

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Case number: A89/2015

In the matter between:

**MTHANDAZI JOHNSON MAGAZI**

Applicant

and

**THE STATE**

Respondent

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**CORAM:** Rampai, J et Lekale, J

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**HEARD ON:** 19 OCTOBER 2015

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**JUDGMENT BY:** RAMPAI, J

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**DELIVERED ON:** 12 NOVEMBER 2015

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- [1] These were appeal proceedings. The appellant was convicted by the regional court on a charge of rape. Following his conviction he was sentenced to life imprisonment. He came to us on appeal against his sentence with the leave of the court *a quo*. The respondent opposed the appeal.

- [2] An incident took place at Bainsvlei in Bloemfontein on 17 October 2010. A minor female child, herein referred to as K, was involved. The incident was reported to the police. The investigation of the incident led to the arrest of the appellant on the same day.
- [3] The appellant was subsequently charged with rape. It was alleged that he unlawfully and intentionally committed an act of sexual penetration with the complainant, K, a girl 7 years of age, by penetrating her vagina with his penis, without her consent in contravention of sec 3 of Sexual Offences and Related Matters Act 32/2007 read with specified statutory provision thereof as well as sec 51 Criminal Law Amendment Act (CLAA) 105/1997 read with Part I Schedule 2. The complainant was born on [.....] 2003 (vide exi a).
- [4] The appellant was tried in the Bloemfontein Regional Court. His trial started on 2 March 2012. Mr. Lesea appeared for the state and Mr. Sojada for the defence. He was required to plead to the charge of rape. He pleaded not guilty. He did not explain the basis of his defence. He put in issue all the elements of the crime.
- [5] Notwithstanding his plea, the appellant was found guilty on 12 March 2012. On 16 April 2012 he was sentenced to life imprisonment. He was aggrieved by the sentence imposed on him. On 2 May 2012 he successfully applied for leave to appeal against the sentence.

- [6] The appellant filed his notice of appeal on 8 May 2012. The principal ground of the appeal was that the sentence of life imprisonment was strikingly inappropriate in that the mitigating factors were not accorded due and proper weight. The essence of his contention was that, the mitigating factors and the aggravating factors were considered and weighed up in an unbalanced manner by the regional magistrate. Such an approach, he contended, inevitably led to the incorrect conclusion that no substantial and compelling circumstances existed to warrant deviation from the prescribed sentence of life imprisonment.
- [7] The question in the appeal before us, therefore, was whether the court *a quo* materially erred in reaching the conclusion that no weighty justification existed to validate deviation from the prescribed minimum sentence and whether on the strength of alleged misdirection it ultimately imposed on the applicant a sentence which was shockingly severe and thus inappropriate.
- [8] On behalf of the appellant Ms. Kruger submitted that the question must be answered in the affirmative. Therefore, she urged us to uphold the appeal and set aside the sentence which she regarded as disproportionately severe and shocking.
- [9] On behalf of the respondent Mr. Strauss disagreed. He submitted that the answer to the question must be negative. Therefore, he urged us to dismiss the appeal and to confirm the sentence which he regarded as proportionately appropriate to the crime.

[10] In sentencing the appellant the following factors were regarded as mitigating factors:

10.1 He was born on [.....] 1984. At the time he committed the crime he was 26 years old. At the time he was sentenced he was 27 years old;

10.2 He received formal education until he passed standard 9;

10.3 He was employed as a gardener at Bethulie. His wages amounted to R600.00 per month;

10.4 He was single and had no children at all;

10.5 His parents were never married. He and his siblings grew up in a single parent household which was headed by his mother;

10.6 He and his siblings were brought up by their maternal grandparents after the death of their mother;

10.7 He maintained his youngest brother at all times prior to his arrest. His aunt was the brother's daily caregiver;

10.8 He was arrested on 17 October 2010 and he was incarcerated ever since then;

10.9 He was a first rape offender with a clean criminal record.

[11] In sentencing the appellant the following factors constituted aggravating factors:

11.1 The nature and seriousness of the crime of rape;

11.2 The prevalence of the crime in the region;

11.3 The complainant was a small child, 7 years of age, at the time the appellant raped her;

11.4 The appellant took an unfair advantage of a small, defenceless and vulnerable child;

11.5 He betrayed the trust which the little girl, her mother and the family had in him;

[12] As already indicated the court *a quo* considered both sides of the coin and found that no substantial and compelling circumstances existed to justify departure from the prescribed minimum sentence of life imprisonment. Ms. Kruger, canvassed specific factors on the strength of which she submitted that deviation was justified and that the imposition of the prescribed minimum sentence of life imprisonment was thereby rendered shockingly inappropriate.

[13] I share the view that rape is a repulsive crime. It humiliates and degrades its victim like no other crime. It is no ordinary assault. It is a vicious assault of a particularly vicious nature. It callously invades the dignity, equality, freedom and privacy of its victim. **S v Chapman** 1997 (3) SA 341 (AD). The scourge of rape has reached alarming proportions in the province. The society as a whole demands effective and meaningful protection of women in general and small girls in particular from abusive sexual offenders. Our courts must leave no stone unturned in an endeavour to stem the tide. It is the duty of the courts to see to it that women enjoy their rights without fear of abusive sexual offenders.

[14] When the crime is prevalent, severe sentence may be justified in order to deter abusive sexual offenders. **S v Reay** 1997 (1) SA 873 (AD) at 877 c. In **S v Moswathupa** 2012 (1) SACR 259 (SCA) the court held that severe sentences should be imposed even on first offenders in a bid to protect women. Where sexually abusive adults reprehensibly satisfy their carnal desires with helplessly young children they have to be deterrantly punished by imposing on them sentences that would reflect not only the strong disapproval of the court as the judges said in **S v D** 1995 (1) SACR 259 (AD) at 259 g but also the natural indignation of society as the judges said in **S v Karg** 1961 (1) SA 231 (AD) at 236 A-B.

[15] In **S v E** 1979 (3) SA 973 (AD) at 978 the court said:

“Kinders moet teen hierdie soort optrede beskerm word. Die Hof het 'n plig om sy afkeuring daarvan ten sterkste uit te spreek en ook om in so 'n geval 'n vonnis op te lê wat die nodige afskrikwaarde sal hê.”

In pretty much a similar vein the court commented as follows in **S v Tyetyame** 1991 (2) SACR 1 (AD) at 7 F Hoexter JA said:

“Dit is die dure plig van ons Howe om jong kinders teen gewetelose geweldenaars te beskerm.”

[16] We have to approach this appeal mindful of the principle that the sentencing of an offender is primarily the prerogative of the trial court. **S v Kgosiimore** 1999 (2) SACR 238 (SCA). In the absence of a material misdirection no appellate interference is

justified. **S v Pieters** 1987 (3) SA 717 (AD) at 728 b-c. It is impermissible to erode the discretion entrusted to the trial court where there was no material misdirection or irregularity committed. To do so would be tantamount to usurping the sentencing discretion of the trial court – **S v Malgas** 2001 (1) SACR 469 para 12. It is trite law that a material misdirection by a trial court vitiates its sentencing discretion.

[17] Ms. Kruger submitted that the sentence of life imprisonment imposed on the appellant was unjust and disproportionate to the crime given that he was a first offender; that he was incarcerated for 18 months; that the complainant did not suffer any physical injuries; that the complainant did not suffer any lasting emotional trauma and that the case could not be considered the most serious of rape cases. She was of the opinion that those 5 factors, cumulatively considered together with all the personal circumstances of the appellant, sufficiently constituted circumstances that substantially compelled deviation and that they could not be dismissed as flimsy reasons as the regional court did. Consequently we were called upon to consider those factors afresh.

[18] As regards the status of the appellant as a first offender, the trial magistrate said:

“To summarise, the legislator has thus clearly expressed its intention in respect of both Part 1 and Part 3 categories of rape. For the one category, once (sic) previous criminal record is relevant for purpose of sentencing and for the other category it is not. The contrast between the sentencing regimes thus speaks for itself.”

