REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

29/4/25 [redacted]

DATE SIGNATURE

Case No: A115/2024

In the matter between:

VUSI ALFRED KHUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an appeal against sentence on a charge of rape read with the provisions of the Criminal Law Amendment Act 105 of 1997. The appellant pleaded guilty to the charges of rape and was convicted on 14 June 2022. He was sentenced on 21 June 2022 to Life imprisonment. The appellant has an automatic right of appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977 read with section 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013. The appellant was legally represented in the court *a quo*.

[2] The crime in question occurred on 28 February 2021 when the appellant met the complainant at a Tavern. She accompanied him to his house. She resisted his sexual advances when he severely assaulted her and raped her. The photograph depicting her face after the incident and the J88 medical report was tendered into evidence. The complainant spent four days in hospital as a result of the assault. She lost her sense of smell as a result of the offence against her. She is a mother of three children. She had to be administered with post exposure prophylaxis. The offence of rape falls within the ambit of Section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Sentencing Amendment Act 105 of 1997 as a result of the grievous bodily harm inflicted on the complainant. The prescribed minimum sentence of life imprisonment is ordained, unless substantial and compelling circumstances were present justifying a deviation from the prescribed minimum sentence.

[3] The appellant's complaint is the trial court misdirected itself in failing to afford appropriate weight to the appellant's guilty plea, indicating his remorse and not wasting

the court's time. The court failed to consider the prospects of rehabilitation, overemphasizing retribution to society, the prevalence of the offence and the deterrent effect of the sentence on others. The court failed to consider his personal circumstances to find substantial and compelling circumstances to deviate from the prescribed minimum sentences. The court erred in not ordering that this sentence run concurrently with the sentence he is currently serving.

The Appropriate Sentence

[4] The power of the appeal court to interfere with a sentence is constrained. In ***S v Rabie*** 1975 (4) SA 855 (A) the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court in ***S v Skenjana*** 1985 (3) SA 51 (A). Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion as it was held in ***Director of Public Prosecution KZN v P*** 2006 (1) SACR 243 SCA. Additionally, the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers.

[5] In ***S v Pillay*** 1977 (4) SA 531 (A) at 535E-F, the court held that:

> "...mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness

that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably...."

[6] In determining an appropriate sentence the ideal outcome is to achieve a proper balance between this triad as it was entrenched in ***S v Zinn*** 1969 (2) SA 537 (A), namely: the nature of the crime, the personal circumstances of the appellant and the interests of society. The court a quo did consider all relevant factors properly. It was incumbent upon the appellant to satisfy the court that there are compelling and substantial circumstances to deviate from the prescribed minimum sentence.

[7] It remains a question in this matter whether to deviate from the minimum sentences prescribed by the legislator for crimes against women who remain vulnerable members of society. Parliament has made it clear that minimum sentences for specific offences such as rape are to be imposed. Courts are therefore obliged to impose these sentences unless they are truly convincing reasons for departing from them.

[8] The offence is serious as the legislature prescribes life sentence be ordinarily imposed for the commission of rape. In ***S v Malgas 2001 (1) SACR 469 (SCA)*** at para 8, the Supreme Court of Appeal held:

"... In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the

objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may."

[9] The appellant was 34 years old when sentenced. He did grade 11 at school. He was unemployed and did odd jobs as a gardener earning R50 per day and used this to maintain his six-year-old child. He is not married but in a permanent relationship. The appellant was under the influence of alcohol when he committed the offence. However, no submissions were made relating to the correlation and impact of the alcohol on the commission of the offence.

[10] In ***S v Vilakazi*** 2009 (1) SACR 552 (SCA), was held that in cases of serious crime, the personal circumstances of the offender, by themselves, would necessarily recede into the background. Once it becomes clear that the crime is deserving of substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to be kind of flimsy grounds that Malaga said should be avoided.

[11] Even at this stage, the appellant advances his guilty plea as a mitigating factor to sway this appeal court to deviate from the prescribed sentence. Accordingly, he

pleaded guilty as a sign of remorse and did not waste the court's time. He acknowledged his acts and requested the court for mercy. In the matter of ***S v Malgas*** the court cautioned that a plea of guilty does not automatically result in a deviation from the prescribed minimum sentence. A sentencing court is not to "deviate from a prescribed sentence lightly and for flimsy reason which could not withstand scrutiny." A sentencing court must look to the ultimate cumulative impact of all these factors in order to determine whether a departure from the prescribed minimum sentence is justified.

[12] In addition the appellant has a previous conviction for two counts of robbery with aggravating circumstance, for which he was sentenced to 15 years imprisonment in 2009. The appellant was on parole when he committed the current offence. The appellant was not only convicted of a violent offence but was also released on parole for violent crimes when committing the current offence. The victim testified in aggravation of sentence and such evidence was not challenged. She was severely assaulted. She suffered a cut from the back of her head which could be the reason for damaging her sense of smell. The sentencing court held that the seriousness of the offence outweighed the personal circumstances of the appellant.

[13] The next factor is rehabilitation. It is submitted that a life sentence imposed will not aid the appellant's rehabilitation. It was argued that the magistrate failed to take cognizance of the effect which long term imprisonment would have on the appellant. On the contrary, correctional supervision during imprisonment is designed to support the appellant in his rehabilitation, irrespective of the period of sentence being one of

life or a lesser one. It is within the appellant's power to choose to rehabilitate if he desires. Education and skills development are available to the appellant during his incarceration. The imprisonment of the appellant should sufficiently rehabilitate him if he chooses to participate in the rehabilitation programs.

[14] It follows that the Magistrate in exercising her sentencing discretion took into account the factors necessary to impose an appropriate sentence and there was no misdirection in her sentencing powers. Life imprisonment is appropriate. In the circumstances the statutory minimum sentence imposed by the Magistrate is confirmed. This sentence would restore the community's faith in the courts to deal harshly with people who commit offences like this. It effectively serves the purpose of the punishment and has the necessary rehabilitative, redistributive, deterrent and preventative objectives.

[15] In the result:

15.1 The appeal is dismissed.

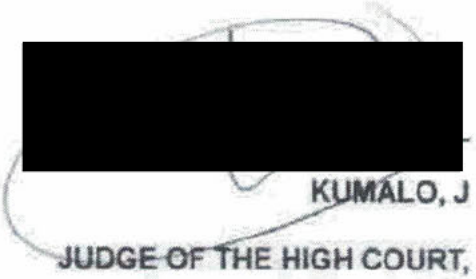
15.2 The conviction and the sentence imposed by the court *a quo* on the appellant is hereby confirmed.

R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT,

PRETORIA

I agree,



KUMALO, J

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

COUNSEL FOR THE APPELLANT:		ADV. H L ALBERTS
INSTRUCTED BY	:	LEGAL AID SOUTH AFRICA, PRETORIA
COUNSEL FOR THE RESPONDENT:		ADV. K T RANCHO
INSTRUCTED BY	:	DPP, PRETORIA
HEARD ON	:	06 MARCH 2025
JUDGMENT DELIVERED ON	:	29 APRIL 2025

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 16h00 on 29 APRIL 2025.