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

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA34/2022

R/C CASE NO: G185/2013

In the matter between:

ABEL LEKWANE **APPELLANT**

AND

THE STATE

DATE OF HEARING **: 28 October 2022**

DATE OF JUDGMENT **: 10 November 2022**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for the hand- down is deemed to be 10h00 on the 10 November 2022.

APPEAL JUDGMENT

CORAM: Hendricks JP, Reddy AJ

ORDER

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against the sentence is dismissed.

(iii) The sentence of life imprisonment is confirmed.

Introduction

[1] The appellant was convicted in the Regional Court Garankuwa on two counts; kidnapping (count1); and the contravention of the provisions of section 3 read with sections 1, section 56(1) section 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the SORMA") read with section 51(1) and Part 1 of the Criminal Law Amendment Act 105 of 1997("the CLAA") (count 2). The charge did not make reference to Schedule 2 of the CLAA. A vigilant examination of record indicates unequivocally that the appellant's right to a substantive fair trial was not impaired as a result thereof. (See S v Ndlovu 2003 (1) SACR 331 at para (11), S v Kolea 2013(1) SACR 409(SCA). The conviction on the second count attracted a sentence of life imprisonment on the basis that the complainant was raped more than once.

[2] The charges relate to a sequence of events on 27 February 2010 when the complainant hereinafter referred to as JM, a female person, was deprived of her freedom of movement when she was dragged and locked in a room and sexually violated by the appellant who penetrated her vagina with his penis.

[3] On 20 May 2016 the appellant duly represented by counsel pleaded not guilty to both counts and exercised his right to remain silent. During the trial consent was raised as the ground of justification negating criminal responsibility in respect of count 2. On 21 September 2016, the appellant was convicted on both counts and sentenced as follows:

Count 1

Kidnapping: 6 years imprisonment

Count 2:

Contravening section 3 of SORMA: Life imprisonment

[4] The court a quo ordered that the two sentences run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The appellant was declared *ex lege* unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

[5] The appeal lies only against the sentence of life imprisonment, consequent to the right to an automatic appeal in terms of section 309(1) of the CPA.

Ad Condonation

[6] A notice of appeal was delivered on the 13 June 2022 some seventy months later. Given this inordinate delay, a condonation application became peremptory. The appellant filed an affidavit in support of the application for condonation on 10 June 2022. The respondent opposes the application for condonation. The basis of the opposition to the granting of condonation is that the appeal has no prospects of success.

[7] The law on condonation is best summarised with reference to the oft quoted passage by Holmes JA in *Melane v Santam Bank Insurance Co. Ltd 1962 (4) SA 531 (A) at 532 B-E* where the following was stated:

"*The factors which the court takes into consideration in assessing whether or not to grant condonation are: [a] the degree of lateness or non-compliance with the prescribed time frame; [b] the explanation for the lateness or the failure to comply with time frame; [c] prospects of success or a bonafide defence in the main case;[d] the importance of the case;[e] the respondent's interest in the finality of the judgment;[f] the convenience of the*

court; and [g] avoidance in unnecessary delay in the administration of justice…. It is trite that these factors are not individually decisive but are interrelated and must be weighed one against the other. In weighing these factors for instance, a good explanation for the prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay."(See also *Darries v Sheriff Magistrates Court, Wynberg and Another (1998) SACR 18, 1998(3) SA 34 (SCA) at 40 H-41 E*)

[8] The Supreme Court of Appeal (SCA) in *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited 2017 ZASCA 88,* restated the factors that are to be given due consideration of in a condonation application stated in *Melane:*

" Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[9] *In Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC)* at paragraph [23], the following was said:

"*It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."*

The appellant's condonation application

[10] In the affidavit in support of the condonation the appellant explains that, pursuant to conviction and sentence on 21 September 2016, instructions were given to Advocate Tshabalala to note an appeal. Advocate Tshabalala advised the appellant that a proper consultation would have to be held for the purposes of obtaining full legal instructions. The proposed consultation did not reach fruition. On realizing that the fourteen-day period for the lodging of the appeal was to lapse, the appellant completed the appeal forms with the assistance of an inmate and forwarded it to the Regional Court, Garankuwa. The delivery of documents did not trigger a response from personnel at the Regional Court, Garankuwa.

[11] During December 2016, the appellant was transferred to the Zonderwater Correctional Facility. In March 2017, a former partner of the appellant instructed counsel to prosecute the appeal. Before any legal remedies could be explored a transcript of the court proceedings was essential, which was to be arranged by the appellant's counsel at that time. Further, mutually agreed consultations did not materialize, neither was the transcribed record secured. In April 2018, a second set of appeal forms provided by personnel at the Zonderwater Correctional Facility were completed. These forms were duly forwarded to the Garankuwa Regional Court. Officials at the Zonderwater Correctional Facility acted as a conduit between the appellant and the Regional Court, Garankuwa.

[12] During June 2018, Legal aid South Africa on behalf of the appellant entered the fray. Legal aid forms were completed and the issue of a transcribed record being integral to the appeal process was again emphasized. An inordinate delay caused by the failure to secure the transcription of the court record since about March 2019 until March 2022 stalled the appeal process. In May 2022 communication was received that the appeal record was

transmitted to the High Court, Mafikeng. On the 9 June 2022, Mr Gonyane, arrived at the Zonderwater Correctional Facility where a consultation was conducted with the appellant. The mandate provided to Mr Gonyane was to prosecute the appeal on sentence. As such a condonation application was drafted and delivered on 13 June 2022.

[13] The appellant has made out a substantive application for condonation by setting out a detailed chronological time frame as regards the various challenges that interrupted the adherence with the Rules of Court from the date of sentence until the filing of the condonation notice. (See *Ethekwini Municpality and Ingonyama Trust 2014(3) SA 240 (CC)*. The explanation is reasonable enough to excuse the default. I am inclined to grant the requisite condonation for the late filing of the appeal as well as the prosecution thereof.

