Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R 57/2022

In the matter between:

BEYANDRE VAN ROOY — Appellant

and

THE STATE — Respondent

Coram: Mamosebo J et Lever J

Judgment

Lever J

1. The appellant was convicted on a charge of raping an 11-year-old girl. The conviction is one that falls under section 51(1) of the Criminal Law Amendment Act[1] (CLAA also colloquially known as the Minimum

[1] Act 105 of 1997.

Sentencing Act). By virtue of the fact that it falls under the provisions of section 51(1) of the CLAA such conviction carries a mandatory sentence of life imprisonment unless 'substantial and compelling' reasons can be found to impose a lesser sentence as contemplated in section 51(3) of the CLAA.

2. The appellant was convicted on the said charge in the regional court, Richmond on the 29 October 2020 and was sentenced to life imprisonment. Accordingly, the appellant has an automatic right to appeal to this court under the provisions of section 309(1)(a) of the Criminal Procedure Act[2] (CPA).

3. The appellant only appeals against the life sentence imposed by the regional court, Richmond.

4. The question of where to start and how one should assess an appeal where the imposition of the sentence is governed by the provisions of section 51 of the CLAA is important. This question was considered and decided by Bosielo JA writing for the full Bench of the Supreme Court of Appeal (SCA) in the matter of S v PB[3], the relevant passages read as follows:

> "[19] The minority judgment in the court below appears to reflect the misunderstanding that the refusal by this court, to endorse the life imprisonment imposed in the three cases of *Abrahams,*

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[2] Act 51 of 1977.
[3] S v PB 2013 (2) SACR 533 (SCA) at paras [19] and [20]. Particularly the last 3 sentences of para [20].

Sikhipa and *Nkomo*, constitutes a bench mark or a precedent binding on other courts. That is a misconception. Such an approach or trend can never be elevated to a bench mark or binding precedent. Those cases remain guidelines. Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing, as enunciated in a long line of cases which includes *S v Zinn* 1969 (2) SA 537 (A), which espoused a proper consideration and balancing of the well-known triad; *S v Rabie* 1975 (4) SA 855 (A) at 862; and *S v De Jager and Another* 1965 (2) SA 616(A) at 628-629. This salutary approach has recently been endorsed by Marais JA in *S v Malgas* para 12.

[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking ? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not."[4] (my emphasis)

5. To the extent that the decision of the SCA in the case of *S v PB* differs from the approach of the SCA in the earlier case of *S v Malgas (particularly at para [12] thereof)*, it must be accepted that the SCA in the *S v PB* case amended or qualified the earlier decision in *S v Malgas* to that extent.

[4] S v PB above.

6. Accordingly, the correct approach in considering an appeal on a sentence imposed under the provisions of section 51 of the CLAA as set out in *S v PB,* is to assess the evidence on the record and make a determination as to whether such evidence constitutes substantial and compelling grounds to depart from the prescribed minimum sentence or not. After the decision in the SCA in the case of *S v PB*, that is the correct point of departure.

7. The next question to be considered is how does one determine what are substantial and compelling grounds to depart from a prescribed minimum sentence.

8. On this question, I can do no better than to quote and apply the guidance given in the seminal case of *S v Malgas* and in particular, the following passages:

> "[20] It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling or those which could not. The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence that must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation as substantial and compelling. When justifying a departure a court is to guard against lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist.
> [21] It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away,

namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of *some* discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.

[22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of the consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

[23] While speaking of injustice, it is necessary to add that the imposition of the prescribed sentence need not amount to a shocking injustice ('n skokende onreg' as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking."[5]

9. Paragraph [22] of the Malgas judgment, quoted above encapsulates what has come to be known as the 'determinative test', the other

[5] S v Malgas 2001 (1) SACR 469 (SCA) at paras [20] TO [23].

paragraphs quoted above assist in illustrating how and in what context the determinative test should be applied.

10. The concept of 'proportionality' is implicit in balancing the considerations encompassed by the triad referred to in the Zinn case[6]. Davis J in the matter of S v SWARTZ & ANOTHER[7] applied the concept of proportionality to the crime itself. His reasoning emerges from the following passage:

> "This is a serious crime. As noted, rape is endemic in our society and these factors were certainly uppermost in the Legislature's mind when it passed the provisions of s 51 *et seq* of the Act. The departure from the mandatory minimum sentence as justified in terms of s 51(3)(a) of the Act is designed to ensure that a mandatory minimum sentence does not produce a constitutionally unacceptable degree of disproportionality between crime and punishment.
> The key to the application of 'substantial and compelling' must be the crime. As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so too, not all rapes deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness."[8] (references omitted)

11. This aspect of the proportionality of the crime itself was considered and accepted by Cameron JA in the matter of S v Abrahams[9] who wrote for the unanimous SCA bench in that matter. In the Abrahams case whilst not diminishing the horrors of rape, the SCA accepted that some rapes are worse than others and that the ordained life sentence should

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[6] S v Zinn 1969 (2) SA 537 (A) at 540G to H.
[7] S v Swartz & Another 1999 (2) SACR 380 (CPD)
[8] S v Swartz., above at p385i to 386c.
[9] S v Abrahams 2002 (1) SACR 116 (SCA) at 127c to 128c.

be reserved for those cases that were devoid of substantial and compelling factors.

