

REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-12-10

Case Number: A639/2008

In the matter between:

MOSES SILAS MOTLHAKANE

Appellant

and

THE STATE

Respondent

and

Case Number: A977/08

JACOB DOCTOR SEHLAKE

Appellant

and

THE STATE

Respondent

and

Case Number: A978/08

JAKOBUS VAN DER RHEEDE VAN OUDTSHOORN

Appellant

and

THE STATE

Respondent

JUDGMENT OF THE COURT

SOUTHWOOD J, MAKGOKA J et KOLLAPEN AJ

[1] The three appellants appeal against the life sentences imposed on them by the High Court after the regional court convicted them of rape. The appellant, Moses Silas Motlhakane, was convicted of rape by the Sweizer Reinecke regional court on 8 January 2003 and was sentenced to life imprisonment by the Circuit Local Division of the Western Circuit of the High Court (Van Oosten J) on 29 July 2004. For the sake of convenience this appellant will be referred to as Motlhakane. The appellant, Jacob Doctor Sehlake, was convicted of rape by the Middelburg regional court on 28 October 2003 and was sentenced to life imprisonment by the Pretoria High Court (De Vos J) on 19 April 2004. For the sake of convenience this appellant will be referred to as Sehlake. The appellant, Jakobus Van Rheede van Oudtshoorn, was convicted of rape (two counts) by the Vereeniging regional court on 16 August 2002 and was sentenced to life imprisonment (on each count) by the Pretoria High Court (Ismail AJ) on 7 September 2005. For the sake of convenience this appellant will be referred to as Van Oudtshoorn. Motlhakane and Sehlake appeal with the leave of the High Court and Van Oudtshoorn with the leave of the Supreme Court of Appeal.

- [2] The three appellants were sentenced to life imprisonment in terms of section 51 of Act 105 of 1997 ('the Act') at a time when the regional court did not have the power to impose a sentence of life imprisonment (this was altered when the Act was amended by Act 38 of 2007 which came into operation on 31 December 2007) and the regional court was obliged to refer the cases to the High Court for sentence. In each case the conviction for rape attracted the life sentence because the victim was under the age of 16 years. The appellants were all sentenced in the early stages of the development of the sentencing regime prescribed by section 51 of the Act. In recent times the courts have expressed their misgivings about the mechanical application of the sentencing regime and articulated a more nuanced approach.
- [3] As part of the constitutional right to a fair trial it is now established that, generally, where the state wishes to invoke the provisions of section 51 of the Act the provisions of section 51 must be brought to the attention of the accused in such a way that the charge can be properly met before conviction. This means that from the outset of the trial the accused must be placed in a position to appreciate properly the charge that he faces as well as its possible consequences. See ***S v Legoa* 2003 (1) SACR 13 (SCA)** para 23; ***S v Ndlovu* 2003 (1) SACR 331 (SCA)** para 12 and ***S v Tshabalala* 2008 (1) SACR 486 (T)** para 14.

- [4] With regard to the application of section 51 of the Act and the requirement of finding the existence of substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed minimum sentences in order to impose such lesser sentences it has been recognised that **S v Malgas 2001 (1) SACR 469 (SCA)** requires more than just a consideration of whether there are such substantial and compelling circumstances. It requires that in every case the court must consider, in the light of all the relevant circumstances what an appropriate sentence will be. This will ensure that justice is done in every case while taking into account that the legislature intended that heavier sentences be imposed for the crimes designated in the Act.
- [5] In **S v Vilakazi 2009 (1) SACR 552 (SCA)** the court dealt comprehensively with the sentence of life imprisonment which the Act prescribes for rape committed in certain circumstances. The court pointed out that the Act demands the imposition of the prescribed minimum sentence unless the court is satisfied in a particular case that there are 'substantial and compelling circumstances' that justify the imposition of a lesser sentence. The court observed that ordinarily the sentence for rape is 10 years imprisonment unless the crime is committed in one or more of the circumstances specified in the Act in which case the sentence prescribed is imprisonment for life. One of these circumstances is where the victim is a girl who is under the age of 16 years (para 12). The court highlighted that there is no gradation

between 10 years imprisonment and life imprisonment and that the minimum sentence of 10 years imprisonment progresses immediately to the maximum sentence irrespective of how many of the aggravating features are present and irrespective of the degree in which they are present and further irrespective of whether the convicted person is a first or repeat offender (para 13). The court then explained how the problem must be overcome:

‘[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in ***S v Malgas*** – which was said by the Constitutional Court in ***S v Dodo*** to be “undoubtedly correct” – that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in ***Dodo*** found the Act to be not unconstitutional. For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some cases that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in ***Malgas***, and in particular its “determinative test” for deciding whether a prescribed sentence may be departed from,

makes plain that the power of the court to impose a lesser sentence ... can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross [and thus constitutionally offensive].

