

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 88/2005

In the case between:

THE STATE

and

BUTI BENJAMIN KEN

JUDGEMENT: H.M. MUSI, J

HEARD ON: 4 AUGUST 2006

DELIVERED ON: 17 AUGUST 2006

[1] This matter came before me on the 26 September 2005 as a referral for sentence in terms of section 52 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). On that day I confirmed the conviction of the accused for rape and proceeded to hear evidence in mitigation of sentence from him. I also called *mero motu* the complainant. After hearing evidence I formed the view that correctional supervision may be a suitable sentencing option and I then requested that a report be obtained from a correctional officer

and remanded the matter further. The accused was ordered to remain in custody. When the matter came up on 15 December 2005, I was away in the Labour Court and the Labour Appeal Court in Johannesburg where I acted until 30 June 2006. The matter was remanded on several occasions until the 4 August 2006 as a part heard matter, which could not be handled by another judge.

[2] In the meantime the requested report by a correctional officer has been filed. The author is Mr. J.A. van der Merwe who holds the degrees B.Soc.Sc. and M.Soc.Sc. from the University of the Free State. He is an experienced professional who has been with the Department of Correctional Services for the past 14 years. Both counsel for the State and the accused indicated that they would not contest any aspect of the report and that it was therefore not necessary for Mr. Van der Merwe to be called to testify. The report was thus handed in by consent. Counsel had already addressed the court on sentence on the previous occasion and had nothing further to add. I may mention that Mr. Strauss, who appeared for the State on the previous occasions, was not available and Miss. Claassen appeared instead.

[3] I must indicate that I have in the meantime been furnished with a transcript of the proceedings of 26 September 2005 when evidence in mitigation of sentence was heard. It appears that the correctional

officer was not aware of the evidence presented on the 26 September 2005 when he compiled his report, for no mention is made in his report of some important facts disclosed in the evidence. I pondered whether it might not have been a wiser move to have made the transcript of the evidence available to the correctional officer with a view to him reconsidering his views in the light of the evidence. That would, however, have caused a further delay in the finalisation of this matter and I considered it in the interest of justice that finality be reached once and for all. As the saying goes, justice delayed is justice denied. For the same reason I passed sentence on 4th August 2006 and indicated that my reasons would follow, which I now give hereunder.

[4] As already indicated, this matter is subject to the provisions of the Minimum Sentences Act as the accused was convicted of rape of a girl under the age of 16. The complainant was 14 years old at the time of commission of the crime (but was already sexually active). In these circumstances a minimum sentence of life imprisonment must be imposed, unless it is found that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. The cardinal question therefore is whether there are such substantial and compelling circumstances in this matter.

[5] **MALGAS v S** ([2001\) 3 ALL SA 220](#) (SCA); [2001 \(1\) SACR 469](#) (SCA) laid down that factors that traditionally qualify as mitigating circumstances may, when taken together, constitute substantial and compelling circumstances as defined. *In casu*, both counsel for the State and defence were agreed in argument that there are indeed strong mitigating factors that constitute substantial and compelling circumstances in this case. I agree with counsel.

[6] At this juncture I record only the most important of such factors as follows:

- i. Firstly the personal background of the accused. He is 47 years old. He is married but is separated from his wife. He is the father of two minor children from the current marriage (the complainant included) and a 25 years old son from his previous marriage (wife passed away). He has a stable work history and earned a living as a building subcontractor with an average income of R500,00 per week.
- ii. He is a first offender.
- iii. It is common cause that he had consumed a lot of liquor when committing the crime, and it appears that it was not his habit to get excessively intoxicated.
- iv. Subsequent to his arrest for the offence and whilst on bail, the complainant went to stay with him at Welkom where he was staying with his live-in lover and he maintained the complainant. They have

reconciled.

v. He has shown remorse and it is unlikely that he will pose any risk to either the complainant or other women and children.

vi. He is a sickly person.

[7] In the premises, this Court is entitled to depart from the prescribed minimum sentence and impose an appropriate lesser sentence. What that would be is the next question to be considered.

[8] Now, in his report, Mr. Van der Merwe has completely ruled out correctional supervision as an option. Two main reasons are advanced for this. Firstly, he found that the accused had no fixed residential address, which is essential for a sentence of this nature, for without such a fixed permanent address proper supervision would be difficult. Secondly, he proffers the view that this is a serious crime and reckons that correctional supervision will not only fail to properly reflect recognition of the gravity of the offence but also that it would send a wrong message to would be rapists. He further reckons that it would not serve the interest of society in the eradication of the scourge of violence against women and children. In a nutshell, the correctional officer implies that correctional supervision cannot be imposed on a conviction of rape and in fact suggests that the prescribed minimum sentence be imposed.

[9] Apart from the fact that the question of what would be an appropriate sentence is a matter within the discretion of this Court, and that I am not bound to follow the recommendations of the correctional officer, the view that correctional supervision cannot be imposed *in casu* on the basis of the gravity of the offence is clearly incorrect. Such a sentence has in the past been imposed on equally serious and even more serious offences. Compare **S v POTGIETER** [1994 \(1\) SACR 61](#) (A); **S v LARSEN** [1994 \(2\) SACR 149](#) (A) (where correctional supervision was ordered in respect of murder) and **S v A EN 'N ANDER** [1994 \(1\) SACR 602](#) (A) (in respect of a rape conviction). And the fact that it would be difficult to exercise proper supervision of the accused due to lack of a fixed place of abode is in itself not sufficient a reason for not considering correctional supervision. See **S v KRUGER** [1995 \(1\) SACR 27](#) (A).

