

# **“SUBSTANTIAL AND COMPELLING CIRCUMSTANCES” IN RAPE CASES**



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## **How have courts defined “substantial and compelling circumstances” in rape cases allowing for a deviation from the minimum sentences as prescribed by the *Combating of Rape Act 8 of 2000*?**

### **A. SUMMARY**

The approach taken by the South African Supreme Court of Appeal in *S v Malgas* 2001 (2) SA 1222 (SCA) and adopted by Namibian courts in *S v Lopez* 2003 NR 162 (HC) continues to be the approach adopted by Namibian courts. The key factors based on the *Lopez* case are:

- Courts should approach the imposition of sentence conscious that the legislature has prescribed minimum sentences which should be imposed in the absence of “weight justification” and “truly convincing reasons for a different response”.
- The specified sentences are not to be departed from “lightly and for flimsy reasons”. The court should not consider “speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders”.
- All other factors traditionally taken into account in sentencing can be taken into account, to see if they “cumulatively justify a departure from the standardised response that the legislature has ordained”.
- “If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”
- The court must take account of the fact that rape has been singled out for severe punishment and any sentence which departs from the prescribed minimum “should be assessed paying due regard to the bench mark which the legislature has provided”

Where an accused has no legal representation, the *Guirirab* case held that the court is expected to take special care to explain the sentencing framework and assist the accused:

- The accused should be informed which provisions of the Act are applicable for purposes of a specific minimum prescribed sentence and on which specific facts the State relies for that purpose.
- The coercive circumstances under which the accused has been found guilty should be mentioned and explained, and the accused should be informed of the minimum sentence which will apply if the court fails to find that substantial and compelling circumstances exist which would justify a lesser sentence.

- It must be explained to the accused that if the court is satisfied that his particular circumstances render the minimum prescribed sentence unjust, in that it would be disproportionate to the crime, the accused's personal circumstances and the needs of society (so that an injustice would be done by imposing the minimum prescribed period), the court will be entitled to impose a lesser sentence.
- It must be explained to the accused that the court must take into account that this particular crime has been singled out by the legislature for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, but that the court will take into consideration all facts and factors the accused will advance in order for the court to come to a just conclusion.
- As usual, it must be pointed out that the accused may make statements from the dock, or that he may testify under oath. If he testifies under oath the State will be again entitled to cross-examine him, but more weight may be attached to what he says under oath. It should also be emphasized that he may call witnesses to testify on his behalf.
- The court must assist the accused during the sentencing process. If the presiding officer is aware of any reasons why the minimum prescribed sentence should not be imposed based on the evidence led at the trial, he or she should inform the State of this and give the parties opportunity to address the court on these issues.

Factors which have been considered in case law to date as part of the totality of factors which can constitute substantial and compelling circumstances include:

- the offender's personal circumstances (*Lopez*)
- the type of coercion used and the surrounding circumstances (*Lopez*)
- the previous relationship between the complainant and the offender (a controversial factor cited in *Lopez*, which involved marital rape by an estranged spouse)
- the degree of force used (*Limbare*)
- evidence of the victim's injuries (*Limbare*)
- time spent in pre-trial custody (*Limbare*)
- the offender's youthfulness (*G & G*).

There is no requirement that the circumstances considered must be "special" or "exceptional". The "normal" circumstances usually considered by the sentencing court as part of the process of arriving at an appropriate sentence may be taken into account to see if they cumulatively constitute substantial and compelling circumstances (*Limbare*).

Commentators have warned about the dangers of misinterpretation of "substantial and compelling circumstances" in rape cases. Namibian courts should similarly avoid relying on discredited stereotypes about rape in the context of sentencing. Factors which should be treated with particular caution include:

- evidence of the character of the complainant
- past sexual conduct or experience of the complainant
- sexual reputation of the complainant.

## B. DISCUSSION

### Legislation

Section 3 of the *Combating of Rape Act* prescribes minimum sentences based on the circumstances of the rape and the offender. Those minimums are not absolute.

Section 3 (2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

Thus, courts must impose at least the appropriate minimum sentence, unless they find “substantial and compelling circumstances” which warrant a sentence below the prescribed minimum. The court must enter those circumstances on the record.

As the legislature has not defined “substantial and compelling circumstances”, it has been up to the courts to do so.