That “determinative test” for when the prescribed sentence may be departed from was expressed as follows in ***Malgas*** and it deserves to be emphasised:

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.

- [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. The Constitutional Court made it clear that what is meant by the “offence” in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence.

That was also made clear in ***Malgas*** which said that the relevant provision in the Act

vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which “*justify*” ... it.’

and

[18] It is plain from the determinative test laid down by ***Malgas***, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in ***Dodo***, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of ***Malgas*** and of ***Dodo*** is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.’

[6] In ***S v GN 2010 (1) SACR 93 (T)*** the full court came to a similar conclusion (although it was not referred to ***S v Vilakazi supra***). After

referring to the statement in ***S v Abrahams* 2002 (1) SACR 116 (SCA)** that ‘... some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust’ which had been followed in ***S v Mahomotsa* 2002 (2) SACR 435 (SCA)** and ***S v Nkomo* 2007 (2) SACR 198 (SCA)** the full court said:

‘[11] In ***S v Mahomotsa*** and also in ***S v Nkomo*** the courts relied on the passage from ***S v Abrahams*** that I have quoted earlier. I have already concluded that the passage does not mean that, even where the Act prescribes imprisonment for life as a minimum sentence, it can be imposed only in the most serious cases. In my view the quoted passage, and its application in the other two cases referred to, conveys that, even where imprisonment for life is prescribed as a minimum sentence, a court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such, it must not be imposed lightly, even when it is a prescribed minimum sentence.

[12] At the risk of complicating it, I shall expand on what I have said in the previous paragraph. It is axiomatic that, in order for it to arrive at a just sentence, a court must have a balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed. In ***S v Malgas*** (para 25) Marais JA pointed out that s 51 of the

Act “has limited but not eliminated the courts’ discretion in imposing sentence”. It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Where the prescribed minimum sentence is less than life imprisonment, such differentiation is possible either by imposing a heavier sentence than the prescribed minimum or, where there are substantial and compelling circumstances so to do, to impose a lesser sentence. Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment.’

Mothlakane

- [7] The appellant was convicted on a single count of rape in the Schweizer Reinecke Regional Court following his plea of guilty. He raped his 12 year old stepdaughter in the family home after entering her room, removing her clothes, threatening her not to scream and then forcing himself upon her. After conviction the matter was referred to the High Court for sentencing and on the 29th of July 2004, the Western Circuit of the High Court applying the provisions of the Act and finding no

substantial and compelling circumstances present, sentenced the Appellant to life imprisonment. The Appellant contends that the failure by the State to properly bring to his attention its intention to rely on the provisions of Section 51 of the Act rendered his trial (at least that part of it that dealt with sentence) unfair and that accordingly he should not have been sentenced in accordance with the provisions of the Act.

- [8] The charge sheet in the matter makes no reference to the provisions of the Act. The Appellant's written explanation of his plea of guilty in terms of Section 112(2) of Act 51 of 1977 similarly makes no reference to the Act and while there is no full transcript of the proceedings of the Regional Court, there is nothing in the limited record that is available to suggest that the provisions of the Act that the State sought to rely on were brought to the Appellant's attention. Accordingly, there is merit in the submission advanced on behalf of the Appellant that there was a failure at the outset of the trial to bring to his attention the provisions of the Act and that failure accordingly rendered the sentencing process unfair. It follows that the failure precludes the sentencing court from relying on the Act in determining an appropriate sentence. See **S v Legoa (supra)**.

- [9] On that basis the appeal against sentence must succeed and the sentence of life imprisonment imposed on the 29 July 2004 must be set aside. This Court is now entitled to approach the question of sentence *de novo* and outside of the framework of the Act.

