THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 440/2019

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE **APPELLANT**

and

JOHANNES MOKATI **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Free State v Mokati* (Case no 440/2019) [2022] ZASCA 31 (25 March 2022)

Coram: MAKGOKA and MABINDLA-BOQWANA JJA and KGOELE, PHATSHOANE and UNTERHALTER AJJA

Heard: 29 September 2021

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Summary: Criminal law and procedure – conviction and sentence – culpable homicide – causation – *mens rea* – whether questions of law properly reserved.

Rape – sentence – whether the prescribed minimum sentence inadequate given aggravating factors.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein, (Mathebula J sitting as the court of first instance):

1 The appeal by the State to reserve questions of law is dismissed.

2 The respondent's cross-appeal against the conviction and sentence is dismissed.

3 The sentence on count 2 stands.

4 The State's appeal against the sentence on count 1 is upheld.

5 The sentence of 10 years' imprisonment on count 1 is set aside and in its place is substituted the following:

'The accused is sentenced to 18 years' imprisonment.

13 years of the 15 years on count 2 shall run concurrently with the sentence on count 1. The effective sentence is thus 20 years' imprisonment.'

6 The substituted sentence is antedated to 27 September 2018 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Phatshoane AJA (Mabindla-Boqwana JA and Unterhalter AJA concurring):

[1] The respondent, a 22-year old, Mr Johannes Mokati, was convicted on two counts in the Free State Division of the High Court (the trial court), namely rape (count 1), for which he was sentenced to 10 years' imprisonment, and robbery with aggravating circumstances (count 2), for which he was sentenced to 15 years' imprisonment. It was ordered that five years of the prison term on count 1 would run concurrently with the sentence on count 2, thus resulting in an effective term of 20 years' imprisonment. The respondent was acquitted of murder (count 3). The appellant, the Director of Public Prosecutions, Free State (the State), appealed against the sentence imposed on the respondent for rape. It also reserved certain questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 (CPA), in respect of the acquittal of the respondent on the count of murder and contended that the

competent verdict of culpable homicide ought to have been returned. The respondent cross-appealed against his conviction and sentence in respect of the rape and robbery counts. The appeal and cross-appeal as well as the reservation of points of law, are with the leave of the trial court. At the request of this Court, Advocates Reinders and Nkhahle of the Free State Society of Advocates appeared as *Amicus Curiae*. We are grateful for their written and oral submissions.

[2] The respondent did not dispute that on 9 February 2017 he had sexual intercourse with the 21-year old Ms AM, now deceased, at her workplace – an attorney's office. Thereafter, the respondent took the deceased's belongings, namely a cellular phone, a laptop computer, a tablet computer and accessories. According to the respondent, the sexual intercourse was consensual and he took the deceased's belongings as a form of security for an amount of R1500 owed to him by the deceased. In terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988, the trial court admitted into evidence a statement made by the deceased to the police on the evening of the day of the incident. It also considered the evidence of the deceased's sister, the police, the forensic and medical experts.

[3] The trial court then made the following factual findings: The deceased was alone at her workplace on 9 February 2017 when the respondent entered the premises armed with a knife. He forcibly raped the deceased after subduing her by threatening her at knifepoint. After the rape, he took her electronic devices mentioned above. He threatened to kill her and her family if she reported the incident to the police. Later that evening, the deceased reported her ordeal to her sister, at home. According to her sister, the deceased was emotional. Although the deceased did not expressly tell her that the respondent had raped her, she confirmed that by nodding in agreement upon probing by her sister. After the rape, the deceased was examined by Dr De Lange, who prescribed her doxycycline 100mg and flagyl 400 mg, broad-spectrum antibiotics that prevent and treat sexually transmitted diseases. Later the same evening, the deceased made a detailed statement to the police about the incident.

[4] The following day the deceased was examined by a clinical forensic nurse, Sister Qhathatsi, at a rape centre. The deceased reported to the nurse that she was vaginally and anally penetrated. No visible (vaginal) injuries were noted. However, the

nurse observed fresh anal lacerations consistent with anal penetration. Sister Qhathatsi gave her post-exposure treatment (prophylaxis), a type of antiretroviral (ARV) to prevent infection, to use for 28 days. She also gave her avral, a hormonal pill. From 9 February 2017, several medicines were prescribed for the deceased by a number of medical practitioners. She died on 24 February 2017. The cause of death was recorded as cerebral venous sinus thrombosis.

[5] With regard to the count of robbery with aggravating circumstances, the trial court accepted the evidence of Mr Matendere, a technology specialist who operated a shop near the deceased's workplace. He testified that the respondent handed over to him a tablet for repairs on 9 February 2017, the day of the incident. The respondent also offered to sell him a laptop computer, which offer he declined. While updating the tablet's software, he noticed several Afrikaans WhatsApp messages and became suspicious that the tablet might have been stolen. He sent a message to one contact he recognised from the tablet list to ask if she knew the tablet's owner. He later received a call from the police who requested him to inform them when the respondent had come to collect the tablet. The following day, the respondent was arrested when he arrived at Mr Matendere's shop. The trial court rejected the respondent's version that he had given Mr Matendere the devices for safekeeping because he did not want to take them to his place in the township. It also rejected his evidence that Mr Matendere had requested him to sell him the laptop.

[6] Based on the above findings, the trial court rejected the respondent's version and convicted him of rape and robbery with aggravating circumstances, against which he was granted leave to cross-appeal. There are three issues to be considered. First, the cross-appeal by the respondent against the conviction on the rape and robbery counts. Secondly, the appeal by the State on the questions of law reserved in terms of s 319 of the CPA. Thirdly, the appeal and cross-appeal against sentence. I consider them in turn.

The cross-appeal by the respondent against the conviction on the rape and robbery counts

[7] In the absence of demonstrable and material misdirection by the trial court, its findings of fact are taken by the appeal court to be correct and will only be disturbed if

they are clearly wrong.[1] The respondent's evidence was at variance with the warning statement he made to the police on how the purported consensual sexual intercourse occurred. He kept his counsel in the dark on numerous crucial aspects of his evidence and claimed not to have known that the issues would be canvassed in court. The trial court found the respondent to have been 'a poor witness' whose version was interspersed with contradictions. On an overall analysis of the record, this finding is unassailable. Furthermore, the deceased's reports of the rape, her sudden panic attacks, anxiety and stress dispel any notion that the sexual intercourse could have been consensual. The overall evidence presented by the State portrays a picture that is consistent and probable that the respondent had raped the deceased.

[8] With regard to the robbery with aggravated circumstances, apart from the inherent improbabilities in the respondent's version, there is independent and objective evidence of Mr Matendere. It was his exemplary conduct that led to the arrest of the respondent. Once his evidence was accepted, it put paid to the respondent's version that he took possession of the deceased's property as a form of security. It makes no sense that the deceased would give the respondent very valuable items (a tablet, a laptop and a cell phone) as security for a debt of only R1 500. Also, if Mr Matendere had an interest in the laptop, it would defy logic for him to jeopardise his chances of acquiring it by having the respondent apprehended, as he did.

[9] In my view, the trial court was correct in convicting the respondent on these two counts. His cross-appeal must fail.

The appeal by the State on the questions of law reserved in terms of s 319 of the CPA

[10] I now turn to the murder count on which the respondent was acquitted and against which the State has been granted leave by the trial court to reserve questions of law. It is to be remembered that the State contended that the competent verdict of culpable homicide ought to have been returned. The State has a right of appeal only

[1] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E-F.

against a trial court's mistakes of law, not its mistakes of fact.[2] The restriction cannot be relaxed simply because the trial judge considered the facts incorrectly.[3] Section 319(1) of the CPA provides that:

'If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.'

[11] Three jurisdictional requirements must be satisfied in terms of the section, namely: (a) only a question of law may be reserved; (b) the question of law must arise 'on the trial' in a superior court; (c) the reservation may be made by the court of its own motion or at the request of the prosecutor or the accused, in which event the court should 'state the question reserved' and direct that it be entered in the record. This Court in *Magidela*[4] stated that the question must be framed by the judge to accurately express the legal point he or she had in mind. There must also be certainty concerning the facts on which the legal point is to be decided. The relevant facts should be set out fully in the record so as to decide the question of law. Moreover, the point of law should be readily apparent from the record for, if it is not, the question cannot be said to arise 'on the trial' of a person.

[12] Apparent from the trial court's factual findings, the deceased had been on a contraceptive pill called Yaz for a year prior to the incident. After the rape, she was prescribed other drugs – ARVs, antibiotics – to which she did not respond well. After taking the first ARV treatment, she experienced severe nausea and took fluids with difficulty, as a result of which she had dehydration. She started vomiting, which was followed by diarrhoea. The doctor who initially treated her, added further medication, which apparently made her health condition worse. She later visited a district hospital where a doctor prescribed a different ARV regimen. Her condition worsened until she died on 24 February 2017. As mentioned already, the cause of death was recorded

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[2] *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 39.
[3] *Ibid*. See also E Du Toit, F De Jager, A Paizes, A Skeen and S E Van der Merwe 'Commentary on the Criminal Procedure Act' Supplementary Volume at 31-38A.
[4] *Director of Public Prosecutions: Natal v Magidela and Another* [2000] 2 All SA 337 (A); 2000 (1) SACR 458 (SCA) para 9.

as cerebral venous sinus thrombosis. According to expert evidence adduced during the trial, this occurs when a blood clot forms in the brain's venous sinuses and prevents blood from draining out of the brain. As a result, blood cells may break and leak blood into the brain tissues, forming a haemorrhage. A clinical pharmacologist testified that this had most likely been caused by dehydration due to vomiting and diarrhoea, which was worsened by lack of taking enough fluids. She also explained that nausea, vomiting and diarrhoea were all known side-effects of the ARVs.

