

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A266/2009

In the appeal between:

JACKSON SEEKOEI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI J *et* KUBUSHI AJ

JUDGEMENT:

RAMPAI J

HEARD ON:

16 MAY 2011

DELIVERED ON:

2 JUNE 2011

[1] This is an appeal. The appellant was convicted on two counts of rape. He was then sentenced to life imprisonment in respect of each count. He was aggrieved. He now comes to us on appeal against both of the convictions and both of the sentences.

[2] The appellant was tried in the Bloemfontein Regional Court. His trial started on 10 September 2008. He pleaded not guilty to both charges before Ms R M Sepato. Ms L Botha

appeared for the state and Ms M Mazibukwana for the defence.

- [3] Five months later, on February 10, 2009 to be precise, the appellant was convicted notwithstanding his plea of not guilty. On the same day he was sentenced to life imprisonment on each count.
- [4] The first charge was that the appellant raped D A M, a minor girl child, 13 years of age at Soutpan between 12th and 13th March 2006 by having carnal intercourse with her more than once in contravention of section 51(1), Criminal Law Amendment Act, No. 105 of 1997 as amended.
- [5] The second charge was that the appellant raped B M M, a minor girl child, 12 years of age at Soutpan during or about the year 2000 to 2003 by having carnal intercourse with her more than once in contravention of section 51(1), Act No. 105 of 1997 as amended.
- [6] As regards the first count the version of the state was narrated by four witnesses, namely: D Albertina Mbanjana –

the first victim, Ms Maria Nono Mosoeu – the first report witness, Mr Pule Tsholofelo Sunday – the police constable and Sr Mogadi Johanna Tlhabang – the examining nurse.

- [7] Collectively summarised their testimonies boiled down to the following evidence:

On Sunday the 12 March 2006 the first victim was sleeping alone at 477 Ipopeng Soutpan. Her mother had died many years before then. The house belonged to her maternal grandmother. The latter was not home during the night in question. She was visiting her son, a certain Mr Teboho Seekoei who lived in the same township.

- [8] At or about 23:00 the victim's younger uncle, Mr Fikile Jackson Seekoei also known as Rooi, in other words the appellant, came in under a false pretext. He later locked the door, walked into the victim's bedroom, slapped her, threatened her, overpowered her and virginally penetrated her on two occasions during that same night. He spent the night in her bed.

- [9] The next morning, Monday the 13 March 2006 D sneaked

out of the house, hurried to Ms Mosoeu at 473 Ipopeng to whom she tearfully reported what the appellant did to her. Mr Oupa Mosoeu was present. He heard the first rape report the victim made to his wife. He called the police. Constable Sunday came. He interviewed the victim before he and his colleague set out to look for the suspect. Near Kgarona Supermarket, the appellant was arrested and taken back to the scene. The victim identified and pointed him out as the culprit.

- [10] She further told the police officers about a bloodstained blue sheet on her bed. The police could find no such sheet in the victim's bedroom. Instead they traced it in a box under a bed in an adjacent house 476 Ipopeng. The appellant was the sole occupier of the house. The house was also owned by the victim's grandmother, Ms Tsarani Seekoei. The victim was seen and examined by Sr Tlhabang. With the aide of Tolidine blue solution, she examined the victim's genitalia. She noted that her hymen was elastic, swollen, freshly torn and bruised. That completed the prosecution evidence.

- [11] As regards the first count the version of the defence was narrated by two witnesses, namely: Mr Fikile Jackson Seekoei, also known as Rooi – the appellant and Mr Vani Jantjie Muller – the appellant's friend.

The version of the defence was that the appellant left his home on Friday the 10th March 2006. He went to his friend Vani from there they went to Sechaba where they spent the night. On Saturday the 11th March 2006 they went to Solly's Tavern and Mabana's Place, but again returned to Sechaba on the same day. They partied there until about 02:30 on Monday the 13th March 2006.

