



**THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case no.: A150/2021**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<b>24/2/2022</b> .....	.....
DATE	SIGNATURE

In the matter between:

**MALOKA EVANS KGOBANE**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

---

**JUDGMENT**

1. This is an appeal against sentence only. The appellant filed a petition against the dismissal of his leave to appeal and leave was granted to appeal the sentence imposed.
2. The Respondent opposed this application on the basis that the court *a quo* had not misdirected itself. The court took all relevant factors into consideration when sentencing the appellant and that the sentence imposed is fair and appropriate in the circumstances.
3. The Appellant was convicted and sentenced in the Regional Court (Pretoria North) on the following: count 1 housebreaking with intent to commit an offence unknown to the State; count 2 rape; count 3 attempted murder; count 4 malicious damage to property. He was convicted on 17 November 2016 and sentenced as follows on 30 August 2017: count 1 (5) years' imprisonment; count 2 (10) years' imprisonment; count 3 (15) years' imprisonment; count 4 (1) year imprisonment. The court ordered that the sentence on count 1, 2 and 4 run concurrently, hence his effective sentence amounted to 25 years' imprisonment.
4. This appeal is specifically in respect of the 15 years' imprisonment on count 3, the charge of attempted murder. The grounds raised was that the effective sentence of 25 years' imprisonment is shockingly inappropriate and harsh. In particular the 15 years for the conviction on

attempted murder. It was submitted the trial court misdirected itself in not finding substantial and compelling circumstances. Also the trial court over-emphasized the interests of the community, the seriousness as well as the prevalence of the offence while it under-emphasized the personal circumstances of the appellant.

5. The complainant, Ms B[....] T[....], knew the appellant and was in relationship with the appellant between October 2014 and January 2015. Whilst in this relationship she was separated from her husband. She ended the relationship with the appellant when she reconciled with her husband.

6. Her testimony was that on 29 January 2015, around 06h00, her husband had left for work. She was awakened by some noise. She thought that it was her husband as he may have forgot something and came back. She opened the front door and found the appellant breaking the burglar door with a spade. She tried shutting the door but the appellant pushed it and got inside the house. She tried to flee but the appellant assaulted her by hitting with a shovel on her forehead. The appellant tied her hands with shoelaces and took out a vest from his backpack and stuffed it into her mouth.

7. The appellant then started vandalising the movable property in the house namely television set, stove as well as the fridge with the said shovel. He then dragged the complainant to the bedroom and he had sexual intercourse with her without her consent. He choked her with a belt around her neck until she became unconscious. Thereafter he broke a hole on the ceiling with the shovel, removed two pieces of ropes from the bag and tied them up on the roof. He told the complainant that he was going to kill her and himself.
8. He took two chairs from the kitchen and placed them on the floor near where he tied the ropes. Her hands were tied at her back then he placed her on top of the chair. She pleaded with him to untie her hands so that she could die freely. He acceded to her request. He then got on top of the chair and put a rope around his neck as well.
9. Whilst on his chair he tried kicking the complainant's chair and his chair simultaneously. He however managed to kick his chair away but failed to kick the complainant's chair. The complainant managed to grab the chair with her one foot and loosened the rope around her neck whilst still standing on the chair. At that stage the appellant was hanging on the roof. The complainant got off the chair and went to call for help from her neighbours. She was assisted by two men. The appellant was brought down and the police and an ambulance were summoned to assist him.

10. When Emergency medical services arrived on the scene, they found the appellant semi-conscious, confused and there was foam coming out of his mouth. The paramedic administered a drip on him, gave him medication and took him to George Mukhari Hospital. At the time of his transition to hospital the appellant was in a critical condition and had rope marks around his neck. Mr Mashau, a police officer stationed at Akasia Police station, testified that he attended the scene of the incident and that the complainant informed him that the appellant raped her.

11. The complainant was examined on 29 January 2015 and the J88 was completed. The doctor who examined the complainant noted that there were red circular bruises around the neck, bruises around the wrists, the right cheek and the nose bridge were swollen. He further said that there was writing on her lower abdomen and both upper legs. It was his further evidence that the anus was normal and there were no injuries on the orifice. The J88 was handed in as an exhibit.

12. Mr J[....] K[....], the complainant's husband testified that upon arrival at their home he found out that his house had been broken into, the burglar door lock was damaged, his plasma tv screen damaged, stove hub was on the floor and the fridge door hinge was also damaged. When he arrived at his home he found the ceiling damaged and the appellant was on the floor, being assisted by the paramedics.

13. The appellant's version was that the complainant was his girlfriend since June 2014. He contends that the complainant phoned him the day before the incident and told him to come to her place the following day. He arrived at her home between 09h00 and 10h00. He knocked on the door and the complainant opened for him. The complainant invited him to the bedroom. Whilst walking behind her he was hit with an object at the back of his head. He fell and lost consciousness and woke up at the hospital. He had no recollection as to what transpired thereafter.

