

1 / 14 / 2008
~~NOT~~ REPORTABLE
**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NO.: A427/2008

DATE:

In the matter between:

JACOB ITUMELENG LETSAPA

APPELLANT

And

THE STATE

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

7 December 2010, J.S. Webster

DATE

SIGNATURE

JUDGMENT

WEBSTER J

1. The matter before us is an appeal against a sentence of life imprisonment, imposed on the appellant on a conviction of raping an 8 year old girl, leave to appeal against the sentence having been granted by Murphy J.
2. The appellant was convicted in the Regional court, Klerksdorp, on 27 February, 2006. The proceedings were stopped and the matter remitted to the North Gauteng High court for sentencing in accordance 52(1)(b) of the Criminal Law Amendment Act No. 105 of 1997.
3. Murphy J confirmed the conviction. Evidence of a social worker was led. The appellant's previous records were proved. The appellant's first conviction was for assault committed on 24 May 1989: the passing of sentence had been postponed for 5 years; the second conviction was for attempted rape committed on 31 August,

1998 for which the appellant was sentenced to five (5) year's imprisonment: he was arrested within a year of being sentenced for the offence that is the subject matter of this appeal.

4. After hearing the submissions during the sentencing process, Murphy J found that no substantial and compelling circumstances had been established and imposed the prescribed minimum sentence of life imprisonment.
5. The imposition of a sentence is a matter pre-eminently for the trial court. A court of appeal will only interfere with such a sentence if it is clear that in imposing the sentence that it did the trial court did not exercise its discretion judicially. This is now trite.
6. The first issue to be determined is whether Murphy J was correct in finding that no substantial and compelling circumstances existed that justified a departure from the prescribed minimum sentence of life imprisonment.
7. The meaning of the term "substantial and compelling circumstances" was fully considered in *S v Malgas 2001(2) 1222 SCA*. At paragraph 21 and 22 Marais JA stated:

"[21] It would be foolish, of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting

someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.

[22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."

At page 1235 (para 25) he clarify the issue further when he said:

"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary:

- 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 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 co-offenders 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.*
- I. 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."*

8. In *S v Vilakazi 2009(1) SACR 552 (SCA)* Nugent JA cautioned against literal application of the provisions of section 51(1) without seriously considering the appropriateness of a sentence having regard to the full facts in the particular case. Commenting on the "gradation" in schedule 2 Part I read with section 51 (1) he remarked at 559 C – H (Paragraph 13):

"[13] What is striking about that regime is the absence of any gradation between ten years' imprisonment and life imprisonment. The minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender. On the face of it a first-offending 18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist who repeatedly gang-rapes and beats senseless a disabled victim whom he consciously infects with HIV. The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes. It requires only a cursory reading of the Act to reveal other startling incongruities. And when the sentences that are prescribed for rape in various circumstances are related to sentences prescribed for other crimes even more incongruities emerge. It is not surprising that the leading writer on the subject of sentencing in this country, Professor Terblanche, advanced the following acerbic observation on the Act ten years after it took effect:

I have criticised the Act elsewhere 17 and, if anything, have become more critical with time. There is hardly a provision in sections 51 to 53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences."

9. The facts that persuaded the trial court to impose the prescribed sentence of life imprisonment are the appellant's previous convictions and the report by a social worker, MS. BRUWER, which was compiled so as to serve as a pre-sentence report on the appellant. The social worker did not limit her investigation to the appellant's circumstances but she also interviewed the victim and her father and also drew up an impact report on the victim. In my view this was undertaken so as to have an informed view and assessment of all the facts necessary to form a balanced opinion and conclusion.
10. According to Ms. Bruwer, the appellant initially denied having raped the victim. Later during the interview, however, he admitted having done so and informed Ms. Bruwer that at the time of raping the complainant he had been confused, having consumed alcohol into which his friends had thrown in some pills. He admitted he was guilty and felt "sore" about it. He also felt ashamed of his conduct. Asked what he would do if someone were to rape his daughter his response was that if he laid his hands on such a culprit he would kill him.
11. The appellant grew up in an urban area. He was brought up by his grandmother. The appellant was employed. He was married and lived with his family. He is illiterate. Ms. Bruwer testified that the appellant had clearly not learnt from his previous convictions and "...nie sy samewerking bied wanneer hy hulp aangebied word nie".
12. The interview with the victim showed that she had been traumatised. She had not received counselling. She exhibited post-traumatic stress which a victim experiences when there is a serious threat to a victim's life and physical integrity. The reaction

of a rape victim is to fear for her life. Being only 8 years of age and the assailant an adult, bigger and stronger than she was, would have caused fear in the complainant. The victim's post-traumatic stress manifested itself from '...onstellende drome, 'n oordrewe skrikrespons en konsentrasie probleme'. The victim had still not recovered from the ordeal. The social worker noted that the appellant had not expressed any remorse.

13. Her recommendation was that direct imprisonment be imposed on the appellant.
14. It was submitted before us that the trial court had failed to take note of the "principle of proportionality" between the seriousness of the offence and the sentence imposed. It was further submitted that the trial court had:
 - (i) erred in imposing the heavy sentence in the belief that it would necessarily serve as a deterrent;
 - (ii) not distinguished the facts of this case from those where the sentence imposed had been based on the degree of seriousness in the perpetration of rape;
 - (iii) not taken into account the time the appellant had spent in custody awaiting trial;
 - (iv) not taken into account that the victim had not sustained serious injury and did not display signs of emotional trauma or distress when she was medically examined;
 - (v) not taken sufficient cognizance of the fact that there was no prognosis of permanent emotional damage. On the

contrary, counselling could alleviate or totally cure the victim from the post-traumatic stress syndrome she was exhibiting. Finally, it was submitted that the court should, not only on the facts in this case, but should also consider similar cases where life imprisonment had been deemed not to be appropriate.

