In the High Court of South Africa
(Western Cape Division, Cape Town)

REPORTABLE

High Court appeal case number: 04/2021; A230/2021
Regional Court case number: RCA 199/2008

In the matter between:

SIYABULELA YOSE	First appellant
MASITHOBE MRWETYANA	Second appellant

and

THE STATE	Respondent

JUDGMENT DELIVERED ON 22 JUNE 2022

VAN ZYL AJ:

Introduction

1. This matter came to this Court by way of an appeal against the sentences imposed upon the appellants by the Regional Court for the Western Cape, held at Khayelitsha, on 24 June 2020.

2. The appellants were aggrieved by the sentences of life imprisonment imposed, and thus exercised their right of automatic appeal to this Court under section 309(1)(a), read with section 309(1)(b), of the Criminal Procedure Act 51 of 1977 ("the CPA"). Section 309(1)(a) provides, in relevant part, that "…*Provided that if that person was sentenced to imprisonment for life by a regional court under section*

51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B…"

3. It appears from the record that the appellants are at present both in custody.

4. It is necessary to point out, at the outset, that the record of the trial proceedings had to be reconstructed in part. Unfortunately, the judgment on sentence was not included in the reconstructed record and, as I discuss below, this means that this Court is unable to determine what factors the regional magistrate took into account in sentencing the appellants, and how those factors influenced him in reaching his decision.

5. Counsel for the parties were nevertheless prepared to proceed with the appeal on the reconstructed record, defective as it is, and argued on the basis of the information that can be gleaned from, *inter alia*, the pre-sentence reports, the charge sheets and the notes detailing the conduct of the trial over the years. As regards the conduct of the trial it is deplorable that the proceedings against the appellants commenced in 2007. Judgment on conviction was delivered on 22 November 2019, and the appellants were sentenced on 24 June 2020. There was thus a period of 13 years between the inception of the proceedings and sentence. I shall return to this issue.

6. I proceed to set out the background to the matter in relation to the charges brought against the appellants, and the subsequent sentences.

The charges

7. The appellants (as accused 1 and 2), together with two others, were charged in the regional court as follows:

a. Count 1: robbery with aggravating circumstances as defined in section (1)(b)(i) and (iii) of the CPA, which involves the wielding of a firearm or a threat to inflict grievous bodily harm.

b. Counts 2 to 4: kidnapping.

c. Counts 5 to 10: rape, in the circumstances contemplated in section 51(1) of the Criminal Law Amendment Act 105 Of 1997 ("the CLAA"), which provides that "*[n]otwithstanding 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 I of Schedule 2 to imprisonment for life*."

8. Section 51(1) of the CLAA is applicable in respect of the following charges:

a. Part II of Schedule 2 of the CLAA is applicable to the robbery charge, in that a fire arm was used during the commission of the offence and the victims were threatened with grievous bodily harm.

b. Part IV of Schedule 2 is applicable to the kidnapping charge, in that a firearm was used and the victims were threatened with grievous bodily harm.

c. Part I of Schedule 2 of the CLAA is applicable to the rape charges in that the victims were raped more than once by all of the accused and one victim was under the age of 16 years at the time of the commission of the offence.

9. The appellants were both legally represented and pleaded not guilty to the charges.

10. Prior to the leading of evidence and at the outset of the hearing the appellants were warned that the provisions of section 51(1)(b)(i) read with Schedule 2 Part 1 of the CLAA 105 of 1997 would apply should they be found guilty of the offence of rape.

The sentences imposed

11. The appellants were subsequently found guilty and sentenced as follows

a. Count 1: 15 years' direct imprisonment.

b. Count 2 to 4: three years' direct imprisonment.

c. Counts 5 to 10: life imprisonment.

12. Although the judgment on sentence is not available, it does appear from the record that, in terms of section 280(2) of the CPA, the lower court expressly ordered the 15-year sentence imposed in relation to count 1 to run concurrently with the life sentences imposed in relation to counts 5 to 10. He did not, however, make such an order in relation to the three years' direct imprisonment imposed on counts 2 to 4.

Whether the sentences in relation to counts 2 to 4 should run concurrently or cumulatively

13. The question arises whether the regional magistrate misdirected himself in failing to so order, and whether the effect of such failure is that the sentences in respect of counts 2 to 4 would have to be served after the life imprisonment sentence.

14. Sections 280(1) and (2) provide as follows:

> *(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.*
> *(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.* (Emphasis supplied.)

15. Sentences thus generally run cumulatively unless there is an express order that they are to run concurrently. That is, however, not the end of the matter. There

are certain instances in which sentences will be served concurrently in the absence of a specific order. The instance relevant to the present matter is where a prescribed sentence is served concurrently with life imprisonment. This follows as a result of the provisions of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998, which provides as follows:

> *(2)(a)Subject to the provisions of paragraph (b)* [not relevant to the present matter]*, a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but-*
>
> > *(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal*; … (Emphasis supplied.)

