Sentencing Rape Offenders in South Africa: Recent Case Law
Sithole v S; Masango v S; Nyathi v S

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Abstract

South African criminal courts are inundated with rape trials. In reaction to the high rate of serious crime, the legislature implemented sections 51 to 53 of the *Criminal Law Amendment Act* 105 of 1997, in terms of which minimum sentences are prescribed for various crimes. Since its passing, this so-called "minimum sentencing legislation" has been the subject of academic debate. The Gauteng high court in *Sithole v S* (A105/2021) [2024] ZAGPPHC 39 (18 January 2024), *Masango v S* (A175/2021) [2024] ZAGPPHC 64 (5 February 2024) and *Nyathi v S* (A133/2020) [2024] ZAGPPHC 121 (6 February 2024) has recently considered the sentence of life imprisonment where the rape involved grievous bodily harm, the complainant was 14-years old at the time of the rape. The complainant was raped by an accused and a co-perpetrator. As part of the ongoing academic debate, these recent decisions implore critical academic analysis. This contribution elucidates how the South African courts employ a sentence of life imprisonment as their most powerful weapon in the ongoing fight against the rising rape statistics. The continued high prevalence of rape cases before South African courts still cast a huge shadow over the success of prescribed minimum sentences as a deterrent to rape.

Keywords

Rape; minimum sentence; life imprisonment; grievous bodily harm; co-perpetrator.

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1 Introduction

In a country scourged by violent crime and gender-based violence, the South African criminal courts are inundated with rape trials. Due to the high prevalence of sexual crimes committed in the country, South Africa has been labelled as the "rape capital of the world".[1] Research indicates that South Africa has one of the world's highest rates of gender-based violence,[2] which manifests as femicide, rape and intimate partner violence.[3] The adverse effect of gender-based violence on victims has also been well documented. It leaves the victims with psychological trauma and physical consequences that need to be addressed. This has recently been confirmed by Mali AJA (Dambuza, Hughes and Matojane JJA and Windell AJA concurring) in *Mthanti v S.*[4] Emphasising the need for developmentally and trauma-sensitive courtrooms for victims of sexual violence, David Crenshaw[5] explains that gender-based violence leaves a lasting impact of trauma on the brain, with synapses, neurons and neurochemicals being permanently altered.[6]

This contribution illustrates to the reader the South African courts' desperate struggle against the continuing rise of rape incidents and the application of the minimum sentence legislation in doing so. In Sithole v S, *Masango v S* and *Nyathi v S* the Gauteng high court has recently heard three appeals from appellants who were sentenced to life imprisonment after a conviction of rape. The only factors that connect the three cases are that all of them deal with sentencing for rape. Apart from that, they are mainly characterised by wide differences regarding the victims, the offenders and the provisions under which the sentences were prescribed. It is trite that, after the death penalty was declared unconstitutional in *S v Makwanyane,*[7] the harshest penalty a court may impose is life imprisonment. Courts are statutorily obliged, under specific circumstances, to impose life imprisonment on a

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1 See Kunle and Matsha 2021 *Cogent Arts and Humanities* 1; S *v Vilakazi* 2012 6 SA 353 (SCA) para 2.

2 See, for example, *S v Jansen* (186/2023) [2024] ZAWCHC 14 (19 January 2024) and *S v Lewis* (54/2024) [2024] ZAWCHC 59 (26 February 2024), where a sister obtained a protection order in terms of the *Domestic Violence Act* 116 of 1998 against her own brother and *JSG v S* (CA 52/22) [2024] ZANWHC 71 (12 March 2024), where a father raped his own 14-year old daughter.

3 Matzopoulos 2019 *SAMJ* 382-386; Le Roux-Bouwer and Museka 2024 *De Jure* 206-220.

4 *Mthanti v S* (859/2022) [2024] ZASCA 15 (8 February 2024) para 21.

5 Crenshaw *et al* 2019 *Journal of Humanistic Psychology* 779, 780.

6 See *JSG v S* (CA 52/22) [2024] ZANWHC 71 (12 March 2024) para 32, where the victim subsequently attempted to commit suicide.

7 *S v Makwanyane* 1995 3 SA 391 (CC).

convicted rapist in an effort to curb the ubiquity of gender-based violence, to give expression to society's condemnation of the crime of rape, and to deter prospective criminals.[8] Burchell[9] illustrates that victims' rights are gaining prominence that was absent from earlier criminal law. In *S v Tabethe*[10] Bertelsmann J stated that the victim of rape had "an inalienable right to convey her own emotions, feelings and convictions, her own view of a suitable sentence for the accused, that the court was obliged to pay attention to her wishes and that she was free to tell the court whatever troubled her". Having said that, there ought to be a healthy balance within the square of considerations, namely the crime, the perpetrator, society's interests and the interests of the victim, when it comes to the imposition of punishment.[11]

The recent cases of Sithole v S, *Masango v S* and *Nyathi v S* are discussed in this contribution, but the legislative framework governing the imposition of punishment for the crime of rape will be expounded before the facts in these cases are provided. While conscious of the risk of a lack of consistency and balance when discussing the three cases, it needs to be stated that the facts in each of the three cases were not discussed by the court in similar detail.