- [12] From there they went back to Vani's. There they carried on drinking beer. Vani then decided to sell his tape recorder, because he needed some money. They ventured out for that purpose. The appellant then suggested that they should first go to his place of residence to get a jacket. He was feeling cold. They went.

- [13] As they were approaching his place they saw D coming out. It was about 06:00. She told them that her grandmother was

not home. From there they went to Teboho Seekoei's place of residence. While they were there Mr Oupa Mosoeu came. He reported to his brother's wife, Ms Nonkosana Seekoei, that D alleged that the appellant raped her. Nonkosana confronted him about the matter. The appellant only heard about D's allegation then. He and Vani then decided to go back home to take the matter up with D. They never got there because the appellant was arrested on the way.

[14] The court *a quo* analysed the two versions and concluded as follows concerning the version of the defence that the appellant was not on the scene of the crime when the victim was raped:

"I dismiss your version as well as that of Vani as a fabrication. The evidence is just overwhelming against you. You do not have a defence at all. I cannot find that D lied."

[15] I am of the view that the court *a quo* was justified to reject the appellant's alibi defence. Shortly after the incident, his sister-in-law confronted the appellant about the first victim's serious rape allegation. His immediate reaction was

unnatural and inconsistent with that which an objective person would have expected from an innocent person. Firstly, he did not emphatically deny the serious accusation by his niece. Secondly, he did not spontaneously explain that he was never home over the entire weekend. Thirdly, he did not ask his friend to set the record straight on his behalf. Fourthly, his good friend did not take it upon himself to dismiss the allegation as absolutely untrue. Finally, the same friend did not instantly give any explanation that their common friend, Sechaba could confirm their whereabouts at the critical time on Sunday, 12 March 2006.

- [16] It is significant to remark that instead of staying put and causing the first victim to be called so that the family could hear both sides of the matter, the appellant chose to abruptly leave. He did so under the false pretext that he was going to see the first victim about the false allegation. The appellant had no serious intention to meet the first victim. He left his brother's home precisely because he did not want to face D in the presence of his family and tell her she was falsely incriminating him. He did not want to face the moment of truth.

[17] Constable Sunday arrested the appellant soon after he walked out of his brother's house. The appellant was still with his friend, Mr Vani Jantjie Muller. Again, the alibi was not disclosed. While the argument that the law did not oblige him to disclose his alibi to a police officer remained attractive, it could not serve as a sound explanation for the appellant's failure to tell: his sister-in-law, his brother-in-law, his mother and the messenger, Mr Oupa Mosoeu, himself the appellant's relative – that he was partying at Sechaba at the critical moment when his niece was raped.

[18] She showed the appellant the blood stained sheet before she sneaked out. She informed Constable Sunday that the sheet was bloodstained. The constable entered her bedroom to collect the sheet as an important piece of evidence but the sheet was missing. On the first victim's advice, the police walked over to the appellant's house. The bloodstained blue sheet of the first victim's bed was found in a box concealed under a bed. It was highly improbable that anyone other than the appellant himself would have removed the sheet from the first victim's bedroom to the

appellant's bedroom. This much was evidenced by the conversation she had with Constable Sunday. If she had done so, she would have sent the police straight to the appellant's house. But she did not.

[19] The discovery of the first victim's sheet in the appellant's bedroom strongly corroborated the first victim's evidence that the appellant was in her bed and that he was still sleeping there when she stealthily walked out and hurried to Ms Maria Mosoeu's (also known as Nono). Two further important deductions can be made from this. Firstly, the sheet was removed from the scene of the crime. Secondly, it was hidden. Whosoever removed and hid the sheet clearly attempted to cover his tracks. He knew his actions were not innocent. He had something serious to hide. There were overwhelming probabilities against the appellant in favour of the first victim's version in this regard.

