

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

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. SS 52/2022

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES:  
YES/NO  
(3) REVISED: YES/NO

**09 February 2024**

DATE

SIGNATURE

In the matter between:

THE STATE

and

M[...], M[...] D[...]

ACCUSED

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JUDGMENT – SENTENCE

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BHOOLA AJ

## *Introduction*

- [1] I convicted the accused on count one of rape read with the provisions of section 51(2), of the Criminal Law Amendment Act 105 of 1997<sup>1</sup>, on count two, pointing of something likely to lead a person to believe it is a firearm, on count three, rape read with the provisions of section 51(2) of Act 105 of 1997, on count five, assault with the intention to do grievous bodily harm, on count seven, rape read with the provisions of section 51(1) of Act 105 of 1997, on count nine, rape read with the provisions of section 51(1) of Act 105 of 1997 and count 10, rape read with the provisions of section 51(1) of Act 105 of 1997.
- [2] Counts one and three attracts a minimum sentence of ten years each in accordance with the provisions of section 51(2) of Act 105 Of 1997 read with part three of schedule two and counts seven, nine and 10 attract a minimum sentence of life imprisonment in accordance with the provisions of section 51(1) of part one of schedule two of Act 105 of 1997.
- [3] For purposes of sentence, I have taken into consideration the personal circumstances of the accused, the seriousness of the offences for which the accused has been found guilty and the interest of the community, often referred to as the triad.<sup>2</sup> I have also considered the impact the offences has on each of the victims.<sup>3</sup> I have blended the sentence with an element of mercy,<sup>4</sup> and ensured that one element was not unduly emphasised at the expense of the others in arriving at a just and fair sentence.<sup>5</sup>

## ***The Accused's personal circumstances***

- [4] Although the accused did not testify in mitigation of sentence, and no pre-sentence or psychological reports were submitted on his behalf, the following personal circumstances of the accused were placed on record: he is 46 years old, he is a first offender for purposes of the offences he is charged with, he is married and in the process of divorce, he has three children whose ages are

<sup>1</sup> Hereinafter referred to Act 105 of 1997

<sup>2</sup> S v Zinn 1969 (2) SA 537 (A) at 540 G

<sup>3</sup> S v Khumalo 1973(3) Sa 697, S v Matyityi 2011 (1) SACR 40 SCA.

<sup>4</sup> S v Sparks 1972(3) SA 396 (A)

<sup>5</sup> S v Banda 1991(2) Sa 352(B-G) at 355A

13,10 and six. At the time of his arrest he was self- employed as a businessman and his monthly income amounted to approximately R15 000. The accused is of sound health and has been in custody since his arrest on the 10<sup>th</sup> September 2021.

### ***The seriousness of the offence***

[5] The offence of rape for which the accused has been convicted of is undeniably serious, and prevalent in society. So too, are the offences of pointing of something likely to lead a person to believe it is a firearm and assault with the intention to commit grievous bodily harm.

[6] The brutality and degree of violence used against some of the victims was degrading and dehumanising. The impact these offences had on all of the victims was devastating. What was disconcerting, and discomforting was the fact that the victims were helpless and terrified. When some of the victims tried to escape they were either hunted down, and/or assaulted and then raped. The aggravating factor was that some of the victims, even though they were assaulted with serious injuries, they were still raped with no consideration been given to the pain they endured from the assaults. Gender justice and the scourge of gender-based violence calls for stricter and harsher sentences to be imposed when women's rights are disregarded and women are treated in an undignified manner. The right to equality, human dignity, freedom and security of a person and protection of bodily integrity applies equally to everyone.

[7] In *S v Mudau*<sup>6</sup> the Supreme Court of Appeal<sup>7</sup> held that:

"It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way."

[8] In *S v Ncheche*<sup>8</sup>, the learned judge stated:

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<sup>6</sup> *S v Mudau* 2013 (2) SACR 292 (SCA) at para [17]

<sup>7</sup> Supreme Court of Appeal (hereinafter referred to SCA)

<sup>8</sup> *S v Ncheche* (A1261/04, A1261/04) [2005] ZAGPHC 21; 2005 (2) SACR 386 (W) at para 35

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely.”

[9] In *S v Chapman*<sup>9</sup> the learned judge held:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

The appellant showed no respect for their rights. He prowled the street and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage, did he show the slightest remorse.

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

[10] In *S v C*,<sup>10</sup> the court stated:

“Rape is regarded by Society as one of the most heinous of crimes, and rightly so. The rapist does not murder his victim. He murders her self-respect and destroys her feeling physically and mentally and security. His monstrous deed often haunts his victim and subjects her to a mental torment to the rest of her life, a fate often worse than loss of life.”