2 Legislative framework

Rape is contemplated in section 3 of the *Criminal Law* (*Sexual Offences and Related Matters*) *Amendment Act* 32 of 2007, involving the unlawful and intentional commission of an act of sexual penetration of a complainant without the complainant's consent. Prior to the enactment of section 3, the common law defined rape in extremely narrow terms. The crime was gender-specific in that only a male could be the perpetrator, and only a female could be the victim of rape. The crime was also anatomically specific in that only non-consensual sexual penetration of the female sexual organ by the male sexual organ qualified as rape. The Constitutional Court in *Masiya v Director of Public Prosecutions Pretoria*[12] then held that the

8 See Burchell *Principles of Criminal Law* 15; Snyman *Criminal Law* 12; Smit 2002 *Monatsschrift für Kriminologie und Strafrechtsreform* 90; Du Toit *et al Commentary on the Criminal Procedure Act* ch 28-p10B-27; Gumboh 2024 *Perspectives of Law and Public Administration* 556-565.

9 Burchell *Principles of Criminal Law* 4.

10 *S v Tabethe* (CC468/06) [2009] ZAGPHC 23 (23 January 2009) para 22.

11 See Jones J (Nepgen J and Chetty J concurring) in *S v Mngoma* 2009 1 SACR 435 (EC) para 9; Van der Merwe J in *S v De Kock* 1997 2 SACR 171 (T) 183A; Navsa JA (Ponnan JA and Pillay AJA concurring) in *S v Matyityi* 2011 1 SACR 40 (SCA); Marais JA (Harms JA, Cameron JA, Chetty AJA and Mthiyane AJA concurring) in *S v Malgas* (117/2000) [2001] ZASCA 30 (19 March 2001) 127 para 17; and Davis J (Van Heerden J concurring) in *S v Isaacs* (SS38/2011) [2012] ZAWCHC 91 (24 May 2012) para B.

12 *Masiya v Director of Public Prosecutions Pretoria* 2007 5 SA 30 (CC) para 62.

definition of rape should be extended so as to include anal penetration of a female. Section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 now defines rape in gender-neutral terms and the crime is formulated to include a vast array of methods of non-consensual sexual penetration.

On 1 May 1998 the legislature implemented sections 51 to 53 of the *Criminal Law Amendment Act* 105 of 1997 in terms of which minimum sentences are prescribed for various crimes. The Act stipulates that a sentencing court may impose a lesser sentence only if it is satisfied that "substantial and compelling circumstances" exist which justify doing so.[13] Section 51(1)(a) of the *Criminal Law Amendment Act* 105 of 1997 provides that a high court shall sentence a person who has been convicted of a crime referred to in Part I of Schedule 2 of the Act to imprisonment for life. Part I of Schedule 2 lists the crimes of murder and rape committed under certain circumstances.[14] Part I of Schedule 2 lists the crime of rape committed under the following circumstances, amongst others: where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by any co-perpetrator or accomplice; or in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy; or where the victim is a person under the age of 18 years; or where the rape involved the infliction of grievous bodily harm. The jurisdictional factors singled out by the legislature for certain offences do not create new substantive offences. Instead, they are jurisdictional factors that must be found to exist when the listed offences are committed. As such, they do not constitute essential elements of the offences.[15]

Life imprisonment is mandated in terms of section 51(1), read with Part I of Schedule 2 upon conviction, unless in terms of section 51(3), substantial and compelling circumstances exist which necessitate the imposition of a lesser sentence than the prescribed sentence. Much debate has occurred on the question of whether the minimum sentence legislation indeed contributes to a reduction in violent crime.[16] Rape involving the infliction of

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13 Compare Snyman *Criminal Law* 17; Burchell *Principles of Criminal Law* 23; *S v Dodo* 2001 3 SA 382 (CC) para 10 and *S v Malgas* (117/2000) [2001] ZASCA 30 (19 March 2001) 482G.

14 Compare *Vardien v S* (A36/2024) [2024] ZAWCHC 79 (11 March 2024) para 21; Terblanche 2017 *PELJ* 4. Cameron J in *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) 67 held that the prescribed minimum sentences are not applicable to offenders between 16 and 18 years of age.

15 *Sithole v S* (A105/2021) [2024] ZAGPPHC 39 (18 January 2024) (hereafter *Sithole v S*) para 22.

16 Terblanche 2003 *Acta Juridica* 194. Edwin Cameron in his Dean's Distinguished Lecture delivered at the Faculty of Law, University of the Western Cape, held that

grievous bodily harm is thus one of the offences singled out by the legislature in Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997. Finding that the rape involved the infliction of grievous bodily harm has a direct influence on the sentence imposed.