[21] The first victim was a child. Therefore, the court *a quo* had to be doubly cautious in its treatment of her evidence. In my view the evidence of the first victim, a child and a single witness, was satisfactory in all material respects. She was a

very impressive witness who gave a credible and reliable account of the incident. The alibi defence of the accused was not reasonably true. It was correctly rejected by the trial court. The version of the state established the guilt of the appellant beyond reasonable doubt. Again, the court *a quo* correctly accepted the version of the state.

[22] On the merits, the appellant's grounds of appeal were devoid of any substance. The court *a quo* committed no appealable misdirection. In the absence of any material misdirection we have no reason to interfere. I would, therefore, confirm the conviction in respect of the first count.

[23] As regards the second count, the version of the prosecution was narrated by two witnesses, viz:

- Ms Buyekwa Margaret Mbanjana – the second victim;
- Ms Buyiswa Suzan Sikhova – the victim's aunt and first report witness.

The second and the first victims were sisters. Sindile Mbanjana was their brother. Their late mother, the appellant and Ms Sikhova were siblings. The victims, their brother and

three other children were in the care of the appellant's mother. They stayed with her at 476 Ipopeng.

[24] The appellant, the victim's divorced uncle, was also staying with them in the same house. According to the second victim the appellant sexually penetrated her in that house for the first time during the year 2000 and for the last time during year 2003. Between those two occasions, he also had sexual intercourse with her on two other separate occasions. All in all, she said the appellant raped her four times. She was twelve years of age when the appellant first raped her and 15 years of age when he last raped her.

[25] She did not tell anyone about the first rape incident because she was afraid of the appellant. The appellant raped her for the second time. After that incident, she ran away from home. At first, she stayed at Brandfort for a while, and then she returned to Soutpan. However, she did not go back home. Instead, she preferred to stay with her friend, Podile, at the latter's parental home. She still had not reported any of the two incidents to anyone.

She stayed with Podile's family for a while, from there she went to her aunt, Ms Sikhova who lived on a farm in the Soutpan area.

[26] She told her aunt Ms Sikhova, who in return told her brother Sindile. Sindile telephoned the police as did the principal but the police never came. The appellant pursued her. He went to the farm, fetched her from her aunt and took her back home in the township against her will. He thrashed her on the way back. Soon after their arrival in the township, the appellant raped her one more time. This was the third incident. At one stage she reported the matter to her grandmother but the latter did not only disbelieve her but actually denied her claim against her son.

[27] Subsequent to the third incident, B once again ran away from home. On this occasion, she went to a lady called Mamotse on a farm near Windmill Casino. She also told the lady about her plight that the appellant had raped her. At that stage, her aim was to permanently get away from Soutpan. She wanted to go to her uncle in Bloemfontein or her aunt at Botshabelo. However, the appellant tracked her

down before she could move. He again took her back to Soutpan where he raped her for the fourth time.

[28] She found it difficult to stay in the same house with the appellant. She started roaming about and visiting taverns. One night the appellant found her at a tavern and took her home. He forced her to share a bed with him as he had done so many times in the past. That night, however, he did not rape her. Not long after that incident, she ran away from home yet again. She stayed for a while at Soutpan with her friend Makgele. In March 2003 B and her friend Manana together left Soutpan with the intention never to go back. She settled on a farm called Diephoek in the Glen area. This completes the prosecution evidence in respect of the second count.

[29] The version of the defence in connection with the second count was narrated by the same witnesses, viz: the appellant, Mr Seekoei and his friend Mr Muller. The appellant denied the second victim's allegations about the rape. His evidence was that initially the relationship between him and B was very good. Then she starting

visiting her aunt Buyiswa (Ms Sikhova) and the problem started. He and Buyiswa did not get along well. The reason for the bad blood between him and Buyiswa was that she claimed he was sexually molesting the children.

