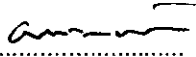


IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

Case no A 252-2012

DELETE WHICHEVER IS NOT APPLICABLE	
1 REPORTABLE	YES / NO ☒ YES ☐ NO
2 OF IMPORTANCE TO OTHER JUDGES	YES / NO ☒ YES ☐ NO
3 REVISED	☒
18.8.2013	
DATE	SIGNATURE

13/8/2013

SILUS MDUPI MOGANEDISA

APPELLANT

and

THE STATE

RESPONDENT

Coram: VAN NIEKERK J and KRUGER AJ

Heard 5 August 2013

Delivered: 13 August 2013

JUDGMENT

- [1] On 3 November 2010, the appellant was convicted on a charge of raping his 15 year old daughter. He was subsequently sentenced to life imprisonment, the prescribed minimum sentence in terms of s 51 (1) of Act 105 of 1997. The appellant appeals against both his conviction and sentence.
- [2] At the hearing of the appeal, the appellant's counsel confirmed the appellant's concession that he had been correctly convicted, a concession foreshadowed by the heads of argument filed on the appellant's behalf. The appeal is therefore confined to the issue of sentence. In particular, it was submitted before us that the trial court failed properly to apply what has become known as the 'determinative test' (the test to be applied to determine when a court may depart from a prescribed minimum sentence) and that on an application of that test, the sentence of life imprisonment was disproportionate to the crime.
- [3] The trial court noted that in the constitutional era, the Constitution provided 'some impetus' towards the greater recognition of the interests of victims at the stage of sentencing. This was particularly so, observed the court, in relation to rape, for which a minimum sentence is prescribed for every act. The court then assessed the substantial and compelling circumstances proffered by the appellant as a basis for deviation from the prescribed minimum sentence of life imprisonment, the complainant being under 16 years old. These included the fact that the appellant was a first offender, his plea of guilty, the period spent in custody awaiting trial (seven months), the fact that the complainant had not been kidnapped, and the prospect of rehabilitation. Each of these was separately considered and rejected. The appellant's plea of guilty was similarly dismissed as a relevant factor, in the absence of any demonstrable expression of remorse. The fact that there was no use of violence or bodily injury suffered by the complainant was eclipsed, reasoned the court, by the fact that the appellant had threatened to kill the complainant should she disclose the appellant's conduct to

any other person. The court also discussed, in comprehensive terms, the effect of the rape on the complainant.

- [4] The trial court noted the authorities to the effect that a sentencing court is entitled to deviate from a prescribed sentence where it is deemed so grossly disproportionate as to amount to an injustice. The court acknowledged that the practical application of a 'worst category of rape' test had been resolved by the legislature when it imposed a minimum sentence of life imprisonment for the rape of a girl under the age of 16. On this basis, the court declined to regard the rape of the complainant by the appellant as 'more or less worse than other acts of rape'. After dismissing the relevance of the period spent in custody prior to sentence, the court imposed the minimum prescribed sentence of life imprisonment.
- [5] There are a number of authorities that postdate the sentence under appeal that are directly relevant, all of which indicate misdirection by the trial court. The first is the decision by the Full Bench of this Division, when it had occasion recently to consider appeals in three cases of rape, all of them involving complainants below the age of 16, and all of them the subject of a challenge to the imposition of the minimum prescribed sentence of life imprisonment. In *S v M*; *S v JS*; *S v JV* 2011 (1) SACR 510, the court emphasised that in those cases involving the imposition of prescribed minimum sentences in terms of s 51, a trial court must necessarily safeguard against the risk that sentences so disproportionate as to be unconstitutional. The applicable test is that established by *S v Malgas* 2001 (1) SACR 469 (SCA), approved by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC). In *Malgas*, the court said the following:

'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.

- [6] A sentencing court is therefore required to determine, in each case, on its own merits, whether the prescribed sentence is proportionate to the offence, the latter term to be construed so as to include the nature and seriousness of the offence, and all relevant personal and other circumstances. The sentencing court may not *a priori* assume that the prescribed minimum sentence is proportionate in each instance; on the contrary, it may well be that the prescribed sentence is seldom proportionate (see *S v Vilakazi* 2009 (1) SACR 552 (SCA), a case where like the present, the offence comprised the rape of a girl under the age of 16).

- [7] The decision of the Full Bench referred to above provides guidance on a sentence that might be proportional in the circumstances. While acknowledging that not all cases are the same, each of the appeals under consideration in that instance displays significant similarities with the present. In *S v M (supra)* the appellant was convicted of raping his 12 year old step daughter in the family home. The court substituted the sentence of life imprisonment with a sentence of 12 years. In *S v JS (supra)*, the appellant, aged 18 at the time of the offence, was convicted of raping a four year old girl. The court similarly substituted the sentence of life imprisonment with a sentence of 12 years. In *S v JV (supra)*, the court substituted the sentence of life imprisonment with a sentence of fifteen years, to run concurrently, on each of two counts of rape in circumstances where the appellant had raped his daughters from the age of about 9 until they reached the age of about 12.

- [8] Similarly, in *Ndou v The State* (93/12, unreported, 28 September 2012) and *Mudau v The State* (764/12, unreported, 9 May 2013), the Supreme Court of Appeal reaffirmed that life imprisonment is the ultimate and most severe sentence which a court can impose and that whether it is an appropriate sentence, especially in relation to its proportionality to the circumstances of the case, requires careful consideration. In *Ndou*, a sentence of life imprisonment was set aside and substituted by a sentence of 15 years' imprisonment in

circumstances where a stepfather was convicted of raping his 16 year-old stepdaughter. In *Mdau*, a sentence of life imprisonment was set aside and substituted by a sentence of 15 years' imprisonment in a case where an uncle was convicted a raping his 13 year-old niece. Of course, in each instance, the sentence was dictated by a conspectus of all of the relevant circumstances, but these are not far removed from the facts in the present instance.

- [9] The trial court appears to have approached the issue of sentence from the perspective that there is no gradation between the prescribed sentence of 10 years' imprisonment where the victim is over the age of 16, and the maximum sentence where she is under that age, irrespective of all of the aggravating or mitigation factors that may be present. To regard the minimum prescribed sentence as determinative or to place undue emphasis on it, runs the risk, as the courts have observed, of a sentence that is disproportionate to the crime, the criminal and the needs of society. In sentencing the appellant, the trial court did not apply the determinative test in the sense that it is articulated by the relevant authorities. Insufficient weight was accorded to the appellant's circumstances and the legitimate interests of society. In the absence of an assessment conducted with the necessary rigour, the result is that the sentence appears to have been 'read off the machine'. This court is therefore empowered to interfere with the sentence and determine a sentence that meets the requirements of proportionality.

- [10] The starting point in any determination of an appropriate sentence is to acknowledge and bring into account the scourge of rape. In *S v Ncheche* 2005 (2) SACR 386 (W), the court said the following:

'Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and

anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely. '

- [11] In the present instance, the circumstances of the rape are such that the complainant was enticed into the appellant's room, which he locked before proceedings to rape her, having turned up the volume of music playing to mask any sound made by the complainant. Afterward, the appellant threatened to kill the complainant if she disclosed the incident to any other person. It was only after the complainant later discovered that she was pregnant (as a consequence of the rape) that she disclosed that she had been raped, identified the appellant as the perpetrator. She later underwent an abortion. The psychosocial report prepared for the purposes of sentence records that the emotional impact of the crime on the victim- her low self- esteem, sense of loss and powerlessness, anger and hostility, her sense of guilt and shame, her pseudo-maturity and inappropriate sexual behavior. The report concludes that the victim was put through a 'life threatening and traumatic experience which can affect her for the rest of her life.'
- [12] The appellant is described in the pre-sentence report as a 40 year-old man, the victim being his only child. He is described as a withdrawn, very quiet, secretive individual, who displays no emotion. The report records the absence of any remorse by the appellant for his conduct, and a harboured sense of anger directed toward the victim's mother. The report does not directly address any prospects of rehabilitation. However, there is nothing before us to refute the proposition that the appellant is capable of rehabilitation, a prospect that would be denied him should the minimum prescribed penalty be imposed. Further, the act of rape, while an act of violence in itself, was not accompanied by any other physical violence or physical injury to the victim.

[13] We must also necessarily take into account that the present case sits on the cusp of a minimum prescribed sentence of life imprisonment, and the ten-year minimum sentence prescribed in cases of rape where the victim is aged 16 or older. The victim in this instance was 9 months short of her 16th birthday when she was raped. As we have noted, the absence of any gradation in the minimum sentence provisions runs the risk of disproportionality (and hence unconstitutionality) of an approach that fails to make a holistic assessment of all of the relevant facts and circumstances, and the victim's age is a factor that must necessarily be taken into account.

[14] In our view, a lengthy prison sentence would properly and proportionally take into account the seriousness of the appellant's crime, the interests of the appellant and the needs of society. A sentence of 15 years imprisonment is consistent with other, similar cases to which we have referred and would constitute a sentence that we consider to be both proportionate and appropriate in the present circumstances.

Order

I make the following order:

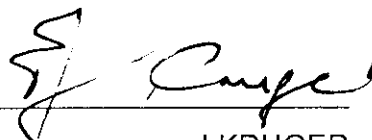
1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence of life imprisonment is set aside and substituted by a sentence of 15 years' imprisonment.



A VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT, NORTH GAUTENG DIVISION

I concur


J KRUGER

ACTING JUDGE OF THE HIGH COURT, NORTH GAUTENG DIVISION

APPEARANCES

FOR THE APPELLANT: Adv Nel, instructed by:

Justice Centre, Pretoria

FOR THE RESPONDENT: Adv Moetaesi, instructed by:

Director of Public Prosecutions, Pretoria