IN THE EASTERN CAPE HIGH COURT

PORT ELIZABETH

CASE NO. CC 13/09

In the matter between:

THE STATE

versus

THEMBELANI MZAYIFANI **1st ACCUSED**
LUNGA MAGONGO **2nd ACCUSED**
MAKHWNAANDILE NINDZI **3rdhe ACCUSED**

SENTENCE

KEMP AJ:

1] The three accused were convicted on the 30th January 2012 of raping a 19 year old female and of robbery with aggravating circumstances in that they stole a silver necklace valued at R50 from her, after the rape. None of them had any previous convictions.

2] The complainant was locking the tavern at which she was working when she was confronted by the three accused. The 1st accused threatened her with a knife and the three of them forced her to walk at knife point to a nearby yard where they took turns to rape her. One of them then took her necklace, which was found in the possession of the 3rd accused the next morning. After raping her and taking her necklace, the accused left her after which she ran to a friend's house where the rape was

reported. All three accused were arrested the next morning and spent approximately two years in custody, before they were eventually granted bail. I will take the time spent in custody into consideration when imposing sentence.

3] After conviction comprehensive reports were prepared by probation officers. The probation officers interviewed the accused, their family members, the complainant, her family members and friends of both parties. Both accused 1 and 2 were brought up in the absence of their parents, although what all three accused had in common, was that they were brought up in difficult circumstances by loving and caring family members, in the case of accused no 3, by both of his parents.

4] Accused no. 1 had just turned 21 years old at the time of the commission of the offences. His mother left him in the care of his paternal grandparents at a very young age and his father died when he was two. After his grandparents passed away in 2010 and 2011 he was placed in the care of his paternal uncle and aunt. According to them he started missing school and socializing with friends who influenced him negatively. According to the probation officer the accused was in his late adolescent stage of development when the offences were committed, and

"This is a stage where deviant behaviour can be the result of general inexperience and immaturity which means that one does not always think as far as the moral consequences of actions and portrays an inability to think beyond the moment. A sense of bravado to increase the adolescent's status in the peer group is often found in this development stage. However the accused was also the eldest of the two other accused who were 17 and 19 years respectively."

5] The accused admitted to smoking cigarettes and dagga, but did not drink alcohol, and according to his friends and family

associated with friends who were known trouble makers in the community. The accused denied any involvement in the crime and thus in the view of the probation officer, appeared to be unremorseful. I don't believe that one can conclude as a hard and fast rule that an accused who still denies guilt after conviction is necessarily unremorseful. One has to consider the age of the accused, their formal education and relative sophistication, and consider what must be an extremely daunting and intimidating experience. The accused are basically still children and experience teaches us that many children will steadfastly deny involvement in an infringement, because that is simply a defence mechanism some children use. One must be careful not to put a wise head on young shoulders, although I think my observations apply equally to a lot of convicted persons of more mature years as well.

6] The 2nd accused was 19 years old at the time of the commission of the offences. Both of his parents are deceased and he was raised by his maternal grandparents. Although the family struggled to make ends meet they were always able to provide the basic necessities. The accused respected his elders and attended church until the age of 12 after which he lost interest in church activities. He failed grade 10 and was then incarcerated for two years, pending and during this trial. His aunt and uncle both reported that there were community complaints about the accused partaking in anti-social conduct in the community. As with many families living on or below the poverty line, the accused shared an overcrowded house with his grandparents, sharing a room with his female cousin whilst his uncle slept on the floor in the dining room. The family depends solely on State grants which are reported to be inadequate for the family needs.

7] As in the case of the 1st accused, the probation officer felt that the accused may have committed the crimes to gain a sense of belonging with his peers and to gain social status, without thinking of the consequences thereafter.

8] The 3rd accused was only 17 years old at the time of the commission of the offences and therefore the minimum sentencing legislation is not applicable to him. His father was retrenched twice early in his career and thereafter was never employed for very long and became dependent on alcohol. He abused his mother verbally and once threatened to stab her. The accused however maintained good relations with both his parents. His one brother was incarcerated at an early age and died shortly after his release two years ago, and his one sister was born paralyzed. The family have endured a lot of hardship. Most of the accuseds' negative memories of his childhood related to the financial circumstances of the family and his embarrassment about their financial circumstances. He frequently went to bed hungry. His mother only visits him in prison every second month, due to financial constraints, and his father is very disappointed that he could not go for his initiation during December 2011 due to the fact that he was in custody. He has a child who is only one year old, and the mother has visited him once whilst he was in custody, as she too struggles financially. She described him as a caring and loving person, although he had once assaulted her. The probation officer concluded that the accused would have been an ideal candidate for correctional supervision, but for the offence committed and the fact that he did not take responsibility for the offence.