[30] His further evidence was that as a result of the bad influence she received from Buyiswa, B became a wayward girl. She bunked school, frequented taverns, consumed alcohol and generally displayed bad behaviour. Her aunt, Ms Sikhova tolerated her unbecoming behaviour whereas he did not. B did not listen to him. His witness also denied the allegations against the appellant. He denied the allegation that the appellant used to assault B. This, in brief, was the sum total of the defence version.

[31] The court *a quo* rejected the appellant's version and accepted the second victim's version. In my view those findings were justified. The second victim was a single witness. Her evidence had to be treated with caution. Like her little sister she was told about the strange instructions from her late mother. Like her little sister she was threatened in the same way. Her account of the

circumstances which compelled her to run away from home and ultimately to give up attending school was more probable than the appellant's. The appellant himself testified that his sibling, Buyiswa (Ms Sikhova) once complained that he was raping the children and that, for that reason, she wanted to have those children taken away from Soutpan to Bloemfontein.

[32] In my view the version of the appellant was not possibly true whereas the version of the second victim was materially satisfactory. No critique was levelled against her evidence on appeal and at the trial. Her evidence was credible and reliable. It established beyond a reasonable doubt that the appellant was indeed guilty as charged. I am therefore, inclined to uphold the second conviction as well.

[33] Now, I turn to the second leg of this appeal, the sentence:

“The question that I should ask now and I should provide an answer is, will the imposition of life imprisonment on each of these counts be a just and appropriate sentence in the circumstances or will it be a sentence that is so disproportionate that it would induce a sense of shock?”

Per Ms R M Sepato.

The regional magistrate concluded, in the end, that the answer to that question was in the negative.

[34] Mr Van der Merwe, counsel for the appellant, submitted that the court *a quo* erred when it determined that no substantial and compelling circumstances existed to warrant any sentence less than the prescribed minimum sentence of life imprisonment in respect of any of the two counts of rape. The foundation of counsel's submission was that the critical ruling by the court *a quo* was based on inadequate evidence. It was argued that when the ruling was made, the court *a quo* did not have evidence by a psychologist, teacher or guardian. As to the real extent to which each of the minor complainants has been affected and was most likely to be affected by the rape in the future. This was the first ground of the attack. See **RAMMOKO v THE DIRECTOR OF PUBLIC PROSECUTION** 2003 (1) SACR 200 (SCA).

[35] Mr Bontes, counsel for the respondent, submitted that the

court *a quo* correctly determined that no substantial and compelling circumstances existed to justify any deviation from the prescribed minimum sentence in respect of any of the two rape charges. Counsel contended that there was evidence of the negative effects of the rape on the minor complainants, especially B.

[36] In sentencing the appellant, the court below took into account certain mitigating factors. In the first place she took into account that the appellant went as far as standard 1 (grade 3) only at school. He was therefore not educationally enlightened. He was a divorced man with one dependent minor child. His ex wife cared for his child. He was not the custodial parent and daily caregiver of the child. He was 34 years of age at the time the sentences were imposed. However, at the time he first raped the second complainant, B, he was 26 years of age and at the time he raped the first complainant, D, 32 years of age. He was not gainfully employed at the time of his arrest. He did some casual jobs from time to time. He had no previous convictions.

[37] The court *a quo* also took into account the aggravating

factors. The complainants were the appellant's nieces. However, they were not just his nieces, but they were children. They were not just children, they were relatively small children. They were not just his nieces but they were motherless and fatherless. All these factors made them very defenceless and vulnerable. First and foremost B and D were human beings. They still are. And so they will remain. In our society, the abiding values of human dignity, gender equality and individual freedom form the very essence of a human person. The perverted sexual abuse of male power against small girl children by those who are expected to be in the frontline of their defence is alarming.

[38] The appellant fully gratified himself inside each of the two children. Each of them was very young. As regards the second complainant, the older of the two girls, the appellant repeatedly satisfied his carnal desires with the helpless child over a long period of 4 years. The second victim in the instant case was not only relatively young but she had neither had a safe haven to return after each sexual abuse nor any of the armour caring parents often use to protect their children. Her mother had died before the uncle started

to sexually molest her. Nothing was said about their father. They were, therefore, practically parentless vulnerable children - the situation which the appellant shamelessly exploited.