### Case law

**a) The South African Supreme Court of Appeal set out an approach to the interpretation of “substantial and compelling circumstances” in the *Malgas* case, which was adopted by the Namibian High Court in the 2003 *Lopez* case.**

*S v Lopez*, 2003 NR 162 (HC)

*S v Malgas*, 2001 (2) SA 1222 (SCA)

In *S v Lopez* 2003 NR 162 (HC) the Namibian court discussed the definition of “substantial and compelling circumstances”, relying heavily on a decision of the South African Supreme Court of Appeal, *S v Malgas* 2001 (2) SA 1222 (SCA).

In *Lopez*, the accused had been convicted of kidnapping and raping his wife and sentenced to the 10 year minimum. The rape occurred during the context of the unlawful detention, thus amounting to “coercive circumstances” leading to a conviction for rape. The accused was subject to the 10-year minimum due to the fact that the rape occurred within the context of an unlawful detention. The accused appealed his sentence, arguing there were substantial and compelling circumstances in his case.

In its decision, the High Court of Namibia quotes liberally from *Malgas*. In *Malgas*, the accused was convicted of murder and subject to a minimum of life imprisonment unless there were “substantial and compelling circumstances” justifying a lesser sentence.<sup>1</sup>

The approach to identifying “substantial and compelling circumstances” is summarised in *Malgas* as follows:

- A Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of

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<sup>1</sup> See sections 51 and 53 of the South African *Criminal Law Amendment Act* 105 of 1997.

- imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
  - D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between cooffenders are to be excluded.
  - E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
  - F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
  - G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.
  - H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
  - J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.<sup>2</sup>

In seeking to define such circumstances, the South African Supreme Court of Appeal in *Malgas* noted that in setting out minimums “the legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response”.<sup>3</sup>

As the South African legislation also requires that the court make note of any reasons for departing from the minimum, the *Malgas* case concludes:

The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.<sup>4</sup>

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<sup>2</sup> *Malgas* at paragraph 25.

<sup>3</sup> *Malgas* at paragraph 8, quoted at 172F in *Lopez*.

<sup>4</sup> *Malgas* at paragraph 9, quoted at 172I in *Lopez*.

In *Malgas*, the court found that the prescribed sentences are “generally appropriate” and the courts must not depart from them unless they are satisfied that there is weighty justification to do so.<sup>5</sup> The court concluded that a court is expected to take into account all the mitigating factors that it would normally consider in respect of sentencing, including the crime, the criminal and the needs of society, and weigh them all in determining whether the minimum sentence is disproportionate and therefore unjust. In making this determination the court must keep in mind that the Legislature has set out these minimums as a bench mark.

In the *Lopez* case, after considering the offender’s personal circumstances combined with the facts of the rape, the court found there were substantial and compelling circumstances necessitating a reduction of the sentence to 5 years imprisonment.

The *Malgas* approach adopted for Namibia by the *Lopez* case, contrasts to an alternative view put forward in South Africa in the case of *S v Mofokeng* [1999] JOL 5403 (W), which held that “substantial and compelling circumstances” should be limited to circumstances “of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes”.<sup>6</sup>

**b) In the *Dodo* case, the South African Constitutional Court confirmed the approach taken in the *Malgas* case.**

***S v Dodo*, 2001 (3) SA 382 (CC)**

The procedure in *Malgas* has been adopted by the Constitutional Court of South Africa in *S v Dodo*. In that case the court was asked to decide whether the South African legislation setting out minimums for certain offences in the absence of “substantial and compelling” circumstances was constitutional. The Court referred to passages in the *Malgas* decision and adopted its approach.

**c) The Namibian High Court elaborated on the implications of the *Malgas/Lopez* approach for an unrepresented accused in the *Guirirab* case.**

***S v Guirirab*, 2005 NR 510 (HC)**

This case adopts the approach to substantial and compelling circumstances as outlined in *Lopez* and *Malgas*. It then discusses the constitutional right to a fair trial for a self-represented accused facing these minimums at the sentencing stage.

The accused was convicted of raping a 13-year-old girl and sentenced to 16 years. The minimum sentence would have been 5 years. Before passing sentence on him, the magistrate invited him to address the court in mitigation but without explaining the concept of “substantial and compelling circumstances”. The accused appealed his sentence.