[10] I have already recorded some of the mitigating factors in this case. I now briefly deal with the aspects that emerged in the evidence but are not captured, or not fully captured, in the report of the correctional officer. Firstly, the extent of the accused's illhealth. The accused testified that he has been suffering from asthma since 1987, that his condition has deteriorated over time, so that he now carries a pump and an oxygen mask which he has to use whenever he gets an attack. He says that

sometimes the attacks become so severe that he falls. He said that since his incarceration he spends most of the time in the prison hospital. He attributes this to the lack of sufficient fresh air in prison. Now this evidence was not contested and raises the question of what purpose does imprisonment really serve if the man spends most of the time in hospital. The correctional report does confirm that the accused “is struggling from health related problems” but does not elaborate. It appears that the nature and extent of the ill health and the conditions under which the accused survives in prison were not investigated.

[11] The second issue relates to the relationship between the accused and the complainant. The correctional officer states:

“His daughter, the complainant in this case is still a minor and in that regard he is still responsible for her. However after what had happened in this case it is obvious that she needs to be protected against him and that she shouldn’t be exposed to him again. Any further exposure to him as the perpetrator will bring back the trauma which she suffered as a result of the rape.”

[12] This statement apparently results from the fact the correctional officer did not interview the complainant. The evidence was that at some stage whilst the accused was on bail, the complainant joined him where he

was staying with his live-in lover at Bodelia in Welkom and they reconciled. This much was confirmed by the social worker who visited the family and compiled a report on 26 April 2005. She states:

“The relationship between the complainant, her father and stepmother appears to be satisfactory.

The complainant indicated that her father never touched her again after the rape.

The complainant's stepmother indicated that while the accused was detained after his arrest, the complainant requested to visit him in jail.”

In her evidence in court the complainant said that the only thing that bothered her was that the accused did not formally apologise to her and he duly did that in open court. The complainant pleaded that the accused be released from custody in order that he can provide for her and her baby. It will be noted that she is now 18 years of age and has a baby of her own by a boyfriend. She said that the accused was the only person who could provide for her and her baby.

[13] The social worker also detected no signs of any permanent emotional scars on the complainant. She did note, however, that the complainant must have been severely traumatised by the rape and that she would still benefit from therapy which had not been given to her. I accordingly advised the complainant to contact the social workers again so that they can assist her to get therapy.

The correctional officer incorrectly reports that the complainant is the only minor child of the accused. The evidence and the social worker's report show that the family background of the accused is as sketched in paragraph 6 above.

[14] Now, there is no gainsaying the fact that not only is rape a serious offence but that it is also prevalent in the whole of this country. The enactment of the Minimum Sentences Act was in fact Parliament's direct response to the public outcry against the rampant crimes of violence like murder, robbery and rape. The purpose was to try to eradicate the scourge. The instant matter is aggravated by the fact that the accused breached the trust that the complainant had in him as a father and protector. In fact we are here dealing with a combination of two offences: rape and incest. The public interest comes very much to the fore in this case.

[15] The most daunting task that faces every sentencing judicial officer is how best to balance the interests of society and the gravity of the crime, on the one hand, and the personal circumstances of the accused, on the other. In my view, the personal circumstances of the accused and the background factors sketched above do not mark him out as a candidate for removal from society. Certainly he no longer poses a

threat to the complainant. His claim that he cannot believe that he could do such a thing did not sound hollow. His conduct can in large measure be attributed to the consumption of alcohol. It must also be taken into account that he has already spent more than a year in prison since his conviction on 16 May 2005.

[16] It is trite that sentence is largely determined by the peculiar circumstances of each case and the dictum stated by Holmes, JA in **S v RABIE** [1975 \(4\) SA 855](#) (AD) that “punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy” is still very much part of our law. Of course mercy in this context has nothing to do with maudling sympathy for the criminal.

[17] I should mention in passing that there is currently a debate raging in public fora and the media around the issue of overcrowding in prisons, with the insinuation that the courts are exacerbating the problem by continually imposing direct imprisonment. Some are even calling for the abolition of the Minimum Sentences Act, notwithstanding the fact that the evil that this piece of legislation was meant to eradicate is still very much with us. For what it is worth, the debate highlights the need for flexibility in sentencing, where the court is not bound by the minimum sentences provisions. In this regard, it

will be useful to recall the sentiments expressed by Kriegler, JA (as he then was) in **S v R 1993 (1) SACR 209** (A) about the approach ushered by the introduction of correctional supervision as a sentencing option. Similar sentiments are echoed in the following passage from **S v SIEBERT 1998 (1) SACR 554** (A) at 559 c:

“An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combination of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of punishment.”

[18] Having considered all the relevant facts, I imposed the following sentence:

Ten (10) years imprisonment, six (6) years of which is suspended for five (5) years on condition that the accused is not convicted of rape, attempted rape, indecent assault or any sexual offence, committed during the period of suspension.

H.M. MUSI, J