

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN
JUDGMENT

ECJ:

PARTIES: **MTHUTHUZELIERIC NDIMA**
AND
THE STATE

- Registrar: **CA 49/2009**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **29/03/10**

DATE DELIVERED: **03/05/10**

JUDGE(S): **JONES and EBRAHIM JJ, and MAKAULA AJ**

LEGAL REPRESENTATIVES –

Appearances:

for the Appellant(s): **ADV: E Theron**
for the Respondent(s): **ADV: M Moodley**

Instructing attorneys:

- for the Appellant(s): **JUSTICE CENTRE (PORT ELIZABETH)**
for the Respondent(s): **DIRECTOR OF PUBLIC PROSECUTION (PE)**

CASE INFORMATION -

- *Nature of proceedings* : **APPEAL**

Reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown

CC 44/2002 SELD
CA 49/2009

In the matter between

MTHUTHUZELI ERIC NDIMA

Appellant

and

THE STATE

Respondent

Coram JONES AND EBRAHIM JJ, AND MAKAULA AJ

Summary Appeal – rape – sentence – life imprisonment – whether substantial and compelling circumstances were present to justify a lesser sentence in terms of section 51(3) of Act No 105 of 1997 – prescribed sentence unjust because of a striking disparity between it and an appropriate sentence of 15 years’ imprisonment – sentence altered accordingly on appeal.

JUDGMENT

JONES J

[1] On 6 August 2002 the appellant was sentenced to life imprisonment by Jansen J in the South Eastern Cape Local Division for the rape of a girl under the age of 16 years. On 9 December 2008 the court granted condonation of the appellant’s late noting of an appeal on sentence and gave leave to appeal on sentence to the full bench of this Court. That appeal is now before us.

[2] The rape was committed near Uitenhage on 24 July 2000. The evidence was that the appellant, who knew the complainant as a neighbour, called at her house and asked her aunt if the complainant could go to the shop for him to buy bread and paraffin. He was given permission and the complainant followed him to his home to get the money. She went inside. There, the appellant took her into his bedroom, got undressed, and had intercourse with her. Afterwards, he gave her R1-00 and told her that he would kill her if she told anybody what had happened. This notwithstanding, she went straight home and reported the incident to her aunt. She was taken to the local police station where a member of the police child unit

was summoned. She arranged for the child to be examined at the hospital by the district surgeon. The complainant was 10 years old at the time.

[3] In his reasons for sentence the learned trial judge referred to the provisions of section 51(1) and (3) which make a sentence of life imprisonment compulsory unless the court is able to find the existence of substantial and compelling circumstances which justify the imposition of a lesser sentence. He also referred to the then newly decided authorities dealing with the section, *S v Malgas* 2001 (1) SACR 469 (SCA) which was confirmed by *S v Dodo* 2001 (3) SA 382 (CC) and *S v Fatyi* 2001 (1) SACR 485 (SCA) 488, and correctly held that in determining whether the prescribed sentence was in the circumstances appropriate he should have regard to the factors traditionally taken account by the courts, namely the personal circumstances of the offender, the nature of the crime and the interests of the community. He stressed the importance of the appellant's personal circumstances and the need for a compassionate understanding of human frailty. He took into account that the appellant was 47 years old with no previous convictions, that he had a responsible job which produced a good income, that he was married with three children, and that he had given his co-operation to the police in respect of the collection of specimens for the performance of tests. He remarked on the lack of evidence of remorse and said that while remorse can be mitigating, he did not regard the lack of outward signs of remorse as aggravating. He did regard as aggravating the fact that the complainant was only 10 years old and that the appellant inveigled her away from her home by telling a lie about wanting to send her to the shop. He took into account the absence of physical injuries, but quite properly remarked that this was probably due to the fact that the child was too small to offer any resistance. He also took into account the threat to kill her and the attempt to buy her off with R1-00. He did not mention possible adverse psychological trauma, but there was no evidence of any emotional after effects. With reference to the interests of the community, he pointed out that women and children are precious to society, that they require protection from being raped and terrorised, that there is in this country a high incidence of rape, and that these considerations

give rise to a duty on the courts to make it clear that perpetrators of rape will be shown no mercy. Severe sentences must be imposed as a deterrent, and perpetrators must be removed from society. He concluded from an analysis of the above considerations that imposition of the prescribed sentence did not lead to injustice.

[4] The imposition of sentence is a matter for the discretion of the trial court. The right of a Court of Appeal to interfere with the exercise of that discretion is limited. The principle is re-stated by Scott JA in *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 241 para [10]-

It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. **All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence.** In the ultimate analysis this is the true inquiry. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so. (My emphasis)

See also (*S v Giannolis* 1975 (4) SA 867 (A) 868E). By requiring compulsory sentences for serious crimes such as rape, the legislature has placed restrictions on the judicial discretion relating to sentence, but it has not taken it away. As was pointed out in the *Malgas* judgment (*supra*) and the many cases which follow and apply it, the court is in every case required to make a value judgment in its evaluation of the facts in order to determine whether the prescribed sentence is proportionate to the offence, and hence whether it is a just or unjust sentence, regard being had to the legitimate interests of society. This involves the exercise of a judicial discretion. In this appeal, therefore, we are entitled to interfere with the learned trial judge's sentence only if we are satisfied that his discretion was not properly exercised. We may use one or another of the many tests applied by the courts to come to a conclusion of the issue, some of which are enumerated in the *S v Kgosimore* judgment *supra*.

