THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 619/10

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

and

PAULOS KAM THABETHE **Respondent**

Neutral citation: ***DPP v Thabethe***
(619/10) [2011] ZASCA 186 (30 September 2011)

Coram: Mthiyane, Bosielo and Shongwe JJA

Heard: **15 September 2011**

Delivered: **30 September 2011**

Summary: **Appeal by the State – Sentence – respondent convicted of rape and sentenced to ten years' imprisonment which was wholly suspended for five years on certain conditions – appropriateness of sentence based on restorative justice – sentence found to be inappropriate – set aside and replaced with an effective term of imprisonment of ten years.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bertelsmann J sitting as court of first instance):

(a) The appeal against sentence is upheld.

(b) The sentence imposed by the court below is set aside and replaced with 10 years' imprisonment.

JUDGMENT

BOSIELO JA (Mthiyane and Shongwe JJA concurring)

[1] The respondent was convicted pursuant to a plea of guilty of rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act) in a Regional Court, Secunda. The alleged rape involved having unlawful sexual intercourse with a girl below the age of 16 years. The respondent was then committed to the North Gauteng High Court, Pretoria for sentence in terms of s 52*(a)* of the Act.

[2] The court (Bertelsman J) imposed the following sentence:

'In the light of the extraordinary circumstances of this case the court imposed the following sentence:

(1) Ten years imprisonment, suspended for five years on condition that:

a) The accused is not convicted, during the period of suspension, of a crime involving violence or a sexual element or both;

b) That he remain in the employment of Mr Roussow unless he is laid off [through no

fault of his own];

c) In such event, he must immediately do everything necessary to find alternative employment;

d) From his income, at least 80% must be devoted to the support of the victim and her family. In particular the accused must accept responsibility for the victim's schooling and, if applicable, for her tertiary education;

e) Such support for the family is to continue even if his relationship with the victim's mother is terminated for whatever reason;

f) The accused must report on one day each weekend (subject to his work program, which normally entails working one day each weekend) to the probation officer at Delmas and participate in any program that such officer might prescribe;

g) Such programs must include a Sexual Offender's Program to be attended at the accused's cost;

h) The accused is to perform 800 hours of community service of a nature to be determined by the probation officer during the period of suspension. (This represents the maximum number of hours the accused can serve as he is only available on one day of every weekend.)'

[3] It is this sentence that the appellant is appealing against in terms of s 316B of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). The appeal is with the leave of the court below.

[4] The appeal turns on whether the sentence imposed on the respondent is appropriate. The appellant argues that, given the nature and gravity of the offence, and the fact that the Legislature has prescribed life imprisonment as the minimum sentence for this offence, the sentence imposed by the court below is startlingly or disturbingly inappropriate. To this may be added the fact that the appellant submits that the sentence imposed is incompetent, given the provisions of s 51(5)(a) which prohibits the suspension of the operation of the minimum sentence provisions in respect of this type of offence. On the other hand, the respondent asserts that the court below exercised its

sentencing discretion properly in finding that there are substantial and compelling circumstances which justified the sentence.

[5] The salient facts of the case are as follows: The respondent was a live-in lover of the complainant's mother. At the time of the incident the complainant was 15 years and 10 months old. The complainant, her mother and the respondent all stayed together in one house, together with the complainant's other siblings. On this fateful day the complainant had apparently left home without her mother's or the respondent's knowledge or consent. It appears that she was away for such a long time that her mother and the respondent started getting worried about her. Both the respondent and the complainant's mother launched a frantic but unsuccessful search for her. Later in the day the respondent found her at a home suspected to be that of her boyfriend. On their way back home, the complainant expressed the fear that her mother might punish her for her misdemeanour. She then implored the respondent not to tell her mother where she had been. Presumably sensing her vulnerability and desperation, the respondent inveigled her to have sexual intercourse with him in return for an undertaking not to tell her mother where the complainant had been. The next day there was some unexplained altercation between the respondent and the complainant which culminated in the respondent going to report the sexual intercourse to the police and voluntarily handing himself over.