[13] The State contended that the respondent should be held responsible for the deceased's death because, had he not raped her, she would not have had to take the ARVs. The trial court held that it was 'clear from the evidence that the use of different medication could have independently caused the clotting or worked against each other to cause sagittal venous thrombosis.' It concluded that, based on the proven facts, the respondent could not have foreseen the chain of events that ultimately led to the deceased's death. Accordingly, the trial court acquitted the respondent on the murder count.

[14] It is this finding that the State is aggrieved by, and reserved the following eight questions of law in three categories:

'7. CAUSALITY:

7.1 Is it correct in Law for the Learned Judge to have found that there is no causal link or nexus between the rape and/or aggravated robbery and the death of the deceased?

7.2 Were the legal principles underlying the element of causality properly considered and applied?

8. EXPERT EVIDENCE

8.1 Was the approach by the Learned Judge pertaining to expert evidence and the evaluation of the testimony of the expert witnesses correct in Law?

8.2 Was proper weight attached to the opinion and findings of the expert witnesses, especially in the light of their expertise in different fields?

8.3 Was the approach by the Learned Judge correct in Law to have found that the state relied on three expert witnesses in its quest to prove the allegations in count 3 whereas the state called five experts in the medical and forensic fields?

9. MENS REA

9.1 Were the principles of dolus eventualis correctly applied vis-à-vis culpa?

9.2 Is it correct in Law for the Learned Judge not to have considered the argument and concession by the state that the accused should be convicted of culpable homicide on the proven facts?

9.3 Is it correct in Law for the Learned judge not to have considered the competent verdict of culpable homicide.'

[15] For the most part the opposing contentions before this Court were confined to questions of law relating to legal causation, the principles of which are well established and not in issue. It is not in dispute that the respondent's conduct was the factual cause of death. The question whether it was correct for the trial court to have found that there is no causal link or nexus between the rape and/or aggravated robbery and the death of the deceased, in my view, is a factual enquiry which would involve the evaluation of evidence to determine whether the rape was the operative cause of death. The conclusion by the trial court that the State had failed to discharge the onus was based upon a finding that 'the use of different medication could have independently caused the clotting or worked against each other to cause sagittal venous thrombosis'. It reasoned that, based on the proven facts, the respondent could not have foreseen the chain of events that ultimately led to the deceased's death. This was not a conclusion of law. Indeed, a different court might have approached the facts differently. However, this would not morph a factual issue to one of law.

[16] In *Director of Public Prosecutions, Western Cape v Schoeman*[5] this Court cited *S v Coetzee*[6] as an example of how our courts distinguish carefully between errors of law and fact. The following remarks were made:

'. . . There [in *Coetzee*] the question posed was whether on the facts found the court had correctly applied the law. There had been two separate incidents resulting in the death of a person. On a charge of murder, the accused's version was that he had acted in self-defence. The trial court acquitted him. The state appealed, contending that he was at least guilty of culpable homicide. It appeared from the record that the trial judge had treated the two incidents in isolation, as if the first incident had no bearing on the second. It was also apparent that he had not analysed the evidence properly by asking himself whether the accused had acted in self-defence or whether the facts showed that there had been a 'free-for-all' between him and the deceased. This court concluded that it may well have been that the trial judge had

[5] *Ibid* fn 2 para 71.
[6] *S v Coetzee* 1977 (4) SA 539 (A).

misdirected himself with regard to his treatment of the facts, but there was no indication of any misdirection regarding the law.' (Footnotes omitted.)

[17] As to the second set of questions relating to the evaluation of expert evidence, the weight to be attached thereto and the trial court's supposed error in having found that the State relied on three expert witnesses to prove murder whereas it called five experts, it suffices to say that these matters are not questions of law.[7] Dealing with the evidence in a fragmented fashion would amount to a misdirection of fact, not that of law. So too, ignorance of the evidence or a lack of appreciation for its relevance are questions of fact, not of law. The mere fact that the judicial process has become flawed by the way a trial court goes about assessing the evidence before it does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact.[8]

[18] The third and last category of questions concerns the State's complaint that the trial court failed to consider its concession, and submission, on the proven facts, that the respondent was guilty of culpable homicide, not murder. Even on their most liberal construction, it takes the matter no further because the trial court, and the State, failed to identify the facts that we should consider for purposes of answering those questions. There is a paucity of factual findings leading to the trial court's conclusion that the respondent could not have foreseen the chain of events that ultimately led to the deceased's death. The absence of adequate factual substantiation does not give rise to a question of law.

[19] In its application for leave to appeal, the State endeavoured to set out the factual basis upon which the purported points of law hinged. These are almost identical to the recorded findings in paras 3 and 4 above. In addition, it stated that from 9 February 2017, several medicines were prescribed for the deceased by a number of medical personnel. From the rape and robbery to her death, the deceased's condition never improved but deteriorated rapidly from 20 February 2017 until her death four days later. Before the attack, it states, the deceased was in perfectly good health and suffered no chronic illness. The mechanism of death, contributing factors and the

[7] *Ibid* at 544H–545A.
[8] *Ibid* fn 2 paras 74.

cause of death were correctly evaluated, investigated and described by the respective expert witnesses.

[20] The generalised findings on the evidence of the experts, as set out by the State, upon which the professed points of law are predicated, suffer deficiencies. In my view, the trial court's findings on this aspect ought to have been explicitly delineated and fully set out in the record. The following remarks in *Schoeman* (supra) para 45 are apposite:

'If we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, thereby second-guessing the trial judge who was best placed to do this. We would thus have to approach the matter as if this were a full appeal on the merits. The problem does not end there. Having embarked on this task, we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court.'

Where it is unclear from the trial court's judgment what its findings of fact are, it is necessary to request the trial judge to clarify its factual findings. Where this is not done, the point of law is not properly reserved and that ought to be the end of the matter.[9]

[21] Apart from the deficient factual basis underpinning the supposed points of law, I have endeavoured to demonstrate that the stated questions were, in truth, questions of fact. The trial court erroneously granted leave in this regard. If this Court were to accede to the State's contentions, it would open the door to appeals by the prosecution against acquittals on the questions of fact, contrary to the sound legal practice and the enduring jurisprudence of our courts. The State's appeal on this ground must therefore fail.

The appeal and cross-appeal against sentence

[22] I now consider the appeal and cross-appeal against the sentence. Essentially the State appeals against the 10-year prison sentence for rape on the basis that it is shockingly lenient and thus inappropriate. This is the prescribed minimum sentence in

[9] *Ibid* fn 2 paras 40 and 46.

terms of s 51(2)(*b*) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) read with Part III of Schedule 2. In the indictment, the State alleged that the respondent had repeatedly penetrated the deceased. Ordinarily, if multiple acts of rape are established, this would attract a sentence of life imprisonment in terms of s 51(1) of the CLAA. The respondent was sufficiently apprised of this provision and the possible sentence of life imprisonment in the event of a conviction.

[23] The State contended that the respondent had raped the deceased in four different positions and at three different places in the office. Consequently, it argued, he should have been sentenced to life imprisonment in terms of s 51(1) of the CLAA.

[24] The trial court had accepted the evidence in the deceased's statement that the respondent had raped her as follows: he first penetrated her vaginally on a chair; secondly, he made her lean on a table and once more penetrated her; thirdly, he pushed her on her knees on the carpet and again penetrated her, and fourthly, when his penis slid out, he turned her on her back and penetrated her. There was also the evidence of sister Qhathatsi that the deceased had reported both vaginal and anal penetration. The nurse also observed fresh anal lacerations that are consistent with anal penetration. This was corroborated by Dr Johanna Maria Kotzé, a clinical forensic medicine specialist, who stated that the multiple tears of the skin around the anus extending inside suggested that the penetration was from the outside and excluded tears occasioned by constipation or inflammatory bowel disease. Thus, the respondent penetrated the deceased in different positions at various places within the office.

[25] The trial court found the rape to have been a single continuous act which fell within the purview of s 51(2)(*b*). It based its conclusion on the reports which the deceased made to Dr De Lange and Cst Prinsloo, whose evidence was that they understood her report to have been that the rape was one continuous sexual encounter in different positions. In addition, concerning whether the deceased was anally penetrated, the trial court gave the respondent the benefit of the doubt because, so reasoned the trial court, the deceased did not convey that report to either Dr De Lange, the police or sister Qhathatsi. It found no substantial and compelling circumstances to deviate from the prescribed minimum sentence hence it imposed the

sentence of 10 years' imprisonment, five years of which was ordered to run concurrently with the 15-year jail term for robbery with aggravating circumstances.