12. This concept was also considered and applied by the SCA in the case of S v SMM.[10] The concept of proportionality in relation to the particular crime of rape was also accepted in this court in the Matter of SAM Stuurman v The State.[11]

13. Valuable insight into the approach to be taken in sentencing in the type of case presently before this court can be gained from the judgment written by Majiedt JA in the case of State v SMM, and in particular in the following passages:

> "[17] It is necessary to reiterate 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. In *S v Vilakazi* Nugent JA referred to the study by Rachael Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that 'women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa'.
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> [18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court (the SCA) held in *S v Abrahams* that 'some rapes are worse than others, and the life sentences ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the

[10] S v SMM 2013 (2) SACR 292 (SCA) at para [18].
[11] Unreported judgment of Tlaletsi AJP and Lever AJ under case number CA&R 115/16 and delivered on the 24 October 2017 at para [21].

conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In *Vilikazi* Nugent JA cautioned against the danger of heaping 'excessive punishment ... on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge'. He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years' imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result. The judgment also sets out the dramatic effect that the minimum sentencing legislation has had in sentencing, most importantly that statistics show that inmates serving sentences of life imprisonment have increased more than ninefold from 1998 to 2008. And he reiterated that even in the context of minimum sentencing legislation the importance of assessing each case on its own peculiar facts and circumstances and the need for proportionality must never be overlooked. Nugent JA expressed it as follows:

> *'It is clear from the terms in which the [determinative test] was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all of the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'*

[19] Life imprisonment is the most severe sentence that a court can impose. It endures for the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. ..."[12] (references omitted)

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[12] S v SMM., above at paras [17] to [19]

14. Whilst it is accepted that rape will have an emotional impact on a victim, this is not sufficient for the exercise of sentencing. What is required when going through the exercise of formulating a just and appropriate sentence in a particular case of rape is actual and reliable information on the emotional impact on the complainant concerned. This is so because the emotional impact can vary widely[13]. At the very least a victim impact report is required.

15. Where a young child has suffered a rape, it would be better and more reliable if the short-, medium- and long-term emotional impact on that child were assessed by a psychologist or a psychiatrist. I accept that for several reasons such professional assessment may not always be available, but particularly in the case of a child there is no excuse for failing to provide at least a victim impact report.

16. Finally, in dealing with the law applicable to sentencing it is necessary to consider the provisions of section 51(3)(aA)(ii). This section provides: "(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying a lesser sentence: (i) ...; (ii) an apparent lack of physical injury to the complainant;..." Plasket J in the case of *S v Nkawu* held that if one interprets this provision literally, it is unconstitutional because it would require judges to ignore factors relevant to sentencing and consequently

[13] S v Vilikazi 2009 (1) SACR 552 (SCA) at para [56].

the subsequent sentences would be unjust.[14] After considering the law relating to interpretation Plasket J determined that it was possible to read the said subsection in a way that was constitutionally compliant. He held that one should read subsection (aA) to mean that any one of the provisions listed under that sub-section on its own could not constitute substantial and compelling grounds to avoid the prescribed sentence, but that each one of those factors may be considered along with other factors which might cumulatively amount to substantial and compelling reasons to depart from the prescribed minimum.[15] Thus the fact that no physical injuries resulted from the rape could be considered along with other factors to conclude that there were or are in fact substantial and compelling reasons to depart from the prescribed minimum sentence. This approach was considered and adopted by the SCA in the case of S v SMM[16].

17. Turning now to the facts of the present appeal and applying those facts to the law summarised above. The appellant had a relationship with the complainant's aunt at the material time and it appeared that this relationship had endured up until the trial. The appellant was therefore in the position of an uncle to the complainant. It appears that the appellant was in fact treated as an uncle by the complainant and her family. The appellant lived on the same premises as the complainant.

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[14] S v Nkawu 2009 (2) SACR 402 (ECG) at para [15].
[15] S v Nkawu., above at para [17].
[16] S v SMM., above at para [26].

The appellant and the complainant knew each other, and the appellant was in a position of trust vis-a-vie the complainant. The facts show that during the rape in question the appellant abused the said position of trust.

18. At the time of the rape the appellant was 23 years old, and the complainant was 11 years old. Although, precisely how it played out is disputed, the appellant used alcohol to make it easier for him to have his way with the complainant.

19. Also, from the mere fact that the appellant was 23 years old, and the complainant was 11 years old at the time of the rape there was clearly an abuse of the power relationship that existed between them. Indeed, this is the very basis of the charge the appellant faced and was convicted of in the court *a quo*. Accordingly, it would be inappropriate to consider it again as an additional aggravating factor in the sentencing exercise.