[6] The complainant and her mother testified on sentence. In an attempt to obtain more evidence regarding the appropriate sentence to be imposed, the court below heard the evidence of a probation officer, Ms Nyundu (Nyundu). At the time she testified the complainant was already 17 years old and in Grade 9. The essence of her evidence was that the complainant has outgrown this incident. She has forgiven and reconciled with the respondent. She is no longer angry with or even afraid of him. She and the respondent have in fact repaired and mended their relationship. Importantly, she stated unequivocally that she does not wish the appellant to be sent to jail. According to her,

the respondent is playing a useful role in maintaining her and her family and she would like him to continue to support them.

[7] On the other hand, the complainant's mother was resolute that the respondent had to be sent to jail for what he did. She appeared to be tormented by the fact that the respondent could have sexual intercourse with her daughter and her as well. She conceded, however, that the respondent and the complainant appear to have mended their relationship and were friendly with each other. Importantly, she admitted that life without the respondent would be difficult as he was the mainstay of the family. As a domestic worker she was earning a paltry R40 per day. The family would not be able to survive without him.

[8] Nyundu, a principal social worker interviewed the complainant, her mother and the respondent. Furthermore, she arranged a victim-offender conference to afford the complainant and the respondent an opportunity to engage each other. Her evidence is to the effect that the complainant and the respondent have reconciled. The respondent has also rejoined the family, urging it to stay together as before the incident. She testified that the respondent expressed remorse for what happened. She described the complainant's mother as being ambivalent. Having considered all the relevant facts Nyundu recommended that the respondent be sentenced to correctional supervision in terms of s 276(1)(i) of the Criminal Procedure Act.

[9] The court below also had the benefit of a psycho-social report on the impact of the offence on the complainant. It is clear from the report that this incident has had serious adverse effects on the psycho-emotional well-being of the complainant. Her academic performance at school deteriorated to such an extent that she did not even write her final examination for Grade 8. She emphasised the fact that the complainant was hurt by the fact that the respondent had betrayed her trust in him as a father-figure.

[10] The approach of the court below to sentencing the respondent is set out as follows in the judgment.

'In the light of these facts, the court was of the view that this case was the one rape case – certainly the first this court has dealt with – in which restorative justice could be applied in full measure in order to ensure that the offender continued to acknowledge his responsibility and guilt; that he apologised to the victim and cooperated in establishing conditions through which she may find closure; that he recompensed the victim and society by further supporting the former and rendering community service to the latter; and that he continued to maintain his family.' The judgment of the court below has been reported as *S v Tabethe* 2009 (2) SACR 62 (T).

[11] Against the backdrop set out above, the court below found the following facts to be substantial and compelling enough to justify a departure from a minimum sentence of imprisonment prescribed by the Act. As required by s 51(3)*(a)* the court below recorded those facts as follows:

'After establishing the accused's disposable monthly income and the fact that the victim was still at school in grade 10, the court found that there were a number of substantial and compelling circumstances that, individually and collectively, justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by Act 105 of 1997 in Part 1 of Schedule 2 thereto read with section 51 of the Act. The substantial and compelling circumstances are the following;

a) The accused is a first offender;
b) The accused exhibited remorse throughout and
c) Pleaded guilty at both stages of the trial;
d) Genuine remorse should be taken into account, *S v Genever and Others* 2008 (2) SACR 117 (C);
e) Although the victim was under sixteen when the offence was committed, she reached that age within a few days of that date;
f) The rape was not preceded by grooming of the victim but occurred on the spur of the moment;

g) Although rape is always a heinous crime, particularly if it occurs within the family, *S v Abrahams* 2002 (1) SACR 116 (SCA), and ought to attract a severe sentence, *S v M* 2007 (2) SACR 60 (W), it is not irrelevant that the victim was not injured physically;

h) The rape was therefore not one of the worst kind of rapes, *S v Nkomo* 2007 (2) SACR 198 (SCA);

i) The accused had remained involved in the family of which he and the victim were part;

j) The accused continued to support the family, including the victim, throughout the period from the commission of the offence to the end of the trial;

k) The accused and the victim's mother resumed their cohabitation during the trial and another child was born from this union before the sentencing process was concluded;

l) The family was entirely dependent upon the accused;

m) The victim was fully aware of this fact and came to the conclusion that it would not be in the family's interest that the accused be incarcerated;

n) This conclusion was reached in spite of the fact that the victim was suffering obvious emotional trauma as a result of the invasion of her physical, emotional and psychological integrity to which she had been subjected;

