IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: A 631/2006

Date heard: 30/01/2008
Date of judgment: 26/02/2008

REPORTABLE

In the matter between:

Ngulube, G.R. Appellant

And

The State Respondent

JUDGMENT

DU PLESSIS J:

[1] The regional court sitting in Pretoria convicted the appellant of the rape of D M. D is the appellant's biological daughter and she was five years old at the time of the rape. The Criminal Law Amendment Act, 105 of 1997 prescribes for the offence in question a minimum sentence of imprisonment for life unless there are substantial and compelling circumstances that justify a lesser sentence. (See section 51 (1) read with Part 1 of Schedule 2 and with section 51 (3) of the Act.) Accordingly, acting under section 52(1) of the Act, the regional court referred the matter to the high court for sentence. This division of the high court *(per* Makafola AJ) confirmed the conviction, found no substantial and compelling circumstances that justify a lesser sentence and sentenced the appellant to imprisonment for life. With the leave of the judge a

quo the appellant appeals to this court against the sentence.

[2] The appellant is estranged from his wife who is the mother of the complainant. When the offence was committed, the mother worked as a domestic assistant and lived at her place of employment. The complainant and two of her sisters lived with the appellant in a shack in a squatter camp. There were two beds, separated from each other by a curtain, in the shack. The appellant and the complainant slept on one and the other two girls on the other bed. On the night of the rape, the appellant and the complainant were lying on their bed when the appellant removed the child's underclothing, inserted his finger into her vagina and thereafter had sexual intercourse with her. There is no evidence that the appellant used violence other than that inherent in the acts that I have described. The complainant sustained bruising of the labia minora "all round from 01:00 to 11:00", but no other physical injuries.

[3] The appellant is a first offender who, at the time of sentence, was 46 years old. He was gainfully employed and he supported his children, including the complainant.

[4] For the appellant Mr Tshabalala submitted that the learned judge *a quo* should have found that there are substantial and compelling circumstances that justify the imposition of a lesser sentence than imprisonment for life.

Counsel conceded that the appellant in this case had committed a despicable deed, but argued that the present is not one of the most serious cases of rape. Life imprisonment, counsel pointed out, is the ultimate sentence that courts in this country could impose and it should, so the argument went, be reserved for the most serious cases. The argument concluded that, if a particular case of rape cannot be said to be most serious, that in itself constitutes a substantial and compelling circumstance that justify a lesser sentence than life imprisonment. Counsel submitted that the argument finds support in the Supreme Court of Appeal's judgments in S v Abrahams 2002 (1) SACR 116 (SCA), S v Mahomotsa 2002 (2) SACR 435 (SCA) and S v Nkomo 2007 (2) SACR 198 (SCA).

[5] As I have pointed out, the Criminal Law Amendment Act prescribes for *inter alia* the offence in question (rape where the victim is a girl under the age of 16) a minimum sentence of imprisonment for life. Section 51 (3)(a) of the Act provides, however, that if the court "is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence" than the prescribed sentence, "it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence". In S v Malgas 2001 (1) SACR 469 (SCA) the minimum sentence provisions of the Act and the courts' discretion to depart from the prescribed minimum sentences were fully considered. It was held that the Legislature has ordained the relevant prescribed minimum sentence as "the sentence which

should ordinarily be imposed" for the relevant offence (Para 8). "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny" (para. 9 and see also para. 20). When faced with a case in which a minimum sentence is prescribed, the court has regard to all the factors, including past sentencing patterns, which traditionally play a role when sentence is considered (Para. 9 and para. 21). A court may not depart from the prescribed minimum simply because the sentence it would have imposed but for the Act is "anything less" than the prescribed sentence (Para. 17). But the prescribed minimum sentence need not be *'"shocking', 'startling'* or *'disturbingly inappropriate"'* before a court is entitled to deviate from it (Para. 12 to 16).

[6] As I understand the Malgas-judgment, the prescribed minimum sentence may be departed from if, having had regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be "disproportionate to the crime, the criminal and the legitimate needs of society" (Para. 22. See also the court's own summary in para. 27).