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<sup>5</sup> *Malgas* at paragraph 18.

<sup>6</sup> *Mofokeng* at 35.

The High Court found that the accused's right to a fair trial pursuant to Article 12 of the Namibian Constitution had not been met, as the correct approach to sentencing had not been explained to him.

The High Court set out guidelines for magistrates and judges in dealing with self-represented accused in these circumstances:

1. at least after the accused has been convicted, the accused should be informed which provisions of the Act are applicable for purposes of a specific minimum prescribed sentence and on which specific facts the State relies for that purpose;
2. at least, the following should then be stated to the accused:
  - 2.1 it must be pointed out to the accused that as a result of the fact that he had been found guilty of the offence of rape under coercive circumstances (the coercive circumstances must be mentioned and explained) and that unless the court finds that substantial and compelling circumstances exist, which would justify the court to impose a lesser sentence, the court will have to impose at least a period of imprisonment of (the term of this minimum imprisonment period must be specified);
  - 2.2 it must be explained to the accused that if the court is satisfied that his particular circumstances render the minimum prescribed sentence unjust, in that it would be disproportionate to the crime, the accused's personal circumstances and the needs of society (so that an injustice would be done by imposing the minimum prescribed period), the court will be entitled to impose a lesser sentence;
  - 2.3 it must be explained to the accused that the court must take into account that this particular crime has been singled out by the Legislator for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, but that the court will take into consideration all facts and factors the accused will advance in order for the court to come to a just conclusion. As usual, it must be pointed out that the accused may make statements from the dock, or that he may testify under oath. If he testifies under oath the State will be again entitled to cross-examine him, but more weight may be attached to what he says under oath. It should also be emphasized that he may call witnesses to testify on his behalf;
  - 2.4 it is also imperative that the accused be assisted during this process. If the magistrate is aware of any reasons why the minimum prescribed sentence should not be imposed (which came to his knowledge as a result of the evidence led at the trial) he should inform the State about that, and give the parties opportunity to address him on such an issue.<sup>7</sup>

The case was referred back to the original magistrate for sentencing in accordance with these guidelines.

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<sup>7</sup> *Guirirab* at 518.

**d) The *Limbare* case pointed out that the court should request information or investigate on its own when counsel for an accused does not address the issue of whether or not there are substantial and compelling circumstances.**

***S v Limbare*, CA 128/05 (HC), 16 June 2006**

The usual factors that a court weighs when coming to a conclusion about sentencing in any case are also factors a court should consider when deciding whether or not there are substantial and compelling circumstances present. As well, even if an accused is represented by counsel, the court has a duty to address the issue of substantial

The accused was convicted of raping his neighbour using physical force and was sentenced to the 10-year minimum. At sentencing, the accused's lawyer made few submissions about the accused's personal circumstances and indicated he felt it had little bearing on the matter. The prosecutor's submission amounted to an indication that the minimum was 5 years. The magistrate's judgment was equally brief.

The accused appealed to the High Court. The Court's decision is critical of the brevity of the sentencing phase. While critical of the defence for not putting circumstances before the court, it notes: "However, it remains the ultimate duty of the sentencing officer to consider whether there are substantial and compelling circumstances."<sup>8</sup> The sentencing court has a duty to investigate the matter itself.

It is further not required that the circumstances must be "special" or "exceptional". It also does not mean that the "normal" circumstances which are usually considered by the sentencing court as part of the process of arriving at an appropriate sentence, such as the personal circumstances of the offender, e.g. his age, education, employment and family circumstances, must be excluded or ignored because they are the "usual" circumstances that one encounters in most cases. They are relevant and must be taken into consideration to be weighed cumulatively with all the other factors in order to decide whether there are substantial and compelling circumstances or not.<sup>9</sup>

The court felt that the magistrate should have taken into consideration the following factors: the small degree of force used, the fact that there was contradictory evidence about the victim's injuries and the 11 months the accused had spent in pre-trial custody. The matter was remitted back to the magistrate for sentencing with instructions that the magistrate must explain the legislation and how to present evidence on sentencing to the accused regardless of whether he is represented.