[26] The process which must be followed in placing an appeal before the court is sourced from the provisions of the CPA. In the case of an appeal by an accused person, it is s 316 which applies and if the State pursues the appeal, s 316B read with s 316 applies.[10] Chief amongst the grounds of appeal against the sentence raised by the State is that the trial court erred in finding that the deceased was raped once and had not been raped anally. The trial court dealt with the enquiry into the question whether there had been multiple acts of rape when it considered the respondent's conviction. Based on its conclusion that the rape 'was one continuous act [in] different positions', it found the respondent guilty on one count of rape.

[27] The State's ground of appeal that there had been multiple acts of rape was not competently placed before this Court for re-evaluation. Its contentions on this score have a bearing on the respondent's conviction, and no appeal by the State lies against that part of the judgment. To illustrate the difficulty with the prosecution of this appeal on the basis suggested by the State, I can do no better than refer to the apt example made by the Constitutional Court in *S v Nabolisa*[11] as follows:

'Take, for instance, a case where the accused person applies for leave to appeal against conviction and sentence. The trial court grants him or her leave in respect of conviction only. He or she would not be allowed to prosecute an appeal against sentence because the scope of his or her appeal is limited to conviction.'

[28] The well-established principle is that when a high court grants leave to appeal to this Court it may limit the grounds of appeal to be addressed or it may grant leave generally so that all the relevant issues might be canvassed. Where the high court has limited the grounds of appeal this Court has no jurisdiction to expand the grounds of appeal. If an appellant is dissatisfied with a high court's decision to limit the grounds of appeal his or her remedy is to petition this Court to expand the grounds of appeal, not to appeal directly to this Court.[12]

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[10] *Nabolisa v S* [2013] ZACC 17; 2013 (2) SACR 221 (CC); 2013 (8) BCLR 964 (CC) para 75.
[11] Ibid para 73.
[12] *Delport and Others v S* [2014] ZASCA 197; [2015] 1 All SA 286 (SCA); 2015 (1) SACR 620 (SCA) para 41.

[29] In my view, it is impermissible for the State, on an appeal against the sentence, to seek a reversal of the trial court's finding on issues having a bearing on the conviction without having sought leave against the conviction through a reservation of a point of law on them. Even though the trial court granted the State leave to appeal against the sentence generally, it did not extend such leave to issues which fell within the ambit of the respondent's conviction. Therefore, it is not open to this Court to re-evaluate whether there had been multiple acts of rape in this case. To hold otherwise would lead to manifest prejudice to the respondent.

[30] It is so that the charge to which the respondent pleaded refers to several acts of penetration, including anal penetration. In the end, he was convicted on one count of rape. The offence attracts a minimum sentence of 10 years' imprisonment for a first offender.[13] Therefore, the appeal by the State against the sentence should be approached on that basis. This is regrettable because the trial court made factual findings in error on a number of issues including whether the deceased suffered anal penetration. The adjudication of rape offences calls for accurate understanding and careful analysis of all the evidence, whereas those who are called upon to sentence convicted offenders in such cases call for considerable reflection.[14]

[31] The evidence concerning anal penetration is so glaring that any reasonable court would not have given the respondent any benefit of the doubt. That the deceased did not report the anal penetration to Dr De Lange and Cst Prinsloo is of no moment. It is to be remembered that the deceased was extremely reticent about her ordeal because the respondent had threatened her with death if she were to report the matter. The deceased had to be implored to report the rape to the police. Dr Kotzé explained that 'in this acute [stressful] situation it is not unusual that the history might lack some detail'. It matters not that sister Qhathatsi did not specify in her report that the deceased told her of the anal penetration. Of importance is that she examined the deceased and recorded the anal lacerations in the medical report. The independent

[13] In terms of s 51(2)*(b)* of the CLAA read with Part III of schedule 2, a term of 10 years' imprisonment is prescribed for a first offender, 15 years for a second offender, and 20 years for a third or subsequent offender.
[14] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 21.

corroborative evidence of Dr Kotzé puts the matter beyond doubt that there had been anal penetration.

[32] Clearly, a complete disregard of anal penetration by the trial court did not accurately reflect the recorded evidence, which is lamentable, given that this would be an aggravating issue. Non-consensual anal penetration of women and young girls constitutes a form of violence against them, equal in intensity and impact to non-consensual vaginal penetration.[15] But for the reasons given above we are bound by the findings made by the trial Court on this point.

[33] The State did not only rely on the multiple acts of rape in its contention that the sentence was inordinately light. It advanced a number of aggravating circumstances which, it submitted, were not properly considered by the trial court.

[34] Rape is undoubtedly a serious offence which invades the dignity, sexual autonomy and privacy of its victims. The respondent graduated into being a menace to society. He committed the offences three days following his release on parole. He has a previous conviction for assault with intent to do grievous bodily harm, for which he was sentenced to six months' imprisonment. This suggests that he has a propensity for violence. The high court found that 'on the accepted evidence, it appears that the accused planned meticulously his offence'. He entered the deceased's workplace, an isolated space, at the end of the business day, which is trespassing. He then subdued her with threats of physical violence at knifepoint. The manner in which he forced the deceased into different positions and repeatedly penetrated her showed a blatant display of his aggression. During the entire episode, as his penis slid out, the deceased said, it ignited the respondent's ire. That the deceased was on her menstrual cycle did not deter him. The trial court correctly labelled this a violation of the deceased's womanhood in the ghastliest manner. The deceased had three fresh bruises or burn marks on her back caused by the carpet she was dragged and laid on during the rape.

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[15] *Masiya v Director of Public Prosecution, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC); [2007] ZACC 9 (CC); 2007 (2) SACR 435 (CC); 2007 (8) BCLR 827 (CC) para 37.

[35] The overwhelming expert evidence adduced provides an adequate measure of the deleterious effect that the offence had upon the deceased. Dr De Lange says when he examined her on 9 February 2017 she was hysterical. He saw her at regular intervals after this date and had to give her calming medication because she suffered from anxiety attacks and had emotional outbursts. He also gave her medicines for head-aches, neck pain and nausea. On 20 February 2017 the deceased started having convulsions and epileptic fits. She is reported to have appeared 'very anxious and frightened'. On her last days of life, after 20 February 2017, she was incoherent in her speech and later was unresponsive to verbal communication. Increased tongue, limbs and focal convulsions were also observed. She could not walk and had to be carried. On 23 February 2017 she went into a coma and died the next day.

[36] Prof Richard John Nichol, a psychiatrist, with reference to the docket, noted that two days following the rape the deceased had hypersomnia, excessive sleepiness. Three days on she had episodes of irregular sleeping with 'strong emotional components'. Prof Nichol says that the anxiety and panic attacks would have fuelled the events. Acute mental stress, negative emotions and psychological trauma trigger atherothrombotic events (clot formation) and the possibility of venous thromboembolism. Prof Nichol opined that not only was the medicine the trigger of the thrombus events, so too was the acute stress. Dr Paulina Maria Van Zyl, a clinical pharmacologist, intimated that apart from the medication, the other factors that could have contributed to the clot formation include the trauma the deceased experienced 'due to the violet manner in which she was treated during the rape.' According to Dr Van Zyl, the extreme anxiety was directly linked to rape. The stress hormone and stress response were activated at all times. She went on to state that 'there is literature that shows that there is an association between psychological trauma and blood clotting.

[37] Thus, there can be little question that the rape evoked ongoing severe psychological and physical distress on the once industrious and perfectly healthy 21-year old woman until her death 14 days later. This signifies the gravity of the offence which ought to have been accorded sufficient weight by the trial court. On this score,

I can do no better than to refer to the remarks made by this Court in *S v De Beer*[16] that:

'Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent.…'

[38] The offences also caused considerable hardship on the deceased's family. Her father's health condition is said to have been negatively affected and deteriorating. It is remarkable that the respondent did not show any contrition and sought to do so during the sentencing phase. This cannot be equated to genuine remorse and flounders in the face of the weight of authority of this Court.[17] All of the above are serious aggravating circumstances.

[39] The trial court acknowledged that it was enjoined to strike a proper balance between the *Zinn*[18] triad of factors which consist of the crime, the criminal and the interest of the society. Despite this, one searches in vain at the factors the trial court considered in respect of the crime and its impact on the deceased. It also perfunctorily referred to some of the aggravating factors and did not direct its mind to the interest of society and the need for deterrence. This constituted a misdirection.