3 Facts in *Sithole v S*

The appellant was 24 years old at the time he committed the crimes. The complainant and her cousin were patrons at the Kayalami tavern, where they met the appellant while sitting amongst a group of friends. She knew the appellant. The appellant offered to buy her a drink, which she accepted and drank. These facts lead to the inference that the complainant was an adult woman. She informed her cousin that she wanted to leave as it was getting late.[17] Whilst the complainant was outside the tavern in the company of her cousin, the appellant requested to talk to her. The complainant responded that she was still busy talking to her cousin. The appellant then pulled the complainant, indicating that they must leave, but her cousin pulled her from the other side. Her cousin eventually let go of her, whereupon all three of them fell down the stairs. A friend of the appellant intervened and said that the appellant could not just leave the complainant after the appellant had bought her liquor.[18]

The complainant then told the appellant that she would not accompany him. In reaction to the complainant's refusal to accompany him, the appellant then slapped her twice on her face with an open hand. At that time, she was seated on the ground. The appellant then dragged her to the other side of the street by pulling her by her arm.[19] She was on her knees when he dragged her. Whilst at the other side of the street, she was seated on her buttocks when the appellant poured beer on her, kicked her and assaulted her with a beer bottle.[20] There were a lot of bricks in the vicinity where the complainant was seated. The appellant picked up one of the bricks and hit her on the head, causing the brick to break. The appellant then picked up another brick and did the same again. The second brick also broke. The complainant was mostly struck on the top of her head, which was swollen due to the assault with the bricks. The appellant thereafter tried to hit her in the face with a brick. She blocked the blow, and the appellant hit her next to her mouth, causing a cut. He then hit her once on the head with a beer

minimum sentences are "a poorly-thought out, misdirected, hugely costly and, above all, ineffective way of punishing criminals" (Cameron "Imprisoning the Nation" para 19).

17 *Sithole v S* para 6. Also see Cameron 2020 *SALJ* 32-71.

18 *Sithole v S* para 7.

19 Compare with *Bulelani v S* (A26/2023) [2024] ZAGPPHC 50 (24 January 2024) para 16, a decision not discussed in this contribution, for similar facts.

20 *Sithole v S* para 8.

bottle, and the bottle broke.[21] The appellant poured a bottle of beer over the complainant's head and took her money, cell phone and shoes. He threatened the complainant, telling her that he would injure her unless she accompanied him.[22] Whenever she stopped walking, he would hit her with open hands on exposed parts of her body. While they were walking in the street, a police vehicle passed by. The appellant told the complainant that if she alerted the police, he would hit her with a bottle. She begged the appellant to stop doing what he was doing, but he kept on pushing her and hitting her with open hands.[23]

Upon their arrival at the appellant's shack, the appellant pushed the complainant inside and locked the door. He then tore her dress off her and raped her. She cried, and the appellant told her to stop crying because she would wake up the people in the yard. She stopped crying and heard her brother's voice outside in the yard. He was calling her name from outside the room. Her brother kicked at the door of the shack/room whilst calling her name.[24] The appellant unlocked the door, and she managed to leave the room. The appellant then threw her shoes and cell phone at her. She was taken to the police station by her mother and two brothers whilst crying and in shock. She filed a case against the appellant, and a police officer recorded her statement. The police officer noticed that the complainant was bleeding and advised her to go home and return the following day.[25] Later that day, two female police officers arrived at her house and took her to the clinic. The J88 medical report documented bruises on the right side of the complainant's back, abrasions on both knees, a laceration on the upper lip and two hematomas on the complainant's head.[26]

The Regional Division of the Gauteng court convicted the appellant of kidnapping and sentenced him to 5 years imprisonment. The appellant was also convicted of rape and sentenced to life imprisonment. The finding that the rape involved grievous bodily harm brought the rape conviction squarely within the ambit of section 51(1), read with Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997 as set out above. The court *a quo* ordered all sentences to automatically run concurrently with the sentence of life imprisonment. The appellant subsequently appealed against his conviction and sentence to the high court by virtue of his automatic right to appeal the conviction and sentence, which right he

21 *Sithole v S* para 9.
22 Compare *Mthanti v The State* (859/2022) [2024] ZASCA 15 (8 February 2024) for similar facts.
23 *Sithole v S* para 10.
24 *Sithole v S* para 11.
25 *Sithole v S* para 12.
26 *Sithole v S* para 13.

derived from section 309(1)(a) of the *Criminal Procedure Act* 51 of 1977 (as amended).

4 Facts in *Masango v S*

The appellant was convicted on a charge of rape in contravention of section 3 of the *Criminal Law* (*Sexual Offences and Related Matters*) *Amendment Act* 32 of 2007. The appellant, although a major, was not advanced in years. The complainant was 14 years old at the time.[27] The trial court sentenced the appellant to life imprisonment under section 51(1), read with Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997. The appellant subsequently appealed this conviction and sentence.

