

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

Appeal No.: A402/2003

In the matter between:

ELIAS NTHOLENG

Appellant

and

THE STATE

Respondent

CORAM: **MUSI J, RAMPAI et VAN DER MERWE, JJ**

HEARD ON: **23 AUGUST 2004**

JUDGMENT BY: **MUSI, J**

DELIVERED ON: **2 SEPTEMBER 2004**

- [1] The appellant was convicted on five counts of rape in the Regional Court at Botshabelo on 24 November 2000. In all the counts the victims of the rape were girls under the age of 16 and presumably the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) became applicable. In terms hereof the appellant became liable to be sentenced to life imprisonment in respect of each of the counts. The matter was

accordingly referred to the High Court for sentence in terms of section 52(1)(b) of the Act.

On 12 December 2001 the matter came before Mabesele, AJ who duly confirmed all the convictions of the appellant and proceeded to consider sentence. He imposed the prescribed minimum sentence of life imprisonment in respect of each of the five counts.

An application for leave to appeal was subsequently filed and since Mabesele AJ was not available, it was heard by my brother Rampai, J who granted it.

- [2] There are two issues in this appeal that call for consideration. Firstly, the offences in counts 1, 2 and 5 were committed respectively on 28 February 1998, 9 March 1998 and 26 April 1998, which is prior to the coming into operation on 1 May 1998 of the Minimum Sentences Act. These counts were therefore not subject to the prescribed minimum sentences as provided for in the Act; and the Court *a quo* was not obliged to impose life imprisonment in respect thereof. This much was common cause at the time of sentencing. However, the Court *a quo* nonetheless

proceeded to impose life imprisonment on the basis that it had the power to do so even if the Act was not applicable. The second issue is failure of the Court *a quo* to deal specifically with the issue of whether there were substantial and compelling circumstances as set out in section 51(3) of the Act, which would entitle the Court to depart from the prescribed minimum sentence.

- [3] In his heads of argument Mr Langenhoven, who previously acted for the appellant, agreed that the Court *a quo* was entitled to impose life imprisonment even if the provisions of the Minimum Sentences Act were not applicable to the offences in counts 1, 2 and 5. He gave notice that he did not think that the imposition of life imprisonment was inappropriate in the circumstances of this case.

Before us Ms Murray, who did not draw up the heads of argument, appeared for the appellant. She agreed that the Court *a quo* had the power to impose life imprisonment even in respect of counts 1, 2 and 5, but deviated from the heads of argument and submitted that life imprisonment was inappropriate in the circumstances of this case and urged us to interfere and substitute appropriate sentences

in respect of those three counts.

In regard to counts 3 and 4, counsel was of the view that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment and could not challenge the sentences imposed.

[4] Ms Giorgi, who appeared for the State, did not deal with this issue in her heads of argument but broadly supported the decision to impose life imprisonment in respect of all the five counts, and thereby also signified an agreement with the decision of the Court *a quo* in imposing life imprisonment in respect of counts 1, 2 and 5 as well. She supported the sentences on the basis of the seriousness of the crimes, the interests of the community and the fact that the crimes were prevalent.

[5] In her heads of argument and in oral argument before us counsel for the State submitted that the Court *a quo* did indeed deal with the question of whether there were substantial and compelling circumstances as set out in section 51(3) of the Act. She said that the fact that the Minimum Sentences Act is referred to in the

reasons for sentence means that the Court *a quo* was aware of the relevant provisions and considered the issue. She further submitted that it is implicit in its judgment that the Court *a quo* found that there were no such substantial and compelling circumstances, and hence it imposed the prescribed minimum sentence.

- [6] In my view, the Court *a quo* materially misdirected itself in imposing life imprisonment in respect of counts 1, 2 and 5. It is so that the Courts retain the power and discretion to impose life imprisonment even in regard to rapes committed prior to the coming into operation of the Minimum Sentences Act. (See **S v MALGAS [2001] (3) ALL SA 220 (SCA) at 227e**). However, a sentencing Court must make a clear distinction between the offences committed prior to and those committed subsequent to 1 May 1998. This is so because the enactment of the Minimum Sentences Act ushered in a completely different dimension to sentencing. It was a drastic measure that created a new regime of sentencing packages applicable to a select category of crimes and to be applied strictly with effect from date of its coming into operation. Such date is significant as it marks a clear break from

the manner in which the specifically delineated crimes had previously been punished. The significance of the break was highlighted by Marais, JA when he stated in **MALGAS** (*supra*) at **227e** that in enacting the Minimum Sentences Act, parliament was not happy with the prevailing sentencing patterns and

“that it was no longer to be business as usual when sentencing for commission of the specified crimes.”