[11] With regard to the charge of pointing anything which is likely to lead a person to believe that it is a firearm, the issue was dealt with in *S v Mukwevho*.<sup>11</sup> The accused in this matter faced various counts of rape and other charges, where life imprisonment was handed down in respect of the rape charges. Amongst other crimes, the accused was also convicted of pointing anything likely to lead a person to believe that it is a firearm, and was sentenced to ten (10) years and eight years imprisonment in respect

<sup>9</sup> *S v Chapman* (345/96) [1997] ZASCA 45 at paragraphs 3 and 4

<sup>10</sup> *S v C* 1996 (2) SACR 181 C at 186 E-F

<sup>11</sup> *S v Mukwevho* (Sentence) (SS39/2023) [2023] ZAGPJHC 1380 (26 November 2023)

of this offence. Comparatively, with regard to this count, in the case before me, the victims were either pointed with and/or were assaulted with something, making them believe that it was a firearm. The accused instilled fear into them by placing the “firearm” on the table and continued to rape them. One of the victims was assaulted with the “firearm.” The victims suffered tremendous trauma and fear. In some instances, they turned to alcohol, lost their confidence and self-esteem.

[12] The accused was also convicted of assault with intent to do grievous bodily harm. In this instance, the accused, assaulted the victim when she tried to flee. He assaulted her with what looked like a “firearm” to her. Despite the pleas of the complainant, the accused continued to assault and then raped her. The complainant will have to live with the emotional scars and stigma of having been humiliated and violated for the rest of her life. Her dignity was taken from her in the most callous manner.

### ***The interest of the community***

[13] Our Courts have consistently held that vulnerable individuals such as women must be protected and treated with dignity and equality. It is noteworthy that sentences imposed does not satisfy public opinion but must serve the public interest.<sup>12</sup> Imposing an effective sentence will always depend on the facts and circumstances of the case and not the sense of outrage of the public whether the sentence is appropriate. Our courts have an obligation to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.<sup>13</sup> It is the duty of the Courts to impose fiercely fair and appropriate sentences even if it is to the dissatisfaction of the public.<sup>14</sup> Courts are obliged to impose sentences that will command the respect of for the criminal justice system and the Rule of Law.

[14] Rape has become a pandemic in our Country. The community has been demoralised, outraged, and discouraged. Society has a legitimate expectation that morally reprehensible criminal activities as displayed by the accused

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<sup>12</sup> S v Mafu 1992(2) SACR 494 (A) at 496g-j, S v Karg 1961(1) SA 231 AD and S v Schietekat 1998 (2) SACR 707 CPD.

<sup>13</sup> DPP, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA)

<sup>14</sup> S v Makwanyane and Another 1995 (2) SACR 1 (CC) 38- 9 paras 87-9

should not be left undetected and unpunished. Society expects that serious crimes warrant serious sentences to be imposed so that the Courts send out clear and strong messages to the accused and prospective perpetrators that commit such acts of gruesome inhumane conduct, will not be tolerated.<sup>15</sup> It is expected of the courts to take seriously the restoration and maintenance of safe living conditions and law and order in our country. I am mindful that the interest of society is not always served by imposing a lengthy sentence of imprisonment as it has the potential to destroy a human being.<sup>16</sup>

[15] As a result of the interest of protecting society, and the rise in gender base violence and femicide, legislation was introduced to curb gender-based violence in our country. Section 51(1) of Act 105 of 1997 provides that if an accused has been convicted of an offence referred to in part one of schedule two, he shall be sentenced to life imprisonment.

[16] Counts one and three falls under the purview of schedule two part three of Act 105 of Act 1997, and the minimum prescribed sentence is ten (10) years applicable for a first offender of rape in terms of section 51(2) of Act 105 of 1997.

[17] Section 51 (3) of Act 105 of 1997 states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[18] Counsel for the accused stated that the following factors when considered cumulatively will constitute substantial and compelling circumstances to justify a deviation from the minimum prescribed sentences being imposed: the accused's age, time spent in custody, the fact that he is a first offender, the cumulative effect of the sentence, the specific facts of each count and that the accused may be found to be a candidate for rehabilitation whilst undergoing therapeutic intervention.

## **Age**

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<sup>15</sup> S v Holder 1979 (2) SA 70 (A), S v Msimango 2005 (1) SACR 377(A)

<sup>16</sup> S v Kunjana 1985 (2) All SA 195 (A)

[19] Counsel submitted that the accused is 46 years old and it is one of the factors to be considered as substantial and compelling circumstances.<sup>17</sup> She contended not only the age of a young person must be considered but also that of old people. Counsel for the State, contended that age is a neutral factor and referred me to the dictum in *S v Matyityi*<sup>18</sup> which stated the following:

“.....At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did.”