[39] She was genuinely afraid of her uncle. He first raped her at knife-point. He threatened to kill her. She believed he could if she told anyone. He persistently violated her. So much that she one day summoned enough courage to tell her grandmother. The grandmother did not believe her. She scornfully dismissed her complaint. She believed that her son, the appellant, could not carnally take advantage of his sister's daughter. The second victim probably perceived the attitude of her grandmother as uncaring. The appellant had the audacity of simply instructing the second victim to leave his mother's house and so he could rape her in his house next door. To rub salt into the wound, the appellant tried to justify his reprehensible conduct by telling the victims that their late mother had instructed him to take away their innocence so that they could become better wives to their future husbands.

[40] The second victim's desperate situation created by her abusive uncle and aggravated by her uncaring grandmother left her with no other choice but to run away from home to give up schooling and to become a wanderer. She moved from friend to friend and from farm to farm because the appellant was frequently pursuing her and violating her human dignity in a cruel sort of way. He betrayed the trust she naturally had in him as her uncle. By March 2003 she could no longer take it. The abuse had become absolutely intolerable. She ran away from home for good and permanently settled at Glen away from her abusive uncle. She was then 15 years of age. Since then she has been on her own. Her school career was ruined. So was her future.

[41] Looking back over her life 5 years later from the witness box she wept. She tearfully recounted the abusive events. Hers were not crocodile tears. They were tears of a young woman who, as a child, was deeply hurt. We may not be able to assess the extent of her emotional injury but we can see what she went through and how adversely affected she was by the appellant's conduct.

[42] Although she was far from home and living in a relatively safe zone, she remained deeply concerned about her little sister. She feared that, in her absence, the appellant would turn to her to satisfy his sexual desires. That is precisely what happened. Her fears were not unfounded. Two or so years later the appellant pounced on her little sister in the middle of the night. She was just 13 years of age at the time. The little one was also threatened and enjoined to silence by the appellant. However, she immediately and bravely broke the silence. The appellant was arrested. A series of further probable rape was thus prevented. It was the bravery of the younger sister which gave the older sister the courage to come out and to report to the police the abuses.

[43] I was at pains to narrate the versions of the victims in connection with the merits. It was really not necessary. I was moved by the second victim. Her sad story epitomizes the agony of an abused child trapped in the same dwelling with the abuser, more often than not a blood relative. It clearly demonstrates that in certain circumstances internal rape can be more horrendous than external rape. To argue

that there was insufficient evidence to show that the rape affected any of the victims is shortsighted. To ignore such glaring adverse impact of the rape series on a child merely because there was no evidence by a psychologist, teacher or mother would boil down to trivialising the agony this child has gone through. This court cannot afford to fail her in that way. In my view the first ground on which the attack on sentence was based, should fail as far as the second victim is concerned.

[44] In **S v D** 1995 (1) SACR 259 (SCA) at 260f – g, Van den Heever JA correctly remarked:

“Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do.”

The appellant almost got away with it as far as the older girl was concerned.

[45] I skip the second leg of the attack on sentence for the time

being. I shall revert to it later. I now proceed to the third leg. On behalf of the appellant, it was submitted that the following factors, cumulatively considered together with the mitigating factors, constituted substantial and compelling circumstances to justify deviation from the prescribed minimum sentence:

- that none of the two rape incidents can be fairly classified under the worst case category;
- that none of the two victims sustained any serious physical injuries besides those occasioned by the rape itself;
- that no excessive violence was employed to break the resistance of any of the two girls.

[46] The trial court dismissed the foregoing submission. It was particularly critical about the worst case scenario. Her worship's critique was:

“Everyday I am informed that this (sic) not the worst rape, there may be a worst one...”