16. The rationale behind this was set out in *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para [8]: "*Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.*"

17. See also *S v Mokela* 2012 (1) SACR 431 (SCA) at para [11], where the Court expressed the view that sentences are to run concurrently where *"the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.*"

18. These principles are clearly applicable in the present case in relation to the kidnapping count as the complainants' evidence in relation to that charge was that when they were walking home they were approached by four males, one of whom took out a firearm and accosted them, and forced them into a nearby shack where

the rapes were committed.

19. Be that as it may, given the provisions of section 39(2)(a)(i) of the Correctional Services Act, the regional magistrate's failure to make an express order in relation to the concurrent running of the sentences imposed for counts 2 to 4 and the life sentences imposed for counts 5 to 10 did not amount to a misdirection. I shall nevertheless, for the sake of clarity, address this issue in the order granted at the end of this judgment (see *S v Mashava* 2014 (1) SACR 541 (SCA) at paras [7]-[8]).

Should the sentences of life imprisonment be reduced on appeal?

20. The test on appeal in relation to sentence is "*whether the court* a quo *misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court that it so marked that it can properly be described as shockingly, startling or disturbingly inappropriate*" (*S v Van de Venter* 2011 (1) SACR 238 (SCA) at para [14]).

21. Sentencing is about achieving the right balance between the crime, the offender and the interests of the community (S *v Zinn* 1969 (2) SA 537 (A) at 540G-H). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others (see *S v Banda* 1991 (2) SA 352 (BG) at 355A).

22. The question is essentially whether, on a consideration of the particular facts of the case, the sentence imposed is proportionate to the offence, with reference to the nature of the office, the interests of society and the circumstances of the offender.

23. In *S v Pillay* 1977 (4) SA 531 (A) at 535E-F the Appellate Division (as it then was) held that the word "misdirection" simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry on appeal against sentence is not whether the sentence was right

or wrong, but whether the court that imposed it exercised its discretion properly and judicially; a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The misdirection must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's discretion on sentence.

24. In the present matter the appellants, broadly, contend as follows:

a. The regional magistrate erred in insufficiently taking into account their personal circumstances, and that they were relatively young at the time of the commission of the offences.

b. The regional magistrate erred in not sufficiently taking into account the fact that the appellants were first offenders.

c. The regional magistrate erred in not taking into account the time spent in custody prior to the finalisation of the trial.

25. The appellants did not indicate in their heads of argument what they regarded as an appropriate sentence in the circumstances. Counsel, upon being questioned in this respect, submitted that a period of 20 years would be appropriate.

26. In the present matter the prescribed minimum sentence for the rape of a person more than once by the accused, and for the rape of a person under the age of 16 years, is life imprisonment. Section 51(1) is peremptory, and gives no discretion to a Court to deviate therefrom in the absence of substantial and compelling circumstances indicating that a lesser sentence is warranted.

27. In *S v Malgas* 2001 (1) SACR 469 (SCA) at para [25] the Court provided guidelines to be followed in determining whether substantial and compelling circumstances exist to justify the departure from the prescribed sentence. The Court stated, *inter alia*, that:

a. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes.

b. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

c. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as 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.

d. All factors traditionally taken into account in sentencing continue to play a role. None is excluded at the outset from consideration in the sentencing process.

e. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as would cumulatively justify a departure from the standardised response that the legislature has ordained.

28. In the present case there is no indication on the record what the lower court took into account, and how mitigatory circumstances (such as were presented) were evaluated. This is because, as I have mentioned, the record had to be reconstructed in part, and the judgment on sentence was not included in such reconstruction. It follows that the record does not reveal what the lower court's reasons were for not deviating from the prescribed minimum sentence, save that – obviously – it found no substantial and compelling circumstances to do so: had the court found any such circumstances, it was not permitted to impose a life sentence (see section 51(3)(a) of the CLAA).

29. Having considered the evidence led at the trial, however, and the lower court's judgment in relation to whether the appellants ought to be convicted of the charges, I am of the view that there is nothing on the record that would justify a departure from the prescribed minimum sentence in the context of the *Malgas* guidelines as far as their personal circumstances are concerned, including their relative youthfulness at the time of the commission of the offences and the fact that they were first offenders. I am in agreement with the lower court that the appellants had more than sufficient chance of escaping from the scene, at times when the gun-wielding perpetrator was not present at the rape of a particular complainant. Yet, they persisted in the commission of the crimes. The court was therefore correct in rejecting the defence that they took part in the rapes out of fear for their own lives.