- [10] In determining an appropriate sentence regard must be had to the seriousness of the offence, the interests of society and the interests of the Appellant. See **S v Zinn 1969 (2) SA 537 (A)**. Rape under any circumstances is a serious and heinous crime and perhaps more so when the perpetrator abuses a position of trust and exploits the vulnerability of a young victim as happened in this case. The prevalence of rape in South Africa is notorious and society has a vital interest in combating the crime.
- [11] The pre-sentence report submitted in evidence indicates that the rape has negatively affected the complainant both in contributing to negative behavioural conduct as well as in her performance at school. It has also damaged the relationship of trust she had with the Appellant. These factors are aggravating which require full and proper consideration in determining an appropriate sentence. On the other hand the Appellant is a first time offender who prior to the commission of the crime lived a responsible life providing through employment for the needs of his family; he was an active member of his church and expressed remorse for his conduct.
- [12] While public opinion generally demands a harsh and uncompromising response from our courts in dealing with rape, one must guard against sentencing policy that caters exclusively or predominantly for public

opinion. In ***S v Mhlakaza* 1997 (1) SACR 515 (SCA)**, Harms JA cautioned that:

‘It remains the court’s duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.’

In this regard our courts have also highlighted the destructive impact of unduly long sentences. See ***S v Khumalo* 1984 (3) SA 327 (A)**, where Nicholas JA said that:

‘it is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the prisoner.’

Notwithstanding the seriousness of the offence committed, the Appellant retains his inherent worth and dignity and this must be considered in the process of determining an appropriate sentence. See ***S v Dodo (supra)***.

- [13] While a long period of imprisonment is appropriate, the court must guard against a sentence that can ultimately destroy the Appellant either physically or mentally. There is no reason to believe that he cannot be rehabilitated and return to continue to be a worthy and valuable member of his family and his society. The sentence must accordingly reflect both society’s deep displeasure against conduct of this kind and society’s concern that the Appellant as a first offender

should not be crushed under the weight of an unduly lengthy period of incarceration.

- [14] In all the circumstances a sentence of 12 years is a fitting and appropriate sentence. This must be ante-dated to 29 July 2004.

Sehlake

- [15] The appellant stood trial in the regional court, Middleburg, on a charge of raping a 4 year old girl. The appellant pleaded not guilty and in his plea explanation, he admitted that the complainant was raped in April 2002. He however stated that the rape took place in Johannesburg whereas he was in Mpumalanga. After his conviction on 28 October 2003 the proceedings were stopped and the appellant was referred for sentence by the High Court in terms of section 52 (1)(b) of Act 105 of 1997. On 19 April 2004, the High Court (De Vos J) confirmed the conviction and found no substantial and compelling circumstances. Accordingly she imposed the prescribed minimum sentence of life imprisonment on the appellant. On 20 November 2006 Shongwe DJP granted leave to appeal to the Full Court against sentence only. (As appears from the accompanying judgment of Makgoka J he has serious misgivings about the correctness of the conviction but, on the assumption that the appellant was correctly convicted, he agrees with this judgment.)

- [16] The facts are simple. The complainant, then a 4 year old girl, went to the appellant's parental house to play. The appellant sent her to her grandmother's nearby house to fetch a spade. When she returned, the appellant took her into the house and ordered her to lie on a couch or sofa, and had intercourse with her. According to the J88 medical report, which was handed in by agreement some 3 months after the incident, on 2 July 2002, the complainant was examined by a doctor who found the complainant's hymen was no longer intact; there were possible signs of friction and abrasion, which had healed and there were signs of vaginal penetration.
- [17] The appellant is a first offender and had just turned 18 when the rape took place. His father abandoned the family when the appellant was approximately 10 years old. He therefore grew up without a father-figure, and raised by his mother. He was a pupil and sold biscuits and potato chips at school to augment family income. He was the second of three boys. He had a difficult childhood. He spent 14 months in custody awaiting finalization of his trial.
- [18] Unfortunately the proceedings in mitigation of sentence were dealt with perfunctorily, both by the appellant's counsel (who was clearly inexperienced) and the court. The learned Judge proceeded from the premise that the onus was on the appellant to convince the court that substantial and compelling circumstances existed. In addition, the learned Judge did not consider the 'determinative test' laid down in

Malgas, namely whether, on a consideration of the circumstances of a particular case, the prescribed sentence would be rendered unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice will be done by imposing that sentence. In both respects the learned judge misdirected herself and this court is entitled to interfere and sentence the appellant afresh.