**e) In the *S v G & G* case, the High Court held that the *Gurirab* procedure for informing the accused about "substantial and compelling circumstances" applies only to self-represented accused and not to those represented by legal counsel.**

***S v G & G*, CA 61/2008 (HC), 10 October 2008<sup>10</sup>**

The two accused in this case pled guilty to housebreaking and rape and received 15 years each. The first accused was 16 years old at the time and not subject to the minimum. They

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<sup>8</sup> *Limbare* at paragraph 11.

<sup>9</sup> *Limbare* at paragraph 9.

<sup>10</sup> Because the two accused were minors, their surnames are not publishable.



appealed against conviction and sentence. The issue on the sentence appeal was whether they were properly informed that they might adduce evidence of substantial and compelling circumstances, relying on *Guirirab*, despite the fact that both were represented by counsel at their original hearing.

The court interpreted the duties of a magistrate as outlined in *Guirirab* as only applying to cases involving unrepresented accuseds. The *Limbare* case is mentioned but not followed and it was not argued before the court.

Despite this finding, the Court continued with its review of the circumstances of this case, finding that the magistrate had relied on facts that were not present in sentencing the 16-year-old offender. The Court also found that the youthfulness of the other offender, who was 18 years old at the time of the crime, was a serious mitigating factor: “However, youthfulness of an offender is a mitigating factor which weighs heavily with the Court in its determination of substantial and compelling circumstances.”<sup>11</sup>

In weighing the aggravating factors, the court wrote: “Gang rape is, by its nature, an aggravating factor.”<sup>12</sup>

After weighing all the factors, the court imposed revised sentences for both accused of 15 years, with 5 years suspended on the condition that each accused not be convicted of rape or attempted rape during that period. The differences between *G and G* and *Limbare* are subtle. *G and G* imposes a duty on a magistrate to inform only an unrepresented accused about “substantial and compelling circumstances.”<sup>13</sup> *Limbare* does not say there is a duty to inform a represented accused about the meaning of “substantial and compelling circumstance” but rather that a judge must consider the issue. If it is not addressed by counsel, the judge must point that out to counsel and investigate if necessary.

**f) The *AK* case discussed aggravating and mitigating factors in rape cases in respect of sentences which do not go below the prescribed minimum.**

***S v AK*, CA 19/04 (HC), 2 November 2005**

The court may impose a sentence longer than the minimum and take into account a particular trauma suffered by a victim.

In this case, the accused was convicted of repeatedly raping his 13-year-old stepdaughter who eventually became pregnant and gave birth to a stillborn child. The minimum for this offence was 15 years and the magistrate sentenced him to 20 years, citing as aggravating the fact that the abuse was repeated and the effect the crime would have on the victim’s future.

The accused appealed against conviction and sentence. The defence argued on the appeal against sentence that the sentence imposed was excessive and shocking. They submitted that the legislature had already taken the aggravating circumstances of the trauma of rape and

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<sup>11</sup> *G & G* at paragraph 10.

<sup>12</sup> *G & G* at paragraph 11.

<sup>13</sup> *G & G* at paragraph 7.

risk of pregnancy into account by legislating a 15-year minimum and that the magistrate should not have gone above that amount in the absence of other aggravating factors.

The High Court disagreed, finding that the courts have discretion to impose a longer sentence and take into account a particular trauma suffered in a case.

In this case, the court then examined the factors the magistrate weighed in coming to his decision and concluded that he had not sufficiently taken into account the two years pre-trial custody served by the accused. The court felt that a sentence of 17 years was more appropriate given that the force used was not considerable, there were no weapons used and no injuries to the complainant. The sentence was varied to 15 years.

**g) In the 2008 *Vilakazi* case, the South African Supreme Court of Appeal again confirmed the *Malgas* approach which is being followed in Namibia.**

***Vilakazi v S*, (576/07) [2008] ZASCA 87 (2 September 2008)**

In *Vilakazi*, the Supreme Court of Appeal of South Africa reiterates that the *Malgas* decision is still applicable. Issues surrounding the constitutionality of the legislation are also explored.

The accused was convicted of raping a girl under the age of 16 and was given the minimum sentence under South African law which is life imprisonment. The Supreme Court of Appeal is quite critical of the severity of the legislation in its judgment. The minimums in Namibia are not so severe and it is important when reading this case to keep in mind the legislative context in South Africa, where the minimum sentences for rape start at 10 years and go up to life imprisonment. The court confirms that the approach taken in *Malgas* and confirmed in *Dodo* is still the correct approach. At paragraph 15:

It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.<sup>14</sup>

The test for proportionality is emphasised as important to maintain the constitutional validity of the legislation.