9] The accused all pleaded not guilty to the charges. Accused no.2 was the only one who admitted to having sex with the

complainant, although he pleaded that it had been consensual. Accused no.'s 1 and 3 both relied on alibi defences, but accused no.1's semen was found on samples taken from the complainant, as were traces of semen from accused no.3. The necklace was found in the possession of accused no. 3 when he was arrested. He alleged that he had found the necklace on the pavement on his way back from school, a week or two prior to the rape.

10]Rape is a serious crime, and as argued by Mr Nyendwana, for the state, is prevalent in this area. I agree with counsel for the accused that the relative youth of the accused is a mitigating circumstance, as is the fact that alcohol probably played a major role. The offences appear to have been committed on the spur of the moment and although the threat of force was used, no violence was committed or injuries caused, other than the psychological injuries which are inevitably incurred by the victims of these attacks. Whilst it is the duty of courts to punish criminals, that punishment must also be meted out with a sense of mercy and the fact that the accused are all first offenders, taken into consideration with their relative youth, are also factors which must be considered.

11]However, rape under these circumstances attract a mandatory minimum sentence of life imprisonment, unless substantial and compelling circumstances indicate that it is inappropriate.

12] In *S v Jansen*[1], Davis J commented as follows on the rape of a child and these comments are as appropriate to the current circumstances, where the complainant was only 17 years old.:

"Rape of a child is an appalling and perverse abuse of male power. Its strikes a blow

1 1999 (2) SACR 268 (C)

at the very core of our claim to be a civilised society. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.

It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentences adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract."

13] In *S v Chapman*[2], Mahomed CJ, said the following about rape:

"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. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. 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 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."[3]

14]There is no doubt that all law abiding citizens will agree with the views of our late Chief Justice. However, one must also temper

2 1997 (3) SA 341 (SCA)
3 at 344 J – 345 D

retribution and the natural outrage one feels with a measure of justice and a weighing up of the circumstances pertaining to the actual crime and the individuals concerned.

15] As pointed out by Pickering J in *S v Ntozini,*[4] it is useful to compare similar cases when considering sentence and also to bear the admonitions of the Supreme Court of Appeal in mind, in judgments such as *S v Malgas:*[5]

"Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."[6]

It is indeed unfortunate that it is not difficult for me to compare sentences which I have handed down in similar matters. The crime of rape fitting this profile seems to show no sign of abating. Notwithstanding the harsh sentences being handed down our prisons are reportedly grossly overcrowded. With the population of prisoners serving life sentences far greater than prior to the promulgation of the minimum sentencing legislation, and growing exponentially, it is an unfortunate consequence of the legislation that unless additional prison space is created at an equal rate, that either the policy will have to be reviewed by the legislature or the courts will have to take into account the deteriorating conditions in prison when considering sentencing options, or else we will be in danger of only paying lip service to the principles contained in our Constitution, when considering the rights of convicted parties.

16] Mr Nyendwana, for the State, argued that the 1st and 2nd accused should be sentenced to the maximum term of imprisonment.

4 2009 (1) SACR 42 (E)
5 2001 (1) SACR 469 (SCA)
6 at 477d-e

Pickering J criticised the fact, in *Ntozini,* that the prosecution often persists in arguing in favour of life imprisonment where it is abundantly clear that substantial and compelling circumstances are present and that a sentence of life imprisonment would never be imposed.[7] He pointed out that the imposition of sentence is one of the most difficult and onerous duties imposed upon a judicial officer and the execution of those duties is not rendered any easier when obviously unsustainable submissions are made by counsel, and referred to *South African Criminal Law and Procedure*[8] in emphasizing the duty a prosecutor has to present the matter to the court fully and fairly, to conduct the case with judicial discretion and a sense of responsibility, as an officer of the court charged with the serious duty of assisting the court to arrive at the truth.

17] The learned judge went on to quote with approval from an unreported judgment of Kroon J,[9] with whom Jones and Jansen JJ concurred. I have for the sake of convenience numbered the points referred to by Kroon J:

"The concept of substantial and compelling circumstances has engaged the attention of the courts on numerous occasions specifically the Supreme Court of Appeal in the matters of *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Fatyi* 2001 (1) SACR 485 (SCA), and the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC). Amongst the principles to be extracted from these decisions are the following:

1. In determining whether substantial and compelling circumstances as envisaged in the section are present the court must have regard to all the factors traditionally taken into account in the determination of a discretionary sentence and
2. it is not limited to circumstances which are exceptional or rarely

7 At p 49 (e – g)
8vol 5 at 512.
9 *S v Masikolo Sobanga,* CA&R 210/07

encountered.

