

REPORTABLE:		
YES/NO	Circulate to	
Judges:	YES/NO	
Circulate to Magistrates:	YES/	
	NO	

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case No: K/S 8/05
Date Delivered: 22/02/2006

In the case between:

THE STATE

and

BILLY PHAKATHI

SENTENCE

TLALETSI, J:

What the Court now has to do is to determine an appropriate sentence for you.

1. The object and purpose of punishment are deterrent, preventive, reformatory and retributive.

2. The triad enunciated in **S v Zinn** 1969(2) SA 537(A) at 540 G remains instructive to this Court. This consist of the crime, the offender and the interest of the society. Added To the trial is the interest of the victim.

A Court should strike a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of other elements.

3. **The offender**

(The following are your personal circumstances which have been placed on record. You are now 23 years old, not married, have two children and they are staying with their mothers. Who are not employed. You are a first offender to Rape, but have previous conviction of theft. You attended school up to grade 12 at school. You were employed earning R 400-00 per week at a panel beating business.)

4. **The offence**

It is common cause that the offence for which the accused has been convicted is of a very serious nature. It is RAPE and Culpable Homicide. The Court must take into account the moral and ethical nature of the offences and their gravity. Logic dictates that more serious crimes have to carry greater moral blameworthiness as opposed to minor offences.

These offences are prevalent in this jurisdiction. The complainant was sleeping in the comfort of her boyfriend's house, and you broke into the house and when you unexpectedly noticed her, ran away. You saw her that she was defenseless as nobody heeded her calls and decided to attack her. Instead of reflecting on the wrong you did by breaking into this house, you decided to rape her twice. She was a defenseless and vulnerable woman. She was injured by the knife you had with you in the struggle. You also, according to the complainant, assisted in the rape by Kale.

Rape is a very serious offence that impairs the privacy and the dignity of the victim, against her constitutionally guaranteed rights.

See **S v Chapman** 1997(2) SACR 3 (SCA) at 5 b – c. The complainant testified that she experienced nightmares.

Psychologically this incident has affected her. She did not sustain life threatening injuries. The physical injuries were the cuts on her finger and marks on the elbow and arm. There is no evidence that you originally planned to go and rape the complainant. You only took the opportunity of seeing her being at eh wrong place at the wrong time.

5. **Interests of the community**

A Court fulfils an important function in applying the law in the society. It has a duty to maintain Law and Order. As it operates in society its decisions have an impact in the individuals ordinary daily lives. The Court must promote respect for the law, and in doing so reflect the seriousness of the offence and provide just punishment for the offender. In doing so the Court must take the personal circumstances of the offender. The feelings, requirements and protection of the society against the accused or would be offenders must be taken into account. The interests of the society should not be over emphasized to the detriment of the personal factors of the accused. Due weight must be given to all the

elements. In considering the interests of the society, I will take into account the entire society without discrimination.

This Court will also blend its sentence with a measure of mercy. **Holmes JA** remarked as follows in **S v Harrison**

1970(3) SA 684 (AD) at 686 A: *“Justice must be done; but*

mercy, not a sledge-hammer, is its concomitant.” also **S v**

Rabie 1975(4) SA 855(A) at 862G-H, where **Holmes**

JA further said the following:

“punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.” Mercy involves an understanding of and compassion for the weaknesses of human nature. It has been said not to involve mindless sympathy for a criminal but involves fairness.

The interests of society are best served by a sentence which produces the biggest advantage, or the least potential harm, to society. Society is served by the most effective sentences possible, bearing in mind the aims of sentencing. The interests of society must not be confused with the emotions or outrage of society. For example, society may perceive that life imprisonment

is the just sentence for a murderer or rapist. However, in the particular circumstances of that case life imprisonment may not be in the interest of society, eg. where a person is a youthful offender with good prospects of rehabilitation.

It may not be in the interest of society to send a rehabilitable person for a very long time to prison. It may also not be in the interest of society to send a rehabilitable person to a very short term of imprisonment, because of the destructive effect such short term imprisonment may have on the offender.

Act 105 of 1997

Criminal Law Amendment Act 105 of 1997 makes provisions for minimum sentences for certain serious offences. This is intended to serve as a deterrent and to ensure some measure of consistency as far as sentences for similar offences are concerned. This particular type of rape is listed in part 1 of schedule 2 and carries with it a sentence of Life Imprisonment. It is an instance where the victim was raped more than once by the same person.

The Court should only depart from the prescribed minimum sentences where it finds that there are substantial and compelling circumstances. The approach that the Court should adopt is properly captured in the case of ***S v Mahomotsa*** 2002(2) SACR 435 (SCA) at 443i - 444e and ***S v Malgas*** 2001(1) SACR 469 (SCA).

In ***S v Mahomotsa*** 2002(2) SACR 4359 (SCA) at 443i-444c per **Mpati JA** the following is said:

“[18] It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the

obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in **S v Abrahams** 2002 (1) SACR 116 (SCA), *'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para [29]).*"

Substantial and Compelling Circumstances

You are a first offender to rape. You are still young. You had consumed liquor excessively. The complainant did not suffer physical life threatening injuries. This is not one of the worst types of rapes. Although you raped her twice these incidents are not far apart, but may be viewed as one cause of event in a chain. There is a marked disparity between the sentence that I would impose and the prescribed sentence such that the imposition of the

prescribed sentence would cause an injustice to you. The cumulative effect of these circumstances in my view qualify as substantial and compelling circumstances.

Long term imprisonment, bearing in mind the benchmark laid down by the legislature is unavoidable. I will give you a chance to rehabilitate yourself and mend your ways. I will take the two rape counts together for the purpose of sentence as they are closely related to each other in terms of proximity and method used. In order ameliorate the effect of sentence.

I will order the sentences should ten concurrently.