The complainant's evidence that she was raped by the appellant was corroborated by a medical doctor, who confirmed that the complainant had had sexual intercourse that caused bruising and that her jersey had been torn. The complainant testified that she had been abducted by the appellant, and this was corroborated by her mother.[28] The complainant's testimony that the appellant raped her was also corroborated by her mother, who testified that she (the complainant's mother) approached the appellant's mother and the appellant the next morning and confronted them both. The complainant's mother testified that she visited the accused's home on the morning following the event and that she had seen a knife, empty alcohol bottles and handcuffs in the accused's room. When she confronted the accused, he apologised and stated that he was sorry for the incident but that he was drunk at the time. This was never disputed when the witness was cross-examined. The accused confirmed in his evidence in chief that the complainant's mother visited his homestead, although he then said that she came only to the gate. In these circumstances, the failure to challenge in cross-examination the evidence that she had spoken to him and that he had acknowledged the incident and apologised had consequences. It is trite that a failure to challenge the evidence of a witness on a particular issue in cross-examination may affect the findings of the court on that issue.[29] The fact that the complainant was 14 years old at the time of the rape brought the rape conviction squarely within the ambit of section 51(1), read with Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997 as set out above.[30]

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27 Compare *Van Rooy v S* (CA & R 57/2022) [2024] ZANCHC 50 (24 May 2024), where the victim was 11 years old.

28 *Masango v S* (A175/2021) [2024] ZAGPPHC 64 (5 February 2024) (hereafter *Masango v S*) para 7.

29 *Masango v S* para 7; also see Chaskalson P in *President of the RSA v South African Rugby Football Union* 2000 1 SA 1 (CC) para 61.

30 Also see *Mokwele v S* (A34/2021) [2024] ZAGPPHC 51 (22 January 2024), where the complainant was a 12-year old girl; *Faniswa v S* (A111/2023) [2024] ZAFSHC

5 Facts in *Nyathi v S*

The complainant, aged 25 at the time of sentencing, testified that the incident occurred at a local tavern at or near Olievenhoutbosch in Pretoria, where she was selling chips. It must be inferred from the facts that the complainant was an adult woman. At about 23:30, a group of 12 to 14 armed individuals entered the tavern, ordered everyone to lie down and proceeded to search the patrons for money and valuables. The complainant was also subjected to a search and thereafter taken from the tavern by two armed individuals. The complainant identified these individuals as the first and second appellant, respectively.[31] She asserted that the first appellant handed a firearm to the second appellant, who then brandished the firearm while the first appellant raped her. Subsequently, the first appellant took control of the firearm while the second appellant raped her.

The complainant testified that she had had R210 in cash in her possession that was taken from her when she was searched in the tavern. She further testified that five months after the incident, she participated in an identification parade and was able to identify the first and second appellants. She identified the first appellant due to a small scar below his right eye, and she recognised the second appellant as the youngest among the robbers.[32] She stated that even though the incident occurred at night, she concentrated on the appellants' faces during their interaction, and she believed she could accurately describe them if asked. Members of the South African Police Service (SAPS), who subsequently arrested the appellants and accompanied the complainant to the identification parade, corroborated the complainant's evidence.[33]

A captain who is stationed at the forensic lab in the SAPS indicated that they discovered the DNA of the second appellant in the swab taken from the complainant. The witness clarified that DNA is found exclusively in sperm and not in semen and also confirmed that not all semen contains sperm.[34] The fact that the complainant was raped by a co-perpetrator brought the rape conviction squarely within the ambit of section 51(1) read with Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997

71 (12 March 2024), where the complainant was a 9-year old girl; and *JSG v S* (CA 52/22) [2024] ZANWHC 71 (12 March 2024), where the complainant was the 12-year old daughter of the appellant.

31 *Nyathi v S* (A133/2020) [2024] ZAGPPHC 121 (6 February 2024) (hereafter *Nyathi v S*) para 5.

32 *Nyathi v S* para 5.

33 *Nyathi v S* para 6.

34 *Nyathi v S* para 7.

as set out above. The appeal against the sentence was, therefore, unsuccessful and the sentence of life imprisonment was confirmed.[35]

6 Discussion

It is common cause that sentencing is the trial court's prerogative, which should not lightly be interfered with.[36] In *Sithole v S,*[37] which was held in the North Gauteng High Court, Pretoria, Yende AJ (Van Der Westhuizen J concurring) referred with approval to what was stated by Zondi JA in *Ndou v S*, namely that

> sentencing is within the discretion of the sentencing court. An appeal court's power to interfere with sentences imposed by a trial court is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[38]

As mentioned already, the legislature mandated the imposition of life imprisonment in terms of section 51(1) of Act 105 of 1997, read with Part I of Schedule 2 upon conviction, unless in terms of section 51(3), substantial and compelling circumstances exist which necessitate the imposition of a lesser sentence than the prescribed sentence.[39]

No statutory definition of the phrase "substantial and compelling circumstances" that might justify a sentence less severe than that which it had prescribed exists. The lawmaker has left it to the courts to decide whether, in a particular case, such circumstances are present or absent on the facts before it. The mere fact that the severity of the prescribed sentence exceeds the severity of the sentence that but for the legislation the court would itself have regarded as appropriate having regard to the sentencing criteria usually applied by the sentencing court is not a "substantial and compelling circumstance" justifying a departure from the sentence prescribed by parliament. Having said that, the Supreme Court of Appeal (SCA) has confirmed that the circumstances that might justify imposing a lesser sentence than the prescribed sentence do include the mitigating factors traditionally taken into account by a sentencing court.[40]

For "substantial and compelling circumstances" to be found, the facts of the particular case must present some circumstance that is so exceptional in its

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35 *Nyathi v S* para 28.

