**REPUBLIC OF SOUTH AFRICA**

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

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

_____ _____
DATE SIGNATURE

CASE NO: **SS149/2015**

In the matter between:

**THE STATE**

and

**NDZIWENI: LAWRENCE ZAMILE** Accused

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**JUDGMENT ON SENTENCE**

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**OPPERMAN J**

[1] I have already handed down judgment in respect of the trial and the conviction which followed upon it. This judgment deals with the evidence lead in respect of the appropriate sentence to be imposed. The two judgments should be read together.

[2] At the hearing prior to conviction, an application was brought by the State in terms of section 153(3)(a) of the Criminal Procedure Act, 51 of 1977 (*the CPA*), which application was not opposed. The application was granted and it was ordered that all persons whose presence was not necessary, would be excluded from the proceedings. The judgment on conviction was not delivered in open court as this court was of the opinion that the identity of the complainants would be revealed. I have relaxed this prohibition for purposes of this judgment, which relates to sentencing, to the extent set out herein.

[3] This Court has ordered that no person shall publish in any manner whatever any information, which might reveal the identity of any complainant in these proceedings. Attention is drawn to the provisions of section 154(5) of the CPA, which makes the publication of any information in contravention of orders granted in terms of sections 153(3) and 154(2), an offence.

[4] The aforesaid order shall not prevent the publication of this judgment relating to the sentencing of Mr Ndziweni, information relating to his name and personal particulars, the nature of the charges against him (without disclosure of the identity of any individual mentioned in such charges), the plea, the verdict, the sentence and any facts which do not disclose the identity of the complainants.

[5] In this judgment I will be referring to the victims as '*the complainant*' or '*the victim'*. This should not be construed as intending to convey any disrespect to those

who suffered at the hands of Mr Ndziweni but should be seen as an attempt by this court to protect the identity of those who were brave enough to come to this court to seek justice.

[6] On 29 June 2017, Mr Ndziweni was convicted by this Court on four (4) counts of rape, three (3) counts of kidnapping, one (1) count of attempted kidnapping, four (4) counts of possession of unlicensed firearms, five (5) counts of robbery with aggravating circumstances and one (1) count of attempted murder.

[7] These convictions attract the following minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997 ('*the Act*'):

7.1. Counts 2, 6, 10 and 13 – Section 51(2)(b)(i) – 10 years imprisonment in respect of each count, even though the evidence shows more than one person raped the victim in count 6.

7.2. Counts 1, 5, 9, 12 and 16 – Section 51(2)(a)(i) – 15 years imprisonment.

7.3. Counts 3, 7, 15 and 18 – Section 51(2)(c)(i) – 5 years imprisonment per count.

7.4. Counts 4, 8 and 11 – Section 51(2)(c)(i) – 5 years imprisonment per count.

7.5. Count 17 – Section 51(2)(c)(i) – 5 years imprisonment.

[8] In respect of count 6, the legal question which falls for determination is whether the minimum sentence is indeed 10 years imprisonment as provided for in section 51(1)(b)(i), or life imprisonment, as envisaged in section 51(1) read with part 1 of schedule 2, as the victim was raped more than once, whether by

the accused or co-perpetrator. In respect of such count, the evidence was that the victim was raped by both Mr Ndziweni and two other perpetrators.

[9] In *S v Mahlase*, 2013 JDR 2714 (SCA), the court held at para [9] that because the co-perpetrator was not before the trial court and had not been convicted of the rape, that it could therefore not be held that the rape fell within the provisions of part 1 of schedule 2 of the Act.

[10] In *Cock v S and Manuel v S*, CA 108/2013 and CA 121/2014, Pickering J, (with whom Plasket, J and Smith, J concurred), disagreed with the reasoning in *Mahlase* (supra) but, of course, considered themselves bound by the SCA pronouncement. They drew on their common law jurisdiction to impose any sentence in excess of that minimum sentence and held that when they exercise such jurisdiction, they were not bound by *Mahlase* (supra) and its interpretation of the Act. They concluded that the only appropriate sentence in that case was life imprisonment.

[11] Where appropriate, I too, will draw on my common law jurisdiction. The minimum sentencing legislation is, after all, just that a minimum sentence that the legislature deemed appropriate, not the maximum.

[12] In *S v Vilakazi,* 2009 (1) SACR 552 (SCA) Nugent, JA introduces the judgment with the following observations:

> "[1] Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. In *S v Chapman* this court called it a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim' and went on to say that [w]omen in this country . . . 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 tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'.
>
> [2] Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape 'the evidence points to the conclusion 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'. During 2007 as many as 36 190 reports of rape were made to the police. Perhaps in some cases the report was false but the figure is nonetheless staggering bearing in mind that rape is notoriously under-reported. It is also notorious that relatively few offenders are caught and convicted."

