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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-08-14

Case Number: A496/08

In the matter between:

[F.....] [J.....] [H.....]

Appellant

And

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

[1] After pleading guilty in the Pretoria regional court to a charge that he had raped his 11 year old stepdaughter, CdP, the appellant amended his plea to not guilty and was eventually tried in the Pretoria High Court (per Els J). On 7 October 2003 the Pretoria High Court convicted the appellant of rape and sentenced him to life imprisonment. After the High Court refused the appellant leave to appeal, on 1 March 2007 the Supreme Court of Appeal

granted leave to appeal to this court against sentence only.

[2] It is unfortunate that the Supreme Court of Appeal did not grant leave to appeal against the conviction. The relevant facts were not fully or properly investigated and the proceedings were conducted in unseemly haste. All this appears from the record and the judgment of the court a quo. As pointed out by the court in *S v Vilakazi* 2009 (1) SACR 552 (SCA) paras 21 and 22:

‘[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.

[22] The case that is before us is characterised by superficiality from beginning to end with the result that it exhibits several disturbing features. Nothing was done to enquire into material matters before the trial commenced. The complainant’s evidence was presented with little care for completeness or accuracy. The evidence was subjected to little analysis and the process of sentencing was perfunctory.’

[3] Apart from summarising the evidence of the four witnesses the court a quo did not comment on their demeanour or their credibility and did not consider the probabilities or find that the appellant’s version was not reasonably possibly true and give reasons for such finding. The court’s reasoning is contained in two short paragraphs. In one, the court says it is satisfied that the

complainant and her mother, although differing in small respects, were telling the truth. In the other, the court says that it is satisfied that the appellant's evidence that the complainant approached him and started fondling him is untrue and that the appellant's evidence that there was no penetration is rejected. No reasons are given for either conclusion. See *S v Guess* 1976 (4) SA 715 (A) at 718E-719A. The statement of the court a quo that the evidence of the complainant and her mother differs in only small respects cannot be supported. As will appear later there are substantial differences. The court a quo also erred in summarising the evidence in at least two important respects. First, the court a quo said that Dr. Grabe, who examined the complainant, found that the complainant had been raped because there had been deep penetration. This is not correct. Dr. Grabe concluded that only remnants of the hymen were present and that the crack in the vaginal wall at 6 o'clock indicated previous vaginal penetration. There is no evidence to relate either finding to the incident in March 2000, at least one month earlier. Second, the court a quo recorded that the appellant conceded in cross-examination that he possibly told the attorney, Pansegrouw, that he had inserted the tip of his penis. This is also not correct. The appellant denied that he had inserted the tip of his penis but admitted that he had tried to push the tip of his penis into the complainant's vagina. This is consistent with the appellant's statement when he pleaded guilty in the regional court some two years earlier. All that he said then was that he had penetrated the complainant. When questioned by the regional magistrate about the meaning of this statement Mr. Pansegrouw added, with the consent of the appellant, 'by pushing my private part into her private part' ('deur my geslagsdeel in haar geslagsdeel te druk').

[4] In view of the court a quo's judgment, which on the face of it is unsatisfactory, the appellant's counsel was asked whether the appellant would like an opportunity to petition the Supreme Court of Appeal again for leave to appeal against the conviction with a recommendation by this court that leave be granted. This was done because this court cannot investigate the correctness of the conviction. Despite the observation by the Supreme Court of Appeal in Vilakazi at para 8 'that the appeal might be broadened to include the conviction if upon reflection on the evidence we were to be of the view that the appellant should not have been convicted' the full court of this division held in *S v July Nkosinathi Majola* (TPD Case No A50/2007 delivered 21 May 2009) that without leave to appeal against conviction the appeal court cannot decide whether the appellant was wrongly convicted. After taking instructions the appellant's counsel informed the court that the appellant did not wish to petition the Supreme Court of Appeal again. He also informed the court that the appellant wishes to have the appeal finalised even if the conviction for rape must stand. The appellant's counsel pointed out that when he was sentenced by the court a quo on 7 October 2003 the appellant had been in custody awaiting trial for three and a half years and that since 7 October 2003 the appellant has served 5 years and 10 months of his sentence: a total of almost nine and a half years. The appellant wishes to avoid any further delays in finalising the appeal. Unlike Vilakazi the respondent is not prepared to agree that this court may broaden the enquiry into the correctness of the conviction. A potential difficulty for the appellant in such an enquiry is that during the trial in the court a quo the appellant's counsel did not put to

any of the state witnesses the lengthy version the appellant testified to in his defence. It is not clear why the appellant's counsel failed to observe this elementary rule of practice but the usual consequence of such failure is that the court ignores the version not put – see *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 58-65 and *S v Boesak* 2000 (3) SA 381 (SCA) paras 50-54.