Finding of Facts by Court A Quo

[14] The facts that the court *a quo* found unassailable can be crisply set out as follows. The appellant was involved in a romantic relationship with the complainant which spanned two days in 2009. The precise month within the year of 2009 was not disclosed. This brisk romantic interlude terminated consensually between the paramours founded on mutual disinterest. On the 27 February 2010 the appellant and the complainant where at Butcher's Tavern consuming alcohol in separate parties. The complainant was in the company of one Salome Kekana (Kekana). Whilst, playing games on the cell-phone of Kekana, the appellant approached and pulled at her person giving her R20-00 as a present. She returned to where she was seated and proceeded to play games on the phone of Kekana.

[15] The appellant called her and requested that she see him out by accompanying him to a specific point at a tree outside the location of Butcher's Tavern. She acquiesced out of her own volition. Kekana was informed that she would be returning. The complainant left in possession of the cell phone belonging to Kekana. On reaching the land mark of the tree the appellant indicated that she should continue to accompany him. When the new agreed point of separation was reached, the appellant refused to allow her to leave, instead he became violent, eventually tripping the complainant and accusing her of undermining him. She was also assaulted. Her presence further in the company of the appellant was involuntary and directed by the appellant who exercised physical control over her person. At the direction of the appellant they reached a certain yard. At this point it was requested that the cell-phone of Kekana that was in her possession be returned. The response was mute. The complainant was led to a bedroom after a door was opened by the appellant. In the bedroom the appellant removed his belt and with the buckle end of the belt assaulted the complainant. The complainant was further assaulted with a broom. When the complainant asked to relieve herself, the appellant refused. A pot in the room had to be used to heed the call of nature. The complainant was instructed to undress and she complied. The appellant then penetrated her vagina using his penis without her consent, whereafter the appellant fell sleep. At about 5h00 a second act of non-consensual vaginal penetration occurred. On both instances no protection was used. Thereafter they both dressed and the appellant accompanied her to the gate of her residence. A report was made as regards her ordeal to Batsiba Khomphiri.

[16] Later that day, Dr Adendorf was consulted. A medico-legal report was completed, customarily referred to as the "J88". The physical examination found that the complainant had a bruise on the left cheek as well as blood

on the left eye, multiple bruises on the left arm, with further bruises and abrasions on her back were observed. It was also found that the complainant was upset and very depressed. The gynaecological examination was set out in some detail with Dr Adendorf testifying that overzealous sexual intercourse could have contributed to vaginal injuries recorded.

The approach of an Appeal Court to Sentence

[17] It is trite that sentencing is pre-eminently the domain of the sentencing court. An appeal court should be astute not to interfere with this discretion unless the discretion has not been judicially exercised, or the trial court misdirected itself to such an extent that its decision on sentence is vitiated or the sentence imposed is so disproportionate or shocking that no reasonable court could have imposed it. (See *R v Rabie 1975(4) SA 855 (A)*

[18] In *S v Malgas 2001(2) SA 1222* Marais JA, said the following:

"[12] *The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance*

and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate." It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[19] The Regional Court Magistrate found that there were no substantial and compelling circumstances present to justify a departure from the prescribed sentence of life imprisonment. The appellant criticised the imposition of life imprisonment on the basis that the trial court had misdirected itself by not finding that the appellant's cumulative personal circumstances constituted substantial and compelling circumstances justifying a departure from the preordained sentence of life imprisonment. The respondent countered by submitting that there were no substantial and compelling circumstances that warranted a departure from the imposition of life imprisonment.

[20] In *S v Matytyi 2011(1) SACR 40 (SCA)* at paragraph (23) Ponnan JA stated as follows:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual". And yet one notices all to frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

Discussion

[21] An examination of the appellant's personal circumstances aerated the following: The appellant was born on the 11th February 1984, being 26 years of age on the day the offences were committed and aged 31 years old at sentence. The completion of his schooling education was permanently abandoned due to the lack of financial resources. The appellant was a first

offender and unmarried. He is the father of four children 16, 14, 12, 10, all of whom were learners. The minor children resided with the appellant and his mother. There was no submission that the appellant may be a primary care giver at trial or before this Court. The appellant supported his children and mother from income accrued as an employee of Crocodile Anglo American Mines. The appellant is a tuberculosis patient. The personal circumstances of the appellant are not truly convincing reasons for the Regional Court Magistrate to have deviated from the prescribed sentence.

[22] The court a quo correctly in my view, evaluated the trilogy of factors as set out in S v *Zinn 1969 (2) SA 537(A)* which *Malgas* confirmed are ordinarily taken into account, inclusive of mitigating and aggravating circumstances to find no substantial and compelling circumstances to justify a deviation from the prescribed sentence.

[23] There is no underscoring the heinous and abhorrent nature of the crime. "*Rape is a very serious offence, constituting as it does a humiliating, degrading and the brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, 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 enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.*" (S *v Chapman (1997) ZASCA 45, 1997 (3) SA 341(SCA) at paragraphs 3-4*)

[24] In the premises, the appeal against sentence should fail.

Order

Accordingly, the following orders are made:

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against the sentence is dismissed.

(ii) The sentence of life imprisonment is confirmed

[redacted]

A REDDY
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

I agree

[redacted]

RD HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appearances:

Date of Hearing:	**28 October 2022**
Date of Judgment:	**10 November 2022**
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Attorney for Plaintiff:	**Mahikeng Local Office** **NO.742 Dr. James Moroka Drive** **MMABATHO** **Tell: 018 381 4582**
Counsel for Defendant:	**Adv Maseko**
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