REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

In the matter between: **CASE NO: A384 / 2015**

VUSIJOSEPH MABUZA

And

THE STATE

JUDGMENT

SIKHWARI, AJ

[1] This matter came by way of appeal from the regional court of Mpumalanga division held at Tonga, the court *a quo.* Leave to appeal was granted by the court *a quo* against sentence only.

[2] The appellant was charged with rape in that he was accused of being guilty of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters Act) 32 of 2007 - RAPE (read with the provisions of Section 51 and / or 52 and Schedule 2 of the Criminal Amendment Act 105 of 1997, as amended) in that on or about the 20th day of May 2011 and at or near Block A Trust area in the regional division of Mpumalanga the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, [N……] [K……] [S……] of 25 years of age by penetrating her vagina and anus without the consent of the said complainant.

[3] Briefly, the circumstances of the rape are that the appellant went to the homestead of his friend, [M…..]. On arrival he found that [M…..] was not present. Instead, he found the complainant sleeping in [M…..]'s house. The complainant was ordered by the by the appellant under the threat of a knife to dress for them to go and look for [M…..]. They took a strange route where there were no people. The route was scary. At a certain stage she tried to break loose from the appellant and ran away but he chased after her and caught up with her. It was in the bushes.

[4] The complainant screamed but could not be rescued. The appellant then caused her to lay down, pulled up her skirt, cut her panty with the knife he was having and penetrated her by putting his penis into her vagina. This was the first rape. A second rape followed but not much details of this second rape were stated in the evidence.

[5] The third rape took place at [E……]. This session included anal penetration while the complainant was on her knees. It is during this third session that appellant assaulted the complainant several times with open hands and also threatened her with a knife. The fourth rape took place at the

homestead of the complainant. The appellant ordered the complainant to go with him to his homestead. He proposed love to her. At this homestead he forced her to eat food or she will die. After eating food, she was ordered to join the complainant in his bed. That's when the fourth rape took place. This ordeal lasted from about 11 pm to 4 am. At 6 o'clock in the morning the appellant accompanied the complainant but left her halfway. He threatened her with death if she should lay charges.

[6] The appellant was found guilty by the court *a quo* **and was sentenced to life imprisonment. The appellant is now appealing the said sentence of life imprisonment.**

[7] In sentencing the appellant to life imprisonment, the court *a quo* **found that there was no substantial and compelling circumstance to persuade it to deviate from the prescribed minimum sentences in terms of the relevant provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997, as amended. In his address in mitigation appellant's legal representative told the court** *a quo* **that** *"...the defence is well aware of the Minimum Sentence Act, at this stage I will have no address*
with regard to the said Act. And may the Court impose a suitable sentence...".
Effectively, he missed the opportunity to address the court *a quo* **on the substantial and compelling circumstances justifying a less severe sentence than the one prescribed.**

[8] The presence of substantial and compelling circumstances is not dependant on counsel's submission that they are there or not. The court has a duty to analyse the submitted circumstances of the appellant, circumstances of the case, surrounding circumstances as well as aggravating factors; and then make a finding if indeed there are no substantial and compelling circumstances.

[9] Du Toit *et al* in their work entitled 'Commentary on the Criminal Procedure Act, at page 28-18D-17 *(service 52 of 2014)* have stated that:
"in 5 u' /V 2000 (1) 209 (W) it was held that In determining whether 'substantial and compelling circumstances' justifying a less than the prescribed sentence under Section 51 of Act 105 of 1997 existed, the court is to consider all facts relevant to sentence, both aggravating and mitigating, and in the light thereof to decide whether the prescribed minimum sentence is grossly disproportionate to the crime committed. If such a finding is made, 'substantial and compelling circumstances' existed entitling the court to impose a lesser than the prescribed sentence. The court was however to bear in mind that the reason for the prescribed minimum sentence Is deterrence and it can therefore not simply have regard to previous sentences in comparable cases..."

[10] In *S v Jansen* 1999 (2) SACR 368 (C) Davis J held that "in considering the imposition of minimum sentence in terms of Sections 51, 52 and 53 of Act 105 of 1997, the court is to consider all available mitigating factors to determine whether they are of substantial *weight,* thus enabling the court to exercise its discretion to provide for a reduced sentence".

[11] In *S V Van Wyk* 2000 (1) SACR 45 (C) it was decided that the phrase 'substantial and compelling circumstances' included all factors which were previously referred to as mitigating circumstances which may indicate diminished moral blameworthiness on the part of the offender.