30. In the arguments addressed to the lower court on sentence, moreover, the personal circumstances of the appellants, the fact that they were first offenders, and their prospects of rehabilitation, were raised in argument, even though the appellants themselves did not give evidence in mitigation of sentence. These aspects were therefore squarely before the lower court for consideration in the course of the sentence proceedings.

31. The personal circumstances of the appellants as set out in the pre-sentence reports, which form part of the record, reveal nothing substantial or compelling that would justify a departure from the sentences imposed. The reports disclose that the appellants have favourable personal circumstances and enjoy family support. The reports (compiled in 2020) indicate, however, that the appellants (even after all of the years following the commission of the crimes) do not acknowledge the seriousness of the offence and neither has shown any remorse. This does not bode well for any prospect of rehabilitation.

32. The aggravating factors by far overshadow any mitigating factors presented by the appellants' personal circumstances. The rapes in question were of the worst kind. The complainants were young, one of them only 13 years of age, and the other 17. The rapes were gang-rapes, and they were repeatedly committed. The complainants were forced to take part in sexual conduct between themselves. The

effect of their ordeal will last for the complainants' lifetimes.

33. In *Mudau v S* 2013 (2) SACR 292 (SCA) at para [17] the Supreme Court of Appeal held as follows: "*It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way*." (See also *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-B.)

34. This Court has consistently upheld sentences of life imprisonment or lengthy sentences in cases of the rape of children. In *Konstabel v S* [2020] ZAWCHC 75 (11 August 2020) the accused was convicted of rape over a period of two years of an 8-year-old child, the daughter of his partner with whom he was living. He was sentenced to life imprisonment, which was confirmed on appeal.

35. In *Abrahams v S* [2019] ZAWCHC 62 (23 May 2019) the accused was convicted of the rape of an 11-year-old girl and sentenced to life imprisonment. He was a security guard at a creche in close proximity to where the child lived. His sentence was confirmed on appeal.

36. Lastly, in *Williams v S* [2015] ZAWCHC 179 (27 November 2015) the accused was convicted of two counts of rape of a 14-year-old complainant. The accused was the complainant's grandmother's brother. He was sentenced to life imprisonment, which sentence was confirmed on appeal.

37. In light of the prescriptive nature of section 51(1), moreover, reliance on the fact that the appellants in the present matter were first offenders as a mitigating factor would be misplaced in the specific circumstances of this case. I agree with counsel for the respondent's submission that the callous and brazen manner in which this offence was carried out warrants the imposition of a severe sentence, especially in light of the appellants' commission of the offences as part of a group.

38. In *S v Muller* [2006] ZAGPHC 51 (23 May 2006) the Court stated at para [59] that: "*I take account that this accused has no previous convictions and that he is a man in his fifties. However, I must also take into account that there is no authority for the proposition that the previous clean record of an accused convicted of offences in Part I of Schedule 2 constitutes, in and of itself, a substantial and compelling circumstance. At most it would be one of the considerations considered for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding*."

39. Insofar, therefore, as the regional magistrate clearly considered that no compelling and substantial circumstances appeared from the appellants' personal circumstances, ages, and clean criminal records at that stage, he cannot be faulted.

Substantial and compelling circumstances?

40. There is only one aspect in this matter, in my view, that falls into the category of "substantial and compelling", and that arises from the very particular manner in which the trial limped to finality over the extraordinary period of thirteen years. During that time, both of the appellants were incarcerated from 4 November 2007 to 14 April 2016, when they were released on bail. They were again incarcerated from 22 November 2019 to 24 June 2020, in the period between judgment and sentence. This amounts to a total period of about 9 years' detention prior to the commencement of their sentences. It is a very long time indeed. From the record it appears that the appellants themselves did not cause the delay in the finalisation of the trial. It was caused by changes in legal representation over the years, by the unavailability of legal representatives on numerous occasions and by the absconding of a co-accused.

41. As to the period in detention pre-sentence, it was held in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and others* 2014 (2) SACR 337 (SCA) that such period is but one of the factors that should be considered in determining whether the effective period of imprisonment to be imposed is justified.

42. I agree that this is the case. The problem in the present matter is however that

the period of 9 years spent in prison awaiting judgment and sentence does induce a sense of shock, and was a factor that should have been considered by the lower court in deciding whether compelling and substantial circumstances existed that would justify deviation from the prescribed life sentence.

43. I agree with counsel for the appellants that the following *dictum* of the Supreme Court of Appeal in *S v Vilakazi* 2012 (6) SA 353 (SCA) at para [60] is apposite in the present matter: "*While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.*"

44. Therefore, insofar as the lower court either did not consider this factor, or did consider the factor but did not regard it as compelling and substantial in the very peculiar circumstances of this case, the court misdirected itself. It follows that the lower court should have held that a deviation from the prescribed sentence was justified by reason of the inordinate period of pre-sentence detention endured by the appellants. Having considered the matter, I am of the view that a sentence of 25 years' direct imprisonment would have been appropriate. The sentence must be backdated to 24 June 2020, the date of sentence in the court below.