[19] Rape is always a serious offence. It is particularly serious when the victim is so young. Nevertheless, in the present matter, the court is not dealing with the category of the worst rapes, and this should be considered in arriving at an appropriate sentence. The rape did not cause the complainant any serious injury and it is impossible to say what the psychological effects will be. Presumably there will be but the full nature and extent of these were not investigated at the trial.

[20] Having regard to the circumstances of the crime, the effect on the complainant, the personal circumstances of the appellant and the interests of society a sentence of 12 years imprisonment would be appropriate. An order must also be made that the substituted sentence be ante-dated to 19 April 2004.

Van Oudtshoorn

[21] On 19 April 2002 Van Oudtshoorn pleaded not guilty to the two rape charges in the regional court and, after the two complainants had

testified and been extensively cross-examined, formally admitted all the complainants' evidence, their ages and their blood relationship to him and that he had had intercourse with the complainants as alleged in counts 1 and 2 and that this took place without their consent. He also admitted that when he had intercourse with the complainants he knew he was committing a crime. On the strength of the complainants' evidence and the appellant's formal admissions the regional court convicted Van Oudtshoorn on two counts of rape. The matter was then adjourned so that pre-sentence reports could be obtained.

[22] On 11 September 2002 the psychosocial report by Mrs. P. Tromp and the correctional services report by Mr. J.J.N. Swart prepared in terms of section 276A(1)(a) of Act 51 of 1977 were handed in as exhibits D and E respectively and the appellant's counsel and the prosecutor addressed the court. They agreed that the provisions of the Act applied, that there were substantial and compelling circumstances which justified a lesser sentence than life imprisonment and that the appellant should be sentenced by the regional court. The regional court then sentenced the appellant to 15 years imprisonment on each count and ordered that the sentences run concurrently so that an effective sentence of 15 years imprisonment was imposed.

[23] On 3 December 2002 the appellant, acting in person, filed a notice of appeal against both conviction and sentence. The notice includes grounds that the regional court erred in accepting the evidence of the

state witnesses and in rejecting the evidence of the accused as not reasonably possibly true. On 5 April 2004 the Pretoria High Court set aside the sentences imposed by the regional court and ordered that the matter be enrolled for sentencing (in the High Court) in accordance with section 52(1) of the Act. There is no judgment by the full court in the record but presumably this was done in accordance with ***Direkteur van Openbare Vervolgings, Transvaal v Makwetsja 2004 (2) SACR 1 (T)***.

- [24] On 16 August 2005 the matter came before the High Court for sentence. After hearing evidence by the appellant, Anna Magdalena Alberts, the Chief Social Worker at Zonderwater Centre A and Emmerentia van Oudtshoorn, one of the complainants, the court imposed a life sentence in respect of each count of rape.

- [25] On 14 November 2007 the Supreme Court of Appeal granted leave to appeal to this court after the High Court had refused leave.

- [26] On appeal the appellant's counsel contends that the High Court did not take a number of relevant factors into account (the two pre-sentence reports; the appellant's back injury; the appellant's admission to Mrs. Tromp and Mr. Swart that he had raped the complainants; the appellant is the sole provider for the family; the appellant was a first offender at the age of 53; the appellant had attended a special school and was poorly educated; the view of the regional court that the

appellant suffers from a character flaw and needs psychotherapy); the High Court failed to properly take a number of relevant factors into account (the appellant's relatively advanced age of 57 – he would only become eligible for parole at the age of 82; the appellant's ill-health and the period of time the appellant had already been in custody and in prison (a total of three years)); that the High Court had failed to apply the 'determinative test' referred to in ***S v Vilakazi supra*** and that the High Court overemphasised the interests of the complainants and the trauma which they had suffered. The appellant's counsel submits that if all the relevant circumstances had been properly considered the court *a quo* would have found that substantial and compelling circumstances existed which justify the imposition of a lesser sentence.

[27] The state supports the sentences. The state contends that the circumstances of the case are very serious and that there are no substantial and compelling circumstances which would justify the imposition of a lesser sentence. The state has not referred to the determinative test or attempted to show that life imprisonment would not be disproportionate to the crime, the criminal or the needs of society.