And at **232A** it is made clear that section 51 of the Act has limited the discretion of the Court in imposing sentence in respect of the specified offences. Therein lies the significance of the distinction, for in respect of the offences not covered by the Act, the Courts retain their unfettered sentencing discretion.

- [7] *In casu* the Court *a quo* merely indicated that it had the power to impose life imprisonment even in respect of the rapes not falling within the purview of the Act, but there is nothing to suggest that it treated the relevant offences differently from those covered by the Act. In my view, had the Court *a quo* approached the matter on the basis of the unfettered sentencing discretion it had in respect of counts 1, 2 and 5, and consulted precedents, it would have realised

that life imprisonment would be startlingly inappropriate in the circumstances of this case. Even if I am wrong in my conclusion that the Court *a quo* misdirected itself as to approach, nonetheless the Court *a quo* was wrong in imposing life imprisonment in the circumstances of this case. It over-emphasised the nature and gravity of the offences and the interests of society and did not give sufficient weight to the mitigating factors in the matter, to which I shall revert shortly.

- [8] I now turn to consider the question of “substantial and compelling circumstances”. This relates to the offences that fall within the provisions of the Act. It is to be noted that sub-section (1) of section 51 is subject to the provisions of sub-section (3) and (6) of the same section. Sub-section (3) provides that where substantial and compelling circumstances are found to exist justifying the imposition of a lesser sentence than the prescribed sentence, then the Court shall enter those circumstances on the record and proceed to impose the lesser sentence. That means that a Court applying the provisions of section 51 must consider the existence or not of substantial and compelling circumstances before passing sentence. This much is clear from the decision in **RAMMOKO v**

DIRECTOR OF PUBLIC PROSECUTIONS 2003 (1) SACR

200 (SCA) at 205g. See also **MALGAS** (*supra*) at **229j**. It was further made clear in **RAMMOKO** that the sentencing officer has a duty to explore the relevant factors and must be proactive in this respect.

Now if the Court finds that such circumstances do exist, it must record them. On the other hand, if it finds none to exist, it is not called upon to record such finding in so many words. In my view, it must, however, be clear from the record that the Court did pertinently deal with the issue and came to the relevant conclusion.

- [9] *In casu* no reference is made to the provisions of sub-section (3) of section 51 aforesaid. There is neither any mention at all of the phrase “substantial and compelling circumstances” in the reasons for sentence nor any indication that the appellant’s then legal representative raised the issue at all. The issue was first raised in the application for leave to appeal by Mr K. Pretorius, who moved that application. I cannot, therefore, agree with counsel that such issue was dealt with by the Court *a quo*. The Court *a quo* simply

followed the traditional route of considering the triad of sentence, found life imprisonment to be appropriate and proceeded to impose it without first pondering whether a departure from the prescribed sentence may be justified.

- [10] In the heads of argument filed on behalf of the appellant, Mr Langenhoven drew attention to this omission to deal with the issue of substantial and compelling circumstances and cited the case of S v CALITZ EN 'N ANDER 2003 (1) SACR 116 (SCA). That case dealt with a situation where the reasons for the sentence imposed were absent from the record of the relevant proceedings and it is distinguishable from the instant one insofar as reasons for the sentence are there in this case. Counsel correctly conceded this much and on that basis abandoned the point. However, that case is relevant insofar as the record herein is blank as far as a consideration of the provisions of section 51(3) is concerned. In this context, the point was validly made. Counsel appears to have abandoned that point also on the basis that, at any rate, on the basis of the principles set out in MALGAS (*supra*) and PRICE AND ANOTHER v S [2003] (4) ALL SA 26 (SCA), there were no

substantial and compelling circumstances in this case. That was also the view expressed by both Ms Murray and Ms Giorgi in oral argument. I respectfully disagree. Firstly, failure to consider the existence or not of substantial and compelling circumstances before imposing the prescribed sentence would normally constitute an irregularity (I say “normally” advisedly because circumstances are conceivable where this may not be the case). Secondly, in my view, there are indeed substantial and compelling circumstances as defined.