[40] In his cross-appeal, the respondent urged that his sentence be reduced to five and 10 years' imprisonment for rape and robbery with aggravating circumstances, respectively. His argument, that the trial court erred in not finding substantial and compelling circumstances present, which merited a deviation from the imposition of the prescribed sentence under s 51(2)(*b*) of the CLAA, does not carry any persuasion. As recited by the trial court, the respondent's personal circumstances were that he was single with a minor child who lives with its grandmother. Prior to his arrest, he was employed at a furniture store earning R250 per week. It was not contended that his mitigating factors constituted substantial and compelling circumstances. Instead, it

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[16](SCA case No 121/2004, 12 November 2004)
[17] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40; [2010] 2 All SA 424 (SCA) (SCA) para 13.
[18] *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A).

was argued that, although the deceased was subjected to mental and physical trauma following the rape, she did not sustain any injuries during the act. This argument must falter. This factor should be considered along with other relevant factors to conclude whether there are substantial and compelling circumstances.[19] An apparent lack of physical injury to the complainant, without more, would not suffice.

[41] Insofar as the trial court reasoned that there were no substantial and compelling circumstances present in this case, no cogent criticism can be sustained. In cases of serious crime, the offender's personal circumstances are in themselves largely immaterial to what the period of imprisonment should be.[20]

[42] The crimes which impair the dignity of women and children; which violate their sexual autonomy and privacy rights, such as rape and other sexual offences, are rampant in our society. Society craves justice and looks up to our courts to impose sentences commensurate to the crime and fit the criminal.

[43] It is trite that punishment is pre-eminently a matter for the trial court's discretion.[21] The circumstances in which a court of appeal may interfere in the sentencing discretion of a lower court are circumscribed. The principles were restated in *S v Malgas*[22] as follows*:*

'. . . A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh . . . However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

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[19] *S v SMM* 2013 (2) SACR 292 (SCA) para 26.
[20] *Ibid* fn 14 para 58.
[21] *S v Rabie* 1975] 4 All SA 723 (A);1975 (4) SA 855 (A) at 857D-E.
[22] *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220 (A) para 12.

[44] As adumbrated above, the trial court imposed the 10-year statutory minimum sentence for rape. The fact that the law prescribes minimum sentences does not prevent the court, in appropriate circumstances, from imposing a more severe sentence. Following *Malgas,* this Court had occasion to consider the import of s 51(1), 51(2) and 51 (3) of the CLAA in *S v Mthembu.*[23] The principles adverted to, apply with equal force here with regard to the interpretation of s 51, in particular, the sentencing discretion of the trial court when imposing a sentence greater than the statutory minimum. *Mthembu* dealt with the question whether a court contemplating the imposition of a sentence higher than the prescribed minimum sentence was obliged to forewarn the accused of its intention. At the heart of that appeal was the correctness of the decision in *S v Mbatha*[24] where, amongst other matters, the full court of Kwa-Zulu Natal Division held that the approach that had been laid down regarding downward revisions from the minimum sentences was also correct when a court was contemplating the imposition of a greater sentence than that prescribed.

[45] In *Mthembu*, paying particular respect to the provisions of s 51 of the CLAA, this Court held:

'[5] Thus far our courts have simply accepted that if, upon an evaluation of the cumulative effect of all the circumstances of a case, a higher sentence was called for, there were no constraints on its discretion to impose a sentence far in excess of the ordained minimum (*Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) ([2008] 4 All SA 132) para 19)…

[8] It is noteworthy that s 51 is headed 'Discretionary minimum sentences for certain serious offences'. That, together with repeated reference to the words 'not less than' in ss (2), is the clearest indicator that the legislature did not intend to fetter the discretion of the sentencing court…

[11] Plainly what we are dealing with is a legislative provision that fetters only partially the sentencing discretion of the court. That much emerges from ss (3)*(a)* which entitles a court to impose a lesser sentence than the sentence prescribed if it is satisfied that substantial and compelling circumstances exist which justify the imposition of such lesser sentence*. It follows that, even were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its sentencing discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just.* (Emphasis added.)

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[23] 2012 (1) SACR 517 (SCA) paras 5-13 and 18.
[24] 2009 (2) SACR 623 (KZP), see also *Mthembu* fn 23 para 4.

…

[13] *Whilst ss (3)(a) obliges a sentencing court to enter the circumstances on the record if it is minded to impose a lesser sentence than that ordained by the legislature, there is no indication in the language of that provision that a similar course must be followed where a more severe sentence is contemplated.* (Emphasis added.)

And at para 18 it was there pronounced:

[18]…After all, any sentence imposed, like any other conclusion, should be properly motivated (*S v Maake* 2011 (1) SACR 263 (SCA). And we should not lose from sight that our appellate courts have, in terms of long standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate…a 'vigilant examination of the relevant circumstances' is required…'

[46] The legislature has deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence in view of the obvious injustice implicit in an obligation to impose only the prescribed sentences in any given circumstance.[25] The courts are freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases.[26]

[47] What is clear from *Mthembu* is that where there are no substantial and compelling circumstances the trial court retains its sentencing discretion. If the trial court has imposed the minimum sentence in terms of the CLAA an appellate court may still determine whether the minimum prescribed sentence is disturbingly inappropriate and accordingly determine the appropriate sentence where the minimum sentence imposed is grossly disproportionate. There is nothing in the CLAA which posits that a deviation from the prescribed minimum sentences be justified in the same way as would be the case where a lesser punishment is called for. Such a construction would manifestly inhibit the object of the CLAA. In addition, on the plain reading of the CLAA, there is nothing indicating that the aggravating circumstances of this case have already been factored in the prescribed minimum sentence of 10 years as the second judgment suggests. This Court in *S v Kolea*[27] held that the term of 10 years'

[25] See *Malgas* fn 22 para 18; *Director of Public Prosecutions, Transvaal v Venter* [2008] ZASCA 76; [2008] 4 All SA 132 (SCA); 2009 (1) SACR 165 (SCA) para 17; *Mthembu* fn 23 para 10.
[26] See *Malgas* fn 22 para 25; *Mthembu* fn 23 para 10.
[27] *S v Kolea* [2012] ZASCA 199 (SCA); 2013 (1) SACR 409 (SCA) para 17.

imprisonment referred to in s 51 (2) is the *minimum* sentence that can be imposed. This means that any sentence in excess of 10 years' imprisonment, and possibly even life imprisonment, can be imposed by a court having jurisdiction to do so and having had regard to the cumulative effect of all the circumstances of the case. This was echoed in *Director of Public Prosecutions, Transvaal v Venter*,[28] when increasing the sentence imposed by the trial court, in this terms:

'It needs to be borne in mind that the sentences provided for in the Act are minimum sentences for the prescribed offences and *Malgas* was directed to whether a lower sentence might be called for in a particular case*. But an evaluation of the cumulative effect of all the circumstances, in accordance with the approach in that case, might well indicate that a higher sentence is called for.'* (Emphasis added.)

[48] The holding in *Mthembu* (supra) is dispositive of the discretion enjoyed by a sentencing court to impose a sentence above the statutory minimum. It specifically declined to adopt the reasoning in *Mbatha*. It is so that this Court in *Maake* made the following remarks:

'[28] The safeguards in relation to minimum sentences must a fortiori apply to the contemplated imposition of a maximum sentence. In relation to motivating the imposition of a maximum sentence, it is necessary to have regard to what was stated in *S v Mbatha* 2009 (2) SACR 623 (KZP) (at 631*f – j*):

'On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated. . . . Otherwise the whole purpose of a reasonably consistent and standardised approach to sentence in the case of the most serious crimes will be defeated, as it will be open to those judges who have particularly stern views on sentence, and regard Parliament's response to serious crime as inadequate, to impose those views in disregard of the purpose of the legislation.'

[49] In respect of the above finding in *Maake,* this Court in *Mthembu* said the following:

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[28] Fn 25 para 19.

‘[19]… *Maake*, in support of the broad hypothesis that conclusions by a court should be properly motivated, called in aid *Mbatha.* It was submitted to us that *Maake* cited *Mbatha* with apparent approval and that that constitutes an endorsement of its correctness on this score. We do not agree. *Maake* did not subject the judgment in *Mbatha* to careful scrutiny, nor was the correctness of its conclusion or reasoning properly considered. It sought support from *Mbatha* in a wholly different context.’

Maake dealt at length with the salutary practice for judicial officers to provide reasons to substantiate their conclusions. *Mthembu* confined the *ratio* of *Maake* to this well understood proposition. As the holding in *Mthembu* made clear, the authority of *Maake* does not extend further. I again endorse the position adopted in *Mthembu* as to the basis upon which a sentencing court may exercise its discretion to increase a sentence above the prescribed minimum, and I apply it in this judgment.

[50] The position may thus be stated as follows. First, Parliament has legislated a minimum sentencing regime in respect of particular crimes to reflect the seriousness with which such offences should be considered by the courts when imposing a sentence. Second, this legislative regime imposes a minimum sentence, absent substantial and compelling circumstances. The presence of such circumstances requires the downward revision of the sentence below the prescribed minimum, so as to ensure that sentencing is not rendered disproportionate, and hence unconstitutional. Third, a prescribed minimum sentence does not prevent a sentencing court from imposing a sentence above the prescribed minimum, if a careful consideration of all the factors relevant to the imposition of a fair and proportionate sentence warrants a sentence above the prescribed minimum. Fourth, the sentencing court’s discretion to determine the correct sentence is not constrained by the requirement that it must find substantial and compelling circumstances before a sentence is imposed that is above the prescribed minimum. That would entail a minimum sentence being a presumptive sentence, which it is not. The sentencing court will take account of the fact that the prescribed sentence, at a minimum, reflects the gravity that Parliament attaches to the crime. However, the variability of crimes and the offenders who commit crimes is legion. Hence, the sentencing court, if it considers that the crime warrants a sentence above the prescribed minimum, should exercise its discretion to do so, taking account of the guidance provided in *Malgas* and the overarching constitutional constraint of proportionality. Fifth, if an appellate court

considers that the sentencing court has failed to impose a sentence above the prescribed minimum when it should have done so, the appellate court may only intervene if the imposition of the prescribed minimum sentence is grossly disproportionate.