- [5] Another matter considered at the hearing was the failure of any party to introduce in evidence the Psycho Social Report dated 9 October 2001 and the Impact Report dated 1 October 2001 which were prepared for the High Court after the regional court referred the case to the High Court for sentence. During the trial none of the advocates seemed to be aware of the existence of these reports. They were not referred to in evidence or argument and the court a quo did not refer to them in its reasons for sentence. The court a quo also did not see fit to ask for such reports to be made available. During the hearing of this appeal the state and the appellant agreed that the reports be placed before this court for the purpose of assisting this court to arrive at an appropriate sentence in the event of it upholding the appeal. The Psycho Social Report is to be found in the first volume of the record at 30-38 and the Impact Report at 28-29.

- [6] At all relevant times the appellant was married to B.... C.... H..... ('H') and they lived together with Human's 11 year old daughter, CdP, the complainant, who was born from H....'s previous marriage. The incident occurred during an evening in March 2000 when the appellant, the complainant and H.....

were lying on a bed in the main bedroom watching television. The complainant had just bathed and was wearing a nightie. Broadly, the state's evidence was that the appellant first caressed the complainant and after fondling her breasts and inserting a finger into her vagina had informed H..... that he wished to have intercourse with the complainant. After H..... failed to object strenuously the appellant proceeded to have intercourse with the complainant, penetrating her vagina fully with his penis. They had intercourse again on about five occasions.

[7] In his plea explanation the appellant denied that he had intercourse with the complainant but admitted that he had touched the complainant's private parts and was guilty of indecent assault.

[8] The state called three witnesses: Jacobus Stephanus Pansegrouw, the attorney who represented the appellant in the regional court, to explain why the appellant pleaded guilty; H..... and the complainant. The appellant formally admitted the contents of the medico-legal report, form J88, prepared by Dr. S.M. Grabe on 2 May 2000. Dr. Grabe recorded that the complainant told her that her stepfather raped her and that it bled and burned afterwards. Under 'clinical findings' (re injuries and wounds) Dr. Grabe noted no abnormalities, he recorded that the complainant's health and emotional status were good although she was tearful and cried when she talked about the incident; that nothing abnormal was found on gynaecological examination except that only pieces of the hymen remained and that there was a crack in the vaginal wall at 6 o'clock. Dr. Grabe noted that the crack in the vaginal

wall indicated previous vaginal penetration. The doctor did not express an opinion as to whether the complainant had been raped or not.

[9] The state's evidence is not consistent. Pansegrouw testified that after a number of consultations, some of them quite lengthy, the appellant decided to plead guilty and a formal plea of guilty was entered in the regional court. According to Pansegrouw, during these consultations, the appellant first admitted indecent assault but he later conceded that he had inserted the tip of his penis but said that he did not proceed because the complainant was too small. According to Pansegrouw the appellant told him that he had ejaculated on the complainant's stomach. On the strength of this information Pansegrouw advised the appellant to plead guilty to rape and the appellant agreed to do so. The appellant confirmed this in the regional court after Pansegrouw had tendered the plea of guilty. The appellant also signed the plea of guilty. As already mentioned, the appellant's counsel did not put the appellant's version to Pansegrouw during cross-examination.