- [11] To conclude this aspect of the inquiry, I hold that the question of whether there were substantial and compelling circumstances as defined was not addressed in this case and that constitutes an irregularity grave enough to vitiate the sentences in respect of counts 3 and 4. This Court is therefore at large to consider sentence afresh. In doing so I propose to start with a consideration of the issue of substantial and compelling circumstances in respect of counts 3 and 4. I shall consider the relevant factors in conjunction with all other factors relative to sentence covering counts 1, 2 and 5 as well.

[12] It is so that there are aggravating factors in this case, quite apart from the fact that rape is a serious crime. The Minimum Sentences Act has marked out rape of a girl under the age of 16 as deserving severe punishment. The complainants in counts 4 and 5 were raped twice by the appellant and that in itself has been marked out for severe punishment. Clearly these two counts are more serious than the others. Then there is the manner of execution of the crimes, about which the Court *a quo* has said all that needed to be said. Suffice it so say that the appellant can be classified as what is normally referred to as a serial rapist. I say this because the offences were all pre-planned and his *modus operandi* was the same. He targeted girls of between 13 and 16 years of age and would falsely accuse the unsuspecting victim of having been involved in, one way or another, the murder of a relative of his. He would then demand that the victim accompany him to the police and in this way lure her to an open space where he would rape her.

[13] On the other hand, there are strong mitigating factors as well and in my view the following factors cumulatively constitute weighty reasons justifying a departure from imposition of the prescribed minimum sentence, at any rate in respect of counts 3 and 4:

1. All the complainants did not sustain any physical injuries other than those incidental to forced penetration and even those were not of a serious nature. The indications are that whereas the complainants were obviously traumatised, no permanent damage has resulted in this regard, at any rate, there is no evidence pointing in that direction.
2. The appellant did not use excessive force and appears to have intended no harm other than to satisfy his sexual lust.
3. The rapes took place during the day in an open veld within the township and the complainants were not subjected to life-threatening conditions as compared to, for instance, being dragged to a forest or other dangerous remote place at night. Compare the situation in **S v BLAAUW [2001] (3) ALL SA 588 (C)**. In a nutshell, these were not rapes of the worst kind. See the remarks of Mpati, JA (as he then was) in **S v MAHOMOTSA 2002 (2) SACR 435 (SCA) at 444**.

4. The appellant has favourable personal circumstances:

4.1 He is a married man of 34 (now) with minor children.

He was fully employed, and earned a reasonable income of R1 800,00 per month and supported his family.

4.2 He was, for purposes of sentence, a first offender.

4.3 The Court *a quo* described the appellant as an enlightened and responsible person. It can be accepted that he is not the type that should be permanently removed from society.

In my view these factors also render life imprisonment in respect of counts 1, 2 and 5 startlingly inappropriate.

[14] Once the Court finds that a departure from the prescribed minimum sentence is justified, it is at large to impose any appropriate sentence. However, it must do so conscious of what the legislature has ordained to be appropriate sentences for the relevant offences. In my view, this awareness must extend also to similar offences not falling within the purview of the Act, for a sentencing Court must

take into account changed circumstances and prevailing societal attitudes. In that context, it cannot be business as usual even in respect of the offences not hit by the provisions of the Act. *In casu*, all the offences fall within the same category and were committed one after the other over a short period of four consecutive months. In my view they warrant similar punishment. I have already indicated that counts 4 and 5 are more serious than the others and the sentences I am about to impose must reflect that. Finally, the effective term of imprisonment to be imposed will hopefully reflect due recognition of the nature and gravity of the offences and the interest of the community in the protection of young girls and women generally against rapists as well as keeping open a window of possibility for the appellant's rehabilitation in the distant future.

[15] In the result, the appeal succeeds and the sentences imposed on the appellant are all set aside and replaced with the following sentences:

1. On each of counts 1, 2 and 3 – ten (10) years imprisonment.
2. On each of counts 4 and 5 – thirteen (13) years

imprisonment.

- 3, The sentences on counts 1, 2 and 3 to run concurrently with the sentences on counts 4 and 5 and all the sentences to be antedated to 12 December 2001.

H.M. MUSI, J

I CONCUR

M.H. RAMPAL, J

I CONCUR

C.H.G. VAN DER MERWE, J

On behalf of Appellant:

Adv. Murray
Instructed by
Legal Aid Board

On behalf of Respondent:

Adv. S. Giorgi
Instructed by
Director: Public Prosecutions

