Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEAL CASE NO: CA 27/2022
REGIONAL COURT CASE NO: RC2/12/21

In the matter between:

RAMETZI NTHATISI **APPELLANT**

AND

THE STATE **RESPONDENT**

CRIMINAL APPEAL
MFENYANA J; DU TOIT AJ

Heard: This matter was enrolled for hearing on 21 June 2024, but was decided on the basis of the papers, record and written argument filed on behalf of the parties.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 10h00 on **05 August 2024.**

ORDER

The following order is made:

1. The appeal against sentence is dismissed.

CRIMINAL APPEAL JUDGMENT

DU TOIT AJ

[1] This is an appeal against the sentence imposed upon the appellant on a count of rape. The appellant appeared in the Regional Court sitting in Klerksdorp on one count of rape in contravention of section 3 of Act 32 of 2007 [Criminal Law (Sexual Offences and Related Matters) Amendment Act; referred to in the charge only as The Sexual Offences Act], read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997. The complainant was born on 28 May 2002 and was 15 years old at the time she was raped.

[2] The appellant pleaded not guilty to the charge preferred against him. He however admitted that he had sexual intercourse with the complainant. After evidence had been adduced, the court *a quo* found the appellant guilty as charged. The respondent proved that the complainant was 15 years old when the appellant raped her. In sentencing the appellant the court *a quo* found that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable and that the sentence to be imposed is that of life imprisonment.

[3] The appellant does not appeal his conviction. The only issue on appeal is the sentence of life imprisonment imposed by the court *a quo*. The appellant, being sentenced to life imprisonment, may note the appeal without having to apply for leave in terms of section 309B of the Criminal Procedure Act, 51 of 1977.

[4] This matter was decided on paper at the request of the parties, both having submitted heads of argument.

[5] The grounds of appeal are set out in the notice to appeal. The appellant submitted that the sentence of life imprisonment is out of proportion to the totality of the accepted facts and that his personal circumstances should be considered as compelling and substantial, which would justify a deviation from the prescribed sentence of life imprisonment. Further that the court failed to consider the fact that the appellant was intoxicated, which reduced his blameworthiness. The appellant further submitted that the magistrate overemphasised the retribution element of sentencing, and the seriousness of the offence.

[6] The respondent submitted that the sentence of life imprisonment imposed is appropriate and that the appellant did not provide any reason which would justify a deviation from the prescribed sentence.

[7] The following passage (indexed record p 470) needs to be considered before determining the appeal. It appears from the record that the court *a quo* stated the following: "*I have considered the submissions of the defence, the surrounding facts of the case and I still remain I am convinced that there is merit in the contention that substantial and compelling circumstances exist based on the facts of this case*" (my underlining). Notwithstanding this remark, the trial court still imposed the prescribed sentence of life imprisonment. This remark does not accord with the reasons for the sentence and the sentence imposed by the court.

[8] The legal representative who represented the appellant during the trial in the court *a quo* noted an appeal against the sentence three days after it was imposed. It appears from the grounds of appeal that the appellant was aggrieved that the trial court did not find any compelling and substantial circumstances. It is stated as follows (indexed record p 390):

> *"AD SENTENCE*
>
> *1. The Learned Regional Magistrate found that there were no compelling*
> *and substantial circumstances present:..."*

This ground of appeal is repeated in the appellant's Heads of Argument.

[9] Except for the remark of the trial court referred to above, it is evident from the reasons for sentence, the sentence imposed and the grounds of appeal, that the trial court found no compelling and substantial circumstances to justify a deviation from the prescribed sentence. The appeal would therefore be considered on the basis that the court *a quo* imposed life imprisonment because there were no compelling and substantial circumstances present to justify the imposition of a lesser sentence.