[10] H..... testified that they had been lying on the bed watching television when the appellant started to caress the complainant's breasts. He then inserted his finger into the complainant's vagina. In the process of caressing the complainant the appellant removed her nightie. The appellant then told H..... that he wished to have intercourse with the complainant. After H..... objected the appellant proceeded to have intercourse with the complainant in the presence of her mother. There is no suggestion that her mother objected again or did anything to prevent this. The appellant lay on

top of the complainant and inserted his penis into her vagina. According to H..... nobody forced the complainant. She simply did as the appellant requested and opened her legs to allow him to insert his penis. This was difficult. The complainant complained that the insertion of the appellant's penis was painful and said that the appellant must stop but he carried on. Eventually the appellant ejaculated on a towel. According to H..... the appellant again had intercourse with the complainant on two or three occasions when she, H..... was present but she furnished no details. H..... testified that the intercourse caused a small amount of bleeding. She said that she permitted the intercourse to take place because the appellant had told her that if she did not do so it would mean that she did not love him and she should take her belongings and leave. H..... knew that the appellant wished to divorce her and that the appellant had had a relationship with another woman who had told him to divorce her after she, the other woman, became pregnant. H..... was originally charged as a co-accused and she pleaded guilty and was sentenced before the appellant's trial in the High Court. In cross-examination the appellant's counsel did not dispute H's evidence about the rape.

- [11] The complainant's evidence differed in material respects from her mother's evidence particularly with regard to the role her mother played. The complainant testified that she, H...., and the appellant were lying on the bed. The appellant told H..... that he wanted to have sexual intercourse with the complainant. When the complainant refused her mother said to her that she should not be afraid and that when she, her mother, was 11 years old precisely

the same thing had happened to her. According to the complainant her mother said that if she did not have sexual intercourse with the appellant they would throw her off the roof of the building. The appellant said that she then gave in. She could not refuse and she did not know what to do. At the time she was wearing a nightie and pants and the appellant and her mother told her to undress. She then lay on the bed and her mother opened her legs so that the appellant could have intercourse with her. The appellant first inserted a finger into her vagina and then had intercourse with her. He never touched her breasts. She testified that the appellant had intercourse with her on each of the next five days. She gave no details. The complainant said that intercourse was extremely painful and that she did not like it. She bled after each act of intercourse. Eventually she went to her grandmother for help and she was removed from her mother's custody. In cross-examination she confirmed that there were no more than five occasions when the appellant had intercourse with her and that her mother was only present on three of those occasions. The appellant's counsel did not put the appellant's version to the complainant as to what happened on the night in question.

- [12] The appellant testified to a version which was not put to any of the state witnesses. He admitted that he had touched the complainant's private parts but he testified that she had fondled him and had said that he must fondle her. He admitted that he had caressed her private parts but stated that she had been wearing pants. According to the appellant, the complainant then got off the bed and took off her pants; he did not tell her to do so. According to the appellant the complainant then took off her nightie. He then succeeded in

inserting his finger in her vagina without causing any pain or bleeding and he said to his wife: 'C has already been penetrated by someone'. He continued to caress her private parts and the complainant opened her legs to make it easier for him. She did not want him to stop. She held his hand so that he could not pull it away. Eventually he removed his hand and at about 8 pm they all went to sleep. Later the complainant got up and came to him and asked him to penetrate her as she wanted to feel what it was like. According to the appellant he told her that she was too small and he would hurt her. They then went no further. The appellant testified that the complainant was so insistent that he lay on top of her and when he saw that it was not possible he stopped. He does not know why it is alleged that there was penetration. According to the appellant the complainant would walk around the house naked and refused to put on clothes. H..... allowed this, he said, because she knew he wanted to get divorced and she did not. According to the appellant, H..... used her daughter to get a hold over him so that they would not get divorced. He also testified that the complainant was in love with him and was very jealous. At the end of his evidence the appellant admitted that he had tried to insert the tip of his penis into the complainant's vagina.

- [13] It has already been mentioned that it was of the utmost importance that the fact and circumstances of the sexual intercourse, if any, be properly established. The appellant's version should have been put to each of the state witnesses and this version should have been tested in the cross-examination of the witnesses. The differences between the complainant's and H's evidence should also have been investigated. After the evidence had been properly

canvassed the court a quo should have made specific findings as to how the intercourse took place. The court a quo did not do this and simply found that an act of intercourse had taken place and accordingly that the appellant was guilty of rape. This court must therefore do the best it can with the evidence available taking into account the nature of the evidence and the probabilities.