[28] As far as the crime is concerned this court must first determine the facts upon which the appellant was sentenced. Neither the regional court nor the High Court commented on the credibility of the

complainants or the probabilities in their versions and neither court made findings as to the relevant facts.

[29] The appellant admitted the allegations in the two charges: i.e. that on various occasions during the period 1998 to December 2000 he had sexual intercourse with Emmerentia van Oudtshoorn without her consent and that on various occasions during the period 1997 to December 2000 he had sexual intercourse with Jeannette van Oudtshoorn without her consent.

[30] Both Emmerentia and Jeanette van Oudtshoorn testified about incidents which had taken place between 1½ years and four years previously. Neither kept any kind of record of the incidents and it emerged that neither had spoken to the other about what the appellant was doing to her although Jeanette seemed to suspect that something was happening to her elder sister. It seems that the sisters confided in their older half sister, Lorinda, when they visited her during the December vacation in 2000. Only then did matters come to a head and something done to protect the complainants.

[31] Emmerentia's evidence was vague, inconsistent and, in certain respects, improbable. She testified that the appellant first started touching her private parts, that he then went further and penetrated her vagina with a finger and finally progressed to having full intercourse with her. According to Emmerentia the indecent assaults happened

quite a lot ('nagal baie') as did the sexual intercourse. In her evidence in chief (and at the beginning of her cross-examination) she was adamant that the appellant only had sexual intercourse with her in his bedroom at home. She also was sure that this only happened on Tuesday (when the appellant was not working). She then testified that the appellant also had intercourse with her on other days in the bathroom at the garage where he worked. When asked why she had not mentioned this before she said she had forgotten. She testified that the appellant would watch her and when she went to the toilet he would follow her and have intercourse with her there. She said she had also forgotten this. She then testified that every day when she went to the garage after school the appellant would have intercourse with her. This happened five days a week for five months. He would either sexually assault her or have intercourse with her. She then changed her evidence to three times a week. This pattern continued throughout the cross-examination. It is a matter of concern that Emmerentia's evidence changed so much and the frequency, timing and place of the intercourse seems improbable. It is clear that her evidence cannot be accepted at face value for purposes of sentence. It would be safer to simply accept the admitted allegation in the charge sheet: that the appellant on various occasions during the period had sexual intercourse with Emmerentia.

[32] Jeanette's evidence was more consistent. She also testified about indecent assaults which started at the age of about 9 and progressed

to sexual intercourse. Unlike Emmerentia the sexual intercourse always took place at home in the appellant's or her bedroom. Understandably she could not be certain about how often sexual intercourse took place. She said it happened a lot ('baie').

[33] In these circumstances the same factual finding should be made as in the case of Emmerentia.

[34] It is clear from the evidence that the appellant's wife knew what was happening between the appellant and his daughters. Not only was she often present in the flat when the intercourse occurred but both girls told their mother and asked her to do something to make the appellant stop. Inexplicably she did nothing and the inference is inescapable that she condoned the appellant's behaviour and that for some reason it suited her not to interfere.

[35] Before considering the appeal further it is necessary to deal with the appellant's application to lead further evidence.

[36] On 5 November 2010 the appellant delivered to the court and the state a substantive application in which he seeks condonation for the late filing of the application and leave for further evidence to be heard at the hearing on 8 November 2010 with regard to the appellant's critically deteriorating health. In his supporting affidavit the appellant states that he has been diagnosed by Dr. Nagel, a medical specialist at Khalafong

Hospital, with end-stage chronic obstruction lung disease, interstitial lung disease and corpulmonary heart failure. This is set out in an unsworn printed 'Referral of Patient' to 'Whom it may concern' and purporting to be signed by J. Nagel, 'Specialist'. According to the appellant he was only able to bring this information to the attention of his counsel on 3 November 2010. The appellant contends that it is evident that his condition has deteriorated drastically since he was sentenced on 7 September 2005 and the current prognosis is that he may not survive another five years. At the hearing on 8 November 2010 the appellant's counsel informed the court that both the appellant and Dr. Nagel were at court and when questioned about the evidential value of the 'Referral of Patient' immediately requested the court to allow the matter to stand down so that Dr. Nagel could confirm the contents of the document in an affidavit. The matter stood down and the appellant's counsel obtained a handwritten affidavit from Dr. Nagel. In this affidavit Dr. Nagel confirmed that he had examined the appellant on 2 November 2010 and made the diagnosis set out in the 'Referral of Patient'. However he went further than previously and expressed the opinion (a) that this Christmas will be the appellant's last; and (b) that the appellant's medical condition is critical and he will die in the following months if not weeks.