[20] Consequently, in the absence of the accused testifying in mitigation of sentence and the fact that he is 46 years, I find that age is a neutral factor. I see nothing inherently disproportionate for this sort of crime being imposed on people ranging in age as the accused. Therefore, I cannot accept that the accused's age at 46 is either substantial or compelling.<sup>19</sup>

#### *Time spent in Custody*

[21] Counsel for the accused submitted that the accused has been in custody since the 10<sup>th</sup> September 2021 and this time period should be considered. She contended that the accused should be credited for his pre- trial incarceration and therefore this justifies a departure from the prescribed statutory penalty. Counsel for the State contended where life imprisonment is inevitable then the time spent in custody cannot be subtracted.

[22] The accused has been in custody since 10<sup>th</sup> September 2021. it would seemingly be that he was incarcerated for approximately 29 months until finalisation of this matter. Ordinarily, I agree that the accused is entitled to a credit for the period of his pre- trial incarceration. However, it seems to me that, where, as in this case, the ordinary statutory penalty is life imprisonment, the law does not recognise that pre- trial incarceration is, in itself, a substantial and compelling circumstance, or a basis on which to reduce the pre-trial incarceration against the sentence.<sup>20</sup> When considering the prescribed minimum sentencing regimes such as those embodied in the Criminal Law

<sup>17</sup> *S v Nkomo* 2007(2) SACR 198(SCA)

<sup>18</sup> *S v Matyityi* 2011(1) SACR 40 SCA

<sup>19</sup> *S v Matyityi* 2011(1) SACR 40 SCA paragraph (14)

<sup>20</sup> *S v Ngcobo* 2018 (1) SACR 479 (SCA) para 14

Amendment Act, courts are bound to give effect to them. It is correct that Section 12(1)(e) of the Constitution, 1996 requires me to avoid imposing a disproportionate sentence, and I may depart from the minimum sentencing norms if the sentence I intend to impose is disproportionate.<sup>21</sup> Considering the facts of the case, under the circumstances, I am not empowered to subvert the regime applicable to this case.

### ***First Offender***

[23] Counsel for the accused submitted that the accused is a first offender and this must be considered as a substantial and compelling factor. Counsel for the State contended the accused is not a first offender. In 2020 he was convicted of contravening section 65(2)(a) of Act 93 of 1996, where he drove a vehicle on a public road while concentration of alcohol in his blood is not less than 0,05 gram per 100ml on the 12<sup>th</sup> of September 2017 and he was also convicted of two counts of contravening section 4(1)(a) of Act 12 of 2004, the Prevention and Combating of Corrupt Activities Act, which involved corruption with officers.

[24] I find that the accused before does have previous convictions. For the purposes of the charges he has been convicted of he has no previous convictions and I will treat him as a first offender. What is disconcerting is whilst he was on bail for the rape of Ms [NFM], he raped Ms [KM]. This is indicative of the fact that he has a total disregard for the law. Although the accused's previous conviction is not related it cannot be ignored. Both the previous convictions clearly illustrates that the accused has a propensity to commit crimes. Even if the previous convictions were remote in nature from the current case, it remained relevant to the accused's sentencing because it showed that he has not been deterred by his previous encounters with the law.<sup>22</sup> In *S v Muller*<sup>23</sup> the court stated that:

"I take account that this accused has no previous convictions and that he is a man in his fifties. However, I must also consider that there is no authority for the proposition that the previous

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<sup>21</sup> *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC), para 40 and *S v Malgas* 2001 (1) SACR 469 (SCA) para 25

<sup>22</sup> *S v J* 1989 (1) SA 669 (A) 675, *S v Matyityi* 2011(1) SACR 40 SCA

<sup>23</sup> *S v Muller* [2006] ZAGPHC 51) paragraph 59



record of an accused convicted of offences in Part 1 of schedule 2 constitutes, in and of itself, a substantial and compelling circumstance. At most it would be one of the considerations considered for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding.”

[25] I have taken consideration of the submissions and I agree with the State that this cannot be in itself a substantial and compelling circumstance when life imprisonment is imposed.

***The specific facts of each count.***

[26] There were no submissions by accused counsel on the specific factor I was referred to the facts in the trial procedure. The State presented the evidence of two social workers, Ms M. Tiro and Ms D Mhlarhi, as well as victim impact reports in respect of all four complainants. The reports provided the court with the description of the emotional, and psychological harm suffered by each of the four victims, the physical injuries or capacity, financial or property loss resulting from the crime and other changes in lifestyle resulting from the crime. These victim impact statements play a particularly important role in rape cases and assists the courts in arriving in a just and fair sentence when considering all the factors.