[10] It is also apposite to comment on the Heads of Argument of the appellant, particularly paragraphs 19 to 23 of the appellant's Heads of Argument. These paragraphs, presented as his own argument, is a verbatim quotation of paragraphs 18, 19, 21, 22 and 23 of the judgment in **Mpongoshe v S (CA24/2019) [2020] ZAECGHC 8 (11 February 2020)**. It is disconcerting that passages of a judgment are used without any reference to the judgment. The following is stated in paragraphs 18 to 24 of **Mpongoshe:**

> *"[18] The effects of the intake of alcohol on an Appellant (Accused) have always been considered when imposing sentence. This requires a consideration of, and the evaluation in every case of the particular facts relating to alcohol and not only when the Appellant reaches a certain degree of intoxication.*

[19] Wessels J (as he then was) stated in Fowlie v Rex:

"It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree of punishment has been recognised in almost every system of jurisprudence. In the Digest, (48, 19, 11), we find the distinctions drawn between the punishment of a sober man and of a man who had been drinking; and Matthaeus says: Ebrius aliquo mitius puniri debet quia non proposito sed impetu delinquit. Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened."

[20] In S v Babada the Court held:

"'n Verhoorhof wat homself regtens gedwonge ag om sekere feite van oorweging uit te sluit, wat regtens nie uitgesluit behoort te word nie, began 'n mistasting. So-ook, wat invloed van drank betref, wanneer 'n Verhoorhof by die uitoefening van sy funksie sy bevoegdheid beperk deur 'n assumpsie dat regtens 'n bepaalde graad van beskonkenheid vereis word alvorens die beskonkenheid as versagtende omstandigheid kan dien, begaan so 'n hof 'n mistasting omdat regtens geen bepaalde graad vasgestel is nie."

[21] In S v Ndhlovu the (then) Appeal Court stated:

"Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of

compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do."

[22] In S v Sigwahla the Court stated:

"Furthermore, in regard to the latter, the Court took into account against him his evidence that he was unaffected by the liquor. This seems to me an imperative approach, for it overlooks the human tendency to deny the consumption of liquor or to deny or be unaware of the effects of its consumption. It seems to me probable that the liquor in question did play some part in the appellant's lawless conduct that evening. In considering the relevance of intoxicating liquor to extenuating circumstances the approach of a trial Court should be one of perceptive understanding of the accused's human frailties, balancing them against the evil of his deed."

[23] It is not in dispute that Appellant was rightly convicted as having had the necessary culpability at the time of the offence. However culpability must be evaluated on a continuum rather than just as two concepts of being culpable or not culpable. It must be accepted on the facts in this matter that Appellant's mental faculties were impaired to some extent. His blameworthiness must then be considered to determine whether this was diminished at the time. This is so, even if an accused had not presented any evidence as such, as the Court must look at all the evidence holistically to determine mitigating circumstances.

[24] In Guide to Sentencing in South Africa Terblanche sets out that:

*"7.3.9 **Liquor and drugs***

The intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. The reason for this is that "[liquor] can arouse sense and inhibit sensibilities", which may diminish the responsibility of the offender. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished."

(With reference to **Fowlie v Rex** 1906 TS 505 511; **S v Ndhlovu** 1965 (4) SA 692 (A) at 695 and **S v Sigwahla** 1967 (4) SA 566 (A) at 571)

[11] Turning to the adjudication of the appeal against sentence, this Court must have regard to the general and overarching principles which have been stated in a number of decisions of the Supreme Court of Appeal as well as the Constitutional Court.

[12] In **S v Kgosimore 1999 (2) SACR 238 (SCA)** at para [10] Scott JA said the following concerning an appeal court's powers to interfere with sentence:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations,

however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. ..... Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

[13] In **S v Barnard (469/2002) [2003] ZASCA 63; 2004 (1) SACR 191 (SCA) (30 May 2003)** it was stated as follows:

> *"[9] The issue is therefore whether the trial Court exercised its discretion properly and judicially in imposing a sentence of 5 years' direct imprisonment. It is trite that sentence is a matter best left to the discretion of the sentencing Court. A court sitting on appeal on sentence should always guard against eroding the trial Court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably."*

[14] The Constitutional Court in **Bogaards v S (CCT 120/11) [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) (28 September 2012)** also held that:

> "*Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is*

vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[15] To determine whether the trial court did not exercise its discretion at all or exercised it improperly or unreasonably, and whether the imposed sentence is so disproportionate or shocking that no reasonable court could have imposed it, it is necessary to consider the nature and seriousness of the offence, the personal circumstances of the appellant, the interest of society as well as the provisions of section 51(1), 51(2) and 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. In **S v KEKANA 2019 (1) SACR 1 (SCA)** it was stated as follows:

"[30] When considering an appropriate sentence, the lodestar remains the enduring triad — the crime, the offender and the interest of society, as enunciated in S v Zinn 1969 (2) SA 537 (A) at 540G. In S v Rabie 1975 (4) SA 855 (A) at 862A – B the main purposes of punishment were reiterated as being deterrence, prevention, reformation and retribution"

[16] The circumstances of the offence and the facts upon which the appellant was convicted may be summarised as follows: The victim, who was 15 years old at the time, went to a tavern with her companions. Because she and some of her companions were underage they were not allowed to enter the tavern. They consumed alcohol while sitting outside the tavern. Her companions at some stage went to the toilet. When they took long to return, she went to look for them. She did not find them and decided to go home. While on her way home the appellant, unknown to her then, called her. She ran away but the appellant managed to apprehend her. They went to a certain house where they stayed for a while. She was scared and drunk. The appellant left with her, holding her tight in such a manner that she was not able to resist. She was intoxicated and as a result lost consciousness. When she regained consciousness, she was in an unknown house, and she realized that she had been raped. She managed to go home where she reported the incident to her aunt.

[17] There is no evidence with regard to the impact the crimes had on the victim, but it leaves no doubt that the offence was "*an invasion of the most private and intimate zone of the victims and strike at the core of her personhood and dignity.*" (**S v Vilakazi** *infra*). She was treated with contempt and total disregard for her dignity and bodily integrity. The conduct of the appellant, accosting a young girl who was defenseless due to her inebriation, take her to his house and rape her, cannot to be tolerated.

[18] When considering the nature and seriousness of the offence, rape should be and is regarded as a very serious offence. This was reiterated in the matter of **S v Vilakazi (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA):**

> "*[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, 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".*

[19] In **Radebe v S (A03/2017, 374/04/2016) [2019] ZAGPPHC 406; [2019] 3 All SA 938 (GP); 2019 (2) SACR 381 (GP) (10 July 2019)** it was stated as follows:

> *"24. Rape directly Impacts on the victim's right to dignity, equality, bodily integrity, freedom of association and the entitlement to choose with whom to share the most intimate relationship. In the present case the girl would have just reached puberty at the time she was violated. Rape erodes the victim's right to bodily and emotional integrity because the violation cannot be undone. In this manner the victim's constitutional right to freedom of security of person has also been trampled on."*

[20] The personal circumstances of the appellant also deserves a thorough consideration (**S v Holder 1979 (2) SA 70(A)**). His personal circumstances are as follows:

He was born on 13 February 1986, and 35 years old when he was sentenced on 6 December 2021. He was about 31 years old on 16 December 2017 when he committed the offence. He has four children. His 16 year old child was staying with his mother and his 14 year old girl was staying with the appellant's parents. The appellant was staying with the mother of the two youngest children, although they were not married. The two younger children were staying with them. The appellant and the mother of the children were employed. The appellant has a previous conviction for rape which he committed in 2003 when he was 17 years old.

[21] It was submitted that the appellant was moderately intoxicated and that it had an effect on his mental faculties which diminished his moral blameworthiness. It was also submitted that the court *a quo* accepted the evidence that both the complainant and the appellant were heavily intoxicated. This submission is not correct. The court *a quo* accepted the version of the complainant. She testified that she was intoxicated. She did not testify as to the sobriety of the appellant. It does not appear from her evidence, or the evidence of Linda who testified on behalf of the appellant, that the appellant was intoxicated to the

extent that it diminished his criminal liability. As was indicated in **Mpongoshe** *(supra)* referring to **Terblanche, Guide to Sentencing in South Africa,** *"it has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished."*

[22] The interest of society must also receive recognition in the sentences imposed by the courts. The interest of the society was explained as follows in **S v BEALE 2019 (2) SACR 19 (WCC):**

"[23] .....It is trite that the community's reaction to a crime and their subsequent demands usually relate to the seriousness of the crime in society's view, and these considerations should be made in the court's determination of a sentence for an offence. In ***S v Flanagan 1995 (1) SACR 13 (A) at 17e – f*** *the court held that the interests of society were not served by a sentence that was too lenient, and that such a sentence was inappropriate. An appropriate sentence is neither too lenient nor too severe.*

[24] In ***Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) F ([2011] ZASCA 186*** *para 22 the court held that our courts have an obligation in imposing sentences to impose a sentence which reflects the natural outrage and revulsion felt by law-abiding members of society and that a failure to do so would have the effect of eroding public confidence in the criminal-justice system.*

[25] In ***S v Blank 1995 (1) SACR 62 (A)*** *Grosskopf JA stated, at 73e – f, that it is not wrong, as stated in* ***R v Karg 1961 (1) SA 231 (A)*** *at 236B, 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."