The court found life imprisonment to be disproportionate and sentenced the accused to 15 years with two years to be deducted for the time he spent in custody awaiting trial.

**h) Commentators have warned about the dangers of misinterpretation of “substantial and compelling circumstances” in rape cases. Namibian courts should similarly avoid relying on discredited stereotypes about rape in the context of sentencing.**

In South Africa, it has been argued that some courts misunderstand the nature of rape when approaching the issue of substantial and compelling circumstances. It has been noted that rape is a crime of inherent violence which causes harm to its victims, regardless of any additional physical injury which the victim may sustain.

It is argued, in this regard, that the practice of justifying a departure from the mandatory sentence has created a jurisprudence that minimizes the inherent violence of rape and creates

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<sup>14</sup> *Vilakazi* at paragraph 15.

a false distinction between rape and rape that causes physical injury. This approach perpetuates ‘mythical rape paradigms’, suggesting that ‘mere’ rape is not violent. This has long-term negative effects on sentencing, as courts fail to recognize and adequately punish crimes of rape unless other specific acts of violence – over and above the violence inherent in rape itself – have also been perpetrated.<sup>15</sup>

In South Africa, it has also been argued that some courts consider irrelevant factors, such as victim’s appearance or the previous relationship between the victim and accused:<sup>16</sup>

Presiding officers have different perceptions of the seriousness of rape. These have led to divergent and inconsistent interpretations of “substantial and compelling circumstances” which have been widely criticised for how they have minimised the harm of rape. This minimisation has occurred because of an unwarranted emphasis on, for example: the previous sexual history of the complainant; an accused’s cultural beliefs about sexual assault; an accused’s use of intoxicating substances prior to the assault; an accused’s lack of intention to cause harm to the complainant in committing the rape; a lack of education, sophistication or a disadvantaged background of the accused; a lack of “excessive force” used to perpetrate the rape; a lack or apparent lack of physical harm to the complainant; a lack or apparent lack of psychological harm to the complainant; or any relationship between the accused and the complainant prior to the offence being committed (including a consensual sexual relationship).

In giving undue weight to these factors and treating them as “substantial and compelling circumstances” to mitigate sentence, presiding officers are minimising the harm of rape and also downplaying... the moral reprehensibility of the crime.

Sexual violence, whether occurring at the hands of strangers or those known to victims, can have profound physical, emotional, relational and behavioural consequences. These traumatic incidents may be completely overwhelming and undermine individuals’ ability to cope with their world. Many victims/survivors live for years with the after-effects of sexual violence, and although often outwardly able to cope with the demands of daily living, the effects can be so pervasive that they permeate all aspects of life, sense of self, intimate relationships, sexuality, parenting, studies or employment, and the ability to cope.<sup>17</sup>

The South African Law Reform Commission (writing prior to the *Malgas* and *Dodo* cases) recommended an approach that allows courts some discretion without undermining the intention of the legislature. However, it also drew attention to the dangers of simply considering, “albeit within a different framework”, all the aggravating and mitigating factors that the court has “traditionally considered”.

It is precisely the strategy of spelling out all manner of circumstances that allow a departure from the prescribed minima, which has led to some judgments of the courts being severely criticised by the public for having taken inappropriate factors into account.<sup>18</sup>

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<sup>15</sup> Y Hoffman-Wanderer, “Sentencing and Management of Sexual Offenders”, in L Artz and D Smythe, eds, *Should We Consent?: Rape Law Reform in South Africa*, Juta, 2008, at page 231.

<sup>16</sup> Id.

<sup>17</sup> L Vetten and F van Jaarsveld, *The (Mis)measure of Harm: An analysis of Rape Sentences Handed Down in the Regional and High Courts of Gauteng Province*, Tshwaranang Legal Advocacy Centre Working Paper Number 1 (2008), available at [www.tlac.org.za/images/documents/mismeasure\\_of\\_harm.pdf](http://www.tlac.org.za/images/documents/mismeasure_of_harm.pdf) (South African case citations omitted).