[27] Ms T [...], the first complainant was depressed and admitted into Thusong Clinic from 2017 until 2020 as a psychiatric patient, where she received counselling and medication. As a result of the rape, she started smoking cigarettes and drinking alcohol excessively to cope with what happened. She however managed to return to moderate consumption of alcohol. She isolated from all her friends and her social life had changed. She was friends with the accused wife and this ruined their friendship. As a result of the crime she suffered from anxiety, was experiencing nightmares and her self-esteem was also affected. She was angry, spent a lot of time crying and her emotions were out of control because the incident was always playing through her mind. She experienced distress and was embarrassed after this crime. The physical impact suffered was that when she fought with the accused, she sustained a

minor injury to her head. She was on her menstrual cycle and was bleeding through her vagina, but the accused continued to rape her. She suffered bodily harm and had to receive medical treatment. She indicated that she experienced body pains for a long time afterwards. She experienced difficulty in being intimate with her partner again because she repelled physical contact and this resulted in the relationship being terminated. She expressed the view that the accused should be incarcerated for years in prison for the crime he committed.

[28] With regard to Ms TM [...], who was 25 years old at the time of the incident, she contended the incident changed how she interacted with people. She attempted suicide after the incident and an ambulance was summoned to take her to hospital, she isolated herself from family and friends. Every time a stranger asked for her number the memories of the incident resurfaced. Her perception of men changed and she was getting to know the accused with a view of starting a relationship with him. She returned to Mpumalanga as she did not feel safe in Gauteng where she came to seek employment. She is still unemployed and depends on others for financial support. Her emotional and psychological state was significantly harmed during the crime. She cried and expressed the view never to speak about what happened to her again. She regretted going out, she was anxious and fearful. She indicated she will never forget how the accused slapped her at the beginning of the violent act, he was hostile and threatened her with a gun. She required mental health services at the hospital which helped her to cope. She too, like Ms [TD] was in the intimacy vs isolation stage of psychosocial development where she was exploring personal relationships.

[29] As a victim of violent crime, she was subjected to a trauma and feared for her life. According to Campbell 2006, rape is one of the most severe of all traumas, causing multiple long term, negative outcomes such as post traumatic disorder, depression, substance abuse, suicidality and health problems. The fact that the victim attempted suicide after the incident, shows the psychological effects of rape on the victim. Campbell (2006) advocates victims of rape go through feelings of powerlessness, shame and guilt. The trauma of rape extends

beyond the actual assault, it also includes the stigma associated with rape. The victim indicated that she felt secondary trauma during the rape examination when evidence was being collected, and she feels it every time when she has to explain what happened.

[30] Ms Dorcas Mhlarhi, a social worker, testified and provided probational officers reports in respect of both Ms K [..], the fourth complainant and Ms F [...], the third complainant, relating to the impact the crime had on these victims.

[31] According to her testimony, Ms K [...] was affected emotionally and psychologically in that she was manipulated by the accused who made her believe that she could trust him. He pretended that he wanted a relationship with her. After being raped she does not trust men easily. Since the rape she finds herself overthinking and over analysing her actions and behaviour when she first met the accused. She is scared and refuses to walk on the streets alone. According to her the impact of the crime resulted in the victim spending five months being locked inside the house as she was fearful. She started consuming alcohol heavily after she was raped, and was concerned that she was becoming dependent on alcohol. She further reported that she neglected her self-care, and she was not bothered about her personal hygiene. She experiences problems with sleep and has sleepless nights as she is afraid that someone will break into her room and rape her again. She struggled to inform her former boyfriend about being raped. She was fearful that he would not understand and that he would judge her. When she eventually disclosed to him, what had happened, he broke up with her as she predicted, this made the victim feel bad. It was uncomfortable to have sex with her current boyfriend, and she had flashbacks about her rape. Sexual intercourse reminded her of the rape incident. Accordingly, post-traumatic stress disorder is a mental health condition that causes a variety of troubling symptoms in the aftermath of a traumatic event such as events like sexual assault. According to the witness, a news 24 article, dated 15 May 2021, Kagiso Police Station was one of nine, amongst the 30 police stations in the country where incidents of rape were reported. This proved that the victim did not stand a chance against the snares of the accused who drove around the community of Kagiso hunting for victims.

The victim is abusing alcohol to mask her pain. She alluded that some survivors may go to great lengths to avoid potentially dangerous situations and may turn to unhealthy and risky behaviour like substance abuse and self-harm in an effort to cope with intense unpleasant emotions that come from being raped. This may help for short period of time; however, it does not erase what the accused put the victim through. Instead the continuous alcohol abuse may lead to further challenges such as alcohol addiction, hypertension, liver failure, foetus alcohol syndrome while drinking when pregnant and other problems. According to her, sexual assault can lead to the onset symptoms such as avoidance, flashbacks and changes in thought.