15. It was submitted, for the State, that the trial court had correctly found that:

- (i) Substantial and compelling circumstances were lacking;
- (ii) The appellant's previous convictions far outweighed any mitigating circumstances;
- (iii) The complainant was emotionally scarred and this is likely to haunt her for the rest of her life;
- (iv) The appellant's conduct should be "...met with the full force of the applicable minimum sentencing legislation" as "...the maximum sentence is [not] reserved for only extreme cases".

16. Life imprisonment is the ultimate sentence that may be imposed in our law. It is also the prescribed sentence that an accused convicted of murder or rape that falls under Part I of Schedule 2 of Act 105 of 1997 may be sentenced to. The rape in the matter before us falls under "Part I – Rape, (b) where the victim – (i) is a girl under the age of 16 years...". This prescribed sentence is equivalent to the sentence for murder, when –

"(a) it was planned or premeditated;

(b) the victim was –

- (i) *a law enforcement officer performing his or her functions as such, whether on duty or not; or*
- (ii) *a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;*
- (c) *the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:*
 - (i) *Rape; or*
 - (ii) *robbery with aggravating circumstances."*

17. In terms of section 51 (2)(a) a person convicted of an offence referred to in Part II of Schedule 2, shall be eligible to be sentenced to:

- (i) not less than fifteen (15) years' imprisonment if he/she is a first offender;
- (ii) not less than 20 years' imprisonment if he is a second offender;
- (iii) not less than 25 years' imprisonment if he is a third or subsequent offender.

18. It required very little if any analysis to realize that regarding the rape of a girl under the age of 16 years as being more heinous than murdering three or more victims. There is clearly incongruity in this. This, in my view, is the "gradation" that Nugent JA was alluding to in *S v Vilakazi* (supra) and the compelling reason for the "principle of proportionality" between the offence and the sentence.

19. The attack on the victim was cowardly and certainly despicable. She was only 8 years of age. That no violence was applied begs the question: the crime remains serious and deserving of severe censure.
20. The only injuries sustained by the victim apart from those of a psychological nature were "...fresh tears of hymen and multiple vaginal bruising". Despite this the complainant exhibited psychological harm. It is not possible and in fact it would be a serious misdirection for this court to conclude that the complainant will be unaffected by the experience. I accept Ms. Bruwer's concerns that the victim will suffer post-traumatic stress and will require counselling.
21. In cases of this nature it is imperative that this court should have regard particularly to the approach by the Supreme court of Appeal in similar cases. In *S v Abrahams 2002(1) SACR 116 (SCA)*, a case where a father raped his own child 'so as to precede other young males in having carnal access to his 14 year old daughter', a sentence of 12 years imprisonment was imposed on appeal. In *S v Mahomotsa 2002(2) SACR 435*, the appellant had raped two girls more than once having threatened one with a firearm and the other with a knife. The second rape had occurred whilst the accused had been awaiting trial on the first count. A sentence of eight years on the first count and twelve years on the second count was deemed appropriate by the Supreme Court of Appeal.
22. In *S v Vilakazi 2009 (1) SACR 552 (SCA)*, a sentence of life imprisonment for the rape of a girl under 16 years of age was set aside and substituted with one of 15 years imprisonment.

23. In imposing the sentence of life imprisonment the trial court clearly did not consider the proportionality test. Had it done so, it is most likely that it would have concluded that life imprisonment in the circumstances of this case was disproportionate to the crime. Those facts alone are in my considered view, sufficient to justify interfering with the sentence of the trial court.
24. Having said so, however, it must be emphasized that whilst long periods of imprisonment may not necessarily rehabilitate an offender two factors need to be emphasized in this case.
25. As pointed out by the court *a quo*, the appellant has traits of violence. Secondly, the appellant had barely been out of prison after serving a sentence for attempted rape when he raped the victim who was only eight years old. These factors are clearly aggravating in nature and tend to demonstrate a total disregard and disrespect for women's bodily integrity. This is particularly apparent when regard is had to the fact that the appellant was a family man and the victim in this case a young child. Whilst this court may not presume that the appellant's conduct inclines towards a strong prospect against rehabilitation the appropriate sentence in this case should bring home to the appellant and like minded people that:
- (i) Rape is a serious offence that will not be tolerated in our society;
 - (ii) Women have the right to bodily integrity and the law will bear heavily on those who violate their rights;
 - (iii) The molestation and abuse of children likewise, will never be tolerated.

26. It is my considered view that the appeal should succeed. I would accordingly set aside the sentence and replace it with the following:

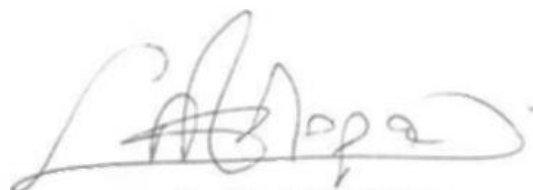
"The accused is sentenced to eighteen (18) years' imprisonment".



G. WEBSTER

JUDGE IN THE HIGH COURT

I agree



L. M. MOLOPA

JUDGE IN THE HIGH COURT