[51] It is so that sometimes decided cases provide useful guidance where they show a succession of punishment imposed for a particular type of crime. However, in *S v Sinden*[29] this Court added that it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. Each case must be determined on its peculiar facts.

[52] Insofar as reference is made in the second judgment that the multiple rapes in *S v Swart*, *S v Nkomo*, *S v Fifana and Mhlongo v The State*[30] were accompanied by far more humiliating and gruesome circumstances than in the present case and that none of the perpetrators were sentenced to anything more than 18 years' imprisonment, caution should be exercised in making comparative judgments of the gravity of offences committed in other cases where all the factual circumstances are difficult to compare. As stated by this Court in *S v Kwanape*,[31] the fact that more serious cases than the one under consideration may be found is not decisive. The enquiry should be whether the circumstances are serious enough that they justify the imposition of a heavy penalty in a particular case, and not whether the level of justified outrage is equal to or not as severe as in other cases in which a lesser penalty was imposed. This Court has cautioned against the danger that lies in that approach.[32] There comes a point beyond which incremental gradations of judicial outrage make little sense. Where a rape, as here, is a cruel infliction of grave harm the sentence must reflect the gravity of the offence. This bearing in mind that the consistency required in sentencing does not equal uniformity.

[53] A sentence should be individualised to fit the crime, the criminal and the interest of society. A court should not shy away from imposing a sentence that accounts for all the triad of factors on the basis that it would be 'tantamount to breaking' the accused,

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[29] 1995 (2) SACR 704 (A) at 708a; see also *S v Fraser* 1987 (2) SA 859 (A) at 863C – D.
[30] *S v Swart* 2004 (2) SACR 370 (SCA); *S v Nkomo* [2007] 3 All SA 596 (SCA); 2007 (2) SACR 198 (SCA); *S v Fifana and Others* [2008] ZAGPHC 326; *Mhlongo v The State* [2016] ZASCA 152
[31] *S v Kwanape* [2012] ZASCA 168; 2014 (1) SACR 405 (SCA) para 22.
[32] *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 19.

as the trial court reasoned. The respondent should atone for his actions. I am of the view that, having regard to the cumulative effect of all the circumstances and the serious aggravating features of this case, the trial court could not reasonably have imposed the sentence that it did. In addition, the minimum sentence imposed in terms of s 51(2)(*b*) of the CLAA is 'disturbingly inappropriate' and markedly out of kilter with the sentence I would have imposed. In sum, the deceased suffered great anguish: there had been, among other harms, an intrusion by a stranger into her private workplace; the explicit threat of extreme violence against her; the ongoing use of coercion and rape in several humiliating and undoubtedly painful forms; and the ordeal had a devastating psychological impact. This justifies our interference to prevent an injustice. In my view, 18 years' imprisonment for rape would best serve all the objectives of punishment. The sentence imposed for robbery with aggravating circumstances need not be disturbed. It follows that the State's appeal against the sentence must be upheld and the respondent's cross-appeal dismissed. In the result, the following order is made:

1. The appeal by the State to reserve questions of law is dismissed.
2. The respondent's cross-appeal against the conviction and sentence is dismissed.
3. The sentence on count 2 stands.
4. The State's appeal against the sentence on count 1 is upheld.
5. The sentence of 10 years' imprisonment on count 1 is set aside and in its place is substituted the following:
   'The accused is sentenced to 18 years' imprisonment.
   The 13 years' imprisonment on count 2 shall run concurrently with the sentence on count 1.'
6. The substituted sentence is antedated to 27 September 2018 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

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M V PHATSHOANE

ACTING JUDGE OF APPEAL

Makgoka JA (Kgoele AJA concurring):

[54] I have read the judgment prepared by my colleague, Phatshoane AJA. I agree with the order of the judgment, except in respect of the sentence on the rape count. As already mentioned in the majority judgment, the rape attracted the prescribed minimum sentence of 10 years' imprisonment in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act),[33] as the respondent was a first offender. Having found, in terms of s 51(3)*(a)* of the Act, that no 'substantial and compelling circumstances' existed for the imposition of a lesser sentence, the trial court imposed the prescribed minimum sentence of 10 years' imprisonment. Five of those years were ordered to run concurrently with 15 years' imprisonment imposed in respect of the robbery. Thus the effective sentence was 20 years' imprisonment.

[55] On appeal, the State contends the sentence imposed in respect of the rape count is lenient. The majority judgment agrees, and sets aside the sentence of 10 years' imprisonment imposed by the trial court and substitutes it with a sentence of 18 years' imprisonment. 13 years of the sentence imposed for the robbery is ordered to run concurrently with the substituted sentence for rape, which leaves the effective sentence of 20 years' intact.

[56] I respectfully disagree with the substituted sentence and the reasoning underpinning it. In my view, there is no basis to interfere with the sentence imposed by the trial court. My difference with the majority judgment lies in our respective answers to the following question: is a sentencing court which imposes a sentence higher than the prescribed minimum sentence, enjoined to demonstrate factors which render the prescribed minimum sentence inappropriate? The question was differently formulated by the full court in *S v Mbatha* 2009 (2) SACR 623 (KZP) para 12 thus:

'…[D]oes the court simply have a free and unbounded discretion once it concludes that a sentence greater than the statutory minimum is appropriate? What influence does the statutory minimum have in the determination of sentence in such a case?

[33] This is because there are no aggravated circumstances referred to in Schedule 2 Part I read with s 51(1) of the Act, for which life imprisonment is prescribed.

[57] I answer that question in the affirmative. The majority judgment holds the opposite view. It places much store on the dictum in para 13 of *S v Mthembu* [2011] ZASCA 179; 2012 (1) SACR 517 (SCA) that, whilst ss 3(a) obliges a sentencing court to enter the circumstances on the record if it is minded to impose a lesser sentence than that ordained by the legislature, there is no indication in the language of that provision that a similar course must be followed where a more severe sentence is contemplated. These remarks should be understood in their proper context, taking into account (a) what the issue in that case was, and (b) the seemingly contrary views expressed in two other decisions of this Court, namely, *Maake v Director of Public Prosecutions* [2010] ZASCA 51; 2011 (1) SACR 263 (SCA); [2011] 1 All SA 460 (SCA) and *S v Mathebula* [2011] ZASCA 165; 2012 (1) SACR 374 (SCA).

[58] The main issue in *Mthembu* was whether a court contemplating to impose a sentence higher than the prescribed minimum sentence was obliged to forewarn the accused of its intention to do so. This had been a finding, among others, of the full court in *Mbatha*. This Court (in *Mthembu*) ruled that *Mbatha* was wrongly decided on this issue, and that there is no such a duty on a court to forewarn an accused. About this finding, there is nothing controversial, as there are no conflicting pronouncements by this Court on it, and it does not arise in this case.

[59] Of relevance to the present case, and which has resulted in conflicting pronouncements by this Court, is how the full court in *Mbatha* had answered the question referred to in para 56 above. Wallis J, writing for the unanimous full court, said the following at paras 14 and 15:

'I appreciate that the Supreme Court of Appeal laid down this approach [in *Malgas*] in the context of cases concerned with a departure from the statutory minimum sentence by virtue of the presence of substantial and compelling circumstances. I am also alive to the fact that the legislation contains no provision corresponding to s 51(3)(*a*) when the departure from the prescribed minimum sentence is upwards rather than downwards. Nonetheless it seems to me that this must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum, in the same way as where it is contemplating imposing a lesser sentence. Otherwise, the process of determining the appropriate sentence will be bifurcated in a most undesirable way… If the approach is different from that which I have indicated it will lead to the following situation. The court will first determine whether the

case is one falling within the minimum sentencing legislation. If it is, then it will enquire whether there are substantial and compelling circumstances justifying the imposition of a lesser sentence. If it concludes that there are none, it will then abandon all that has gone before and simply determine in the exercise of its discretion an appropriate sentence, having no regard to the legislation.

In my view such an approach disregards one of the purposes of the minimum sentencing legislation, which is to provide a measure of uniformity and not simply to limit in one direction the discretion of courts in imposing sentence in particular cases, whilst leaving them entirely at large in the other direction…'

[60] And at para 20 Wallis J further explained:

'On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated. . . . Otherwise the whole purpose of a reasonably consistent and standardised approach to sentence in the case of the most serious crimes will be defeated, as it will open to those judges who have particularly stern views on sentence, and regard Parliament's response to serious crime as inadequate, to impose those views in disregard of the purpose of the legislation.'