[7] I now proceed to consider counsel's argument with reference to the three Supreme Court of Appeal-judgments referred to in paragraph 4 above. The three judgments all concerned what may be termed cases of serious rape

but in not one of them did the Supreme Court of Appeal confirm or impose the minimum prescribed sentence of imprisonment for life. In the Abrahams-case the learned judge made reference to the circumstance that "weigh... towards the conclusion that a sentence of life imprisonment would be unjust". He continued: "In addition... this is not one of the worst cases of rape. This is not to say that rape can ever be condoned. But 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. 28 and 29. The underlining is mine).

[8] Counsel argued that the underlined portion of the quotation means that, even where the Act prescribes imprisonment for life as a minimum sentence, it can be imposed in only the most serious cases. I do not think that is what the underlined portion conveys and the argument runs counter to what Mpati JA said in paragraph 19 of the judgement in S v Mahomotsa. Moreover, such an interpretation of what the Supreme Court of Appeal held would be contrary to the wording of the Act and to what was said in S v Malgas from which the court in Abrahams did not differ.

[9] I have pointed out that S v Mahomotsa and S v Nkomo concerned serious instances of rape. In both cases the victims were kidnapped, held captive and raped repeatedly. In each of the judgments the court set out the

"substantial and compelling circumstances" that justified a lesser sentence than life imprisonment (See paragraphs 17 to 22 of the Mahomotsa-judgment and paragraphs 12 to 14 of the Nkomo-judgment). With respect, in themselves the factors listed in the judgments are not convincing (See the minority judgment in S v Nkomo).

[10] The facts in the three cases that counsel referred to differ substantially form those that we are concerned with in this case. We are however bound by the ratio of those judgments if it applies to the present one. It is, therefore, necessary to determine why the Supreme Court of Appeal decided not to impose the minimum prescribed sentence for what, particularly in the Mahomotsa and Nkomo cases, seem to be unconvincing reasons.

[11] In s v Mahomotsa and also in S v Nkomo the courts relied on the passage from S v Abrahams that I have quoted earlier. I have already concluded that the passage does not mean that, even where the Act prescribes imprisonment for life as a minimum sentence, it can be imposed in only in the most serious cases. In my view the quoted passage, and its application in the other two cases referred to, convey that even where imprisonment for life is prescribed as a minimum sentence, a court must bear in mind that it is the ultimate penalty that the courts in this county can impose. As such it must not be imposed lightly, even when it is a prescribed minimum sentence.

[12] At the risk of complicating it, I shall expand on what I have said in the previous paragraph. It is axiomatic that in order for it to arrive at a just sentence, a court must have balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed. In S v Malgas (para. 25) Marais JA pointed out that section 51 of the Act "has limited but not eliminated the courts' discretion in imposing sentence..." It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Where the prescribed minimum sentence is less than life imprisonment, such differentiation is possible either by imposing a heavier sentence than the prescribed minimum or, where there are substantial and compelling circumstances so to do, to impose a lesser sentence. Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and

compelling to the extent that justice requires a lesser sentence than life imprisonment.

[13] The learned trial judge was not referred to the abovementioned three judgments. Accordingly, he did not consider their effect, did not follow the approach sanctioned therein and in that sense misdirected himself. This court therefore has to consider sentence afresh.

[14] In S v Blaauw 2001 (2) 5ACR 255 (C) the victim was also a girl of five. The accused was much younger - he was only weeks older than 18 when he committed the offence. His youth was an important factor that led the court to conclude that substantial and compelling circumstances that justify a lesser sentence than life imprisonment exist. The victim in that case suffered relatively serious injuries and in that sense the rape was more serious. The court imposed a sentence of 25 years imprisonment.

[15] The judgment in S v Ngomane 2007 (2) SA 535 (W) was also brought to our attention. The appellant there was 25 years old. He was found guilty of the rape of a 13-year old girl. The high court imposed a sentence of 28 years imprisonment. It does not appear from the reported judgement why the minimum of imprisonment for life was not imposed. For reasons that do not apply in this case, three judges of the Witwatersrand Local Division on appeal reduced the sentence to 15 years imprisonment. Apart from serving as an

indication of sentencing patterns, the judgment does not assist us in this case.