- [14] It is clear that both H..... and the appellant had a motive to misrepresent the facts. H..... failed in her duty to protect her child and did so for selfish reasons (she did not want to be divorced from the appellant). She downplayed her role. On her version she was passive and simply did nothing to protect her child. The appellant also downplayed his role. On his evidence there was no penetration. At worst for him he had attempted to penetrate the complainant (i.e. attempted rape) and at best for him he had improperly fondled the complainant's private parts (i.e. indecent assault). The complainant obviously has reason to be angry with both her mother and the appellant yet she does not seem to have attempted to misstate the facts or exaggerate. She was clearly a vulnerable little girl abused by the people who should have protected and not abused her and she simply recited the facts as she understood them. She is obviously inexperienced and even when she testified in October 2003 she was not capable of describing the intercourse and she did not understand what ejaculation was. The lack of detail about the incident and the other acts of intercourse is troubling. Furthermore, if a full grown man has proper intercourse with an 11 year old child it is probable that she will have fairly extensive and serious injuries. The absence of such injuries seems to indicate that whatever penetration there was was of limited

and short duration. On the evidence I do not think that the state proved that further acts of intercourse took place. The evidence is simply too vague to support a finding that they took place. This view is reinforced by the fact that the state did not charge the appellant with six counts of rape. If the state considered that the complainant's evidence indicated that the appellant had raped the complainant six times the overwhelming probability is that the state would have charged the appellant accordingly.

[15] This appeal will therefore be determined on the complainant's version of the incident. On that version there was one act of sexual intercourse, probably of limited duration and extent, on the night in question. Furthermore, on that version, the complainant's mother made no attempt to stop the appellant from having intercourse with her daughter, did not even attempt to persuade him not to have intercourse with her daughter and in fact assisted the appellant to overcome the complainant's resistance to having intercourse with the appellant.

[16] After the conviction no attempt was made by the state, the defence or the court to ascertain the psycho social circumstances of the appellant or why the appellant should think that he was entitled to have intercourse with his wife's 11 year old daughter or why the child's mother would allow this to take place in her presence or at all. It has already been mentioned that the trial court proceeded in unseemly haste and clearly considered that it was obliged to impose a sentence of life imprisonment simply because the complainant was under the age of 16. The court a quo did not refer to the provisions of Act

105 of 1997, *S v Malgas* 2001 (3) SA 1222 (SCA) or other cases dealing with appropriate sentences in terms of the Act or the relevant circumstances of the crime itself. The court approached sentence from the simple premise that the court is obliged to impose a sentence of life imprisonment unless it is satisfied that there are substantial and compelling circumstances which would justify the imposition of a lighter sentence. After finding that there were no such circumstances the court stated that even if the Act did not exist the court would have imposed life imprisonment. It is striking that the court a quo did not consider the question of why the appellant committed the crime or why the complainant's mother assisted him to do so.

[17] In sentencing the appellant the court a quo did not apply the principles set out in *S v Malgas* and accordingly misdirected itself. This court is therefore entitled to interfere with the sentence if this is justified. This court will do so in accordance with the principles formulated in *Malgas* and explained in *Vilakazi* and other cases.

[18] The Act provides that ordinarily a sentence of 10 years imprisonment should be imposed for rape. However it provides for eight circumstances where the sentence for rape is imprisonment for life. One of these circumstances is where the victim is a girl who is under the age of 16 years. As pointed out in *Vilakazi* paras 13-15 the Act is a blunt instrument and must be applied with circumspection to ensure that unjust sentences are not imposed:

‘[13] What is striking about that regime is the absence of any gradation between 10 years imprisonment and life imprisonment. The minimum sentence of 10 years

imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or a repeat offender. On the face of it a first-offending 18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist who repeatedly gang-rapes and beats senseless a disabled victim whom he consciously infects with HIV. The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within 10 minutes. It requires only a cursory reading of the Act to reveal other startling incongruities. And when the sentences that are prescribed for rape in various circumstances are related to sentences prescribed for other crimes even more incongruities emerge. It is not surprising that the leading writer on the subject of sentencing in this country, professor Terblanche, advanced the following acerbic observation on the Act 10 years after it took effect:

I have criticised the Act elsewhere and, if anything, have become more critical with time. There is hardly a provision in sections 51-53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences.