20. In his plea, the appellant admitted the act of sexual penetration, but initially made two claims in relation to that act. Firstly, he was not aware that the applicant was below the age of 12. A claim he quickly abandoned when he gave evidence and he conceded that he knew the complainant had not yet reached the age of 12. Secondly, that *de facto* the complainant consented to the sexual act. This second claim by the appellant does not survive scrutiny.

21. Given the complainant's age *de facto* consent was not relevant in respect of the conviction. The complainant testified that the appellant threw a blanket over her head before raping her. Although the complainant is a single witness in this regard, this evidence was sufficiently corroborated by Mr Morris who gave evidence for the State that when he entered the relevant informal shack on the premises, he saw the complainant on the bed with a blanket partially covering her upper body. I accept this evidence of the complainant and from the record I can find no credible ground to reject such evidence.

22. The only function a blanket over the head of the complainant can serve in this context is to control her and make it impossible to raise the alarm. Both of which negate *de facto* consent. In the circumstances there was no *de facto* consent.

23. Unfortunately, there was no independent or professional evidence on the short-, medium- and long-term emotional impact of the rape on the complainant. The State did not deign it necessary to have a victim impact assessment done and no such report was presented to the trial court. Despite several admonitions by the SCA of the necessity for such evidence, this was ignored in this case. There was evidence that the complainant received counselling after the rape. The State could have subpoenaed the relevant counsellor and for that matter the learned trial magistrate could have done the same. They chose not to.

24. The evidence that was placed before the court on this aspect was from the complainant herself and her mother. The complainant's evidence was that she was sleeping well and that her schoolwork had not suffered and that she had progressed to the next grade.

25. The evidence of the complainant's mother was to the effect that after the rape the complainant did not sleep well and had nightmares. However, she testified that after counselling this problem went away. The complainant's mother did not point to any ongoing difficulties with the complainant's schooling.

26. There was no remorse in the sense contemplated in Matyityi's case[17]. The argument advanced on behalf of the appellant that the appellant's admission that he made a mistake is evidence that appellant had gone part of the way to showing remorse, cannot be sustained. Either there is remorse or there is no remorse. In any event without more evidence than that which appears from the record one does not know which mistake he acknowledged and/or regrets. For example, does appellant regret committing the offence so close to home that he was in essence caught red handed, or is it something else that the appellant regrets. Accordingly, I cannot support this argument advanced on behalf of the appellant.

[17] S v Matyityi 2011 (1) SACR 40 (SCA).

27. The appellant's personal circumstances are: He was 23 years old at the time he committed the rape; He was 25 years old when he was convicted and sentenced; His highest level of schooling is that he completed Grade 10; He is unmarried; At the time of sentencing he had a three year old child; This child lived with her mother who was unemployed at the time the appellant was sentenced; The child's mother received a social grant for the child; The appellant was unemployed at the time of sentencing; The appellant had previously been employed as a farm labourer earning R160 per day.

28. The appellant is an overall first offender. This is confirmed by the SAP 69 which was filed of record in the matter. As already set out, at the time of the offence he was 23 years old and was 25 years old when convicted and sentenced. There was no evidence of other pending matters when he was sentenced. Therefore, there is no evidence of a pattern of criminal conduct on the part of the appellant.

29. The appellant admitted to being sexually aroused by young girls.

30. The relevant rape is not one of the worst rapes seen in our courts.

31. There was no lasting physical injury. The injuries that were found were consistent with sexual penetration. All of this is confirmed by the medical assessment evidenced by the J88 form which was admitted to the record by consent.

32. The appellant was relatively young on conviction. The prospect of rehabilitation cannot be discounted.

33. Taking all these factors into account it would be disproportional to sentence the appellant to life imprisonment. A sentence of life imprisonment is disproportional to the crime, the criminal and the legitimate needs of society in all of the circumstances set out above.

34. In my view a long term, even a harsh term of imprisonment would be justified in all the circumstances of the case. At the same time such sentence must be just in all the circumstances of the case. The sentence must balance the crime, the criminal, and the legitimate needs of society. In my view an appropriate sentence would be twenty-five years imprisonment back dated to 29 October 2020.

35. There is a material difference between life imprisonment and 25 years imprisonment. Accordingly, the present case meets the determinative test set out in *Malgas.* Accordingly substantial and compelling grounds to deviate from the prescribed life sentence must be taken to have been established from the circumstances set out above.

Accordingly, the following order is made:

1) The appeal against the appellant's sentence is upheld.

2) The life sentence imposed on the appellant is set aside.

3) The said sentence is replaced with a sentence of 25 years imprisonment backdated to the 29 October 2020.

[redacted]

Lawrence Lever
Judge
Northern Cape Division, Kimberley

I agree,

[redacted]

Mpho Mamosebo
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

Appellant:	*Mr P J Fourie*
Instructed by:	*LEGAL AID SOUTH AFRICA, KIMBERLEY.*
Respondent:	*ADV S Sauls*
Instructed by:	*DIRECTORS OF PUBLIC PROSECUTIONS, KIMBERLEY.*
Date of Hearing:	*23 October 2023*
Date of Judgment:	*24 May 2024*