[5] A frequent argument in appeals on sentence is that the trial judge did not exercise a proper discretion by reason of misdirections of law or fact. Such an argument was attempted by counsel for the appellant in this case. But it cannot prevail. In my view the learned judge gave a complete and balanced assessment of the facts before him. He did not omit relevant considerations or overemphasise or underemphasise anything. There are no material misdirections. But that does not mean that his conclusion was correct. As explained by Ackermann J in *S v Dzukuda; S v Tshilo* 2000 (2) SACR 443 (CC) para 23:

Even when exercising the first function referred to above [the setting aside of the sentence imposed by the trial court], there are circumstances when a court of appeal is obliged, on the bare record, to consider what punishment it would have imposed in the case under appeal. This occurs when no patent misdirection has been demonstrated but the Court of appeal sets aside a sentence on the grounds that

'there exists such a striking disparity between the sentenc(e) . . . passed by the (trial court) and the sentenc(e) which (the court of appeal) would have passed . . . as to warrant interference with the exercise of the (trial court's) discretion regarding sentence.'

As part of this evaluative process the Court of appeal has to determine what sentence it would itself have passed; and this it does on the bare record of the trial court. This, of course, does not by itself establish that such sentencing procedure is consistent with the right to a fair trial under our present Constitution. It is in fact a procedure employed in other democratic countries, such as England, Canada, Australia, New Zealand, India, France and Germany.

See also *Giannoulis's case supra* at 868E and *S v Whitehead* 1970 (4) SA 424 (A) at 436C-E.

[6] The test of a striking disparity between a prescribed sentence and the sentence which the Court of Appeal would have passed has been used in a number of cases in recent appeals against sentence for the crime of rape. See for example *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the Supreme Court of Appeal substituted a sentence of 15 years' imprisonment for a sentence of life imprisonment for rape where the only really aggravating feature was the age of the complainant, of a girl of 14 or 15 years of age. This is not to say that the Supreme Court of Appeal underplayed the seriousness of the rape of a 15 year old girl. On the contrary, the judgment makes it clear that all rapes are aggravated offences by

their very nature, and particularly rapes of girls under the age of 16. But by 2009 there has been a considerable body of case law in which the courts have analysed and debated the various considerations relevant to an appropriate sentence for rape. I refer, for example, to *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Njikelana* 2003 (2) SACR 166 (C); and *S v Nkomo* 2007 (2) SACR 198 (SCA) 205. Prominent in recent judicial thinking is that while all rape cases are serious, some are, in the nature of things, more serious than others. Different degrees of seriousness can and should give rise to different sentences. In this regard, the learned trial judge did not have the benefit of these decisions when he imposed sentence in this case, with the result that his sentence does not demonstrate this degree of differentiation and, with it, a full appreciation that in view of the differentiation this case does not fall into the category of rape cases which are so serious that they imperatively call for the ultimate sentence.

[7] The most serious element of this rape is that the victim was a little girl of 10 years who had not yet reached the age of puberty. The young age of this victim makes it a more serious than, for example, *Vilakazi's* case *supra* where the victim was about 15 years. Like *Vilakazi's* case no weapon was used and the victim suffered no serious physical injury other than that produced by the act of rape, and there was no evidence of serious emotional trauma. The appellant in *Vilakazi's* case was 24 years old and capable of rehabilitation. In this case, too, the appellant is capable of rehabilitation. He is, furthermore, a mature family man of 47 years who has until this offence lived a blameless life, who made a good living as an insurance broker, and who made a contribution to his community. These personal circumstances, in my view, make him a candidate for rehabilitation and are possibly in themselves enough to take this case out of the worst case category from the point of sentence. Combined with the other features to which I have alluded, I have no doubt that that is so.

[8] I have used *Vilakazi's* case as no more than a point of departure. It should not be forgotten that no two cases can ever be comparatively on all fours when it comes to the

imposition of sentence for rape, not least because the personality of the victim and the perpetrator can never be the same in any two cases. Each case must be considered in the light of its own facts, and one case can never be more than a general guide to the seriousness of another. It seems to me, however, that if the court *a quo* had had the benefit of the judgment in *Vilakazi's* case and the cases referred to above when it imposed this sentence in 2002, it would have come to the conclusion that on these facts a sentence of life imprisonment is disproportionate to the seriousness of this crime. In my view a sentence of a long term of imprisonment, imprisonment for as long as 15 years, is a proper and just sentence in relation to this offence. A sentence of 15 years' imprisonment brings home to the appellant the gravity of what he did, it serves as a sufficient deterrent to others, it meets the legitimate interests of society in relation to retribution and the protection of women and children, and it gives the appellant a prospect of rehabilitation.

[9] There is a striking disparity between a sentence of 15 years' imprisonment and imprisonment for life. In terms of *S v Malgas supra*, this justifies the imposition of a lesser sentence than the sentence prescribed by section 51 of the Act.

[10] In the result, the appeal is allowed. The sentence of life imprisonment is set aside and will be replaced with a sentence of 15 years' imprisonment, which is antedated to the date upon sentence was imposed by the trial court, i.e. 6 August 2002.

RJW JONES
Judge of the High Court
12 April 2010

EBRAHIM J I agree

Y EBRAHIM
Judge of the High Court

MAKAULA AJ I agree

M MAKAULA
Judge of the High Court (Acting)