- [37] The state objected to the application and the evidence which the appellant wished to place before the court. The state did not accept the correctness of the facts set out in the application (as amplified by

Dr. Nagel's affidavit) and sought an opportunity to have the appellant examined by a doctor of its choice. Without ruling on the application or the admissibility of the evidence the court postponed the hearing of the appeal to 8 December 2010 to enable the state to investigate the matter and, if so advised, to place its own evidence before the court. The state has not filed any evidence to refute (or even answer) the appellant's evidence nor has the state filed further heads of argument to deal with the evidence.

[38] The appellant's counsel has filed further heads of argument dealing with the appellant's application to lead further evidence, the evidence itself and the legal position. She contends that in the light of this evidence the court should uphold the appellant's appeal and impose a new sentence, the effect of which would be that the appellant be released immediately.

[39] In ***S v Britz* (613/09) [2010] SAZCA 71 (27 May 2010)** the court set out the legal position as follows:

‘... the general rule is that an appeal court will decide whether the judgment appealed from (and that includes a judgment on sentence) is right or wrong according to the facts in existence at the time it was given, not according to new circumstances subsequently coming into existence. Nevertheless, this court has previously indicated that the rule is not necessarily invariable and the rule has recently been relaxed to allow evidence to be adduced on appeal of facts and circumstances

which arose subsequent to the sentence imposed, where there were exceptional or peculiar circumstances present ... In cases such as the present where the facts and circumstances arose after sentence, the application must be carefully scrutinized to ascertain whether it does indeed disclose exceptional or peculiar circumstances. It is undesirable to attempt to define these concepts further’.

See also: ***S v Jaftha* 2010 (1) SACR 136 (SCA)** para 15: ***S v Karolia* 2006 (2) SACR 75 (SCA)** para 36.

- [40] This court clearly has the power to receive new evidence on appeal but it will do so only if the requirements stipulated in ***S v De Jager* 1965 (2) SA 612 (A)** at 613A are satisfied – see ***S v Britz supra*** paras 4 and 5. The requirements are –

- ‘(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.’

- [41] With regard to the third requirement the court in ***S v Britz supra*** commented at para 8 –

‘So far as the “materially relevant” consideration is concerned, the appeal court should only allow the evidence tendered if satisfied that there is at least a probability, not merely a possibility, that the evidence, if accepted, would affect the outcome (*R v Weimers & Others*) – *in casu*, whether the evidence warrants interference with the sentence. In my view the evidence would not have to be decisive.’

[42] When the hearing of the appeal resumed on 8 December 2010 the state informed the court that it had not been possible to have the appellant examined for a medico-legal report. Nevertheless the state contended that the appellant had not made out a proper case for the new evidence to be heard and accordingly that the appellant’s application should be refused and the appeal dismissed.

[43] That the first requirement is satisfied is self-evident. As far as the second requirement is concerned the appellant’s counsel contends that the evidence must be accepted because the state has not tendered evidence to contradict Dr. Nagel. This is clearly not the correct approach. The court will only accept uncontradicted evidence if it is credible. It will not do so where the evidence is contradictory, vague or improbable – see *Siffman v Kriel* 1909 TS 538; *Shenker Bros v Bester* 1952 (3) SA 664 (A) at 670E-G; *Nelson v Marich* 1952 (3) SA 141 (A) at 149A-E. As already pointed out there is a material contradiction between the appellant’s affidavit and Dr. Nagel’s ‘Referral of Patient’ and Dr. Nagel’s affidavit of 8 November 2010. The appellant obviously repeated what he was told by Dr. Nagel. In his affidavit Dr.