36 In *S v Siebert* 1998 1 SACR 554 (A) 558i Olivier JA confirmed that sentencing is a judicial function *sui generis*.

37 *Sithole v S* para 32.

38 *Ndou v S* 2014 1 SACR 198 (SCA) para 21. Also see *Bogaards v S* (CCT 120/11) [2012] ZACC 23 (28 September 2012) 41.

39 This was echoed by Ackermann J in *S v Dodo* 2001 3 SA 382 (CC) para 1.

40 So stated by Lewis JA in *S v Sikhipha* (262/05) [2006] ZASCA 73 (30 May 2006) (hereafter *S v Sikhipha*) para 16.

nature and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case that it can rightly be described as "compelling" the conclusion that the imposition of a lesser sentence than that prescribed by parliament is justified. The SCA endorsed a similar approach in *S v Malgas* 2001, where Marais JA stated the following:

> On the other hand, it seems clear that those who have decried the suggestion that the exercise required involves no more than assessing what, but for the legislation, would have been an appropriate sentence and, if that should be anything less than the prescribed sentence, regarding that as sufficient justification for departure, are right. As they have pointed out, that approach would obviously represent a return to what I have called "business as usual" and no effect whatsoever would be given to the intention of the Legislature.[41]

The interpretation of the phrase "substantial and compelling circumstances" was met with approval by the court in *Director of Public Prosecution, Pretoria v Tsotesti,*[42] where Copper AJA referred to *Malgas,* where it was stated that even though "substantial and compelling" factors need not be exceptional, there must be truly convincing reasons or "weighty justification" for deviation from the prescribed sentence. Copper AJA held that the minimum sentence is not to be deviated from lightly and should ordinarily be imposed. This approach was also confirmed in *S v Dodo*[43] and explained in S *v Vilakazi.*[44] In *S v PB*[45] Bosielo JA (Brand JA, Heher JA, Malan JA and Pillay JA concurring), after stressing that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons, refused to interfere with a prescribed sentence of life imprisonment imposed on a father who had raped his 12-year-old daughter.

As explained above, the legislature mandated life imprisonment in terms of section 51(1) of Act 105 of 1997, read with Part I of Schedule 2 upon conviction, unless in terms of section 51(3) substantial and compelling circumstances exist which necessitate the imposition of a lesser sentence than the prescribed sentence. In terms of section 51(1) of Act 105 of 1997, read with Part I of Schedule 2, life imprisonment is mandated where the rape "involved the infliction of grievous bodily harm".

6.1 Sithole v S

The high court in *Sithole v S*'s critical analysis of what exactly constitutes "grievous bodily harm" constitutes a valuable piece of jurisprudence. In *Sithole v S* the appeal was directed against the court *a quo's* finding that the rape conviction involved the infliction of grievous bodily harm. The pertinent

41 *S v Malgas* (117/2000) [2001] ZASCA 30 (19 March 2001) para 17.
42 *Director of Public Prosecutions, Gauteng Division, Pretoria v Tsotetsi* (170/2017) [2017] ZASCA 83 (2 June 2017) para 27.
43 *S v Dodo* 2001 3 SA 382 (CC) para 11.
44 *S v Vilakazi* 2009 1 SACR 552 (SCA) para 14.
45 *S v PB* 2013 2 SACR 533 (SCA) para 24.

question for the high court to decide was, therefore, whether the court of first instance erred in its finding, having evaluated the evidence *in toto,* that the rape *in casu* involved the infliction of grievous bodily harm.[46] Yende AJ was consequently tasked to consider what constitutes grievous bodily harm. Whilst the term "involving the infliction of grievous bodily harm" is not defined in Act 105 of 1997, the court held that the ordinary meaning of "involving" and "grievous" must be given to the words and that the "infliction of grievous bodily harm" ought not to be equated with the offence of assault with the "intent to do grievous bodily harm", where mere intention is sufficient, as opposed to actual causation of grievous bodily harm.[47] Yende AJ referred with approval to the decision in *S v Tuswa,*[48] where it was held that the word "involving" means "to include something as a necessary part of an activity, event or situation".[49] Regarding the meaning of the word "grievous", Yende AJ referred to *Rabako v S,*[50] where Musi J also accords to the word its ordinary natural meaning, describing it as meaning "actually serious". In essence, if the injury inflicted by the accused on the body of the rape survivor is serious, then that amounts to the infliction of grievous bodily harm. It should not be a trivial or insignificant injury. Whether an injury is serious will depend on the facts and circumstances of every case.[51] In *Sithole v S*, Yende AJ concluded that the manner in which the complainant was attacked and assaulted by the appellant and thereafter sexually violated made the conduct of the appellant fit squarely with the explication provided in Act 105 of 1997 and that the minimum sentence applicable in the present matter in respect of the rape count was life imprisonment. (The court incorrectly made reference to "the *Minimum Sentence Act*, *Act* 32 of 2007"[52] instead of the *Criminal Law Amendment Act* 105 of 1997). The submission and argument by the appellant's counsel that the injuries sustained by the complaint were not grievous was accordingly rejected, and the sentence of life imprisonment was confirmed.[53]