o) This conclusion was reached by the victim independently and without obvious outside influence;

p) The accused and the victim participated in a successful victim/offender program;

q) The accused maintained his employment and fulfilled his obligations in that regard throughout the trial;

r) If the accused were to be sentenced to imprisonment, he would lose his employment and income and the family would lose its only source of support;

s) This might lead to the loss of the family home;

t) It was clearly not in the family's interest to remove the accused out of their lives;

u) It was also not in the interests of society to create secondary victims by the imposition of punishment upon the accused that would leave at least five indigent person[s] dependent upon social grants;

v) The accused represents no threat to the community or society at large, as it is highly unlikely that he will re-offend;

w) The accused is a good candidate for rehabilitative therapy and is able to render community service at a suitable facility that is available;

x) He spent four years on bail while the trial was in progress, attended every single court date and observed his bail conditions.'

[12] In argument before us, counsel for the appellant launched a three-pronged attack against the sentence. First, he submitted that a sentence based on restorative justice is not appropriate for such an offence as it failed to reflect the gravity and seriousness of rape, particularly the rape of a 15 year old girl. He contented further that the fact that the respondent stood in a father-daughter relationship which invariably involved trust made this offence even more serious. According to him the sentence imposed by the court below has the effect of trivialising the offence.

[13] Second, counsel argued further that the court below erred in overemphasising the personal circumstances of the respondent at the expense of the seriousness of the offence and the interests of society. It was submitted that the sentence is not balanced as it does not show that the other two legs of the triad ie the seriousness and gravity of the offence as well as the interests of society were ever considered and weighed against the respondent's personal circumstances. Third, he contended that the court below erred in suspending the sentence imposed as this is expressly prohibited by s 51(5) of the Act.

[14] On the other hand, counsel for the respondent contented that the peculiar circumstances of this matter are so exceptional that they justified a departure from the minimum prescribed sentence and the imposition of a sentence based on restorative justice. He contended that this sentence has enabled the family of the complainant to reunite with the respondent, thus achieving reparation and reconciliation. In the process, the respondent has apologised to the complainant who accepted the apology and forgave him. He contended that this has resulted in the wound which was inflicted on

the complainant and the family being healed. He concluded by contending that the family has shown the willingness to forgive and reconcile with the appellant, pick up the pieces of their once-shattered family life and to go on with their ordinary lives. This was said to be the resounding victory of restorative justice.

[15] The court had admitted Mrs Skelton, to intervene as amicus curiae. Her main interest in the case was to assist the court to understand the theoretical and jurisprudential basis of restorative justice as an alternative form of punishment in our criminal justice system. She conceded correctly, in my view, that rape is very serious and endemic in our society. Notwithstanding this, she asserted that restorative justice heralds a new trend in the sentencing philosophy where, unlike in the past, the victim's voice deserves not only to be heard but to be accorded appropriate weight in the determination of a suitable sentence. Relying on a Canadian case of *R v Gabriel* 1999 CanLII 15050 (ON SC) she cautioned however against allowing the victim to become too involved in the sentencing process as the ultimate responsibility remains with the court which has to decide on an appropriate sentence and not the victim.

[16] As far back as 1997, the late Mohammed CJ described rape in *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.'

It is regrettable that notwithstanding this observation the rate of rape in the country has reached pandemic proportions. It is no exaggeration to say that rape has become a scourge or a cancer that threatens to destroy both the moral and social fabric of our society.

[17] What is even more disturbing is the emergence of a trend of rapes involving

young children which is becoming endemic. A day hardly passes without a report of such egregious incidents. Public demonstrations by concerned members of the society condemning such acts have become a common feature of our everyday news through the media. In many instances such young, defenceless and vulnerable girls are raped by close relatives, like in this case, a person whom she looked upon as a father. Cameron JA describes this kind of a rape as follows in *S v Abrahams* 2002 (1) SACR 116 (SCA) para 17 as follows:

'…Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter…'.