Nagel contradicts this and says the appellant's condition is terminal. This contradiction is not explained. The timing and the lateness of the evidence is also not explained. The appellant has not told the court what caused him to consult Dr. Nagel on 2 November 2010 and, why, if his condition had deteriorated so badly this was not brought to his counsel's attention long before the 2nd of November 2010. It is therefore not possible to find that Dr. Nagel's evidence on this issue is credible and reliable. The second requirement is therefore not satisfied. As far as the third requirement is concerned it cannot be found that the evidence would probably affect the outcome of the appeal. The mere fact that a sentenced person becomes very ill during his imprisonment is no justification for the court to alter his sentence on appeal. The appellant's remedy, if one is required, must be found in the provisions of the Correctional Services Act 111 of 1998 and the Regulations made thereunder. In this regard section 79 of the Act provides:

'Any person serving any sentence in a correctional centre and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the National Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be, to die a consolatory and dignified death.'

- [44] In the premises the appellant's application to tender further evidence must be refused.

[45] In sentencing the appellant the High Court did not refer to or apply the 'determinative test' dealt with in *Vilakazi* para 14 and it did not refer to the pre-sentence reports prepared for the regional court. In both respects the High Court materially misdirected itself and this court is therefore entitled to interfere with the sentence.

[46] The crimes are serious. The appellant raped his own daughters from the age of about 9 until the age of about 12. It is difficult to conceive of a more serious violation of the father daughter relationship of protection and trust. The appellant clearly regarded the complainants as his chattel to be used at will. There is, however, no evidence that the appellant threatened or used violence in order to have intercourse with his daughters. The evidence suggests that they slowly came to realise that the appellant's behaviour was wrong and independently of each other asked their mother to make the appellant stop and that when she did nothing they resigned themselves to the situation until their half sister intervened. The role of the mother is inexplicable on any other basis than that she found it convenient to allow the appellant to use his daughters to obtain sexual satisfaction.

[47] The complainants have been seriously affected by the crimes. Their relationship with their father (and other members of the family) has completely broken down. After matters came to a head they were placed in foster care. Both suffered emotionally and required therapy.

The younger daughter Jeanette displayed behavioural problems for which she will require long term treatment. Both daughters expressed a desire not to see the appellant again and said that they lived in fear of their lives. Both alleged that other members of the family have threatened them and fear that if they encounter these other members of the family they would come to harm. These perceptions seem to be borne out by the reports which indicate that the family members are angry with the complainants for 'turning against the appellant'.

- [48] The appellant was the eldest of three children. His father passed away when he was 8 years old and he and his family moved in with an uncle and aunt. Apparently this was because his mother was unable to support herself and the children. The appellant did not have a good relationship with his uncle and aunt. After completing standard 6 he left school and went to work in the open market. His work history was erratic. He had a large number of low level jobs before he was employed on the mines. He worked at a number of mines until about 1994 when he sustained a back injury and was retired with a disability pension. The appellant continued to receive this pension and it seems to have been the primary source of support for him and his family. The appellant has been married twice. His first marriage ended in divorce after he discovered that his wife was involved in an extramarital relationship. Three daughters were born of the marriage and by the time of the trial in the regional court all were married. The appellant's second marriage produced four children. At the time of the crimes the

family (the appellant and his wife, the appellant's youngest son and the two complainants) was living in a two room apartment. The appellant was employed as a petrol attendant at a garage and was earning about R300 a week. His wife obtained temporary employment from time to time. The family clearly was not financially well off.

[49] The appellant clearly considered that he was entitled to do what he did with his daughters. He continued to have intercourse with them over a lengthy period without any objection by his wife or other members of the family who seemed to suspect that the appellant was abusing the complainants. At the very least the appellant's wife condoned his conduct but it seems more probable that she aided and abetted him. No-one seems to have impressed upon him that his conduct was both unlawful and unacceptable. His lack of remorse indicates a serious lack of insight into societal norms and acceptable behaviour for a father *vis-à-vis* his daughter. The manner in which the appellant conducted the trial in the regional court demonstrates a singular lack of concern for or understanding of his daughters' predicament. Because of his plea of not guilty they were forced to give evidence of a most painful kind and were then subjected to lengthy and detailed cross-examination which must have been painful and humiliating. It was striking that no version was put to the complainants and that eventually the appellant simply admitted everything which they had said. It is also striking that other members of the appellant's family still believe in his innocence.