[61] The findings in para 20 of *Mbatha* were cited with approval by this Court in *Maake* and *Mathebula.* In *Maake* (at para 28) this Court said:

'The safeguards in relation to minimum sentences must *a fortiori* apply to the contemplated imposition of a maximum sentence. In relation to motivating the imposition of a maximum sentence it is necessary to have regard to what was stated in *S v Mbatha* 2009 (2) SACR 623 (KZP) (at 631*fj*)…'

And in *Mathebula* (at para 11):

'The proper approach to be adopted by a sentencing court *which contemplates to impose higher than the prescribed minimum sentence* seems to me to be the one adumbrated by Wallis J in *S v Mbatha* 2009 (2) SACR 623 (KZP) para 20… [T]his salutary approach was endorsed in [*Maake*] (above) para 28…' (Emphasis added.)

[62] As already mentioned, this Court in *Mthembu* (in the dictum at para 13) declined to endorse the findings in para 20 of *Mbatha*. About the endorsement of those findings in *Maake*, this Court said the following at para 19:

'One further aspect merits mention. *Maake,* in support of the broad hypothesis that conclusions by a court should be properly motivated, called in aid *Mbatha.* It was submitted to us that *Maake* cited *Mbatha* with apparent approval and that that constitutes an endorsement of its correctness on this score. We do not agree. *Maake* did not subject the judgment in *Mbatha* to careful scrutiny nor was the correctness of its conclusion or reasoning properly considered. It sought support from *Mbatha* in a wholly different context.'

[63] It is significant that despite the misgivings expressed in *Mthembu* about the correctness of *Maake* endorsing para 20 of Mbatha, this Court did not overturn *Maake* as being clearly wrong on the issue. The effect is that there are three decisions of this Court in seeming disharmony – *Maake* and *Mathebula* expressly endorsing those views, and *Mthembu* disapproving of them. This is the context in which *Mthembu* is to be understood. Incidentally, *Mathebula* and *Mthembu*, expressing contrary views on the issue, were delivered on the same day ie 29 September 2011, the two cases having been heard on 5 and 16 September 2011, respectively.

[64] To the extent of this seeming disharmony between *Maake* and Mathebula on the one hand, and *Mthembu*, on the the other, *Mthembu* does not seem to be the final and authoritative pronouncement on the issue. I therefore respectfully disagree with the proposition in the majority judgment that *Mthembu* is dispositive of the issue. It could only be so had *Mthembu* overturned *Maake*. As mentioned already, it did not. In the light of the seeming disharmony pointed out, it seems that the jury is still out on the correctness of the holding in para 20 of *Mbatha*.

[65] As I see it, where a minimum sentence is prescribed in the Act, it is not enough for a court to simply invoke its 'inherent jurisdiction' to deviate from the prescribed minimum sentence and impose a higher one. Something more is needed to justify departure from the prescribed minimum sentence to a higher one. There must be an objective and juridical basis to ensure that imposing a sentence higher than the prescribed minimum is not undertaken on an undefined basis, and influenced by a particular judicial officer's subjective views as to what is appropriate. Where a court deviates downward, the basis for doing so is found in s 51(3)*(a)* of the Act, in terms of

which a court may deviate from the prescribed minimum sentence and impose a lesser sentence, if it finds 'substantial and compelling circumstances' to exist.

[66] This proviso serves as a jurisdictional factor without which, a court is obliged to impose the prescribed minimum sentence, subject to the caveat enunciated in *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220 (A).[34] In *Malgas*, considering an appeal to reduce the prescribed minimum sentence of life imprisonment, this Court cautioned that the specified prescribed minimum sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.[35]

[67] To my mind, the proviso in s 51(3)*(a)* and the dictum in *Malgas* referred to above, is a good pointer at the other end of the sentencing equilibrium. Thus, where a court is called upon to impose a sentence higher than that prescribed by the Act, weighty considerations are required to demonstrate the out-of- ordinary facts of the case which render the prescribed minimum sentence inadequate. By prescribing minimum sentences in respect of particular offences, the legislature has set normative benchmarks against which sentencing discretion should be exercised.

[68] Accordingly, in my view, when a court imposes a sentence higher than the prescribed minimum sentence, it must bear the normative benchmark in mind, and demonstrate the circumstances of the case which takes it out of the ordinary to justify a sentence higher than the prescribed minimum. Thus, where there is a deviation from the prescribed minimum sentences, either downward or upward, the extent of the deviation requires justification. To my mind, the greater the deviation the greater the burden of justification. In my view, this threshold is even higher where a court of appeal

[34] In *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220 (A) para 22 it was explained: 'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence'.
[35] Fn 3 above para 11.

is asked to interfere with the exercise of a discretion by a trial court, which, as already stated, is subject to a stringent test.

[69] Before I turn now to the issues in this case, it is necessary to restate trite principles which govern an appeal court's powers in respect of the sentence imposed by the trial court. It is settled that sentencing is a matter which falls pre-eminently within the discretion of a trial court. A court of appeal can interfere with a sentence imposed by a trial court only in two situations. First, where material misdirection by the trial court vitiates its exercise of that discretion. The nature of the misdirection referred to here is one envisaged in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F, being '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'. Second, where the disparity between the sentence imposed by the trial court and that which the court of appeal would have imposed had it been the trial court, is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.[36] Where minimum sentences are prescribed for particular offences identified in the Act, there is an added consideration in that a trial court imposes a sentence within a particular legislative framework.

[70] Another important sentencing principle is this. In appeals against sentence, where it is contended that a sentence by the trial court is either excessive or lenient, the appellate court is not at large in the sense in which it is in a situation where misdirection is the basis of the appeal.[37] Thus, in the former situation, an appellate court can only interfere if the sentence is one that no reasonable court would have imposed.

[71] In the present case, the State, correctly in my view, does not contend that the trial court misdirected itself when it imposed the prescribed minimum sentence. Instead, the assertion is that, given the circumstances of the case, the prescribed minimum sentence is inadequate, and that a higher sentence should have been imposed. Thus, the two issues are whether: (a) there are circumstances justifying a

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[36] *S v Sadler* 2000 (1) SACR 331 (SCA); [2000] 2 All SA 121 (A) para 8; *Cwele and Another v S* [2012] ZASCA 155; [2012] 4 All SA 497 (SCA); 2013 (1) SACR 478 (SCA) para 33; *S v Swart* 2000 (2) SACR 566 (SCA) para 21; *S v Coetzee* 2010 (1) SACR 176 (SCA); *S v Matlala* 2003 (1) SACR 80 (SCA).
[37] Ibid para 12.

sentence higher than the prescribed minimum sentence of 10 years' imprisonment; and (b) the sentence imposed by the trial court is one that no reasonable court would have imposed in the circumstances. I consider them, in turn.

Are there circumstances justifying a higher sentence?

[72] The majority judgment mentions several factors to justify a higher sentence. They are that: the respondent has a previous conviction for assault with intent to do grievous bodily harm; the respondent had 'meticulously' planned the rape; the respondent 'trespassed' onto the premises where the rape took place; the deceased was subdued with threats of physical violence at knifepoint; the respondent penetrated the deceased in different positions thereby showed a 'blatant display of aggression'; the deceased was on her menstrual cycle; the rape was a violation of the deceased's womanhood in 'the ghastliest manner'; the deceased had three fresh bruises or burn marks on her back caused by the carpet she laid on during the rape acts; the deceased suffered severe physical and mental distress.

[73] In my view, none of these aggravating factors, either individually or cumulatively with others, constitutes a basis for a higher sentence. I should not be understood to say that these are not important as aggravating factors in considering sentence. What I emphasise is that they are inherent in most rapes. They are integral features of the offence of rape, and their presence is already reflected in the prescribed minimum sentences decreed in s 51(2) and, in particular, the sentence of 10 years' imprisonment for rape simpliciter, with which we are concerned. Thus, they cannot be used as justification for increasing the sentences further. The same applies to an accused, who cannot advance the fact that he or she is a first offender as a basis to reduce the prescribed minimum sentence, as this has already been factored in by the legislature. Thus, in the absence of the aggravated factors mentioned in s 51(1) which would attract life imprisonment, the prescribed minimum sentence of 10 years' imprisonment must, subject to the *Malgas* caveat, ordinarily be imposed.

[74] I briefly comment on some of the factors mentioned in the majority judgment as being sufficient to impose a higher sentence, and endeavour to show that this is not justified. In almost all the rapes, either a weapon or actual violence is used to subdue

a complainant's resistance. There is no evidence that the offences were 'meticulously planned'. The trial court mentioned this without reference to any factual or circumstantial basis from the evidence on record. But even if they were, there are few rapes that occur spontaneously. However, whether planned or spontaneous, rape remains abhorrent. The fact that one is commited without planning does not make it less serious. Thus, the issue of planning is a neutral factor. As to 'trespassing', most rapes occur in the complainant's homes or on private properties. It is a factor inherent in the crime of rape.