6.2 Masango v S

The appellant in *Masango v S* was convicted in the court *a quo* of the rape of a 14-year-old girl who had turned 15 years shortly prior to the trial. The appellant submitted that the trial court had misdirected itself in relying solely on the complainant's evidence and claimed that there was little reliable corroboration regarding the perpetrator's identity. The appellant further

46 *Sithole v S* para 22.
47 *Sithole v S* para 23.
48 *S v Tuswa* 2013 2 SACR 269 (KZN) para 13.
49 Also see *Thole v S* (A138/2010) [2011] ZAFSHC 136 (30 August 2011) para 11.
50 *Rabako v S* (A234/2006) [2007] ZAFSHC 47 (7 June 2007) para 7.
51 *Sithole v S* para 24.
52 *Sithole v S* para 30.
53 *Sithole v S* para 37.

submitted that the trial court misdirected itself in finding that his version could not reasonably be possibly true. As for the sentence imposed, the appellant contended that the trial court misdirected itself in not finding that substantial and compelling circumstances existed that justified a lesser sentence.[54]

Van der Schyff J in the High Court of South Africa Gauteng Division, Pretoria was mindful of the fact that the complainant was youthful and that she testified in the court *a quo* after having taken the oath. The trial court held that a child of 14 years can be presumed to be able to distinguish between right and wrong and, concomitantly, between truth and falsehood.[55] The court referred to the decisions in *Nedzamba v S*[56] and also *S v V*[57] where the position as stated above was confirmed. He held that the capacity to understand the difference between truth and falsehood is a prerequisite for taking the oath. In *S v B*[58] and *Director of Public Prosecution, KwaZulu-Natal v Mekka*[59] it was established that a formal inquiry to determine whether a child witness understands the oath need not be undertaken. In *Mekka*, the court found it appropriate for the trial court to assume that a nine-year-old child did not understand the nature and importance of the oath.[60] A presiding officer might thus conclude that a child would not understand the oath based on the child's youthfulness.

In *S v Gallant*,[61] where the witness was 11 years old, a full bench of the Eastern Cape Division held that there had been no reason for a departure from administering the prescribed oath and resorting to an admonition in terms of section 164 of the *Criminal Procedure Act*, even in the case of a relatively young complainant. In *S v Sikhipha*[62] the SCA held that 14 years was regarded as sufficiently old to presume an understanding of the oath, and an inquiry was not deemed necessary.[63] Van der Schyff J consequently held that the complainant's competence to testify was reinforced and substantiated by the manner in which she gave evidence and that no reasons existed to interfere with the conviction.[64]

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54 *Masango v S* para 2.
55 *Masango v S* para 17.
56 *Nedzamba v S* (911/2012) [2013] ZASCA 69 (27 May 2013) para 26.
57 *S v V* 1998 2 SACR 651 (CPD) 652H.
58 *S v B* 2003 1 SACR 52 (SCA) para 15.
59 *Director of Public Prosecutions Kwazulu-Natal v Mekka* (57/2002) [2003] ZASCA 17 (26 March 2003) para 7.
60 *Director of Public Prosecutions Kwazulu-Natal v Mekka* (57/2002) [2003] ZASCA 17 (26 March 2003) para 12.
61 *S v Gallant* (CA&R 69/06) [2007] ZAECHC 64 (19 July 2007) para 15.
62 *S v Sikhipha* para 13.
63 Also see *S v Stefaans* 1999 1 SACR 182 (K) 185i.
64 *Masango v S* para para 25.

As far as the sentence of life imprisonment was concerned, the court made reference to the SCA's decision in *Sikhipha*[65] where it was held that the circumstances that might justify imposing a lesser sentence included the mitigating factors traditionally taken into account in sentencing. These must then be weighed together with aggravating circumstances but need not be "exceptional". Van der Schyff J concluded that the presiding officer had committed a serious misdirection in failing to have regard to the relevant mitigating factors.[66] The appellant, although a major, was not advanced in years. By accepting the evidence of the complainant's mother, the court *a quo* wrongly accepted that alcohol had played a role in the commissioning of the crime. The appellant was a first offender who was his family's primary breadwinner. He had attained only a low level of education, leaving school after having completed grade 7. Before the incident occurred, he had actively been involved in the Apostolic Faith Mission Church and served as the church's secretary. He had spent more than a year in custody awaiting trial. After considering the pre-sentence report, Van der Schyff J was of the view that the appellant's personal circumstances indicated that he was capable of rehabilitation. The sentence of life imprisonment was, therefore, set aside. Van der Schyff J then considered an appropriate sentence, mindful of the prescribed minimum sentence the legislature deemed appropriate for the rape of a child under 16 years, namely life imprisonment.

