REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A82/2020

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

Date: 31 August 2022 E van der Schyff

In the matter between:

PATRICK MASUKU **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

The Court

Introduction

[1] The appellant was charged with kidnapping, robbery, murder, three counts of rape, unlawful possession of a firearm, and unlawful possession of ammunition. He pleaded not guilty but was convicted on all charges. The following sentences were imposed on 23 May 2012:

Count 1: Kidnapping	(10) Ten years' imprisonment
Count 2: Robbery	(22) Twenty-two years' imprisonment
Count 3: Murder	Life imprisonment
Count 4: Rape	Life imprisonment
Count 5: Rape	Life imprisonment
Count 6: Unlawful possession of a firearm	(5) Five years' imprisonment
Count 7: Unlawful possession of ammunition	(2) Two years' imprisonment
Count 8: Rape	Life imprisonment

[2] When the appellant was sentenced by the court *a quo*, he was already serving a sentence of 15 years imprisonment for armed robbery and kidnapping. The trial court ordered the sentences it imposed to run concurrently with each other and with the sentence the appellant was serving.

[3] The appellant applied for leave to appeal regarding the conviction and sentences imposed. Leave to appeal was only granted in respect of the sentences imposed on counts five and eight.

Submissions

[4] Counsel representing the appellant submitted that the appellant should have been charged with one count relating to the 'multiple rapes,' instead of being charged with three separate counts of rape. This would have resulted in one conviction on the rape charges and one life sentence imposed as far as the incidents of rape are concerned. Counsel submitted that the imposition of three life sentences might prejudice the appellant if he is considered for parole. Counsel agreed that no

objection was raised by the defence regarding the number of rape charges when the appellant pleaded, but requested the court to take the three rape charges together for purposes of sentencing. Counsel further submitted that in the event the court reconsiders the sentences imposed, the court should find that substantial and compelling circumstances exist that justify a deviation from the prescribed sentence. Counsel had difficulty identifying such substantial and compelling circumstances. However, he submitted that the fact that the appellant only had one previous conviction and that the complainant was not injured during the rape should be considered, together with the appellant's age and personal circumstances, as sufficiently compelling and substantial to deviate from the prescribed life sentence for multiple rapes.

[5] Counsel for the state submitted that the three counts of rape should not be taken together for sentencing purposes. He submitted that the appellant was correctly charged with three separate counts of rape as it cannot be said that the appellant had a 'single intent' when the three separate acts constituting rape were committed.

The record

[6] According to the complainant's evidence, she was raped four times. She was raped three times by the appellant, first next to the road, a second time at the house she was taken to when they arrived there, and for the third time the following morning while they were still at the house.

Legal principles

[7] It is trite that sentencing powers fall within the judicial discretion of the trial court. A court of appeal should be careful not to erode this discretion. The sentence imposed by the trial court should only be interfered with if the court of appeal is convinced that the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate.[1] The fact that a court *a quo* grants

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[1] *S v Rabie* 1975 (4) SA 855 (A) at 857D-E, *S v Van de Venter* 2011 (1) SACR 238 (SCA) par [14].

leave to appeal, does not disavow this principle. Sentencing is about attaining the right balance between the crime, the offender, and the interests of the community.[2]

[8] Minimum sentences are prescribed for persons convicted of the offence of rape. Section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) provides as follows:

> '(1) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.'

Discussion

[9] The facts of this case indicate that the appellant committed multiple acts of sexual penetration that constitute multiple acts of rape committed at different locations and times. Since leave to appeal was not granted as far as the respective convictions are concerned, this court is bound by the trial court's finding that the appellant is guilty of three separate counts of rape.

[10] Where rape is committed in circumstances where the victim was raped more than once, it falls within Part 1 of Schedule 2 of the CLAA, and a sentence of imprisonment for life is the prescribed minimum sentence. A court may not deviate from this mandatory minimum sentence in the absence of substantial and compelling circumstances indicating that a lesser sentence is warranted.[3]

[11] The first question at hand is whether life imprisonment as a minimum sentence should be imposed for each conviction of rape or whether the three convictions should be taken together for the purpose of sentencing, which will result in only one sentence of life imprisonment being imposed.

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[2] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

[3] *S v* Malgas 2001 (1) SACR 469 (SCA) par [25]; Yose *and Another v S* (04/2021; A230/2021; RCA 199/2008) [2022] ZAWCHC 130 (22 June 2022] par [26].

[12] In considering this question, the dictum by Mahomed CJ in *S v Chapman*[4] comes to mind:

> '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 each person are basic to the ethos of the Constitution and to any defensible civilisation.'

[13] Van Zyl AJ, writing for the Full Bench, explained in *Yose and Another v S*,[5] that there is a practice in the court to take charges together for the purpose of sentencing. This, he said, seems to have arisen from the provisions of s 94 of the Criminal Procedure Act 51 of 1977 (the CPA), where it is provided that where an accused person, on diverse occasions during any period, committed an offense in respect of any particular person, the State can charge that person in one charge with the commissioning of offenses on diverse occasions during the stated period, irrespective of the number of charges a person is alleged to have committed. However, Van Zyl AJ highlighted that this practice had been discouraged, especially where the accused faces prescribed minimum sentences in terms of the CLAA.

