor children and his employment that earned him R900 per week. It accepted that he had no previous convictions relevant to this case, but viewed the aggravating features of his conduct in a very serious light, because he not only raped the complainant twice but he also assaulted and dragged her. On this basis the trial court found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. Not even the appellant's time in custody moved the court to consider a lesser sentence.

When the full bench heard the matter, it applied the principles enunciated in *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Matyityi* 2011 (1) SACR 40 (SCA) that sentences must be proportionate and that the court may only interfere if an injustice would result. It found that the appellant had failed to advance any evidence that his immaturity should count in mitigation. Nor did he show any remorse. The court endorsed the trial court's finding about the absence of substantial and compelling circumstances. Accordingly it upheld the sentence of life imprisonment.

### ***Decision***

The difference that two years would make to the sentence of life imprisonment is so marginal that it does not render the sentence shockingly disproportionate. The SCA could not interfere with the sentence as it did not find a misdirection by the courts below. Accordingly the appeal was dismissed.