Charges of rape taken together for sentence

45. One issue remains to be addressed. It is not clear from the record whether the lower court sentenced the appellants to life imprisonment on each charge of rape, or whether those charges (counts 5 to 10) were taken together for the purposes of sentence and thus that one sentence of life imprisonment was imposed upon each of the appellants in respect of those charges. The more probable interpretation of the sentences as they appear from the record is that a globular sentence in relation to those charges was imposed.

46. There is a practice in the courts to take charges together for the purposes of sentencing. This seems to have arisen from the provisions of section 94 of the CPA,

namely that where it is alleged that an accused person, on diverse occasions during any period, committed an offence in respect of any particular person, the State can charge that person in one charge with the commission of offences and diverse occasions during the stated period, irrespective of the number of charges a person is alleged to have committed.

47. This practice has, however, been discouraged, especially where an accused faces prescribed sentences in terms of the provisions of the CLAA. This Court stated as follows in *S v Mponda* 2007 (2) SACR 245 (C) at paragraph [9]:

> "*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 convicted of a single count of rape faces a prescribed minimum sentence of 15 years.*"

48. The undesirability of taking charges together for sentencing in such circumstances is obvious. This issue has been extensively dealt with by this Court in the matter of *Maqhaqha v The State* (unreported judgement delivered on 14 December 2021 under case number 837/2021). In paragraph [33] of the judgement the Court (per the Honourable Justice Henney) refers to the Supreme Court of Appeal's decision in *S v Rantlai* 2018 (1) SACR 1 (SCA) where, after having reviewed and summarised a number of cases on this point over the years the SCA confirmed the undesirability of this practice, but also reiterated that there is no absolute bar against the imposition of globular sentences:

> "*[9] It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See S v Young 1977 (1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such*

sentences particularly where an accused was convicted after having pleaded not guilty but subsequently having the conviction on some counts set aside on appeal. See Director of Public Prosecutions, Transvaal v Phillips [2011] ZASCA 192; 2013 (1) SACR 107 (SCA) para 27…
See also S v Kruger [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 10.

[10] As it is clear from Young, Kruger and Phillips that there is no absolute bar against imposing globular sentences, there seems to be some unanimity in our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances. See S v Nkosi 1965 (2) SA 414 (C) at 416C. This is because there will be circumstances where for instance it can be used to ameliorate the effect of sentences which individually may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused pleaded guilty on multiple offences which are closely connected in terms of time and common facts and in respect whereof the individual sentences may, cumulatively amount to a sentence that induces a sense of shock. There may of course be other cases where such a sentence might be appropriate."

49. I am in the agreement with these sentiments in general. In this particular matter, however, I do not regard the fact that the magistrate had apparently taken the rape counts together for the purposes of sentencing to be undesirable or a misdirection. 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. Individual sentences may very well cumulatively amount to a sentence that induces a sense of shock. I take this approach on the basis of what was stated in *S v Young* 1977 (1) SA 602 (A) at 610E-F:

"Appellant's counsel contended that counts 1 to 4 should be taken together for the purpose of imposing one sentence thereon, and that counts 5 to 7 should be dealt with similarly. That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act, 56 of 1955. Where <u>multiple counts are closely connected or similar in point of time, nature, seriousness, or</u>

otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions … the practice is undesirable and should only be adopted by lower courts in exceptional circumstances." (My emphasis.)

50. The present matter is, in my view, one of those exceptional cases which warrant the imposition of a globular sentence in relation to counts 5 to 10.

Order

51. In the circumstances, I would propose that the appeal succeeds to the following extent:

a. The appellants' appeal against the sentence of life imprisonment imposed upon them in relation to counts 5 to 10 under section 51 of the Criminal Law Amendment Act, 1997, is upheld.

b. The sentences imposed upon the appellants in relation to counts 5 to 10 are set aside and the following sentences are substituted:

"*Counts 5 to 10: The counts are taken together for the purposes of sentence and accused 1 and accused 2 are each sentenced to 25 years' direct imprisonment."*

c. The sentences on counts 1 and counts 2 to 4 are confirmed.

d. All of the sentences are to be backdated to 24 June 2020.

e. In terms of section 280 of the Criminal Procedure Act 51 of 1977, it is directed that the sentences imposed in respect of counts 2 to 4 will run concurrently with the sentences imposed in respect of count 1 and counts 5 to 10. The cumulative effect of the sentences is thus 25 years' direct imprisonment.

VAN ZYL AJ

I agree and it is so ordered.

GAMBLE J

Appearances:

O. Mtini for the appellants (Legal Aid South Africa)

L. Matyobeni for the respondent (Director of Public Prosecutions, Western Cape)