[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas* – which was said by the Constitutional Court in *S v Dodo* to be “undoubtedly correct” – that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in *Dodo* found the Act to be not unconstitutional. For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some cases that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in *Malgas*, and in particular its “determinative test” for deciding whether a prescribed sentence may be departed from,

Makes plain that the power of the court to impose a lesser sentence ... can be exercised well before the disproportionality between the mandated sentence and the nature of the offence become so great that it can be typified as gross [and thus constitutionally offensive].

That “determinative test” for when the prescribed sentence may be departed from was expressed as follows in *Malgas* and it deserves to be emphasised:

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.

[15] It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the “offence” in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

Consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*, which said that the relevant provision in the Act

vests the sentencing court with the power, indeed the obligation, to consider whether

the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which “justify” ... it.’

[19] It has already been held that the rape was of limited extent and duration. No violence was used to overcome the complainant’s resistance, only the threat of violence. The complainant sustained no injuries but was obviously emotionally affected. This is dealt with in the Impact Report which lists the following problems which presented after the incident (I translate and paraphrase):

(1) Serious scholastic problems: a decline in academic performance; identifying with the wrong friends; truancy and lack of motivation to attend school;

(2) Exposure at school to questions and comments from fellow students and teachers who know about the incident. The complainant felt that other people’s regard for and attitude towards her had changed since the matter had become public knowledge;

(3) Emotional trauma: the complainant still has feelings of fear, guilt, embarrassment, depression and distrust;

(4) Guilt about the tremendous impact the publication of the incident and the court case had on the family. This was aggravated by the fact that her mother and stepfather were in prison. The complainant has a great need for support;

(5) Suppressed anger changed to aggression. The complainant causes trouble by being pugnacious, rebelling against her superiors and sometimes refusing to subject herself to authority;

(6) Disturbed sleep pattern and nightmares about the sexual incident;

(7) Sexually precocious. The complainant shows unseemly interest in the opposite sex. She says that people now see her in a negative light and act differently towards her;

(8) Fear of the alleged transgressor and feelings of guilt and anxiety. The fact

that her stepfather is the alleged transgressor and that her mother has been charged as an accomplice intensifies her feelings of guilt and anxiety;

(9) Difficulty in working through the sexual molestation. Nevertheless the complainant is motivated to become involved in therapy.

The social worker concluded that the complainant was already showing serious emotional and behavioural problems.

[20] The Psycho Social Report deals extensively with the appellant's dysfunctional background and upbringing. The most important aspects are (once again I paraphrase and translate):

(1) The appellant was born on 27 February 1963 and was therefore about 37 years old at the time of the incident. He grew up in a dysfunctional family where his father abused alcohol and neglected him physically and emotionally and sometimes abused him physically. The appellant could not progress at an ordinary school and he completed his school career at a special school. (It will be remembered that Pansegrouw testified that the appellant was slow to understand and Pansegrouw was worried that the appellant did not properly understand what was happening.) The appellant passed Standard 9 and then qualified as a machine turner. At school he was hyperactive and this retarded his academic progress. The appellant performed well at sport and won Northern Transvaal colours for wrestling;

(2) After he left school the appellant served for 2 years in the Defence Force doing his national service. During that period he repeatedly requested to be sent to the border. The appellant regarded the Defence Force as a great challenge until he was injured in a land mine explosion which seriously impaired his hearing;

(3) The appellant met his first wife while he was in the Defence Force and married her when he was 20 years old. They have 3 children. It was a stormy marriage. The appellant was manipulated and abused by his wife. They were twice married and divorced, the last time in 1994. According to the appellant's first wife the marriage was characterised by a number of extra marital relationships, physical abuse and the appellant's instability. The appellant met his present wife in 1994 and they married in 1995. They have no children. After a few happy years the marriage started to disintegrate. This was caused by his wife's extra marital affairs and the fact that she became pregnant and lost the child and the appellant's own extra marital relationship from which a child was born. The appellant believes that the fact that he made another woman pregnant and wanted to divorce his wife caused his wife and the complainant to conspire against him. On the other hand the appellant planned to make another woman pregnant so that he could escape from a possessive marriage;