[14] In *S v Mponda*[6] the court stated:

> 'It is most unsatisfactory that too frequently sufficient care is not paid the appropriate formulation of the charge-sheet, especially in serious cases where the potential sentence faced by the accused person can be of the highest severity, particularly where a multiplicity of counts is involved. Under the sentencing provisions applicable in terms of the [CLAA], an offender convicted of rape where the victim has been raped more than once is liable to be sentenced to life imprisonment, while a rapist

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[4] 1997 (2) SACR 3 (SCA) 5A-B.

[5] *Yose, supra* par [46].

[6] 2007 (2) SACR 245 (C) par [9].

convicted of a single count of rape faces a prescribed minimum sentence of 15 years.'

[15] In *S v Rantlai*[7] the Supreme Court of Appeal held that although there was no bar to imposing a globular sentence, it is imperative for judicial officers to consider the desirability of such a sentence carefully before imposing it.

[16] In *Yose,* the sentencing court took the rape charges together for purposes of sentencing. The Full Bench was of the view that although a life sentence was the prescribed minimum sentence in relation to each of the charges, the offences were committed on a single occasion and were closely connected in time, location, and common facts. In these circumstances, individual sentences could induce a sense of shock.

[17] *In casu*, Mabuse J ordered the respective sentences imposed in relation to the three rape convictions to run concurrently. There is thus no cumulative effect that induces a sense of shock. The period within which the appellant will become eligible for parole is not affected since the respective sentences are to run concurrently, and the period is fixed by statute. The discretion of whether to release the appellant on parole rests with the Parole Board. The sentences imposed are not adversely disproportionate.

[18] As far as a deviation from the prescribed minimum sentences is concerned, it is already indicated that counsel for the applicant had difficulty highlighting any compelling and substantial circumstances that would justify the imposition of a lesser sentence. It is clearly stated in s 51(3)(a) that an apparent lack of physical injury to the complainant does not constitute a substantial and compelling circumstances. The appellant's personal circumstances, although taken into account, do not in the circumstances of this case, constitute a convincing reason for departing from the prescribed minimum sentence.

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[7] 2018 (1) SACR 1 (SCA).

[19] Counsel's further statement that the court should consider those factors cumulatively, together with the fact that the appellant had only one previous conviction for which he was serving time to find substantial and compelling circumstances, was ill-fated. Counsel, who clearly miscomprehended the application of the principle was at pain to explain that as the multiple rapes did not result in a physical injury and the appellant had until that time only offended once, considered cumulatively with his personal circumstances, the court should acquit the appellant from the multiple life imprisonment sentences imposed, which would in turn put him in a better stead for consideration for parole in future.

[20] In *S v Vilakazi* 2009 (1) SACR 552 (SCA), the Court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. However, in ultimately deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. Lack of physical injury during rape does not constitute a mitigating factor and therefore cannot be a factor to be considered cumulatively with the other traditional mitigating and aggravating factors. The personal circumstances of an accused are taken into account, though hardly any of these carry sufficient weight to tip the scales in favour of the Appellant to impact on the life sentence prescribed to be imposed for the multiple rapes, especially by a repeat and violent offender.

[21] An injustice will certainly be done to the victim and to society at large, if in the circumstances of this case, where there are undeniably no substantial and compelling circumstances diminishing the gravity of the moral blameworthiness of the Appellant, the court departs from the prescribed minimum sentence.

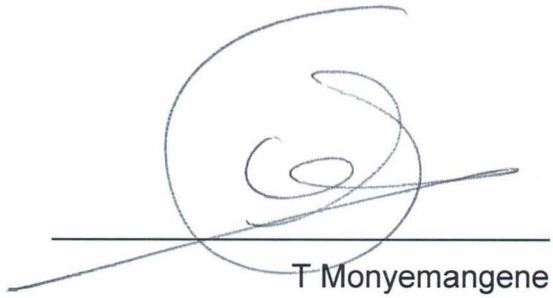
ORDER

In the result, the following order is granted:

1. The appeal is dismissed.

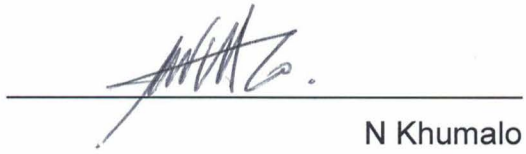
E van der Schyff
Judge of the High Court

I agree.



T Monyemangene
Acting Judge of the High Court

I agree, and it is so ordered.



N Khumalo
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the appellant	Adv. Van As
Instructed by:	Legal Aid SA
For the respondent:	Adv. J Nethononda
Instructed by:	State Attorney
Date of the hearing:	8 August 2022
Date of judgment:	31 August 2022