[75] With regard to 'repeated acts of penetration', on a careful reading of the deceased's statement, it seems that the repeated acts of penetration had to do with the fact that the respondent's penis kept sliding out, and less to do with demonstration of aggression. But, once more, aggression is inherent in the offence of rape, as does the fact that the deceased's womanhood is violated 'in a ghastly' manner. All rapes against women, irrespective of the circumstances in which they take place, fit that description. Similarly, the fact the deceased suffered bruises or marks on her back is an inherent incidence of the violent nature of rape, which, like all other factors mentioned above, have been factored in by the legislature in the prescribed minimum sentence of 10 years' imprisonment.

[76] As to the impact of the rape on the deceased, on the face of it, the death of the deceased itself might be said to constitute a factor that should move a court to impose a higher sentence. It must be accepted that every rape would have negative psychological effect on those who survive the horrific ordeal. It is here where a proper and dispassionate appraisal of the facts is called for.

[77] It is common cause that a few hours after the rape, the deceased was placed on a cautionary treatment consisting of anti-retroviral drugs and antibiotics. At that stage, the deceased had been using a contraceptive pill called Yaz. The deceased's body reacted negatively to this combination of drugs and the contraceptive pill. According to the deceased's sister, the deceased experienced extreme nausea shortly after she started using the initial ARV regime. It got worse when a further ARV regime was added to the initial ones. This eventually led to the deceased's death, the cause of which was recorded as cerebral venous sinus thrombosis.

[78] It was further common cause during the trial that had the deceased not reacted negatively to the combination of the prescribed medications, it is conceivable that she would not have died. A cerebral venous sinus thrombosis occurs when a blood clot forms in the brain's venous sinuses and prevents blood from draining out of the brain. A haemorrhage forms when the blood cells break and leak blood into the brain tissues. According to Dr Paulina van Zyl, a clinical pharmacologist,[38] who testified during the trial that the condition was caused by a combination of ARV drugs, antibiotics and the contraceptive pill the deceased had been using.

[79] As a result of the deceased's immediate negative reaction to the drugs, and her unfortunate and untimely death, the expert evidence before the trial court focused on the pathological impact of the drugs on the deceased, rather than the nature and extent of the psychological impact of the rape on her. The limited evidence of the psychological impact is that the deceased had acute stress disorder. She was very fearful and would not leave her home unless accompanied by a person known to her. She also had episodes of insomnia, although this could be attributed to the effect of the medication she had been prescribed. But, on the whole, the factors mentioned in the majority judgment as having a deleterious psychological effect on the deceased are the predictable, natural consequences to be expected of a traumatic event such as rape. They do not add to the respondent's moral blameworthiness as to justify a sentence higher than the prescribed minimum sentence.

[80] Whilst the death of the deceased is a factor that should undoubtedly be borne in mind in considering sentence, it must never displace the need for a proper and balanced approach. Ordinarily, one does not expect a rape incident such as the one in the present case to result in the chain of events that lead to death. It is important to emphasise that the deceased did not die from the injuries sustained during the rape, but as a result of the precautionary medical intervention following the rape. Indeed, during rape itself, the deceased suffered no more than the bruises on her back and on her genital organs, which, as I have said, are inherent in the offence of rape.

[38] This is a specialist in the study of interaction between humans and medicine.

[81] There is therefore a point beyond which the respondent cannot be sentenced for the chain of events which followed the rape. The respondent's causal liability ends where the effect of the ARVs begins, which, as mentioned already, was immediate. Any sentence which ignores this fine line, is likely to result in the respondent indirectly being punished for the tragic death of the deceased, for which he was acquitted. Simply put, the respondent can only be punished for rape simpliciter, and its predictable, inherent consequences, which unfortunately do not include death. Viewed in this light, the death of the deceased, tragic and unfortunate as it is, is not a factor which would justify the imposition of a higher sentence. The upshot of all of the above is that there is no basis to interfere with the sentence imposed by the trial court.

[82] I need to briefly comment on the majority judgment's criticism of the trial court's finding that there was no anal penetration. In paras 25-30 the majority judgment explains why it is not competent for this Court to take into account anal penetration in considering sentence. That reasoning, is with respect, correct. That should be the end of the matter. But the majority judgment proceeds to critisise the trial court's decision to afford the respondent the benefit of the doubt in this respect, and actually make a definitive finding that there was anal penetration. In my view, this is unnecessary, and serves no purpose, given the acceptance, for the reasons given, that there is nothing this Court can do about this issue. The issue is therefore irrelevant to the consideration of sentence on appeal.

Is the sentence imposed by the trial court one which no reasonable court would have imposed?

[83] The threshold to establish that the prescribed minimum sentence of 10 years' imprisonment is so lenient that no reasonable court would have imposed it, is self-evidently high. A court of appeal should not easily conclude that the requisite threshold has been reached in a particular case. This is for the simple reason that, absent substantial and compelling circumstances, and subject to the *Malgas* caveat referred to earlier, the imposition of a prescribed minimum sentence is deemed adequate and reasonable.

[84] In the context of s 51 of the Act, there are further considerations why the sentence of 18 years' imprisonment is disproportionate. The prescribed minimum

sentence for murder in terms of s 51(2) of the Act is 15 years' imprisonment for a first offender. This is the sentence the respondent would have faced had he been convicted of murder as initially charged. On the approach of the majority judgment, the respondent would have been sentenced to 15 years for murder and 18 years for rape. This would have been an incongruous outcome, as murder, being the capital offence, must perforce carry the heavier of the two sentences. It is also worth noting that the sentence of 18 years' imprisonment is close to the sentence prescribed for murder where an accused is a second offender, which is 20 years. With respect, I do not think this can be justified for rape simpliciter, the specific circumstances of the rape in this case nothwithstanding. As alluded earlier, care must be taken that the respondent is not unwittingly sentenced for the death of the deceased. He was charged with murder, but acquitted of that charge.

[85] What is more, it must be borne in mind that the legislature has consciously not made any gradation of determinate sentences for rape. The prescribed minimum sentence of 10 years' imprisonment progresses immediately to life imprisonment once any of the aggravating features is present.[39] Viewed in that light, the sentence of 18 years' imprisonment imposed by the majority judgment seems to be, with respect, an impermissible judicial intervention and an attempt to fill a deliberate aperture created by the legislature.

[86] I therefore conclude that the sentence of 10 years' imprisonment imposed by the trial court is not such that no court acting reasonably, would have imposed it. Granted, another court might have considered a higher sentence. But as emphasised earlier, this is not the test on appeal. It is not about what the appeal court prefers, but whether a court acting reasonably, would have imposed the impugned sentence. Whether the sentence imposed by the trial court in the present case can be said to be unreasonable in the sense envisaged in the authorities, can also be tested with reference to sentences imposed in far more aggravated circumstances than the present case, which I consider below.

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[39] See the observation in *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA); [2008] 4 All SA 396 (SCA); 2012 (6) SA 353 (SCA) para 13 where the gap was described as 'striking'.

[87] I refer to previous cases conscious of the fact that sentences imposed in such cases can only serve as mere guidelines. As this Court explained in *S v Sinden* 1995 (2) SACR 704 (A) at 708A:

'Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of discretion (see *S v S* 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishment imposed for a particular type of crime. (See *R v Karg* 1961 (1) SA 231 (A) at 236G). But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. "(E)ach case should be dealt with on its own facts, connected with the crime and the criminal . . .."'

In *S v D* 1995 (1) SACR 259 (A) at 260*e*, it was stated that 'decided cases on sentence provide guidelines, not straightjackets'. And, in *S v PB* 2013 (2) SACR 533 (SCA) (at para 16) this Court cautioned against a slavish following of decided cases on sentences, which could result in an abdication by the court of 'its duty and discretion to consider sentence untrammeled by sentences imposed by another court, albeit in a similar case'. Ultimately each case must be decided in the light of its peculiar facts.[40]

[88] On the other hand, whilst sentence is always individualised and bound to the facts of a particular case, value can be gained by considering sentences imposed in comparable cases.[41] For, as pointed out in *Malgas* at para 21:

'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust.'

[89] With these dictates in mind, I consider a few cases.

(a) I commence with *S v Swart* 2004 (2) SACR 370 (SCA), where this Court remarked that the respondent had subjected the complainant to 'extreme humiliation and degradation'. The respondent and the complainant lived on the same property as tenants but were not used to each other. One evening, while the complainant was asleep, the respondent, who was drunk, broke into her room. He hit her in the face,

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[40] See *S v Kwanape* [2012] ZASCA 168; 2014 (1) SACR 405 (SCA) para 16.
[41] *Tiry and Others v S* [2020] ZASCA 137; [2021] 1 All SA 80 (SCA); 2021 (1) SACR 349 (SCA) para 120.

and hurled profanities at her. He forced her legs apart and pinned her down and tried to penetrate her vaginally, but his penis was not sufficiently erect, so he pushed one of her legs up behind her head and then succeeded in penetrating her. He later dragged the complainant by her hair to the kitchen where he forced her to smear margarine on his penis and on her vagina. All the time he had her in his control, holding her by her hair and pulling her about by it.