[23] In **Kekana v S (37/2018) [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 (SCA) (31 October 2018)** (at paragraphs 39 and 41) it was held that:

> *"[39] Due to the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the appellant should be accorded a smaller role. His personal circumstances similarly have to bow to the interests of society. As pointed out in S v Vilakazi* ***2009 (1) SACR 552 (SCA) G (2012 (6) SA 353; [2008] 4 All SA 396; [2008] ZASCA 87)*** *para 58, in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Without doubt, this is one of those cases."*
>
> *"[41] In S v Mhlakaza and Another* ***1997 (1) SACR 515 (SCA)*** *at 519c – e this court pointed out that, given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. Harms JA went on to explain, with reference to S v Nkwanyana and Others* ***[1990] ZASCA 95; 1990 (4) SA 735 (A)*** *at 749C – D, that in other instances retribution may even be decisive. See also S v Nkambule* ***1993 (1) SACR 136 (A)*** *A at 147c – e; S v Swart* ***2004 (2) SACR 370 (SCA)*** *paras 11 – 12; S v Govender and Others* ***2004 (2) SACR 381 (SCA)*** *para 32."*

[24] The offence for which the appellant was sentenced to life imprisonment falls within the ambit of section 51(1) of the Criminal Law Amendment Act, Act 105 1997 read with part 1 of schedule 2, which prescribed a sentence of life imprisonment where a victim of rape was under the age of 16 years (as it was before the amendment of schedule 2 in August 2022 to read 18 years). In terms of section 51(3)(a) of the Act the court may only impose a lesser sentence if the court is satisfied that there are compelling and substantial circumstances which will justify a lesser sentence.

[25] With regard to the determination of compelling and substantial circumstances the Supreme Court of Appeal stated as follows in **Maila v S (429/2022) [2023] ZASCA 3 (23 January 2023):**

> "*Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'. The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. For these reasons, this Court is not at liberty to replace the sentence that the trial court imposed."*

[26] The following was said in **S v MATYITYI 2011 (1) SACR 40 (SCA)** in respect

of the imposition of minimum sentences:

> *"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."*

(See also **S v Malgas 2001 (1) SACR 469 (SCA); *S v Dodo* 2001 (2) SACR 594 (CC)** 602-603)

[27] It was submitted on behalf of the appellant that the trial court should have found that the appellant's personal circumstances constitute compelling and substantial circumstances, and that the sentence imposed leaves no room for the appellant to be rehabilitated. Further that the trial court over emphasized the seriousness of the offence and the interest of society. His personal

circumstances however cannot be viewed in isolation to determine whether they constitute compelling and substantial circumstances. It must be considered in the light of all the elements and circumstances of the case. To find that his personal circumstances are compelling and substantial to the extent, when balanced with the other considerations, that it warrants a lesser sentence would be an unjustified over emphasis of his personal circumstances to the detriment of the other elements.

[28] The trial court considered the personal circumstances of the appellant, the seriousness and prevalence of the offence, the interest of society and the minimum sentence legislation. Having considered the reasons for sentence the regional magistrate did not commit any misdirection in imposing the prescribed sentence.

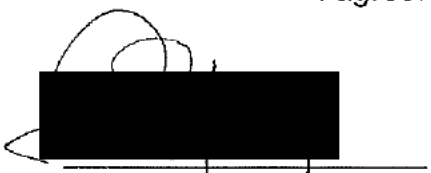
Order

[29] Consequently, the following order is made: -

The appeal against sentence is dismissed.

S DU TOIT
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree.



S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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Date reserved:	21 June 2024
Date of judgment:	05 August 2024