[12] The court *a quo* was informed that the appellant was 22 years of age, a first offender, a sole breadwinner of his family, employed as a fruit picker with a monthly salary of R1000, he has no pending cases against him, he is a single father of one child, he could still be rehabilitated, complainant did not sustain serious physical injuries, and the state did not prove severe emotional pain on the part of the complainant. The State did not submit any evidence or submission in aggravation. Though the State did not submit any aggravating evidence or facts to the court *a quo,* the fact that the appellant has raped the

girlfriend of his own friend is aggravating.

[13] These factors, when taken together, in my view do constitute 'substantial and compelling circumstances'. Life imprisonment is the harshest punishment which our courts can impose on an offender. This court aligns itself with the decision in *S v Malgas* **2001 (1) SACR 469 (SCA) at pages 481J-482A, where the SCA stated that** "the specified sentences are not to be departed from lightly and for flimsy reason. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts are to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded". **In the** *Malgas* **matter the SCA set aside the sentence of life imprisonment and replaced it with 25 years' imprisonment.**

[14] The court *a quo<M* **not consider the circumstances of the appellant which were presented in mitigation. This was a misdirection on the part of the court** *a quo.* **The submitted circumstances are neither flimsy nor light. They are genuine and uncontested by the respondent. Therefore, the court** *a quo* **should have properly considered the said circumstances, together with aggravating circumstances, in order to determine whether or not they carry substantial and compelling weight. This exercise was not done by the court** *a quo.*

[15] The courts are determined to impose long terms of imprisonment to offenders in more serious cases like rape, murder and robbery with aggravating circumstances. The Supreme Court of Appeal has expressed the correct approach towards rape cases in *S v Chapman* **1997 (3) SA 341 (SCA) at page 344J-345B when it held that** "rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to 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 entertainment, to go and come from work, and to 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"

[16] The SCA went further to sum it up at page 345D of the *Chapman* **decision that** "the courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the quality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights". **The SCA then confirmed an effective sentence of fourteen years of direct imprisonment for three counts of rape.**

[17] The above approach was further emphasised in *DPP, North Gauteng v Thabethe*IQII (2) **SACR 567 (SCA) at page 577G-I**"... rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and advancements of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self- respecting members of society. Our courts have an obligation to impose sentences in such crime- particularly where it involves young, innocent, defenseless and vulnerable girls—of the kind which reflects the natural outrage and revulsion felt by the law-abiding members of the society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system". **The SCA imposed a sentence of ten years imprisonment in** *Thabethe* **case.**

[18] In 5 / *VHakazi* **2009 (1) SACR 552 (SCA) at page 574D the SCA Stated that** "in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment the question 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 me to be the kind of 'flimsy' grounds that *MaigasssiwS* should be avoided. But they are nonetheless relevant in another respect The material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment". **In *Vilakazi* the SCA set aside the sentence of life imprisonment for rape of a victim who was under the age of sixteen years and replaced it with fifteen years of direct imprisonment.**

[19] Both *Ma/gas* and *Vilakazi* decisions do not take away the discretion of the trial court on sentencing and its duty to determine if there are substantial and compelling circumstances by way of applying the correct test. Courts should guard against sacrificing an accused person at the expediency of deterrence. These decisions inform the court imposing sentence that it must do so having it in tis mind that the legislature has legislated certain minimum sentences.

[20] In 51' *Nkomo* 2007 (2) SACR 198 (SCA) the appellant's age of 29 years, employment, and positive chances of rehabilitation were accepted by the SCA as constituting substantial and compelling circumstances.

This should be taken into account with the fact in mind that life imprisonment is the gravest form of sentence that can be imposed. Therefore, *Malgas* and *VHakazi* should be understood within the context that each case will be determined on its own merits.

[21] This court is persuaded that there are 'substantial and compelling circumstances' in favour of the appellant which justify a less severe sentence than the one prescribed in terms of Act 105 of 1997. However, due to the fact that appellant raped the complainant repeatedly, a lengthy term of imprisonment is justified.

[22] In the premises, the following order is made:

1. That the appellant's appeal against sentence is upheld.

2. That the sentence of the court *a quo* of life imprisonment is set aside and replaced with the following:

2.1. The appellant, Vusi Joseph Mabuza, is sentenced to fifteen (15) years imprisonment.

2.2. That the sentence so imposed of 15 years is antedated to the 24th day of November 2011 being the date upon which the sentence of life imprisonment was imposed.

DATAED IN PRETORIA ON THIS THE DAY OF MARCH 2016 SIKHWARI, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA I agree

TOLMAY, *J*
JUDGE OF THE HIGH COURT, PRETORIA