3. Nor are there (sic – should be "these") circumstances restricted to factors that reduce the moral blameworthiness of the convicted person.
4. In general, however, it was the intention of the legislature to provide for a severe standardised and consistent response from the courts unless truly convincing reasons exist and are so discernable for a different response.
5. Stated differently the prescribed sentences must in general be regarded as appropriate for the specified offences and should not be deviated from without weighty justification.
6. Where on a conspectus of all the relevant circumstances the court considers that the imposition of the prescribed sentence would work an injustice it is entitled to categorise the circumstances as substantial and compelling sufficient to justify the imposition of a lesser sentence.

18]The fifth principle illustrates the forth and although it does not contain the words "it was the intention of the legislature", it seems, because it illustrates the forth principle, to follow that they should be implied.

19] The Constitutional Court, in *Dodo,* found that the minimum sentencing legislation was not unconstitutional for a number of reasons; firstly because a number of open and democratic societies around the world permit their legislatures to define certain activities as criminal and to prescribe specific punishments for defined activities,[10] but most importantly, because of the reason that if the determinative test in *Malgas* is followed, that the implementation of the legislation would not lead to unconstitutional results.[11]

20] The fact that the prescribed sentences should not be regarded as the norm was emphasised by Nugent JA in *S v Vilakazi*.[12]. *Malgas* and *Dodo* both pointed out that it was the legislature that was of

10 at paras 27 – 33;
11 at para 40
12 2009 (1) SACR 552 (SCA)

the view that the prescribed sentences should ordinarily be imposed. There is an important distinction between the view of the legislature and the view a judicial officer must take when considering sentence, and it is this distinction that must be kept in mind. The view of the legislature must be accorded appropriate weight but this is only achieved if the law is interpreted in line with the judgements of *Malgas* and *Dodo.* Nugent JA made the distinction between the two positions quite clear in *Vilakazi* when he stated:

"It was submitted before us that in *Malgas* this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in *Malgas.* The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter '**conscious of the fact that the Legislature has ordained** [the prescribed sentence] as the sentence which should *ordinarily* **and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances'[13] (the emphasis in bold is mine). In the context of the judgment as a whole, and in particular the 'determinative test' that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite 'weighty justification' for the imposition of a lesser sentence."[14]

21]Nugent JA went on to say the following:

"To say that a court must regard the sentence as being proportionate *a priori* and apply it other than in an exceptional case runs altogether counter to both *Malgas* and *Dodo*." [15]

"It is plain from the determinative test laid down by *Malgas* , consistent with what

13 Para 25 at part B of the summary of its conclusions.
14 Para 16
15 Para 17

was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo* , that a prescribed sentence cannot be assumed *a priori* to be proportionate in a particular case. It cannot even be assumed *a priori* that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice."[16] (my emphasis)

"I have pointed out that the essence of the decisions in *Malgas* and in *Dodo* is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in *Malgas* . It was also pointed out in *Malgas* that a prescribed sentence need not be 'shockingly unjust' before it is departed from for '(o)ne does not calibrate injustices in a court of law. It is enough for the sentence to be departed from that it would be unjust to impose it."[17] (my emphasis)

22]Nugent JA further clarified the approach to be followed when interpreting *Malgas:*

"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."[18]

16 Para 18
17 Para 20
18 Para 25

23] In *S v Skoti,*[19] a judgment of the Eastern Cape High Court by Jones J, with Pakade and Dambuza JJ concurring, a life sentence for rape against an 8 year old girl was substituted with a sentence of 20 years imprisonment. The learned judge referred to *Vilakazi* as support for the view that what was necessary, was a balanced evaluation of all the relevant considerations taken as a whole, both aggravating and mitigatory, to see whether a sentence other than life imprisonment would be just and appropriate, and that it was only where any lesser sentence would be inadequate that it could be said that a sentence of life imprisonment would be a just sentence. In that case the aggravating features were the age of the complainant, the physical gynaecological damage and the serious and permanent psychological trauma described in the report of the clinical psychologist. The child had however shown substantial improvement since the rape. The learned judge agreed with Nugent JA's remark in *Vilakazi* that to make the appellant pay for the crime for the remainder of his life would be grossly disproportionate.