Considering the triad in *S v Zinn* 1969 2 SA 537 (A) and the objectives of sentencing, the court was of the view that a lengthy sentence of imprisonment was appropriate. A period of 20 years' imprisonment was thought to send a message to the community that rape would be visited with severe punishment. Van der Schyff J held that such a sentence would deter prospective rapists, acknowledging the period for which the accused had already been incarcerated. In addition, the appellant was ordered to attend a rehabilitation programme for sexual offenders. A portion of his sentence might be suspended if he successfully completed a programme for sexual offenders. The court concluded that suspending a portion of the sentence subject to the imposed conditions would have a rehabilitative and deterrent effect.[67]

This decision by Van der Schyff J in *Masango v S* is consistent with that in *S v Sikhipha*. In the latter case Lewis JA (Scott JA and Van Heerden JA concurring) held that the trial court had misunderstood what is meant by "substantial and compelling circumstance". In *S v Sikhipha* Lewis JA referred to the decision in *S v Malgas,* where the court held that in

65 *S v Sikhipha* para 16.
66 *Masango v S* para 27.
67 *Masango v S* para 28.

determining whether there are substantial and compelling circumstances, a court must be

> conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. It is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those factors traditionally taken into account in sentencing as mitigating factors.[68]

These must be weighed together with the aggravating factors, but none of these circumstances need to be "exceptional".[69] Lewis JA concluded:

> The sentence of life imprisonment required by the legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover, the mitigating factors are not speculative or flimsy. In my view, life imprisonment is not a just sentence for the appellant. However, a lengthy sentence of imprisonment is warranted. I consider that a period of 20 years' imprisonment will send a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message.[70]

6.3 Nyathi v S

The appellants in *Nyathi v S* were convicted of rape as co-perpetrators, and this brought the rape conviction squarely within the ambit of section 51(1) read with Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997 as explained above. The first appellant testified in his own defense. He attempted to refute the charges by providing an alibi, claiming that he was with his pregnant girlfriend at the time of the incident. He acknowledged the presence of a scar on his face, which he has had for several years. He confirmed that he was acquainted with the second appellant as they resided in the same yard. Notably, when the first appellant was arrested, he had never mentioned or made any statement regarding his alibi, and he had closed his case without calling any witnesses.[71] The second appellant admitted to engaging in sexual intercourse with the complainant but, in his defence, claimed that three individuals armed with firearms coerced him into this act. The second appellant did not provide any details regarding the individuals involved in the alleged coercion. Similarly, he had also never mentioned the alleged coercion when he was arrested and had chosen not to provide any plea explanation.[72] In *Nyathi v S,* which took place in the North Gauteng High Court, Pretoria, Coetzee AJ (Van der Westhuizen, J concurring) correctly held that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct

68 *S v Sikhipha* para 16.
69 *S v Sikhipha* para 16.
70 *S v Sikhipha* para 19.
71 *Nyathi v S* para 9.
72 *Nyathi v S* para 10.

and will be disregarded only if the recorded evidence shows them to be clearly wrong.[73] In assessing whether the trial court was correct in its determination, the evidence presented by the State was weighed against that of the first and second appellant in order to ascertain if their version could reasonably be deemed possibly true.[74] The trial considered the entirety of the evidence before arriving at a decision and determined that the complainant left a strong impression. The court found her testimony to be satisfactory and that she had responded to all of the questions posed by both the State and the defence. The trial court was convinced that she had come to court with the intention of being truthful and that she had indeed demonstrated this during her testimony. The complainant was further very specific with her evidence, and, as a result, the court deemed her a credible witness and accepted her evidence.[75] On the other hand, the court concluded that neither the first nor the second appellant had left a favourable impression.[76]

In considering sentencing and the presence of compelling and substantial circumstances, the court in *Nyathi v S* assumed a startlingly different approach to the court in *Masango v S* discussed above.

On behalf of the first appellant, it was argued that the trial court had erred in failing to find significant and compelling reasons to depart from the minimum prescribed sentence of life imprisonment. The first appellant, who had been 25 years old at the time of sentencing, had become a father while in prison. His relationship with the child's mother had ended following his arrest. He had had a challenging upbringing and had come to South Africa from Zimbabwe in pursuit of a better life. Furthermore, he had no prior criminal record. It was contended that the absence of physical injuries to the complainant and the potential for rehabilitation constituted significant and compelling factors to deviate from the prescribed minimum sentence.[77] On behalf of the second appellant, it was argued that he was 23 years old at the time of sentencing, having been 18 years old at the time of the rape. He was unmarried and without children, similarly, coming to South Africa in pursuit of a better life due to the challenging circumstances in Zimbabwe. As he was a first-time offender, it was contended that substantial and compelling factors existed, including his youth, as corroborated by the complainant's testimony regarding his comparatively youthful age within the group, suggesting that there may have been potential influence from others.

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73 *Nyathi v S* para 12; also see *S v Hadebe* (298/94) [1997] ZASCA 86 (29 September 1997) para 13; *S v Monyane* (160/01) [2006] ZASCA 113 (23 November 2006) para 15; *S v Francis* (95/89) [1990] ZASCA 141 [(26 November 1990) para 19.

74 *Nyathi v S* para 14.

75 *Nyathi v S* para 15.

76 *Nyathi v S* para 16.

77 *Nyathi v S* para 20.