<sup>18</sup> South African Law Reform Commission, Report: Project 82, *Sentencing: A New Sentencing Framework*, 2000 at section 1.31, available at [www.doj.gov.za/salrc/reports/r\\_prj82\\_sentencing\\_2000dec.pdf](http://www.doj.gov.za/salrc/reports/r_prj82_sentencing_2000dec.pdf).

The South African Parliament responded to such concerns with a recent statutory amendment to its legislation to clarify some of the situations not covered by “substantial and compelling circumstances” in rape cases.

*Section 51 (3)(aA)*: When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- the complainant’s previous sexual history;
- an apparent lack of physical injury to the complainant;
- an accused person’s cultural or religious beliefs about rape; or
- any relationship between the accused person and the complainant prior to the offence being committed.<sup>19</sup>

In Namibia, the Combating of Rape Act has placed stringent limitations on the admissibility of certain evidence on the question of guilt or innocence, as a way to ensure that courts move away from past stereotypes about rape:

- evidence of the character of the complainant
- past sexual conduct or experience of the complainant
- sexual reputation of the complainant.<sup>20</sup>

Although such evidence is not technically inadmissible on the question of sentencing, it can be argued that consideration of such issues even in the context of sentencing would undermine the goals of moving away from past approaches which tended to blame victims for “provoking” rapes.

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<sup>19</sup> Criminal Law (Sentencing) Amendment Act 38 of 2007.

<sup>20</sup> Combating of Rape Act 8 of 2000, sections 17-18.

#### D. NAMIBIAN DECISIONS (as of end 2008)

Case name	Facts/ issues	Factors	Sentence/outcome
<i>S v Lopez</i> 2003 NR 162 (HC)	Accused convicted of raping and kidnapping his estranged wife. Coercive circumstances were the context of the unlawful confinement.	Mitigating: first time offender, self employed, father of a young daughter (the previous not enough but when coupled with following), no overt threats or force used, complainant not a stranger to sex with accused.	10 year minimum reduced to 5 years.
<i>S v Limbare</i> CA 128/05	Accused worked on farm where complainant lived. Accused raped her in her home.  Issue of whether substantial and compelling circumstances fully explored. Accused was represented.	Mitigating: Accused in custody for 11 months before sentencing, degree of force used was little, no injuries other than pain in stomach or arm	Remitted back to magistrate.  Court must consider whether there are substantial and compelling circumstances and make enquiries if issue not addressed by counsel.
<i>S v Bezuidenhout</i>  NHCCC4/05; CC4/05 [2006] NAHC 8 1 March 2006	Accused convicted of abduction and rape.  Issue of previous conviction for rape and whether it can be disregarded after 10 years.	Aggravating: previous conviction for rape for which Accused received 8 year sentence.	45 year minimum  As accused only released 2 years before this offence, his previous conviction is still relevant.
<i>S v Kaanjuka</i>  2005 NR 201 (HC)	Accused raped two 8-year-old girls in one incident. Sentenced to 2 consecutive 20 year terms.  Was it one transaction or 2 rapes?	Mitigating factors as argued by accused were not found.	Appeal dismissed.
<i>S v Guirirab</i>  2005 NR 510 (HC)	Accused raped a 13-year-old girl.  Issue of self represented accused at sentencing.		Guidelines issued for courts and how must explain minimum sentences and process for self represented accused.
<i>S v G &amp; G</i>  CA 61/2008 10 October 2008	2 accuseds pled guilty to rape and housebreaking and sentenced to 15 year minimum on rape. Both represented at sentencing. One of accused was 16 at time. Other was 18.  Issue: should represented accuseds be informed of substantial and compelling circumstances?	Mitigating: Youthfulness is a strong mitigating factor weighing heavily as substantial and compelling circumstance.  Aggravating: gang rape.	Judge only has duty to provide information about substantial and compelling circumstances to self-represented accused.  Sentence varied to 15 years with 5 years suspended on condition not convicted of rape or attempted rape in that period.

(continued...)