[47] There are rape cases and there are rape cases. They differ

in degree and in kind. Some are more violent than others. Some involve single and others plural incidents. It is important to appreciate such diverse shades of the crime. Their significance lies in the realisation that they enable the courts to exercise their residual sentencing discretion to prevent foreseeable injustices. In exercising such a discretion we are required to bear in mind that we have no clean slate on which to inscribe whatever sentence we reckon fit – **S v MALGAS** 2001 (1) SACR 469 (SCA).

[48] Ensuring a severe, standardised and consistent response by the courts does not, however, mean that the courts should mechanically impose the prescribe minimum sentences, particularly the ultimate and hardest of them all – life imprisonment, irrespective of the moral blameworthiness of the offender's conduct. Accordingly we have to approach this question mindful that sometimes imposing the prescribed minimum sentence may yield unjust outcomes disproportionate to the crime and the person on the offender.

[49] The courts were cautioned that a prescribed minimum sentence should not be lightly assumed a *priori* to be

proportionate in any given case. See **S v VILAKAZI** 2009 (1) SACR 522 (SCA) 562 par [18]. This is understandable because doing so would erode the residual sentencing discretion the courts have. The sentence of life imprisonment differs from any other prescribed minimum sentence. The gravity of life punishment is comparable to no other in our criminal justice system. It infinitely deprives an offender of his natural freedom for the rest of his natural life. It takes away his will to live and leaves him in an endless agony of hopelessness. For more about the nature of this sentence see **S v SANGWENI** 2010 (1) SACR 419 (KZP) 422 from par [5] and further.

[50] The question as to when it is just and appropriate to impose it remains a vexed issue. The lesson that emerges from the majority of decided cases seems to be that the magnitude of the offender's moral blameworthiness has a lot to do with it. The greater the degree of blameworthiness the greater the chances of it being imposed. The converse also holds truth. Here we need to go beyond the mere structural classification of the crime as a first schedule offence to determine whether imposing the ultimate sentence would be just and

proportionate to the serious scheduled crime. While we navigate in that perilous sphere, we should vigilantly look for sound reasons not to eternally condemn an offender.

[51] When it was submitted on behalf of the appellant that a set of certain factors boiled down to substantial and compelling circumstances, the court was called upon to examine such factors and to say why it was not so persuaded. I am of the view that it was not correct for the court *a quo* to merely dismiss the submission about the worst case scenario simply as an old tune the court *a quo* had heard before.

[52] Indeed, it is so that the victims did not sustain serious physical injuries. This is so because the appellant did not use brutal force to break the resistance of any of them. Although he assaulted them, he did not employ excessive violence. The brutality of a rapist's action naturally worsens the moral blameworthiness of his actions.

See **DINGANE MABITSE v THE STATE** (A84/10) 2010 FSB (06.09.2010) 6, pars [11] – [18] per Rampai J *et* Molemela J.

[53] In the instant case we should not lose sight of the broader

picture. The crimes were planned. The planning was not a once off event. The appellant wanted the children to believe that their mother licensed him to have sex with them. He had ample opportunity to reflect after the first incident in the year 2000. Yet he relentlessly pursued and tracked down the second victim time after time. He fetched her from wherever she was hiding in the township and on the farms. The victims regarded the appellant as a father figure in the household. He was their late mother's biological brother. He betrayed the natural trust they had in him as their uncle.

[54] Shortly before B ran away for good the appellant fetched her from a certain tavern and detained her in his bedroom for the night as before. Although he did not violate her that night as he had done on four previous occasions, can one imagine the agony of the victim throughout that night? It was her realisation that the appellant was not prepared to stop the abuse, which made her to flee from home and to start a new life elsewhere at an unfamiliar place.