14. The appellant's case is that the effective sentence of 15 years' imprisonment for attempted murder is shockingly inappropriate and harsh. His conduct should be seen in context. The complainant and the appellant had been in a sexual relationship which was subsequently terminated by the complainant. The appellant was upset about this.

15. The court *a quo* noted that on the day in question, he forcefully entered her home with a shovel. He hit her once with the shovel on the head. She was subsequently bound with shoelaces and gagged with a vest. These were items that the accused had brought with him to the scene. He then proceeded to damage household items by striking them with the shovel. She was raped anally, thereafter, the accused tied a belt around the victim's neck which caused her to lose

consciousness. When she had regained consciousness, he assaulted her further. He attempted to hang both himself and the victim. She, fortuitously, managed to escape the noose and summoned help. When help arrived the accused was still hanging from the noose, with his tongue hanging out and his eyes closed.

16. It is not in dispute that the Appellant raped the complainant prior attempting of killing her, he planned, he attack and came prepared. His version that he could not recall as to what happened on the day in question was improbable.

17. It is important to note that *“rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the 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 their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”*<sup>1</sup>

---

<sup>1</sup> S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4.

18. He exercised power and control, over her, thereby stripping her of her rights to equality, human dignity and bodily integrity.

19. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women. The complainant was not only struck on the forehead with a shovel, she was strangled with a belt until she lost consciousness, she was further hung from the ceiling with the intention of ending her life. She was subjected to torture over a prolonged period. This court has no doubt that the complainant suffered grievous bodily harm. It is clear from this that she was extremely fortunate to have survived.

20. In considering whether the sentences imposed upon the appellant were inappropriate, his personal circumstances were considered by the court *a quo*. He was born on 2 August 1977; His father passed away while he was still very young and he was raised by his mother and step-father; his step-father passed away in 2016; he attended school until grade 11 and dropped out; he is unmarried and has two children aged 15 years old and 10 years old; at the time of his arrest he was employed as a general worker at a doctor's surgery; He was supporting his children financially; his arrest affected his older child that her school performance deteriorated.' He was already in custody for 2 years awaiting trial.



21. **S v Malgas** is the *locus classicus* on how minimum sentences should be approached. In summary cognisance should be taken of the following guidelines set out therein:

21.1 Courts are required to approach the imposition of the sentence aware that legislature has imposed life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

21.2 The specified sentences are not to be departed from lightly and for flimsy reasons.

21.3 All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

21.4 If the sentencing court find the prescribed sentence is disproportionate to the crime, the criminal and the needs of the society it shall impose such lesser sentence.

21.5 The sentencing court must always take into account the benchmark that was provided by the Legislature<sup>2</sup>.

22. It is noted that Section 51 has limited but not eliminated the court's discretion in imposing the sentence in respect of the offences referred to in Part 1 of Schedule 2.

23. It is trite that sentencing involves a very high degree of responsibility which should be carried out with equanimity. In *S v SMM*, **2013 (2) SACR**

---

<sup>2</sup> 2001(1) SACR 469 SCA

**292** (SCA), para [13], the court emphasized that the imposition of sentences entails a fair process. The following was stated:

*“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 ....”*

24. It is apt to refer to *S v Rabie*, where the court emphasized that:

*'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.'*

25. The court *a quo* considered the manner in which the complainant was assaulted and raped. These were the aggravating factors that the court *a quo* correctly took into account. Such aggravating circumstances of the offences outweighed the mitigating circumstances of the appellant. Had the complainant not held on to her chair she would not have survived. The gravity of the accused's conduct; the injuries and the torture the complainant sustained were severe. The court *a quo* noted that the complainant suffered psychologically as well. The court *a quo* also took into consideration that the appellant showed no remorse. In fact he denied the entire incident.

26. It is trite that a court of appeal will only interfere with the sentence imposed by the trial court where the sentence imposed is disturbingly inappropriate, out of proportion to the magnitude of the offence, vitiated by misdirection illustrating that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it. The trial court did not misdirect itself in failing to take any of the relevant factors into account.

27. This court is not persuaded that there are indeed substantial and compelling reasons to deviate from the prescribed minimum sentence. Therefore, we conclude that the trial court was correct in imposing the sentence, more particularly in respect of count 3. No exceptional circumstances were presented and that were compelling to justify a lesser sentence.

28. Considering all the facts and circumstances, there is no basis to interfere with the sentence imposed by the trial court in respect of the appellant. In the premises the appeal is not successful.

In the result, the appeal is dismissed.

---

H KOOVERJIE  
Judge of the High Court,  
Gauteng Division, Pretoria

---

T.P BOKAKO  
Acting Judge of the High Court,  
Gauteng Division, Pretoria

Appearances

<i>Counsel for the Appellant:</i>	<i>Ms MB Moloi</i>
<i>Instructed by:</i>	<i>The Legal-Aid Board</i>
<i>Counsel for the Respondent:</i>	<i>Adv S Lalane</i>
<i>Instructed by:</i>	<i>The National Public Prosecutor</i>
<i>Date heard:</i>	<i>9 February 2022</i>
<i>Date of judgment:</i>	<i>February 2022</i>