<b>Case name</b>	<b>Facts/ issues</b>	<b>Factors</b>	<b>Sentence/outcome</b>
<i>S v AK</i> (High Court) CA 19/04 2 Nov 2005)	Accused had repeatedly raped his 14-year-old stepdaughter who had a stillborn child as result. Sentenced to 20 years (15 would have been minimum due to complainant's age and position of trust)  Issue: was going above minimum excessive?	Aggravating: fact that complainant had stillborn child, effect on victim, multiple rapes.  Mitigating: force not considerable, no weapons, no injuries, 2 years pre-trial custody, no previous convictions	Courts can impose a sentence in excess of the minimum.  Accused's sentence was varied to 17 years minus 2 years pre-trial custody to 15 years.
<i>S v Roos &amp; Claasen</i>  CC 34/07 2007.11.09	Two accuseds convicted of rape and attempted rape. Accused 1 raped complainant while accused 2 assaulted her and then stood by. Attempted rape stopped by security guards. Accuseds fled with complainant's clothes.	Mitigating: time spent in pre-trial custody (1.5 and 2 years), one accused had no history of physical violence.	Court takes 2 counts together for purposes of sentencing as incidents followed each other closely. Finds 17 years is appropriate, minus time spent in custody to 15 years. As accuseds had benefit of taking 2 counts together, issue not decided based on substantial and compelling circumstances.
<i>S v Swartz</i>  CC 37/07 2007.08.24	Accused and complainant's husband had been in fight earlier in evening. Complainant, her husband and children came upon accused who attacked husband. Husband fled. Accused pushed complainant who was holding her 1.5-year-old son. Hit her in face, pushed her to ground. Removed her clothes and raped her. Taunted her that she could go to police afterwards.	Mitigating: Accused was intoxicated, is first offender, accused's youth (21), employed and supporting family.  Aggravating: manner of rape, degree of violence, complainant was carrying a small child, injuries while not severe included extensive bruising and a black eye, accused not remorseful (had tried to get complainant to withdraw and was making state go to burden of proving case).	Court finds aggravating factors outweigh mitigating, and no substantial and compelling circumstances. Sentence = 12 years (which is above minimum of 10).  Accused spent 4.5 months in custody awaiting trial but this period was found to be too short to be taken into consideration. Must be substantial period before court subtracts it.
<i>S v Pius</i>  CA63/2003 29/10/2003	Accused convicted of raping a 6-year-old. Sentenced to 15 year minimum. Appealed minimums as unconstitutional and disproportionate.  Defence argues there were substantial and compelling circumstances as accused was young (20), first offender, intoxicated, no violence used.		Appeal unsuccessful. Not unconstitutional.  Mitigating factors submitted by defence viewed cumulatively are not substantial and compelling, especially considering young age (6) of complainant.

(continued...)

<b>Case name</b>	<b>Facts/ issues</b>	<b>Factors</b>	<b>Sentence/outcome</b>
<i>S v Rooi &amp; X</i> CC 35/07 21 Dec 2007	Rape x 2, kidnapping, attempt murder. Rooi (25 years old) and X (17 years old) abducted complainant from her home, both raped her, Rooi told X to stab her and X stabbed her 7 times. They left her in the veld. Complainant was 13 years old and a virgin.	Aggravating: complainant's age and virginity; circumstances were some of worst encountered by the court.	Rooi sentenced to 19 years imprisonment on first rape, 15 on second, 7 for kidnapping, 10 for attempted murder. Some portions to run concurrently. 29 years total.  X sentenced to 12 years on first rape, 8 on second rape, 5 for kidnapping, 8 for attempted murder. 19 years total as some concurrent.
<i>S v Kanyuumbo</i> CC 03/2007 26 April 2007	Accused raped 6-year-old complainant vaginally and anally.  Evidence of complainant's trauma and continuing effects of rape led by prosecutor.  Accused did not testify in mitigation but submissions were made on his behalf.	Mitigating: Accused is supporting 13 minor siblings. Court comments that other factors (intoxication, remorse) might have carried more weight had accused testified about them.  Aggravating: brutal rape, 2 acts of penetration, small girl, permanent physical harm, psychological and emotional effects.	21 years imprisonment. (minimum was 15).
<i>S. Kalingindo</i> CC 09/2007 10 May 2007	Accused raped 10-year-old sister of girlfriend while his young child was in the room. Threatened to beat her if she cried.	Accused's youth (21), possibility of rehabilitation.  No physical injuries but emotional scars.	20 years imprisonment with 5 years suspended on condition accused not convicted of rape during that period.
<i>S v (youth)</i> CC07/2007 16 April 2007	Accused pled guilty to raping a 4-year-old girl. No force or physical violence used. Accused was 17 at time and not subject to minimums.	Aggravating: Complainant was 4 years old and exceptionally vulnerable.	15 years imprisonment, 5 years suspended on condition accused not convicted of rape during that period.
<i>S v Doeseb</i> CA 20/2006 6 Oct 2006	Accused appeals sentence. 18-year-old accused raped 11-year-old sister left in his care.	Aggravating: young age of complainant & fact that she was his sister whom he should have protected.  Mitigating: accused's youth, guilty plea (although he did not testify in mitigation so cannot be sure of remorse), first offender, no physical injury, not against will of complainant.	Appeal dismissed. 15 year sentence upheld.