Still pulling the complainant by her hair he dragged her to the adjoining bathroom where he pushed her over the bath and penetrated her anally. That caused pain to the complainant and when she screamed, the respondent hit her hard on one of her ears. The complainant felt a bowel movement and begged to use the toilet. The respondent, still pulling her by the hair, dragged her from the bath and pushed her onto the toilet. The complainant lost control of her bowel movement and defecated on the floor on her way to the toilet and then again in the toilet. While the complainant sat on the toilet the respondent pulled hard at head and put his penis into her mouth, causing the complainant almost to choke. He pulled her back to the bedroom, pushed her onto the bed, and penetrated her vaginally. When she screamed, he put his hand into her mouth, with his fingers behind her teeth, and pulled her jaw. She bit his hand and the respondent in turn bit her breast. He then altered his position, withdrew his penis, and penetrated her yet again. On that occasion he pinned her arm to her chest and she felt as if she was suffocating.

As to the psychological impact of the rape on her, the complainant's uncontested evidence was that she had lost confidence in herself, and had not been able to work and could not bring herself to look for work. In the first few weeks after the incident, she wore dark glasses when going out. She had a nervous breakdown and was admitted to hospital, but could only stay in hospital for a week because her medical aid funds had been exhausted. Because of that fact, she also had to give up anti-depressant drugs prescribed for her. The rape incident had affected her sex life with her husband. There was no intimacy between her and the husband, and, as she put it, she 'just get all uptight and everything when he comes near me. I had flashbacks'. It took at least five months before they had any sexual relationship after the incident. When her husband was having to work nightshifts, she would lie awake at night with every light on in her flat, fully clothed, with three

kitchen knives and her husband's gun in the bed. She felt badly about herself and described herself as 'a wreck.'

The respondent was convicted in the high court of housebreaking with intent to rape, two counts of rape, and two counts of indecent assault. The offences were taken together for the purposes of sentence by the trial court, and the respondent was sentenced to seven years' imprisonment, which was suspended for five years on certain conditions. On appeal by the State against the sentence, this Court set aside the sentence imposed by the trial court and substituted it with a sentence of eight years' imprisonment.

(b) Next is *S v Nkomo* [2007] 3 All SA 596 (SCA); 2007 (2) SACR 198 (SCA). The complainant met the appellant in a bar, who gave her a drink laced with alcohol. He forced her into a hotel room where he raped her. He locked her in the room and went back to the bar for more drinks. She attempted to escape from the room by jumping out of a window, and fell some ten metres to the ground and injured her leg. She fell where the appellant had been sitting and drinking. He forced her back into the hotel room and raped her four more times during the course of the night. He also forced her to perform oral sex on him and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away. The complainant managed to escape the following morning. The appellant was sentenced to life imprisonment by the high court after the matter had been referred to it by the regional court after conviction. On appeal, this Court, by majority, allowed the appeal on sentence and replaced the sentence of life imprisonment with that of 16 years' imprisonment.

(c) In *S v Fifana and Others* [2008] ZAGPHC 326 a four-months pregnant woman was gang-raped at knife point by three men after they had broken into her house at night whilst she was asleep. Over and above being gang-raped, each of the three assailants repeatedly raped her. Although one of the accused initially used a condom, during one of the repeated rapes he did not. Another accused was HIV positive, thereby exposing the complainant and her unborn baby to the risk of HIV/Aids infection. The accused were sentenced to 15 years each for the rapes.

(d) In *S v SM* 2014 (1) SACR 53 (GNP) a 15-year-old girl was raped and impregnated by her father, who had threatened to kill her if she reported him to anyone. When

her pregnancy started to show, the complainant disclosed that she had been raped by the appellant. A psychosocial report on the complainant's post-crime situation recorded severe emotional impact of the rape on the complainant. She had: low self-esteem, sense of loss and powerlessness, anger and hostility. Furthermore, she developed a sense of guilt, shame and developed pseudo-maturity and inappropriate sexual behaviour. The report concluded that the complainant was put through a 'life threatening and traumatic experience which can affect her for the rest of her life'. The appellant was sentenced to life imprisonment by the regional court. On appeal, the high court set aside that sentence and substituted it with one of 15 years' imprisonment.

(e) In *S v Mabaso* 2014 (1) SACR 299 (KZP) the complainant was accosted by an unknown man on her way from work who threatened her with a knife, and forced her into a forest, where he raped her in a spot where there were dense trees, grass, soil and stones. The thorns pierced her shoulders. Then he instructed her to get dressed, and they continued walking. After a while he forced her to undress again, upon which he raped her once more. The entire ordeal lasted for about an hour and a half, and was very painful. Thick, long and sharp thorns pierced her back and feet. The tips broke into her feet. During the incident, the appellant robbed the complainant of her cellular phone and her wallet. She also lost her shoes. The trial court sentenced him to life imprisonment. On appeal to the high court, the majority upheld his appeal against the sentence and imposed a sentence of 15 years' imprisonment in respect of each of the two rapes and eight years imprisonment for the robbery. With the concurrency order the appellant was sentenced to an effective 20 years' imprisonment. The minority judgment would have imposed a term of 25 years' imprisonment for the two rape counts.

(f) In *Mhlongo v The State* [2016] ZASCA 152 the complainant, a 27-year-old woman was subjected to 'a night of terror and repeated rapes'. On the day of the incident, the complainant was lured by the appellant and his uncle to get a lift home. Instead of driving her home, the appellant took her to his own home, where he assaulted her and threatened to kill her, whereupon he overpowered and raped her repeatedly throughout the night until he released her the next day. The complainant was still a virgin. She was subsequently diagnosed with HIV, from which she later

died. The regional court sentenced the appellant to life imprisonment. On appeal to the high court, the sentence was set aside and substituted with a sentence of 18 years' imprisonment. Although this Court, at para 21, expressed disquiet about the reduction of the sentence by the high court, it held that 'in the light of there being no cross appeal by the State against sentence; this court can, unfortunately, do no more'.

[90] A common theme in the cases referred to above, is the presence of aggravated factors referred to in s 51(1) of the Act, in that there were multiple rapes, which attracted life imprisonment. In addition, the multiple rapes were accompanied by far more humiliating and gruesome circumstances than in the present case, especially those in *Swart*, *Nkomo*, *Fifana and Mhlongo*. But none of the perpetrators were sentenced to anything more than 18 years' imprisonment. It is therefore not clear how, in the present case, in respect of a rape unaccompanied by the aggravated factors mentioned in s 51(1), a sentence of 18 years' imprisonment can be justified. As explained in *Malgas* (at para 8) one of the purposes of the Act was to ensure '… a severe, standardised, and consistent response' from the courts to the commission of such crimes. That purpose is not achieved where there is no consistency in the sentences imposed by the courts, especially where, as here, aggravated rapes have been met with lesser sentences, and a rape simplicister, attracts a more severe sentence. In my view, this could never have been the intention of the legislature.

[91] Two further obvious points remain to be made. The first is that when an appellate court sets aside a sentence imposed by a trial court, and substitutes it with its own, it exercises a discretion. It must therefore ensure that its substituted sentence is not itself vitiated by misdirection or a disturbingly lenient or heavy sentence. The second is that the constitutional right to a fair trial also covers the sentencing stage. In *S v Dodo* 2001 (1) SACR 594 (CC); 2001 (5) BCLR 423 (CC) paras 37-38, the Constitutional Court noted that proportionality between the seriousness of the offence and the period of imprisonment lies at the core of the right not to be punished in a cruel, inhuman or degrading way.[42] A disproportionate sentence is therefore unconstitutional. It therefore remains the duty of a sentencing court, whether at first

[42] See s 12(1)*(e)* of the Constitution of the Republic of South Africa, 1996.

instance or at appellate stage, to exercise its discretion in such a manner that that right is not infringed.

Conclusion

[92] In the circumstances of the present case, a sentence of 18 years' imprisonment is in my view, totally disproportionate, and thus not constitutionally compliant. As mentioned already, in the context of the minimum sentences prescribed in s 51 of the Act, it is heavier than the sentences prescribed for murder (a capital offence) where an accused is a second offender and almost the same as the sentence for murder where an accused is a third offender. Comparatively, it is also far heavier than the sentences imposed in more aggravated circumstances, evidenced by the cases to which I have referred. For these reasons, I am unable to support the sentence of 18 years' imprisonment imposed by the majority judgment. I find it disturbingly severe and shockingly inappropriate.

[93] However, the principled basis for my disagreement remains that a juridical basis to interfere with the sentence imposed by the trial court, as envisaged in both *Maake* and *Mathebula*, has not been established.

[94] I would in the circumstances dismiss the State's appeal against the sentence. Save for that, I concur in the rest of the order of the majority judgment.

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T Makgoka

Judge of Appeal

APPEARANCES:

For appellant:	J M de Nysschen
Instructed by:	Director of Public Prosecutions, Bloemfontein
For respondent:	P L Van der Merwe
Instructed by:	Legal Aid South Africa, Bloemfontein
Amicus curiae:	S J Reinders (with R J Nkhahle)