[32] Regarding Ms F [...], she testified, she was affected emotionally and psychologically in that after the rape she was overcome with fear and distraught. She blamed herself for trusting the accused and allowing herself to get inside his car. She did not suspect that the accused had any intention of raping her. According to the victim, the accused is a cruel and vicious man who preys on innocent victims. He pretended to be helpful and friendly whilst his intentions were evil. She believed that the accused deliberately removed her from her familiar surroundings and people who knew her. He was protecting himself from being recognised and identified by the community. He forced himself on the victim and he was okay raping her. The victim reported that she had to play along with the accused's sickening assertion that they were in a relationship for her safety. She is disgusted how the accused normalised his actions and believed that the two were in a relationship. He forced himself on the victim and he was okay raping her, despite her protests and efforts to fight him off. This behaviour made the victim question herself and what she may have done differently to avoid the situation.

[33] According to her, the accused assaulted her with what appeared as a gun on her chest and body. She reported that when she was examined in hospital there was no medical evidence of her injuries. However, days or a week after the rape she was struggling with breathing. She had chest pains, and it was painful for her to breath and cough. She did not receive any treatment for her injuries. did not suffer any physical injuries or capacity.

[34] In so far as the other changes in lifestyle resulting from the crime, the witness relocated to Mpumalanga after the offence as she was afraid that she might come in contact with the accused. She was afraid that the accused might kill her for getting him arrested. The victim has challenges with trusting men.

[35] The witness in evaluation testified the victim was frustrated and mentally exhausted about talking about this case. She experienced secondary victimization. Which refers to the process, actions and omissions that may intentionally or unintentionally contribute to the re- victimization of a person who has experienced a traumatic incident through disbelief of the person's account, blaming the victim and lack of (or insufficient) services to assist the victim. The victim shared that every time she talks about the incident, she is re-living what the accused put her through all over again. Victims of gender- based violence especially women, fear sharing what happened to them. The victim expressed anger and frustration that as a victim she had to prove to the police and court that she was a victim, while the accused lied throughout the whole process. He painted himself as an innocent caring boyfriend. He twisted his actions and lied to make himself more believable, disregarding the pain, humiliation and trauma he put her through. She is still angry and has not sought counselling therefore she is frustrated. According to Rogers 1978; 310 in proposition 14, the following was said "psychological maladjustments exists when the organism denies to awareness significant sensory and visceral experience which consequently are not symbolized and organized into the gestalt of the self – structure, when this situation exists, there is a basic or potential psychological tension."

[36] According to her, the victim wants to see the accused spending the rest of his life in prison as it will be a guarantee that he won't hurt another woman. The victim expressed the view that justice must prevail, innocent victims and society at large must be protected. According to the victim, rape is a serious threat to any person's constitutional right in an article by Interpol, South Africa was dubbed as a Rape Capital. The article further stated that a woman in South Africa has a high chance of being raped than to learn. (News 24 2020).

### **Rehabilitation**

[37] Counsel for the accused submitted the accused may be found to be a candidate for rehabilitation whilst undergoing specific therapeutic interventions. Counsel relied on an article titled “The prospect of Rehabilitation” as a substantial and compelling circumstance to avoid life imprisonment in South Africa<sup>24</sup> where it was found that one ought to move from the premises that every human being is capable of change and transformation if offered the resources. The State submitted that the accused cannot be found as a candidate for rehabilitation as no psychological reports were submitted. I was referred to *S v Solomon and Another*<sup>25</sup> where the learned Judge stated:

“It must be accepted that even where a person can be said to be suitable for rehabilitation, occasions do rise where the seriousness of the crime committed is such that it is only deserving of the severest punishment.”

[38] The accused did not testify in mitigation of sentence, neither were there any psychological or pre- sentence reports placed before this court, except for his personal details. The accused did not present any evidence to show that he conducted himself in a manner that illustrated that he had a psychological problem. In the absence of such evidence, I agree with Counsel for the State and in particular reference to *S v Solomon*<sup>26</sup> in that this case is deserving of the severest of punishments. However, when such barbaric behaviour is displayed, in cases of violent crime then the pendulum must shift in the direction of deterrence and retribution over that of prevention and rehabilitation.<sup>27</sup>

[39] Counsel for the accused contended that the accused was convicted on all the counts of rape on the same date and therefore none of the convictions can be considered as “previous convictions” of rape.

[40] The State in rebuttal submitted that life imprisonment is prescribed in respect of Ms F [...] because the accused is convicted of two or more convictions, prior to the Ms F’s [...] conviction. She further submitted that life imprisonment was applicable in respect of Ms K [...] since the accused had sexual intercourse with her twice.

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<sup>24</sup> Jmil Ddamulira, 2008: The South- African Journal of Criminal Justice.

<sup>25</sup> *S v Solomon and Another* 2008(2) SACR 149E at paragraph 17

<sup>26</sup> See footnote 31.

<sup>27</sup> *S v Msimanga and Another* 2005(1) SACR 377 (O) 381

[41] Section 51(1) of Act 105 of 1977 provides “Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in part one of schedule two to imprisonment for life.”

[42] The relevant offences in respect of which the accused has been convicted of in respect of part one of schedule two is rape when committed in terms of section 3 of SORMA:

(1) in circumstances where the victim was raped more than once whether by the accused or .....

(a) Counsel for the accused contended that the rape of the complainant in counts nine and 10 took place in the execution of one event and with one intent and not that the complainant was raped more than once.

(b) In *S v Willemse*<sup>28</sup> the issue of single or multiple acts of rape arose. In this matter, the accused was convicted of two counts of rape. On appeal, amongst other things, the appellant contended that the appellant should not have been convicted of two separate offences of rape since the act of penetrating the complainant vaginally and the act of penetrating her anally was part of one continual act of rape. Referring to the dictum of *S v Blaauw*<sup>29</sup> where it was said:

“Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (if the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place,”

(b) The appeal court proceeded to distinguish the facts from the decision in *Blaauw* and held that the fact that the appellant first penetrated the complainant vaginally and had intercourse with her in that manner and then withdrew, changed her position, whilst controlling her forcefully, and then proceeding to rape her anally, must have involved a distinct

<sup>28</sup> *S v Willemse* 2011 (2) SACR 531 (ECG)

<sup>29</sup> *S v Blaauw* 1999 (2) SACR 295(WLD)

thought process on the part of the appellant during the course of which he proceeded to rape the complainant in a completely different manner to that which he had initially done. The learned Judge held at par 18

“By doing so, in my view, the appellant formed a completely separate intent to rape the complainant in a manner which was different to that in which he had initially raped her and is a strong indication that this was a separate form of rape, even though it may have occurred reasonably close in time to the initial act.”

- (c) Consequently, the court held that these two acts were two separate and distinct acts of rape committed by the appellant and that the Magistrate had been correct in convicting the appellant of two separate acts of rape.
- (d) Similarly, in the facts before me, the accused penetrated the complainant, had intercourse with her. Before taking a nap, he informed the complainant that he wanted a second round of sex after the nap. After taking a nap, the accused penetrated the complainant for the second time. Consequently, after the first penetration, ejaculation, and withdrawal of his penis, the accused had formed a new intent to have intercourse with the complainant for the second time. This can certainly not have taken place in the execution of one event and with one intent. Consequently, part one of schedule two relating to rape under section 3(a)(i) is applicable and section 51(1) of Act 105 of 1997 is applicable.
- (2) by a person who has been convicted of two or more offences of rape ..., but has not yet been sentenced in respect of such convictions.....<sup>30</sup>
- (a) Counsel for the accused contended that the accused was convicted on all the rape counts on the same date and therefore none of the convictions can be considered as “previous convictions.” Consequently, counsel’s contention although not vocalised was that the court, in applying the sub clause to Schedule two, relating to rape, would only consider those convictions of rape made before the trial commenced.<sup>31</sup>

<sup>30</sup> Section 51(1) of the Criminal Law Amendment Act read with schedule 2.

<sup>31</sup> Masenya v S (A871/2012) [2017] ZAGPPHC 229; 2018 (1) SACR 407 (GP) (24 May 2017) paragraphs 12 and



- (b) Counsel for the State contended that Ms F's [...] rape conviction, calls for section 51(1) of Act 105 of 1997 to be applicable since the accused was convicted of two counts of rape prior to that incident. Consequently, the accused is to be sentenced to life imprisonment.
- (c) This case is distinguishable from *Masenya v S*<sup>32</sup>, because the provisions of Part one of Schedule two of Act 105 of 1997 has since been amended thus providing clarity as to the interpretative issue arising therefrom. The amendment, which came into effect on 5 August 2022, provides that life imprisonment is triggered when the accused has been convicted by the trial court of two or more offences of rape or offences of rape and compelled rape.
- (d) The amendment to Part one of Schedule two now provides that a sentence of life imprisonment is mandatory when rape is committed in one or more of the following instances:

"(iii) by the accused who—

(aa) has previously been convicted of the offence of rape or compelled rape; or

(bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of—

(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;

(bbb) the date of the commission of any such offence of which the accused has so been convicted;

(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;

(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or

(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions."

(e) From the facts of the aforesaid case, the accused has been convicted of five counts of Rape. The amendment to Part one of Schedule two is clear and unambiguous. I have no doubt in my mind on an application of this amendment to the facts before me, the State Counsel is correct in its submission before this court and that section 51(1) of Act 105 of 1997 is applicable in respect of count seven.

[43] In so far as the rape convictions relating to counts one and three are concerned, it is common cause that the convictions on both these counts of rape are read in accordance with sections 51(2) of Act 105 of 1997 and read with part three of schedule two attracts a minimum sentence of ten (10) years in respect of each count as the accused was a first offender.

[44] Having, considered the context of the facts in conjunction with the legislation. If substantial and compelling circumstances exist when viewed cumulatively, justify the imposition of such a lesser sentence then I have a judicial discretion to reduce the mandatory sentence after having entered those circumstances on the record of proceedings.<sup>33</sup>

[45] Section 51(3) (aA) of Act 105 of 1997 provides instances when imposing a sentence in respect of rape, that the following factors will not constitute substantial and compelling circumstances justifying a lesser sentence: The complainant's previous sexual history; an apparent lack of physical injury to the complainant, an accused person's cultural or religious beliefs about rape; or any relationship between the accused person and the complainant prior to the offence being committed. Therefore, Counsel for the accused's contention that

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<sup>33</sup> Section 3(a) of the Criminal Law Amendment Act read with schedule 2.

the complainant(s) did not suffer any injuries cannot be considered as a substantial and compelling circumstance,<sup>34</sup> and has no merit in the light of this amendment.

[46] In the judgment of *S v Malgas*<sup>35</sup> the SCA provided extensive guidance on how the departure clause in section 51(3) should be interpreted. I am required to consider the prescribed sentences as the benchmark which should ordinarily be imposed and not departed from for insubstantial reasons.

[47] However, if the cumulative effect of all the factors that a court would normally consider in respect of sentencing would justify the court to depart from the minimum sentence in a specific case, the court should consider deviating from the prescribed sentence.<sup>36</sup>

[48] When the prescribed sentence would amount to an injustice being disproportionate to the crime, the criminal, and the needs of society, I should prevent the injustice and impose a lesser, appropriate sentence.<sup>37</sup> The Constitutional Court in *S v Dodo*<sup>38</sup> confirmed the approach to the "substantial and compelling" formula adopted in *Malgas*. Counsel for the Accused enlisted the process in paragraph three of her heads of argument so there is no need for it to be repeated in this judgment.

[49] The 'determinative test' enunciated in the *Malgas*<sup>39</sup> judgment, has been described as 'undoubtedly correct' in *S v Dodo*<sup>40</sup> and was approved in *S v Matyityi*.<sup>41</sup> It was held that the sentencing court should be aware that the legislature had ordained minimum sentences as the sentences which would ordinarily be imposed for the crimes specified. The legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of certain crimes and that there should be truly convincing reasons for a different response. The specified prescribed sentences should not be

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<sup>34</sup> *Zamla v S* (A207/2016) [2018] ZAWCHC 130

<sup>35</sup> *S v Malgas* 2001(1) SACR 469 at paragraph 251.

<sup>36</sup> *S v Malgas* 2001(1) SACR 469 at paragraph 25E-G

<sup>37</sup> *Malgas* supra par 22, see also par 25I, which *S v Dodo* 2001 (1) SACR 594 (CC) paragraph 40

<sup>38</sup> *S v Dodo* 2001 (1) SACR 594 (CC) paragraph 11.

<sup>39</sup> See footnote 35

<sup>40</sup> *S v Dodo* 2001(1) SACR 594 (CC)

<sup>41</sup> *S v Matyityi* 2011(1) SACR 40 (SCA)

departed from for flimsy reasons<sup>42</sup>. The court has a duty to consider the circumstances of each case, including the many factors traditionally considered by courts when sentencing offenders. This includes both mitigating and aggravating factors and the cumulative effect thereof.<sup>43</sup>

[50] In the final analysis, the overall question remains whether imposing the minimum sentence would be disproportionate, considering all the factors placed before me. For the reasons I have given, I cannot see any disproportion in the statutory penalty. The crime was serious, alarming and violates the values of human dignity, equality, safety and security. There is no evidence before me that suggests that a life sentence would operate too harshly, or that it would not appropriately respond to the offence, the accused's circumstances, which cannot be elevated above the interest of society, the seriousness of the crime and the impact the rape has on all the victims. The accused conduct was morally reprehensible in numerous respects as illustrated in the victim impact reports.<sup>44</sup>

[51] In *Tshabalala v S; Ntuli v S*<sup>45</sup> the SCA held:

“This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality, human dignity and safety and security.”