(continued...)

<b>Case name</b>	<b>Facts/ issues</b>	<b>Factors</b>	<b>Sentence/outcome</b>
<i>S v Gowaseb</i> CA 82/2006 12 Aug 2008	Appeal against conviction and sentence. Accused (59 years old) walking home with complainant (58 years old). Pushed her over when she was urinating and raped her. Complainant passed out during rape. Passersby heard her screaming.	Pushing was physical force.	10 year minimum upheld.
<i>S v Thimoteus</i> CA 66/2003 24/06/2004	Appeal against conviction and sentence. Accused raped two 11-year-old girls and one 9-year-old girl. They were at the house where he lived. He told the girls that he wanted to have sex with them and offered to pay them. They each got \$5 and were told not to talk about it.  Defence appealed, arguing that fact that he was a first offender not taken into account, that interests of society and seriousness of crime were overemphasised.	Accused was sentenced to 15 years on each of 3 counts but 10 years of counts 2 and 3 were to be served concurrently.	Appeal dismissed. Severity of cumulative effect was taken into account when portions were to be served concurrently.

## **E. SELECTED SOUTH AFRICAN DECISIONS**

*The South African context is different from the Namibian one, as the minimum sentence for rape under some circumstances can be life imprisonment in South Africa. Only key cases which articulate relevant principles are listed here.*

<b>Case name</b>	<b>Facts/ issues</b>	<b>Factors</b>	<b>Sentence/outcome</b>
<i>S v Malgas</i> 2001 (1) SACR 469 (SCA)	A murder case.		Defines substantial and compelling circumstances.
<i>S v Dodo</i> 2001 (1) South African Criminal Law Reports 593	Murder case.  Issue: constitutional validity of mandatory minimums to be free from cruel and unusual punishment.		Sentence must be proportional.

*(continued...)*



<b>Case name</b>	<b>Facts/ issues</b>	<b>Factors</b>	<b>Sentence/outcome</b>
<i>Vilakazi v S</i> (576/07) [2008] ZASCA 87 2 Sept 2008	Complainant had gotten a lift from accused who was driving a truck. He stopped, raped her twice and then left her.  Issue: whether sentence of life (minimum in circs) would be disproportionate. Follows <i>Dodo</i> .	Factors considered: not extraneous violence or injury other than that inherent in case, accused used a condom, unfortunate lack of evidence about impact on complainant (but good comments about impact of rape generally), accused's personal circumstances (has family, is employed, no previous serious brushes with law)	Only serious aggravating factor was that complainant was under 16 at time.  Minimum under SA law is life imprisonment. Court did not feel that sentence was appropriate.  15 years minus 2 for time spent in custody.
<i>S v Nkomo</i> 160/2000 SCA 1 Dec 2006	Accused met complainant at a hotel bar where she had gone to meet with a woman she had lent clothes to. Complainant was forced upstairs by accused to a room where he raped her. He then locked her in the room. She jumped out the window, injuring herself, to escape. Accused found her, forced her back and raped her 4 more times. He forced her to perform oral sex, slapped her, pushed her, kicked her and prevented her from leaving.	Mitigating: Accused was employed, no record, 3 children to support. Complainant not seriously injured. Young, employed, may have been a chance at rehabilitation (although no evidence of that).  Aggravating: Complainant raped more than once (5 times), raped after being injured, accused held her captive, no remorse, offered to pay her to withdraw.	Sentence = 16 years (minimum is life).

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