[16] I return to a consideration of the facts of this case. It is true, as counsel pointed out, that the complainant suffered no physical injuries. In my view, that fact, although relevant, cannot carry much weight. Rape itself is "an act of violence committed against a woman" (S v Ncheche 2005 (2) SACR 386 (W) at para 25). If the victim is physically injured in the course of the rape, a crime that is inherently serious is rendered even more serious. Moreover; one should not place too much emphasis on physical injuries or the absence thereof as such injuries would ordinarily heal in the course of time. The unquestionable emotional harm that rape does may vary in gravity, but it generally deserves more emphasis than physical injuries. In this case there is no evidence to evaluate the emotional harm that the deed did to the victim but I confidently proceed on the assumption that she was not left unscathed.

[17] The fact that the appellant raped his own daughter is not mitigating. It might indicate that he is not likely to commit the crime outside of the intimate circle of the family, but a daughter's father should be the one male person that she can rely on for protection. The appellant breached that trust in a particularly invasive manner.

[18] What counts in the appellant's favour is that he was an economically active member of society who maintained his children in what, judged from

the living arrangements, were difficult circumstances. It is of substantial importance that the appellant is a first offender at the age of 46. The last mentioned fact in itself indicates that the appellant could be rehabilitated.

[19] I have read the remarks of my brother Poswa. I am, with respect, unable to agree with all those remarks. The appellant's socio-economic circumstances are, however, a factor that must be taken into account. Despite his difficult socio-economic environment, the appellant has managed to earn an income, to maintain his family and, up to the age of 46, to maintain a clean criminal record. I have pointed out that the evidence shows him to be capable of rehabilitation. Having regard to the cumulative effect of all these factors, I am of the view that substantial and compelling circumstances exist to impose a lesser sentence than imprisonment for life.

[20] Having said that, the crime remains very serious and must be punished severely. In my view a sentence of 20 years imprisonment would do justice to all the considerations that dictate an appropriate sentence.

The following order is made:

1. The appeal succeeds.
2. The sentence of life imprisonment imposed by the court a *quo* is set aside and in its stead the following sentence is imposed:

   "The accused is sentenced to 20 years imprisonment".
3. In terms of section 282 of the Criminal Procedure Act, 51 of

1977 the sentence is antedated to 6 August 2004.

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B. R. DU PLESSIS
Judge of the High Court

I agree

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T. J. RAULINGA
Judge of the High Court

Poswa J:

[21] I have read the judgment of my brother Du Plessis and agree therewith and with the order he proposes. I would add the following.

[22] Whilst nothing can justify the appellant's conduct, the circumstances in which he committed this offence ought to be considered a substantial and compelling circumstance in determining the appropriate sentence. Evidence is that the appellant and his three daughters shared a single apartment in an informal settlement. The appellant and the children's mother had quarrelled, leading to her leaving their place of residence. In what appears to have been a normal way of living, in those circumstances, the two older daughters shared a bed, whilst the younger daughter, the victim of the rape, shared a bed with the appellant, her biological father, behind a curtain that was apparently ordinarily in place, to provide a semblance of separate bedrooms.

here was, therefore, nothing untoward, in the circumstances, concerning the sleeping arrangements I have described.

[23] Ordinarily and in circumstances other than those prevailing in an informal settlement, no father would share a bed with his daughter. That abnormal situation was, in my view, entirely a consequence of social conditions over which the appellant and the children the entire family had no control. It, in my view, provided the appellant and will always provide others as wicked minded or morally weak as l'1im, with an opportunity that would ordinarily not have been available. Under normal living conditions, the appellant would have had to go out of his way to bring himself to share a bed with his daughter - a fact that might have been well-nigh impossible even for him.

[24] It is, perhaps, appropriate to draw the Legislature's / Government's attention to the many hidden evils of the sub human living conditions in informal settlements. The present case may just be the tip of the iceberg.

J.N.M. POSWA
Judge of the High Court

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