[13] *Vilakazi* (supra) was delivered on 3 September 2008. If the experience of the victims in this case are anything to go by, it seems that, 9 years later, little has changed for women in South Africa.

[14] The prescribed minimum sentences, may only be departed from:

> '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." see *S v Malgas*, 2001 (1) SACR 469 (SCA) at para [25].

[15] In *Vilakazi* (supra) Nugent JA held as follows at paras [15] and [16]:

> "[15] It is clear from the terms in which the 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 the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas,* which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which *'justify'* it.

[16] 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 that should *ordinarily* **and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances'(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."

[16] I am called upon to apply my mind to whether the sentences ordained in the Act are proportional to the particular offences of this particular case but also and implicit

in this enquiry, whether I should draw upon my common law jurisdiction and impose sentences *in excess* of such ordained sentences.

[17] In drawing upon my common law jurisdiction, the following general principles have application and were restated in *S v SMM*, 2013 (2) SACR 292 (SCA) at para [13] in the following terms:

> '[13] …….It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in *S v Rabie*:
>
> 'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'
>
> And further at para [14]
>
> [14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. In *S v RO* I referred to this extremely worrying social malaise, to the latest statistics at

that time in respect of sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge — the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much-quoted *Zinn* dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives. More than 40 years ago Schreiner JA had the following to say about the balance which has to be struck:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

[18] Taking the above principles into account I apply them to this case.

[19] This matter was postponed on many an occasion to procure a pre-sentencing report which was, finally, obtained. In summarising Mr Ndziweni's personal circumstances, I draw generously from such report which has, by agreement with the prosecution, been received as evidence. The state recorded its reservations in respect

of two features being that Mr Ndziweni suffers from an illness and that the report suggests implementation of section 276 (1)(b) of the CPA.

[20] Mr Ndziweni has no previous convictions. He was born on […] 1977 and is thus currently 41 years of age. Although not married, he has three children from two different partners. Two children, aged 14 and 15 years of age, from one partner, reside with their maternal grandmother in the Eastern Cape. Their biological mother, from whom he separated in 2007, resides in Johannesburg. His third child, who is 8 years of age, is under the care of his biological mother who resides in the Eastern Cape. Prior to his arrest, he was working, earning R250 per day. He supported his children financially.

[21] The probation officer, Ms Sekoba, interviewed Mr Ndziweni's sister who reported that their mother had abandoned them at an early age as a result of which they were raised by their maternal grandmother as well as by extended family members. She opined that both she and Mr Ndziweni suffer from anger issues as a result of lack of parental love, care and support during their formative years. She said that he presented with negative behaviour from an early age and that he is an aggressive and violent person who has a tendency of involving himself in physical fights. Mr Ndziweni's sister was very emotional during the interview and indicated that it pained her not to be on good terms with her brother, he being the only close family member that she has.

[22] Mr Ndziweni told Ms Sekoba that he had completed grade 10 but had dropped out of school following the death of his maternal grandmother. His sister disputed this.

She contended that Mr Ndziweni had dropped out of school during grade 4 due to rebellious behaviour.

[23] Mr Ndziweni did not testify in mitigation of his sentence. The state relied on 3 victim impact reports which similarly, were received into evidence by agreement between the parties.

[24] My judgment in respect of the conviction of Mr Ndziweni contains an evaluation of the circumstances in which the offences were committed. I have considered them in arriving at a decision whether the sentences I intend imposing are proportional to the minimum prescribed sentences and I do not again repeat such circumstances herein.

[25] The circumstances I had regard to in relation to considering the proportionality of the minimum sentences, were also considered in exercising my general criminal jurisdiction.

[26] I highlight some of the material facts I have considered in respect of the specific counts:

**Counts 1 - 3**

[27] Mr Ndziweni, and him only, ordered the complainant into the bathroom and threatened to shoot her. In order to keep her subdued, he placed the gun on the rim of the bath whilst he raped her. He did not use a condom thereby increasing the risk of pregnancy and the transmission of disease. In this judgment I will mention whether or not a condom was used when a victim was raped. When I do so it should be understood that in respect of such victim, I find, as a fact, that the failure to have done so, increased the risk of pregnancy and the transmission of disease.

[28] No victim impact report could be obtained for the complainant as she had left the country and her destination is unknown.

**Counts 4 - 7**

[29] The complainant was accosted by two knife wielding assailants, one of whom was wearing a balaclava. She was then raped on no less than 5 occasions by 3 perpetrators. In her victim impact statement it is recorded how petrified she was the first 8 months following the ordeal. She was fortunate to have a very supportive family. She expressed the wish that Mr Ndziweni be sent to prison '*for ever so that some other women will be safe from his dirty doings*'.