- [50] The appellant has no previous convictions which are relevant for present purposes. He has a history of alcohol and drug (dagga) abuse but this has no bearing on the case.
- [51] The High Court properly considered a number of factors which it considered as aggravating and found that there are no substantial and compelling circumstances to justify a lesser sentence than life imprisonment. As already mentioned the High Court did not apply the 'determinative test' to determine whether the prescribed sentence is disproportionate.
- [52] The appellant obviously lacks proper insight into and understanding of his conduct – why it is unlawful and why society regards it as unacceptable and most importantly perhaps why it would harm his daughters. He clearly considered that he was entitled to do what he did. In this misguided view he was supported by his wife and probably other members of his family. This must have played an important if not decisive role in his thinking and the commission of the crimes. This is a very important factor to be taken into account in his favour. While this does not detract from the seriousness of the crimes it is an important aspect of the appellant's personal circumstances. Society does not require the ultimate penalty to be imposed on such a person.

[53] Taking all the relevant circumstances into account it cannot be found that this was one of the most serious cases of rape. It is also significant that the court has not been referred to any judgment of the Supreme Court of Appeal where life imprisonment has been supported or imposed by the court for the rape of a girl under the age of 16 years. Insofar as there is a tendency in that court it seems to be to support or impose sentences of about 15 years imprisonment. Obviously the facts of the cases are all different. Bearing in mind the comments of the court in **S v Khumalo 1984 (3) SA 327 (A)** about the destructive effects of very lengthy prison sentences this court considers that a sentence of 15 years is a very heavy sentence and would be appropriate in this case (even taking into account the period served by the appellant after he was sentenced by the regional court). It will properly take into account the seriousness of the crimes, the interests of the appellant, and the needs of society. It follows that the court regards a sentence of life imprisonment as disproportionate to the crime, the appellant and the needs of society. There is also clearly a striking disparity between 15 years imprisonment and life imprisonment. The court will order that the two sentences run concurrently.

[54] The sentence must also take into account the fact that the appellant was detained from 5 April 2004 until 7 September 2005 i.e. a period of about 17 months before being sentenced by the High Court. It will be

ordered that the sentence will expire 17 months earlier than would ordinarily have been the case – see *Vilakazi supra* para 61.

[55] The following orders are made:

I In the appeal of Moses Silas Motlhakane (Case No A639/2008)

1. The appeal is upheld.
2. The sentence of life imprisonment is set aside and replaced with a sentence of 12 (twelve) years imprisonment.
3. In terms of section 282 of Act 51 of 1977 the substituted sentence is deemed to have been imposed on 29 July 2004.

II In the appeal of Jacob Doctor Sehlake (Case No A977/2008)

1. The appeal is upheld.
2. The sentence of life imprisonment is set aside and replaced with a sentence of 12 (twelve) years imprisonment.

3. In terms of section 282 of Act 51 of 1977 the substituted sentence is deemed to have been imposed on 19 April 2004.

III In the appeal of Jakobus Van der Rheede van Oudtshoorn
(Case No A978/2008)

1. The application to lead further evidence is dismissed.
2. The appeal is upheld.
3. The two sentences of life imprisonment are set aside and replaced with two sentences of 15 (fifteen) years imprisonment from which 17 (seventeen) months are to be deducted when calculating the date upon which the sentences are to expire.
4. In terms of section 282 of Act 51 of 1977 the substituted sentences are deemed to have been imposed on 7 September 2005.
5. In terms of section 280(2) of Act 51 of 1977 it is ordered that the two substituted sentences run concurrently so that the effective term of imprisonment is 15 (fifteen) years.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree

N.J. KOLLAPEN
JUDGE OF THE HIGH COURT

CASE NO: A639/2008

HEARD ON: 8 November 2010

FOR THE APPELLANT: ADV. J.M. MOJUTO

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. C. HARMZEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 10 December 2010

CASE NO: A977/2008

HEARD ON: 8 November 2010

FOR THE APPELLANT: Mr. O.P. Makobe

INSTRUCTED BY: Makobe & Associates, Witbank

FOR THE RESPONDENT: ADV. C. HARMZEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 10 December 2010

CASE NO: A978/2008

HEARD ON: 8 November 2010 and 8 December 2010

FOR THE APPELLANT: ADV. M.K. STEENEKAMP

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. C. HARMZEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 10 December 2010