



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

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

CASE NO: SS68/2021

8 September 2023

In the matter between:

THE STATE

And

MALEKA, AGANANG RICHMOND

Accused

JUDGMENT

Mdalana-Mayisela J

- [1] This is the judgment on sentence. The accused was convicted of five counts of kidnapping, four counts of robbery with aggravating circumstances, five counts of rape each read with section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the CLAA), three counts of rape each read with section 51(2) of the CLAA and two counts of assault with intent to do grievous bodily harm ("the offences"). During the plea proceedings, the state amended the original indictment in respect of count 9. The offence of kidnapping was substituted with rape read with section 51(2) of the CLAA. In considering the evidence before me and the accused's plea explanation I concluded that in count 25 the accused is guilty of rape read with section 51(2) of the CLAA.
- [2] During the sentencing proceedings the accused testified in mitigation of sentence and presented a pre-sentencing report prepared by the probation officer, Mr Tshepo Zulu and a social worker, Mrs Vivienne Mateme. The state presented six victim impact reports.
- [3] The accused has been convicted of the offences where the CLAA is applicable. He was informed before pleading in Court of the provisions of section 51(1) and 51(2) of the CLAA. Section 51(3) of the CLAA provides 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 those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.
- [4] The state submitted that the prescribed minimum sentences should be imposed where applicable, as there are no substantial and compelling circumstances warranting a deviation. The accused conceded during his testimony that his personal circumstances do not amount to substantial and compelling circumstances.
- [5] First, I deal with the personal circumstances of the accused. He is 37 years old. He has three children from different mothers aged 20 years, 8 years and 6 years respectively. Previously, he worked for three security companies. In his last employment he was earning R5600.00 per month. He was maintaining his children, siblings and parents before he became unemployed. He lost his job in 2015. He spent 4 years in prison awaiting trial. He passed matric. He is a first offender. He has no pending cases. He

pleaded guilty. He apologised to the victims and community during his testimony in court.

- [6] I now deal with the aggravating factors. The accused has been convicted of the offences that are very serious and prevalent in the society. In *S v Mudau 2013 (2) SACR 292 (SCA)* at para [17] the Supreme Court of Appeal 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."*
- [7] The rapes in question were of the worst kind. Most of the victims suffered emotionally, psychologically and financially as a result of the offences. The victims feel embarrassed, have low self-esteem, no longer trust men, are traumatized and live in fear. One of the victims died after the rape incident as a result of depression and left a boy who is now five years old. The boy is still traumatised because his mother was raped in his presence. The deceased's husband and child suffer emotionally as a result of the accused's actions. The victim in counts 7, 8 and 9 was 59 years old when raped by the accused. She lives in fear as she resides alone in her house. The victim in counts 4, 5 and 6 was very traumatized after the incidents to the extent that she had to quit her job.
- [8] The accused cried and apologised to the victims and community during his testimony in court. Before the Court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his change of heart; and whether he indeed have a true appreciation of the consequences of those actions, and that there is chasm between regret and remorse (*S v Matyityi 2011 (1) SACR 40 (SCA)* at paragraph [13]).
- [9] The accused testified that he does not know why he committed the offences. They were committed between 2016 and 2018. He informed the probation officer that he was possessed when he committed them. The accused was in a stable relationship with his girlfriend during the commission of the offences. Clearly, he was motivated by greed and cruelty. After the accused was convicted and during his interview by the probation

officer, the accused disputed that he had sexual intercourse with the victims without their consent. Counsel for the state submitted that in all the offences the accused was linked positively by DNA evidence. He challenged the DNA evidence and requested further particulars before he pleaded guilty. The accused informed the probation officer that he pleaded guilty because the evidence against him was overwhelming. In court during cross-examination he denied this statement and said he pleaded guilty because he feels guilty. The probation officer's report was handed in by agreement between the parties. I have no reason not to believe the probation officer. The accused testified that he regretted his actions after he was arrested. I find that the accused has not shown a genuine remorse instead he regrets his actions.

- [10] The aggravating factors by far overshadow any mitigating factors. To elevate the accused's personal circumstances above that of the society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution (*S v RO and another 2010 (2) SACR 248 (SCA) para 20*). 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 (*S v Swart 2004 (2) SACR 370 (SCA) para 12*). The accused is a danger to the society. He should be removed from the 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 society.
- [11] 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.
- [12] 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. This follows as a result of the provisions of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998, which reads as follows:

“(2)(a) Subject to the provisions of paragraph (b) a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but-

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal;..”

[13] The complainant in counts 20, 21 and 22 was raped more than once. It was one incident but separate acts of sexual penetration. In count 20 she was penetrated in her mouth. In counts 21 and 22 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 three life sentences on these counts, the sentence will be excessive and shocking. Therefore, these three counts will be taken together for the purposes of sentencing. In *S v Moswathupa 2012 (1) SACR 259 (SCA)* at para [8] it was held that *“Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that aggregate penalty must not be unduly severe.”*

[14] It is trite that punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy (*Moswathupa supra*). I have considered all the relevant factors in sentencing, without overemphasizing one factor above others. In my view the appropriate sentences that fit the accused as well as crimes, fair to him, the victims and society are those that follow.


ORDER

[15] The accused is sentenced as follows:

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|-------------|-------------------------------|
| 1. Count 4: | 5 years direct imprisonment. |
| 2. Count 5: | 15 years direct imprisonment. |
| 3. Count 6: | 10 years direct imprisonment. |
| 4. Count 7: | 2 years direct imprisonment. |
| 5. Count 8: | 5 years direct imprisonment. |

6. Count 9: 10 years direct imprisonment.
7. Count 17: 15 years direct imprisonment.
8. Count 18: 5 years direct imprisonment.
9. Count 19: 2 years direct imprisonment.
10. Counts 20, 21 & 22
(taken together): life imprisonment.
11. Count 23: 15 years direct imprisonment.
12. Count 24: 5 years direct imprisonment.
13. Count 25: 10 years direct imprisonment.
14. Count 26: 15 years direct imprisonment.
15. Count 27: 5 years direct imprisonment.
16. Count 28: life imprisonment.
17. Count 29: life imprisonment.

18. In terms of section 103 of the Firearms Control Act the accused is declared unfit to possess a firearm.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

Date of delivery: 8 September 2023

Appearances:

On behalf of the State: Adv G Market

Instructed by: National Prosecuting Authority

On behalf of the Accused: Mr L Musekwa

Instructed by: Legal Aid South Africa