[55] It is my firm view that the aforesaid factors commutatively considered do not survive scrutiny. They are eclipsed by the

impact of the aggravating factors. The magnitude of the moral blameworthiness of his actions was very high. In my view, the court *a quo* was correct in finding that deviation from the prescribed minimum sentence was not justified in this instance. For these reasons, I am not persuaded that the court *a quo* erred as regards the second count.

[56] The courts have to protect children against this prevalent outrage. The appellant has callously, shamelessly and repeatedly abused the vulnerable child. The court was correct in deterrently, preventatively and retributively punishing him to ensure that he would never again have an opportunity of repeating the offence - **S v REAY** 1987 (1) SA 873 (A) at 877 B per Galgut AJA.

"Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society."

S v JANSEN 1999 (2) SACR 368 (C) at 378 g per Davis J.

[57] In **S v MATYITYI** 2011 (1) SACR 40 (SCA) par [10] Ponnann JA lamented a disturbing tendency by the courts:

“The situation continues to be alarming... And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny.”

[58] As I have already indicated the appellant turned to the younger of the two girls after the older one had run away. Three years after repeatedly abusing the older girl the appellant thought he could get away with it again and he almost did. The horrendous manner in which he had treated B and her subsequent misery did not deter him. He clearly believed that he would once again easily get away with it. His disregard of his horrendous actions towards B and his determination to do just that all over again in respect of B's little sister is a particularly aggravating factor. When that is taken into account together with the fact that he raped little D twice in one night, then one begins to understand what prompted the court *a quo* to find that there were no substantial and compelling circumstances in respect of the first count as well.

[59] Notwithstanding the foregoing determination of the appellant to abuse and whatever the court *a quo* probably read in the appellant's conduct – we should not lose sight of the big difference between the two counts. The first complainant was 13 years of age. There was a long spell of about three years between her rape and that of her elder sister. The incident covered by the first count, serious though it was, did not have similar devastating impact on D as the incidents, described in the second charge had on her sister.

[60] The appellant was 32 years of age at the time. He still had an unblemished criminal record. Notwithstanding what he did to the D's sister years earlier, he still remained a first offender in law. He was incarcerated for 39 months before he was sentenced. The moral blameworthiness of his conduct was comparatively low. Speaking for myself this particular incident was not the worst rape case I have seen. Notwithstanding the case of **PATRIC BOOYSEN v THE STATE** 2010 ZASCA 162 I feel uneasy about the life sentence imposed on the appellant in these circumstances.

[61] I am convinced that the sentence in this instance was unjust and disproportionate. This conviction considered with the factors outlined in the preceeding paragraph, the huge disparity between the sentence imposed and the sentence I would have imposed had I been the court of first instance as well as the general profile of the appellant warranted the finding that substantial and compelling circumstances were present to justify a different response in my respectful view.

“...The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust...”

S v MALGAS 2001 (1) SACR 469 (SCA) 481 par [22] per Marais JA.

[62] The court *a quo* did not deal with those important factors in the way that I have done. To the extent that the court *a quo* did not, it materially erred. On account of the material

misdirection we are entitled to interfere.

“A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (*supra*) at 684B - C; *S v Pillay* (*supra*) at 535E).”

S v KIBIDO 1998 (2) SACR 213 (SCA) at 216 h – i.

[63] Accordingly, I make the following order:

63.1 The appeal against conviction in respect of count 1 fails.

63.2 The appeal against the sentence in respect of count 1 succeeds.

63.3 The sentence of life imprisonment imposed in respect of count 1 is set aside. It is substituted with one of 15 years imprisonment.

63.4 The substitute sentence is antedated to 10 February 2009, being a date on which the original sentence was imposed on the appellant.

63.5 The appeal in respect of the second count fails *in toto*.

63.6 The conviction and sentence in respect of count 2 are confirmed.

M. H. RAMPAL, J

I concur.

E. M. KUBUSHI, AJ

On behalf of the appellant:

Adv. P. van der Merwe
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. D. W. Bontes
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN