

IN THE HIGH COURT OF SOUTH AFRICA**(NORTHERN CAPE HIGH COURT, KIMBERLEY)****Case No K/S 4/10****Date heard: 29 May 2012****Date delivered: 8 June 2012****In the matter between****THE STATE****V****ANDRIES MOHALE**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

PAKATI J

1. The applicant, Mr Andries Mohale, is represented by Mr A Van Tonder. He applies for leave to appeal against his sentence. He was convicted on 10 June 2010 of rape in count 1, robbery with aggravating circumstances in count 2 and in count 3, murder. He was sentenced to ten years imprisonment for the rape, fifteen years for the robbery and life imprisonment for murder. The sentences were ordered to run concurrently.

2. In his notice of Appeal filed on 24 June 2010 he listed the following grounds:

"That there exists a reasonable possibility that another court on appeal may find that:

- i. Compelling and substantial circumstances exist which could justify a deviation from the prescribed minimum sentence;*
- ii. The totality of the personal circumstances of the applicant amounts to substantial and compelling circumstances; especially his youthful age and the fact that he spent 1 year, 4 months and 20 days in custody awaiting the finalisation of his trial; and*
- iii. The imposition of the minimum sentence on all of the counts is so severe a sentence that it amounts to an injustice to the applicant."*

3. The provisions of Section 51 of the Criminal Law Amendment Act, 105 of 1997, are applicable in respect of the offences that the applicant was found guilty of.
4. Mr Van Tonder for the applicant argued that the personal circumstances of the applicant taken cumulatively amount to substantial and compelling circumstances. State counsel Ms AH Van Heerden submitted that the sentences does not induce a sense of shock and should therefore stand. She submitted further that there are no prospects of success in this application.

5. The personal circumstances placed on record by Mr Van Tonder were the following:

"The accused is currently 23 years old. At the time of the commission of the offence, or offences, he was 22 years old. He is not married, but has one dependent child, a daughter of 3 years. The accused enjoys good health. He is not suffering from any illness. At the time of the commission of the offence, the accused was unemployed. The accused's mother is still alive and he has no siblings. He is the only child. He succeeded standard 5 at school. He was arrested on the 20th of January 2009 and has been in custody since that time. The period that he has been in custody is 1 year, 4 months and 20 days. The accused is also a member of the Union Express Church".

6. When considering whether substantial and compelling circumstances exist during imposition of an appropriate sentence the following passage is of importance in **S v MALGAS 2001 (1) SACR 469 (SAC)** at 477D-E.

"The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances".

The following passage at 477 F is also worthy of consideration:

"But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante

omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders”.

7. During the trial the applicant did not show immaturity nor was it evident that he was subjected to peer pressure by anyone. On the contrary the manner in which the deceased was assaulted by the applicant was testified to by Dr Surtie. He testified that the injuries on the body of the deceased, a 72 years old lady, were compatible with the use of a blunt object like a stone, with which the deceased was dealt several blows. He confirmed that the bruising of the face of the deceased in a zig-zag pattern also needed a significant amount of force. The assault on the deceased was vicious if one looks at the multiple abrasions, anterior neck with bruising of deep tissue and fracture of the right hyoid bone which was suggestive of strangulation.
8. The applicant maintained his innocence throughout the trial. He did not testify in mitigation of sentence. He was content to have his legal representative, Mr Van Tonder, state his personal circumstances of which none explained remorse.
9. In **S v MATYITYI 2011 (1) SACR 40 (SCA)** at 47g- 48c Ponnann JA held:

“It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to

be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did".

10. Courts are expected to dispense justice. This kind of brutality is regrettably too regularly a part of life in South Africa. Courts are expected to send out clear messages that such behaviour will be met with full force and effect of the law. The legislature is covered and so too should we be. See **DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL V NGOBO AND OTHERS 2009 (2) SACR 361 (SCA)** at para 26.

11. In imposing a suitable sentence in the instant case the court took into consideration the personal circumstances of the appellant, the nature and the gravity of the offences and the interest of society. I found that there were no substantial and compelling circumstances justifying a departure from the prescribed sentences. The

aggravating circumstances outweighed the applicant's personal circumstances. None of these factors were singled out for exclusion from consideration. See **S v ZINN 1969 (2) SA 537 A at 540G**.

12. In my view there are no reasonable prospects of success on appeal and also no reasonable possibility that another court may arrive at a different decision. The application must therefore fail.

Order

Application for leave to appeal is dismissed.

BM PAKATI
JUDGE

For the State	:	Adv. Van Heerden
For the Accused	:	Adv. Van Tonder