**Counts 8 to 10**

[30] Mr Ndziweni raped the complainant at knife point without the use of a condom. The offence had devastating consequences for this complainant. The victim impact report reveals that she decided to resign from her job as she felt that she was being gossiped about and she was being ridiculed. She resorted to the excessive consumption of alcohol. She suffered from anxiety, still experiences much anger and has suicidal thoughts. Those around her where she stayed made fun of the crime perpetrated upon her and she feels trapped within this unsympathetic and cruel home environment. She wrote: '*I wish God can make decision about him about all dirty thing that he did if he can rot in jail it fine he deserve it.'*

**Counts 11 - 14**

[31] This complainant too was raped without a condom at gun point however, prior to raping her, Mr Ndziweni had announced that when he was done raping her, he would kill her because if he did not do so, she would go to the police, come back to the place

under the bridge with the police. Mr Ndziweni might well have executed his heinous plan had he not been disturbed by the ringing of the passer by's phone. One shudders to think what might have happened had the complainant not rolled away from the spot where she had been lying and where the shot had been fired. The victim impact report reveals that she has become extremely fearful and distrusting of men. She says she cannot walk the streets without fear any more. She expressed the wish that he be imprisoned for the rest of his life to prevent him from doing the same thing to her.

**Counts 15 - 17**

[32] Mr Ndziweni was possessed of a stick and his co-perpetrator, with a gun. In this case too, the complainant was saved from the unthinkable by the actions of a third party, the pamphlet distributor. The complainant was unwilling to co-operate in the production of a victim impact report as she wanted to put this entire incident behind her.

[33] The emotional impact the offences had on the victims, their families, their relationships and their lives is profound. These offences caused much emotional distress and damage.

[34] The behaviour of the accused and his co-perpetrator shows lack of respect for the complainants' physical integrity, freedom of movement and human dignity. He has offered no explanation for this barbaric behaviour.

[35] The offences forming the subject of this trial were committed over a period of one and a half years, starting 25 December 2012 and ending on 20 May 2014. During this time Mr Ndziweni had time to reflect on his heinous deeds and to change his life. He did not. Instead he continued to inflict unspeakable acts of injury and humiliation

upon his victims. He lay in waiting, like a hyena, pouncing on the vulnerable and then taking them to his lair. These women were all trying to eke out a living by walking early in the morning or late at night to and from their place of employment to provide for their families.

[36] The courts are duty bound to send a clear message to other potential rapists that the courts are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who invade these rights, see S v *Chapman* (supra) at 345D.

[37] Mr Ndziweni's rehabilitation prospects are slim. He is a serial sexual predator who has made life hell for so many people for so long that he evidently lacks the capacity for mercy that he now seeks. He has no insight into his wrongdoing, has shown no remorse and persists with his innocence post conviction, despite the overwhelming evidence against him.

[38] That he grew up in a disadvantaged community and in circumstances which were characterised by violence, stands uncontroverted. His sister, who grew up under the same circumstances, however, managed to walk a different road. His relocation to Hillbrow during 1997 appears to have introduced him to a lifestyle of criminal activities. An unfortunate turning point. That Mr Ndziweni was dealt an unfair hand stands undisputed but none of this can justify the callous, ruthless and cruel treatment he meted out to his victims.

[39] Much emphasis was placed on the fact that almost 4 years have lapsed since the date of arrest of Mr Ndziweni, being the 24th of June 2014. Although it is undoubtedly so that under the correct circumstances this fact alone could have

qualified for a finding that substantial and compelling circumstances were present which would have entitled this court to deviate from the minimum sentences applicable, this case is not such a case. It also does not follow as a matter of course that the sentences should be reduced with mathematical precision having regard to the amount of time spent incarcerated awaiting trial. I hold the view that the minimum sentences in the circumstances of this case are not unjust and are not disproportionate to the crimes committed.

[40] Life sentence is the most severe sentence, which a court can impose. It endures for the length of the natural life of the offender. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. This I have done and I am unable to find that there are any substantial and compelling circumstances present which would warrant a deviation from the minimum sentences applicable. Applying this finding then to the 5 separate incidents, chronologically with reference to the date of the offences:

**25 December 2012 – Counts 1-3**

[41] The rape count (count 2) attracts a minimum sentence of 10 years imprisonment, the robbery with aggravating circumstances count (count 1) a period of 15 years imprisonment and the possession of a fire-arm count (count 3) a period of 5 years. In my view, an appropriate sentence would be one in which the 5 year period were to run concurrently with the 15 year period.

**27 June 2013 – Counts 4 - 7**

[42] The rape count (count 6) attracts a minimum sentence of 10 years imprisonment, the robbery with aggravating circumstances count (count 5) a period of

15 years imprisonment, the possession of a fire-arm count (count 7) a period of 5 years and the kidnapping charge (count 4) a period of 5 years. In my view, an appropriate sentence would be one in which the 5 year period in respect of count 7, were to run concurrently with the 15 year period in respect of count 5.