- [19] I have difficulty with the proposition that an offender's criminal past automatically becomes an irrelevant factor once it has been shown that his actions fell within the purview of the first category – in other words Part I of Schedule 2. A clean record or a first offender's status as a category one offender cannot be discarded up front as a flimsy reason as regards sentence. It always remains a significant factor in an adjudicative process of objectively interrogating all the peculiar circumstances of a particular case in order to determine a sentence that is just and proportionate to the gravity of the offence. A sentencing court is still obliged to take into account all the factors relevant to sentencing even where a rape offender's actions fall within the penal purview of the first category. Nothing must be excluded, right from the outset, from consideration **S v Malgas** 2001 (1) SACR 469 (SCA).
- [20] In **S v Vilakazi** 2009 (1) SACR 552 (SCA) para 16 Nugent JA was at pains to clarify the thrust of Malgas' decision and the important effect of its crucial qualifications namely: that the prescribed minimum sentence must not be imposed as the general norm of sentencing which must be rarely departed from in exceptional cases only; that Malgas decision was no authority for the proposition that the prescribed minimum sentence should be ordinarily imposed; that the thrust of that leading decision was that a court must approach the matter of sentencing:

“... conscious of the fact that the legislature has ordained the prescribed sentence as the sentence that should ordinarily, and in

the absence of weighty justification, be imposed for the scheduled listed crimes committed in categorized and specified circumstances.”

- [21] The rigid approach advocated by the regional court crucified all those qualifications. The recurrent theme in the Malgas decision was that factors traditionally taken into account in sentencing remain relevant to the sentencing process and that none of them should, from the very beginning, be consciously eliminated from the punitive equation as the regional court propounded in respect of cases specifically categorized in the first part of the schedule.
- [22] Consider the following hypothetical factual matrix: X and Y rape a 7 year old girl. Obviously they face a charge of first category type of rape. It then turns out that Y was also linked to 3 other separate rape incidents in which girls of the same age were involved. The two are tried together in connection with 4 rape charges. At the end of the trial X is found guilty in respect of one count of rape but Y of all 4 counts.
- [23] In considering whether the prescribed minimum sentence of life imprisonment would be a proportionate, just and appropriate sentence or not in respect of Y, the peculiar circumstances of the particular hypothetical case tend to be indicative of his propensity to rape and that, although he is a first offender, he is likely to re-offend. However, the position of X is different. There is nothing that tends to indicate that he is likely to become a repeat offender soon, although that cannot be confidently predicted. Therefore, it is a material consideration whether an offender can be expected to offend again - Vilakazi, *supra*, para 58.

- [24] To sentence the appellant, as an accused person, without the slightest consideration of his status as a first offender and its relevance to the offence or consequences of excluding it as irrelevant factor, was a clearly material misdirection.
- [25] As regards the fact that the complainant did not suffer any serious and permanent physical injury, the regional court again declined to give the appellant credit. In this case there was no extraneous violence of any sort unleashed by the appellant on the child. We live in a violent society. At times victims are sexually abused in extremely violent and brutal circumstances - **S v Matyityi** 2011 (1) SACR 40 (SCA) and **S v Mosia** 2012 (2) SACR 537 (FB) in particular pars [20-22]. A victim's serious and permanent physical injuries often symbolise the degree of violence an offender brutally used against a victim before, during or after the sexual abuse. The greater the degree of brutality or violence the greater the degree of an offender's moral blameworthiness **S v Mabitse** 2012 (2) SACR 380 (FB) pars [17] and [18].
- [26] The complainant was taken to Tshepong Centre where Sr Sechoci, examined her on 18 October 2010. The forensic nurse clinically found no evidence of visual physical injuries. (5 exi c) Her gynaecological examination showed a whitish vaginal discharge, abrasion and reddishness. There were no tears, bruises, perforation of the hymen or bleeding noted. These were material facts that emerged from the medical report. Certainly they were not irrelevant. In weighing whether the ultimate sentence will be indeed proportionate in this case, the absence of

serious and permanent physical injury on the part of the complainant was a materially relevant factor.

[27] The regional court reckoned that the fact that the appellant did not physically injure the complainant was not a materially relevant consideration. The regional court was prompted to do so by its own understanding of sec 51(3)(aA)(ii) Act No 105/1997. The section which came into operation on 31 December 2007 provides that an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence in respect of the offence of rape.

[28] In **S v Nkawu** 2009 (2) SACR 402 (ECG) Plasket J was called upon to interpret the aforesaid legislative provision. He generously interpreted the provision in a way favourable to the rape offender. He did so in keeping with the basic canon of interpretation of statutes. A punitive statutory provision is liberally interpreted in favour of the subject. He concluded that the rape victim's apparent lack of physical injury remained a factor that must be included in the common basket of factors relevant to the enquiry in terms of sec 51(3) in order to determine the question:

“to deviate or not to deviate.”

[29] In **S v Mabitse** 2012 (2) SACR 380 (FB) this court aligned itself with the interpretation of sec 51(3) (aA)(ii) by Plasket J in **S v Nkawu**, *supra*.

At para [17] we said:

“Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next (Jones J in **S v Booyesen** supra, at para 7), so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next. The physical injury symbolises the measure of violence the perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the degree of the rapist's moral blameworthiness. I am of the firm view that dictates of justice demand that, in meting out sentence, differentiation be made, based on the degree of violent and brutal force used.”

At para [18] we said:

“If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors, for inclusion in the melting pot of consideration in order to make a determination in terms of s 51(3) regarding the existence or otherwise of substantial and compelling circumstances — Plasket J in **S v Nkawu** supra, at para 17.”

- [30] In **S v Mokoena** (A323/2012) [2012] ZAFSH 12 (9 February 2012) pars [29-0] this court re-affirmed its decision in **S v Mabitse**, supra. Both of those decisions were fundamentally inspired by the process of thought employed by Plasket J in **S v Nkawu**, supra, para 17. The Nkawu decision was authoritatively approved and applied in **S v SMM** 2013 (2) SACR 292 (SCA). At

para 26 Majiedt JA had this to say about sec 51(3)(aA)(ii) Act No 105/1997 and its interpretation by Plasket J in **S v Nkawu**, *supra*:

“He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.”

[31] It follows from the aforesaid authoritative decision that the trial magistrate committed a material misdirection on a question of law in declining to apply **S v Mokoena**, *supra* on the grounds that it was wrongly decided. We have to remind ourselves that legislative prescription sometimes tend to strip courts of their sentencing discretion and that courts have to be alive to and to guard against the potential unjustness of such edicts - **S v Malgas**, *supra*, para 1. To the extent that the trial magistrate reckoned that the rape victim’s lack of serious and permanent physical injury was an irrelevant factor, in view of the aforesaid punitive legislative measure, which fell to be entirely eliminated “a priori” from the enquiry, he materially erred.

[32] The regional magistrate reckoned that he was not bound by the decisions of this high court and followed a decision of another high court - **S v Muller** 2007 JOL 19407 (W)

In doing so the regional magistrate misapplied the principle of *stare decisis*. The judgments not followed were appeal decisions. In terms of the principle a regional magistrate is generally bound by decisions of its provincial division of the high court.

- [33] As regards the question of emotional trauma a victim impact report was obtained and filed “exi e”. Mr. I Ntoi, a social worker, interviewed the complainant and her family on 21 March 2012. He reported that the victim was born on [.....] 2003; that she lived at Botshabelo with her parents and 2 siblings; that she was a middle child; that she was a grade 2 learner of T. P. S.; that she was a generally healthy child; that she tearfully gave the first report of the incident to her mother on the same day of the incident; that her vagina was painful at the time she reported the incident to her mother; that she could not go to school for 4 days after the rape incident because she was not well; but that she was able to concentrate in class without any problems.
- [34] The adverse impact of the rape was noted. She dreamed about “Worsi,” in other words the appellant, killing her and her family. She still remembered that he had threatened to kill her and her family if she dared tell what he did to her. It appeared she dreamed about the appellant on 3 occasions. Since the incident she was afraid to play with or to talk to boys. She feared that they would ask her to undress. The social worker noted that she vividly recalled the incident as if it happened a day before the interview. The victim impact report was handed up and marked “exi e”.
- [35] What we had before us in assessing the emotional impact of the crime upon the complainant was that she was in tears when she told her mother about the incident. Her tears could have been attributable to emotional hurt, physical pain or both. All the same

each of them was attributable to the crime. When she was examined by the forensic nurse a little later, she observed no symptoms of emotional distress. The nurse noted that she was calm. Although she has had few flashbacks about the incident, horror dreams about the appellant, none of those adverse effects was described as recurrent and permanent. She did not have any nightmares. Her concentration was not negatively affected. There was no evidence of ongoing emotional trauma.

[36] I accept, nonetheless that she has been inevitably traumatized. Said Nugent JA in Vilakazi *supra*, para 57:

“I think it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault, and that in this case the complainant must indeed have been traumatized, but the evidence does not reveal anything more specific than that.”

There is some thin evidence in this case upon which to measure the emotional impact of the crime upon the victim. It is sufficient to say that it is evident from the available facts that she currently appears to have sustained no emotional damage of a permanent nature. I am mindful that emotional distress and damage that accompanies rape might be extensive even if it is not immediately and overtly manifested, more so in the case of young girls such as the complainant. Her fears and mistrust for boys was not deeply probed and no prognosis was given. However, I gained the impression that she is a resilient girl and that she is likely to overcome those emotional hurdles with the passage of time.

**S v Mosia** *supra* epitomises a case of very serious ongoing trauma. So does **S v Matyityi**, *supra*.

[37] As regards the incarceration period, the appellant was arrested on 17 October 2010, being the date of the incident. Ever since then he remained incarcerated. He had been incarcerated for almost 18 months at the time he was sentenced on 16 April 2012. The agony of such incarceration is treated by our courts as a factor relevant to sentence. In *Vilakazi*, *supra*, para 60 Nugent JA said:

“There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.”

[38] In **Radebe v S** (726/12) [2013] ZASCA 31 (27 March 2013) para [14] Lewis JA said:

“... the test is not whether on its own the period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.”

[39] In **S v Kruger** 2012 (1) SACR 369 (SCA) at 373 c-d. Shongwe JA

“An effective sentence of 26 years, in the circumstances of this particular case, is disproportionately harsh and induces a sense of shock. The other consideration is the period spent in prison by the appellant while awaiting trial. It is only fair to consider that period, especially where it is a lengthy period. In the present case the appellant was incarcerated for a period of three years and eight months before he was finally sentenced on 24 February 2000. One way of factoring this period into a sentence is by antedating the sentence to the date on which he was sentenced or an earlier date by simply deducting the three years and eight months from the imposed sentence.”

- [40] It is clear and obvious, in the light of those recent decisions of the SCA, that the agony of an awaiting trial offender remains a material sentencing consideration. It should not be watered without serious thought. There are cases where it would not matter but this is not one of such cases.
- [41] Having cumulatively considered the aforesaid four factors in particular together with the appellant's personal profile in general as well as the peculiar circumstances of this particular case - I am persuaded that the regional court injudiciously and improperly exercised its sentencing discretion. Given all the peculiar circumstances of this particular case, the sentence of life imprisonment was disproportionate to the crime. The misdirections earlier alluded to were all material. The sentencing discretion of the trial court was thereby vitiated. We are, therefore, at liberty to consider the question of sentence afresh **S v Malgas**, *supra*.

[42] The complainant was a very small child. Her rape was, therefore, an inherently very serious crime. When viewed as a whole, her age was the only material feature disclosed by the evidence as having aggravated the crime. I am satisfied that, by itself, her age alone did not justify the imposition of the ultimate sentence permitted by law. In my view a substantial sentence of 20 years imprisonment appears to be sufficient to bring home to the appellant the gravity of his crime and also to exact sufficient retribution for his crime. To make him pay for the crime with the remainder of his life would seem to me to be grossly disproportionate and merciless punishment.

[43] There is one further matter that calls for comment. The trial magistrate reckoned that there is a tendency by the courts to disregard legislative prescriptions.

“My personal view is one of the main reasons why the legislator deemed it fit to amend the Act and legislate Section 51 [3] [A] [a] [2], is amongst others the manner in which the Courts easily deviated from the minimum sentences.”

[44] In a rather uncustomary manner the trial magistrate criticised judges of this division such as Cillie J, Rampai J, Kruger J and Van der Merwe J. The trial magistrate also reckoned that he was not bound by the decisions of this division because, in his view, they were wrongly decided. It will be recalled that the trial magistrate chose to follow and to apply the decision of another provincial division - **S v Muller** 2007 JOL 19407 (W) as regards the interpretation of sec 51(3)(aA)(ii). It is unorthodox for a

magistrate to act in that manner and to disregard the principle of stare decisis. I say no more.

[45] In the result the following order is made:

- 45.1 The conviction stands;
- 45.2 The appeal against the sentence is upheld;
- 45.3 The sentence of life imprisonment is set aside and substituted with the one below;
- 45.4 The appellant is sentenced to 20 years imprisonment from which 18 months are to be deducted when the date of his release is calculated.
- 45.5 The fresh sentence is antedated to 16 April 2012.

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**M.H. RAMPAL, J**

I concur

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**L.J. LEKALE, J**

On behalf of appellant:      Attorney S. Kruger  
Instructed by:  
Bloemfontein Justice Centre  
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On behalf of respondent: Adv. M. Strauss  
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