(4) The appellant's parents did not satisfy his emotional needs and the appellant, as an adult, attempts to satisfy these unfulfilled needs by various sexual relationships. The appellant's perception of himself is very negative and this makes him unhappy. He experiences little personal fulfilment or satisfaction and experiences feelings of fear, guilt and inferiority. The report notes that the appellant has two personalities: one is good and caring: the other is aggressive, irrational and impulsive, tells lies, has no sense of responsibility and is manipulative;

(5) According to the assessment the appellant comes from a dysfunctional family where both parents abused alcohol and where he was physically assaulted. The appellant demonstrates the characteristics of the product of such homes which include

a lack of responsibility; a tendency to extreme behaviour; unexpressed anger vis-à-vis his parents which is internalised and leads to self-destructive emotions and behaviour and other manipulative behaviour. The appellant's strong sexual urges and extra marital relationships are clear symptoms of feelings of inferiority, rejection and deprivation. The appellant compensates for these feelings by sexual relationships and activity: i.e. he satisfies his unfulfilled emotional needs by means of intimate sexual relationships;

(6) The report states that the present rape can be compared to incest. It concludes that the complainant played the mother's role as sexual mate within the marriage and formed part of the marriage system. At the time of the incident the appellant's marital relationship was weak and unsatisfactory. The complainant was used to save the marital relationship by being used in sexual activity. The complainant's mother kept quiet about these activities to save the marriage. There was a change of roles and the complainant became a marriage mate who satisfied the appellant's needs in alternative ways;

(7) The fact that the appellant shows no remorse and does not accept responsibility for his actions is an aggravating factor;

(8) The appellant knows that what he did was wrong.

[21] The family relationships were, to say the least, very complicated. The appellant seems to have an overpowering libido. He has three children from his first marriage. He has no children from his second marriage to Human but he has fathered a child out of wedlock during that second marriage and he

clearly considered that he was entitled to have intercourse with his wife's minor child. This seems to be the result of the change of roles within the family and was a view promoted by his wife. Instead of disabusing the appellant of the idea his wife helped the appellant to commit the crime.

[22] All these factors and particularly the appellant's lack of intellect and understanding of his situation and his wife's behaviour must be taken into account in determining whether life imprisonment is appropriate.

[23] It is important to bear in mind that the Supreme Court of Appeal has stated that the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such sentence is inappropriate and unjust. See e.g. *S v Abrahams* 2002 (1) SACR 116 (SCA) para 29; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) paras 17-19; *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 12; *S v Sikipha* 2006 (2) SACR 439 (SCA) paras 17-19 and *S v Nkomo* 2007 (2) SACR 198 (SCA) paras 13-21. Cases marked by extreme violence and humiliation are usually regarded as such cases. See e.g. *S v Swartz* supra and *S v Nkomo* supra. In the present case there was no violence, there were no injuries and it is not possible to ascertain the degree of humiliation experienced by the complainant. She does not say she was humiliated and no-one else comments on her humiliation. These factors were also not considered by the court a quo and must be considered by this court.

[24] Other factors not considered by the court a quo include the appellant's

personal circumstances. He is a first offender. He is employed and supports a wife and possibly the complainant. He is relatively young and probably capable of rehabilitation now that the seriousness of what he has done has been brought home to him. The appellant was detained in prison awaiting trial in the High Court for three and a half years. He has since served about 6 years of his sentence.

[25] I am accordingly of the view that taking into account all the circumstances of this case the prescribed sentence of life imprisonment is unjust and a lesser sentence should be imposed. In my view justice would be served if the appellant was sentenced to 10 years imprisonment and an order was made that when calculating the date upon which the sentence is to expire three and a half years must be deducted. See Vilakazi para 61.

Order

[26] I, The appeal is upheld. The sentence of life imprisonment is set aside and replaced with a sentence of 10 years imprisonment from which $3\frac{1}{2}$ years are to be deducted when calculating the date upon which the sentence is to expire.

II In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence of 10 years imprisonment be deemed to have been imposed on 7 October 2003.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

P. ELLIS
ACTING JUDGE OF THE HIGH COURT

I agree

S. POTTERILL
ACTING JUDGE OF THE HIGH COURT

CASE NO: A496/08

HEARD ON: 5 August 2009

FOR THE APPELLANT: MR. H.L. ALBERTS

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. C. KERSTEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 14 August 2009