[43] In respect of the gang rape to which the complainant was subjected, I draw on my common law jurisdiction as I hold the view that the sentence of 10 years is wholly inappropriate. In my view, a life sentence is warranted.

**16 December 2013 – Counts 8 - 10**

[44] The rape count (count 10) attracts a minimum sentence of 10 years imprisonment, the robbery with aggravating circumstances count (count 9) a period of 15 years imprisonment and the kidnapping charge (count 8) a period of 5 years. In my view, an appropriate sentence would be one in which the 5 year period in respect of count 8, were to run concurrently with the 10 year period in respect of count 9.

**28 February 2014 – Counts 11 - 15**

[45] The rape count (count 13) attracts a minimum sentence of 10 years imprisonment, the robbery with aggravating circumstances count (count 12) a period of 15 years imprisonment, the kidnapping charge (count 11) a period of 5 years, the attempted murder (count 14) 10 years and the possession of a fire-arm (count 15) a period of 5 years. In my view, an appropriate sentence would be one in which the 5 year period in respect of count 15, were to run concurrently with the 15 year period in respect of count 12.

**20 May 2014 – Counts 16 - 18**

[46] The robbery with aggravating circumstances count (count 16) attracts a minimum sentence of 15 years imprisonment, the kidnapping charge (count 11) a period of 5 years. The attempted murder count (count 17) has no minimum sentencing provision applicable and in terms of my general criminal jurisdiction I consider 10 years imprisonment to be appropriate. The possession of a fire-arm (count 18) attracts a minimum period of 5 years imprisonment. In my view, an appropriate sentence would be one in which the 5 year period in respect of count 18, were to run concurrently with the 15 year period in respect of count 16.

[47] In the result I make the following order:

47.1. **Counts 1 - 3**

47.1.1. Count 1 – Robbery with aggravating circumstances - the accused is sentenced to 15 years imprisonment.

47.1.2. Count 2 – rape - the accused is sentenced to 10 years imprisonment.

47.1.3. Count 3 – Possession of unlicensed fire-arm – the accused is sentenced to 5 years imprisonment.

47.1.4. The sentence imposed in respect of count 3 is to run concurrently with the sentence imposed in respect of count 1.

47.1.5. The effective sentence in respect of counts 1, 2 and 3 is thus 25 years imprisonment.

47.2. **Counts 4 - 7**

47.2.1. Count 4 – Kidnapping - the accused is sentenced to 5 years imprisonment.

47.2.2. Count 5 – Robbery with aggravating circumstances - the accused is sentenced to 15 years imprisonment.

47.2.3. Count 6 – Rape – the accused is sentenced to life imprisonment.

47.2.4. Count 7 – Possession of an unlicensed fire-arm – the accused is sentenced to 5 years imprisonment.

47.3. **Counts 11 - 15**

47.3.1. Count 11 – Kidnapping - the accused is sentenced to 5 years imprisonment.

47.3.2. Count 12 – Robbery with aggravating circumstances - the accused is sentenced to 15 years imprisonment.

47.3.3. Count 13 – rape – the accused is sentenced to 5 years imprisonment.

47.3.4. Count 14 – Attempted murder – the accused is sentenced to 10 years imprisonment.

47.3.5. Count 15 – Possession of unlicensed fire-arm – the accused is sentenced to 5 years imprisonment.

47.3.6. The sentence imposed in respect of count 15 is to run concurrently with the sentence imposed in respect of count 12.

47.3.7. The sentence imposed in respect of count 11 is to run concurrently with the sentence imposed in respect of count 13.

47.3.8. The effective sentence in respect of counts 11, 12, 13, 14 and 15 is 35 years imprisonment.

47.4. **Counts 16 - 18**

47.4.1. Count 16 – Robbery with aggravating circumstances - the accused is sentenced to 15 years imprisonment.

47.4.2. Count 17 – Attempted kidnapping - the accused is sentenced to 5 years imprisonment.

47.4.3. Count 18 – Possession of unlicensed fire-arm – the accused is sentenced to 5 years imprisonment.

47.4.4. The sentence imposed in respect of count 18 is to run concurrently with the sentence imposed in respect of count 16.

47.4.5. The effective sentence in respect of counts 16, 17 and 18 is thus 20 years imprisonment.

47.5. The accused's name is to be entered into the National Register for Sex Offenders as contemplated in terms of section 42 of the Sexual Offences Act, in terms of section 50(2)(a)(i) of the Sexual Offences Act.

47.6. The accused is declared unfit to possess a firearm as contemplated in terms of section 103 of Act 60 of 2000.

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I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 15 January 2018, 13 March 2018, 27 March 2018 and 20 April 2018
Judgment delivered: 20 April 2018
Appearances:
The State: Adv Kowlas
For the Accused: Adv Bosiki