[52] In spite of the application of the prescribed minimum sentence, I have considered various other sentencing options such as a suspended sentence correctional supervision even though no reports were submitted and direct imprisonment. I have balanced the scales of justice by considering triad as stated in *S v Zinn*.<sup>46</sup> I am of the view due to the serious nature of the offence

<sup>42</sup> *S v Matyityi* 2011(1) SACR 40 (SCA), *S v Malgas* 2001(1) SACR 469(SCA).

<sup>43</sup> *S v Matyityi* 2011(1) SACR 40 (SCA).

<sup>44</sup> *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019)

<sup>45</sup> *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019)

<sup>46</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G

and the barbaric manner in which these offences were committed that both these sentencing options are not viable and direct imprisonment is the appropriate sentence.

[53] To allow the well-being of the accused to precede the interests of the community, the seriousness of the crime and the impact on the victim, will result in a distorted sentence. It is trite that life imprisonment is the heaviest sentence a person can legally be obliged to serve. Accordingly, where section 51(1) applies, an accused person must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. It was further held that the sentencing court should not hesitate too long to find that compelling and substantial circumstances do exist, when it appears to be the position.<sup>47</sup>

[54] The aggravating factors in this case by far overshadow any mitigating factors. To elevate the accused's personal circumstances above that of the society in general and the all the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution.<sup>48</sup> Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.<sup>49</sup> The accused is a menace to society. He should be removed from society for a long term. The sentences to be imposed by this court should send a clear message to the potential offenders that these offences would not be tolerated in our community.

[55] Having considered all the relevant factors, I find that the accused's personal circumstances, cumulatively taken, do not amount to substantial and compelling circumstances warranting a deviation from the imposition of the prescribed minimum sentences

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<sup>47</sup> *Rammoko v DPP* 2003 (1) SACR 200 (SCA)

<sup>48</sup> *S v RO and another* 2010 (2) SACR 248 (SCA) paragraph 20

<sup>49</sup> *S v Swart* 2004 (2) SACR 370 (SCA) paragraph 12

[56] Counsel for the accused submitted that the court should order other sentences to run concurrently with a life sentence. In terms of section 280(1) and (2) of the Criminal Procedure Act 51 of 1977 sentences of imprisonment run cumulatively unless the court directs that they shall run concurrently. However, where life imprisonment is imposed, other sentences of imprisonment are served concurrently with life imprisonment without a specific order in accordance with the provisions of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

[57] With regards to section 39 (2)(a)(i) of the Correctional Services Act 111 of 1998 ("Correctional Services Act") any determinate sentence of incarceration in addition to life imprisonment is subsumed by the latter. Accordingly, in terms of section 39 (2)(a)(i) of the Correctional Services Act the sentence imposed on count five is automatically subsumed under the life imprisonment sentence.<sup>50</sup>

[58] The complainant in counts 9 and 10 was raped more than once. It was one incident but separate acts of sexual penetration. In both counts she was penetrated in her vagina. I am aware that taking the counts together for the purposes of sentencing is discouraged. However, in my view if I impose two life sentences on these counts, the sentence will be excessive and shocking.<sup>51</sup> Therefore, these two counts will be taken together for the purposes of sentencing.

### **Order**

[59] As the result, I make the following order:

- (a) Count 1: The accused is sentenced to ten (10) years imprisonment.
- (b) Count 2: The accused is sentenced to ten (10) years imprisonment.
- (c) Count 3: The accused is sentenced to ten (10) years imprisonment.
- (d) Count 5: The accused is sentenced to five (5) years imprisonment.
- (e) Count 7: The accused is sentenced to life imprisonment.

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<sup>50</sup> *S v Young* 1977 (1) SA 602 (A) 610 G, *S v Fourie* 2001 (2) SACR 118 (SCA), paragraph 20

<sup>51</sup> *S v Moswathupa* 2012 (1) SACR 259 (SCA) at paragraph 8

(f) Counts 9: The accused is sentenced to life imprisonment.

(g) Count 10: The accused is sentenced to life imprisonment.

[60] Due to the fact that the accused is sentenced to life imprisonment and according to 39(2)(a)(i) of the Correctional Services Act 111 of 1998, where life imprisonment is imposed, other sentences of imprisonment are served concurrently with life imprisonment without a specific order.

[61] In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is *ex lege* deemed unfit to possess a firearm.

[62] The complainant(s) was informed of the provisions of section 299A of Act 51 of 1977 and the impact and import thereof was explained to them. The Registrar was ordered to complete the relevant forms has been handed to the complainant, which was done.

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**C B BHOOLA**  
**ACTING JUDGE OF THE HIGH**  
**COURT JOHANNESBURG**

Date arguments heard on sentence: 08/12/2023

Sentence handed down: 09/02/2024

### **Appearances**

For the State: Advocate Serepo

For the Accused: Advocate Nel