24] In S v Nkomo,[20] a judgment referred to me by Mr O'Brian, a life sentence was set aside on appeal and a term of imprisonment of 16 years substituted. The appellant in that case engaged in a series of horrific rapes during the course of one night on the complainant, forcing her to engage in oral sex, kidnapping her, keeping her naked, after which she jumped out of the second floor of the house where she was imprisoned, sustaining injuries, after which he again raped her. The appellant was 29 years old and a first offender, leading Cameron JA to conclude that his relative youthfulness and lack of previous convictions warranted

19 Unreported judgment of the Eastern Cape High Court under case no CA 77/09, handed down on 23 October 2009.
20 2007 (2) SACR 198 (SCA)

the conclusion that substantial and compelling circumstances were present. Theron AJA, in a dissenting judgment disagreed emphatically. I am however bound by the majority judgment and if a term of 16 years imprisonment was appropriate in that case, then it is self-evident that in this case where the assault was far less abhorrent and where there can be no argument that the accused were little more than children, that a lesser sentence would be appropriate.

25]The complainant was 19 years old at the time of the attack and had a one year old child. She was solely responsible for locking the tavern at which she worked and one of the probation officers intimated that the conditions under which she worked were unjust and that her employers should have at least provided some assistance to her when closing. It is clear that she provided an easy target for criminals and that such criticism is justified. She felt humiliated by having to recount the experience in court where she felt that the court did not believe her and that the accused were laughing at her and delighting in her discomfort. She has not received counselling yet although it appears that she will in the near future. The experience has impacted negatively on her relationship with her boyfriend as she no longer enjoys normal sexual relations and finds anyone with similar physical characteristics to those of the accused offensive. Mrs van der Mescht, the Senior Probation Officer who interviewed her, felt that with counselling, the complainant would lead a normal life, although she cautioned that sexual victims were similar to alcoholics, in that constant care is required. The complainant will require counselling virtually for the rest of her life, and provided it is provided, will eventually be able to live a satisfactory and fulfilling life.

26] I am bound to interpret the minimum sentencing legislation in the light of the judgments of *Malgas, Dodo* and *Vilikazi,* and in doing so conclude that a sentence of life imprisonment in this case would be sufficiently disproportionate to be unjust. I am of the view that the accused are candidates for rehabilitation and whilst bearing in mind the abhorrent nature of the offence, the kind of sentence this crime would have attracted prior to the minimum sentencing legislation, the views of the Legislature, and the principles of sentencing enshrined in *S v Zinn,*[21] and judgments such as *Nkomo,* I am of the view that the sentences I am about to impose will be just and will give effect to the competing interests we have to try and balance.

27]The first accused was the eldest of the accused and should have played a responsible role. He clearly would have had the authority by virtue of his age to dissuade the other younger accused from their actions if it had been them that first initiated the attack. It seems to me that by virtue of his age he probably was the ring leader and that if it was not for his actions that the crimes would probably not have been committed. This conclusion is supported by the evidence of the complainant who identified him as the one who first approached her, opened the knife and held it to her whilst forcing her to the yard where she was raped. He was also the one who first raped her and also identified by her as the one who took her necklace, even though it was found in the possession of the third accused.

28]The second and third accused, by virtue of their ages were probably impressionable and more likely to go along with deviant behaviour initiated by their elder co-accused. This is especially so with regards to the third accused, who was barely out of puberty.

21 1969 (2) SA 537 (A)

29]Although it appears that it was the first accused who actually took the necklace, the accused were all found guilty of robbery with aggravating circumstances on the basis of the common purpose they formed with the first accused. Although a weapon was wielded and continued to play a role when the offence was committed, the primary intention of the attack was clearly to rape. The theft of the necklace appeared to be an afterthought and to order the sentences to run cumulatively would appear to a large extent to be punishing the accused twice for the same element of what was a chain of events which appeared to be inextricably linked. Those considerations on their own comprise substantial and compelling circumstances which accordingly permit me to deviate from the prescribed sentence. In addition thereto, all of the considerations referred to above in respect of the rape, apply equally to the charge of robbery with aggravating circumstances.

1. In respect of the conviction of rape the first accused is sentenced to fifteen years imprisonment and the second and third accused are each sentenced to thirteen years imprisonment;

2. In respect of the convictions of robbery with aggravating circumstances the first accused is sentenced to five years imprisonment and the second and third accused are each sentenced to three years imprisonment;

3. The sentences in respect of the rape and the robbery with aggravating circumstances are ordered to run concurrently in respect of all of the accused;

4. Five years in respect of the sentences in respect of the rape

convictions are suspended on condition that the accused are not convicted of the offence of rape committed during the term of suspension;

5. No determination is made in respect of section 103 (1) (g) of the Firearms Control Act No. 60 of 2000 in respect of any of the accused.

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L D KEMP

ACTING JUDGE OF THE HIGH COURT

Matter heard on	:	10 April 2012
Sentence delivered on	:	10 & 11 April 2012
Counsel for the State	:	Mr Nyendwana
Counsel for the Accused	:	Messrs O'Brian, Joubert, Skepe