IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, BHISHO]

CASE NO: CA&R 41/2021
HEARD ON: 10 JUNE 2022
DELIVERED ON: 10 JUNE 2022

In the matter between:

MZOXOLO DREAD BUZANI Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

NHLANGULELA DJP

[1] This matter concerns an appeal against the sentence of life imprisonment imposed by the regional magistrate of Zwelitsha upon a conviction of gang-rape.

[2] The type of rape that the appellant was convicted of is defined in section 3 of the Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007, read with the Criminal Law Amendment Act 105 of 1977 (the Act). This offence is punishable by life imprisonment in terms of s 51 (1) of the Act. In this case the appellant contends that the magistrate misdirected himself in not imposing a sentence lesser than life

imprisonment because the personal circumstances of the appellant constitute substantial and compelling circumstances as envisaged in s 51 (3) of the Act.

[3] The personal circumstances of the appellant are listed in the record of the sentence proceedings as follows:

(a) The accused is 40 years of age;
(b) He lives with his mother and brother, both who are sickly;
(c) He is single, but has a 13 years old minor child from a woman who is responsible for the maintenance and support of the child;
(d) He is unemployed;
(e) He spent a period of 11 months and 27 days in police custody before his trial was concluded on 23 July 2013;
(f) He has a previous conviction for rape dated 08 November 2001, for which he was sentenced to undergo 10 years imprisonment;
(g) He has a second previous conviction for a road traffic offence for which he was caused to pay R300,00 admission of guilty fine.

[4] The magistrate took into account that the complaint, 22 years at the time, was raped by the appellant together with his friend (Anele) for the whole night of 22 July 2012; with each taking turns until the complainant seized a chance to run away from the bedroom in which she had been confined. Anele was not prosecuted because the police have not been able to apprehend him despite numerous attempts to do so. The magistrate considered the fact that the appellant did not show penitence for his immoral and horrific criminal acts. Having weighed-up the serious nature of the crime committed by the appellant against a defenceless and innocent 22 years old woman, the prevalence of such crimes in our society and the numerous turns that the appellant took in raping the complainant throughout the night, the magistrate saw it fit to impose the pre-ordained sentence of life imprisonment.

[5] It was submitted on behalf of the appellant that this appeal trenches on the statement made in *S v Zinn* 1969 (2) SA 537 (A) that in search for an appropriate sentence the sentencing courts should find a balance between the personal circumstances of the accused, the nature and extent of the offence and the interest of the community. This submission is beyond debate, just as it was stated in *S v Malgas* 2001 (1) SACR 469 (SCA) at para [11] that in sentencing under s 51 (1) of the Act the courts are enjoined to take the traditional factors into account, but subject to the following caveat:

> "D. The specified sentences [listed in Part 1 of Schedule 2 to Act 105 of 1997] are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[6] The parties did recognise the fact that the offence of gang rape of which the appellant was convicted is one of the circumstances listed in Part 1 of Schedule 2 to the Act in which the sentence prescribed for the crime is imprisonment for life; unless, in terms of s 51 (3), substantial and compelling circumstances exist that warrant imposition of a lesser sentence. The sentencing regime under the Act will always require that the factors of the triad, not just the personal circumstances of the appellant, be qualified as substantial and compelling factors of sufficient weight to trigger imposition of a sentence that is lesser than life imprisonment. In this case the egregious nature of the offence of rape committed by the appellant coupled with the strong views held by the members of our society that rapes must be punished with life imprisonment make the appellant's aversion to his personal circumstances flimsy. See: *S v PB* 2011 91) SACR 448 (SCA) at para [21].

[7] The search for a response to the submission advanced on behalf of the appellant that the period of 11 months and 27 days spent by the appellant in police custody

before the conclusion of his case must invoke recourse to the principle stated *S v ET* 2012 92) SACR 478 (WC) that pre-sentence incarceration is one of those factors that pale into insignificance if one has regard to the fact that it alone is not a substantial and compelling circumstances that require deviation from imposition of a sentence of life imprisonment in terms of s 51 (1) of the Act.

[8] The argument advanced on behalf of the appellant that the absence of a victim impact assessment report ought to have been regarded as a mitigating factor is unhelpful in the sense that it is unthinkable that the complainant who was raped by two men for the whole night would escape the psychological scars from such violent and demeaning attack. In any event, the provisions of s 51 (3)(a)(A) of the Act renders counsel's submission moot because an apparent lack of physical injury to the complainant is no longer a substantial and compelling circumstance for the purposes of sentencing under s 51 (a) of the Act. Put differently, based on *S v Nkawu* 2009 (2) SACR 402 (ECG) the absence of proof of psychological or physical injury to the complainant weighed up together with the triad of factors does not make the aggravating circumstances of the appellant any better.

[9] To succeed in this appeal matter, the appellant had to demonstrate that the magistrate committed a misdirection or that the sentence of life imprisonment imposed is unreasonable failing which this Court cannot interfere with sentence. The appellant failed on both tests. Therefore, the appeal against sentence must fail. The appeal also fails on the determinative test that is referred to in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para [14] in the following terms:

"[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas* which was said by the Constitutional Court in *S v Dodo* [2001] (1) SACR 574 (CC) at 614 -615] to be 'undoubtedly correct' that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in *Dodo* found the Act to be not unconstitutional. For by

avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some case that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in *Malgas*, and in particular its 'determinative test' for deciding whether a prescribed sentence may be departed from, 'makes plain that the power of a court to impose a lesser sentence … can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross' [and thus constitutionally offensive]. That 'determinative test' for when the prescribed sentence may be departed from was expressed as follows in *Malgas* [at 482e] and it deserves to be emphasised:

> *'**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.'"***

[10] In the result the following order shall issue:

The appeal against the sentence of life imprisonment is dismissed.

Z. M. NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA

I agree:

A. BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant :	Adv. A. Giqwa c/o Legal Aid South Africa KING WILLIAMSTOWN.
Counsel for the respondent :	Adv. C. Giyose c/o Director of Public Prosecutions BHISHO.