His clean record and extended time spent in custody awaiting trial, approximately five years, were emphasised as deserving consideration as significant circumstances.[78] Conversely, counsel on behalf of the State contended that the trial court had duly considered the factors normally considered for the purposes of sentence and that no significant and compelling reasons had been presented to warrant deviation from the prescribed minimum sentence. The only potential mitigating factor, according to the State, was the extended period of five years awaiting trial.[79]

Coetzee AJ in *Nyathi v S* afforded due weight to the statement in *Malgas*, namely that a court should not lightly impose a sentence lower than the prescribed minimum sentence. In line with the criteria outlined in *Malgas*, it was apparent that a comprehensive analysis of the mitigating and aggravating factors is essential to determine the presence of substantial and compelling circumstances.[80]

With regard to the first appellant, Coetzee AJ found no significant and compelling circumstances in either his personal background or the potential for rehabilitation. Contrary to what had been stated in *Masango v* S, Coetzee AJ did not consider the lack of physical injuries to the complainant as a mitigating factor. The nature of the first appellant's crime was found to be "callous and likely to inflict lasting emotional harm upon the complainant, despite the absence of physical injuries".[81] As for the second appellant, Coetzee AJ similarly found no substantial and compelling circumstances. Contrary to what had been stated in *Masango v S*, Coetzee AJ held that merely being of a young age was not adequate to be considered a mitigating factor. The second appellant, moreover, appeared to have no remorse for his actions.[82] The sentences were also not found to be disturbingly inappropriate given the circumstances and the appeal against the conviction and sentence was unsuccessful.[83]

7 Conclusion

The transition of South Africa into a new democracy came with a notable increase in the number of violent crimes.[84] In an attempt to curb this escalation and to protect society, parliament adopted new legislation which introduced the concept of mandatory minimum sentences in our law. The enactment of section 51 of the *Criminal Law Amendment Act* 105 of 1997 was a significant step. While mandatory minimum sentencing was originally

78 *Nyathi v S* para 21.
79 *Nyathi v S* para 22.
80 *Nyathi v S* para 24.
81 *Nyathi v S* para 25.
82 *Nyathi v S* para 26.
83 *Nyathi v S* para 28.
84 Snyman *Criminal Law* 14.

intended to be a temporary fixture, the provisions are in force until expressly abolished. Section 51(1)(a) of Act 105 of 1997 provides that a high court shall sentence a person who has been convicted of a crime referred to in Part I of Schedule 2 of the Act to imprisonment for life. The Act applies to adult offenders only, and only presiding officers of the high court and regional court may impose these sentences.

The Act stipulates that a sentencing court may impose a lesser sentence only if it is satisfied that "substantial and compelling circumstances" exist which justify it. Parliament has not indicated what is meant by the phrase "substantial and compelling circumstances" that might justify a sentence less severe than that which it had prescribed. It has been left to the courts to decide whether, in a particular case, such circumstances are present or absent. An overview of recent case law demonstrates that courts are still not *ad idem* on what exactly constitutes substantial and compelling circumstances. Relative youthfulness was accepted as a mitigating factor in *Masango v S*,[85] where the court stated, "[i]n my view, the presiding officer committed a serious misdirection in failing to have regard to the following mitigating factors, the appellant, although a major, was not advanced in years". In *Nyathi v S*,[86] on the contrary, the court held that merely being of a young age is not adequate to be considered a mitigating factor.

In *Sithole v S* the high court stated that the "infliction of grievous bodily harm" ought not to be equated with the offence of assault with the "intent to do grievous bodily harm", where mere intention is sufficient, as opposed to the actual causation of grievous bodily harm. It is submitted that the flipside of the coin, namely whether the absence of physical injuries to the victim constitutes a mitigating factor in sentencing, has, unfortunately, not been resolved. It is argued that the role of physical injuries to the victim in the sentencing of rape constitutes a viable topic for further research. While the appeal court in *S v Sikhipha*[87] accepted the absence of physical injuries to the complainant as a mitigating factor, Coetzee AJ in *Nyathi v S*[88] emphatically stated that he does not consider the lack of physical injuries to the complainant as a mitigation factor. This is clearly an issue that invites further research.

The devastating impact of sexual violence on victims is well documented.[89] In *Maila v S*[90] the court stated that "sexual violence victims often experience a profound sense of shame, stigma and violation". On 5 April 2022 the

85 *Masango v S* para 27.
86 *Nyathi v S* para 26.
87 *S v Sikhipha* para 18.
88 *Nyathi v S* para 25.
89 Compare, generally, Le Roux-Bouwer 2023 *SALJ* 1-16.
90 *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023) para 28.

Constitutional Court condemned "the horrific reality that this country has for far too long been, and continues to be, plagued by a scourge of gender-based violence to a degree that few countries in the world can compare" (Tlaletsi AJ (Khampepe J, Madlanga J, Majiedt J, Mhlantla J and Theron J concurring) in *AK v Minister of Police.*[91] Given the fact that sexual violence is a degrading, humiliating and brutal invasion of the security of the person, it is submitted that a rape victim is most often left with psychological injuries that are far more serious and difficult to detect than physical injuries. It is therefore submitted that the absence of physical injuries should not be afforded too much weight as a mitigating factor in sentencing.

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List of Abbreviations

SALJ	South African Law Journal
SAMJ	South African Medical Journal
SAPS	South African Police Service
SCA	Supreme Court of Appeal
PELJ	Potchefstroom Electronic Law Journal