[18] There are disturbing features in this case. It is common cause that although the respondent was not the complainant's biological father, he had assumed the role of her father and she regarded him as such. That he exercised parental authority over her is shown by the fact that on the ill-fated day of the rape, he had gone looking for her. In all likelihood, when he found her at her boyfriend's place, he must have suspected her of some unbecoming behaviour as she was in an adolescent stage at the time. Fearing that he mother might punish her, she implored him to keep this fact a secret and not to tell her mother. This is eloquent testimony of her trust in him which subsequent events proved to have been misplaced. The respondent took undue advantage of her and had unlawful sexual intercourse with her. There is no evidence that she was sexually active at the time. Such a sexual assault by someone she trusted must have caused her serious trauma. Although there is no evidence of any notable physical injuries, it is clear that she suffered serious psycho-emotional harm to a point where her studies suffered. The court below failed to take these aggravating features into account in considering sentence. Evidently this is a misdirection.

[19] Both counsel for the appellant and respondent were agreed that this case had serious mitigating factors which qualified as substantial and compelling enough to justify a departure from the prescribed minimum sentence. Importantly, both counsel were agreed that a sentence based on restorative justice can, in suitable circumstances be a viable sentencing option to be applied in our criminal justice system. I agree. However, as stated already they differed on whether such a sentence is appropriate for this type of crime, given its prevalence, seriousness and its deleterious effect on society.

[20] Although restorative justice received a somewhat lukewarm reception by the judiciary starting tentatively in *S v Shilubane* 2008 (1) SACR 295 (T) it has in the last few years grown in its stature and impact that it has even received the approval of the Constitutional Court in *Dikoko v Mokhatla* 2006 *(b)* SA 235 (CC), *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC),*The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC). Restorative justice as a viable sentencing alternative has been accorded statutory imprimatur in the Child Justice Act 75 of 2008, in particular s 73 thereof. I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some over-zealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public. This is aptly captured in the trite dictum by Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 236A-C where he stated:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment. SNYMAN AJ, was bringing home to the appellant and other persons the seriousness of the offence and the need for a severe punishment, and I can find nothing in his remarks to show that he gave undue weight to the retributive aspect.'
See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c-e; *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519d-e; and *S v Di Blasi* 1996 (1) SACR 1 (A) at 10f-g.

[21] A controversial if not intractable question remains: do the views of the victim of a crime have a role to play in the determination of an appropriate sentence? If so what weight is to be attached thereto? That the victim's voice deserves to be heard admits of no doubt. Afterall it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on amongst other things, how the crime has affected him/her. This does not mean however that his/her views are decisive. Whilst grappling with this problem, Ponnan JA enunciated the following principle in *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 16-17:
'An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a

crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim. (See generally Karen Muller & Annette van der Merwe 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court'.)

By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim…'.

[22] I agree that this case presents a panoply of facts which qualify as substantial and compelling to justify a departure from the prescribed minimum sentence. However, I am not persuaded that such facts justified a wholly suspended sentence, or one based on restorative justice. It is trite that in addition to deterring an accused person from committing the same offence in the future, a sentence must also have the effect of

deterring like-minded people. Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system. Regrettably, the court below omitted to pay attention to these important considerations. In fact it is clear to me that the court below accorded undue weight to the respondent's personal circumstances and paid scant regard to the seriousness of the offence and the broader interests of society. It appears to me that the learned judge in the court below inadvertently allowed maudlin sympathy for the respondent to cloud his better judgment. The result is a sentence which is disturbingly disproportionate to the seriousness of the offence. Any crime that threatens the well-being of society deserves a severe punishment.

[23] It is true that s 51(5)(a) precludes a sentencing court from suspending a sentence imposed in terms of this Act. It follows that the court below erred in having the sentence wholly suspended.

[24] There is yet another aspect of this case which deserves some attention. Whilst the complainant was testifying under oath, the presiding judge interrupted her and asked her as follows:

'Are you very certain that the accused has not molested you since the first charge was laid against him? — Yes.

You have sworn to tell me the truth? — Yes.

Then it is in your own best interest to do so. Would you like to see me alone? — No.
Okay. I am going to see the witness in chambers.'

[25] It is common cause that, notwithstanding the fact that the complainant responded clearly that she did not wish to see the presiding judge in his chambers, the presiding judge proceeded to see her in the company of his registrar in chambers. Neither the complainant's mother nor the two counsel were invited to be present. The presiding judge had a private conversation with the complainant who was still under oath in his chambers.

[26] Section 35(3)(c) of the Constitution provides that every accused person has a right to a fair trial which includes the right to a public trial before an ordinary court. Furthermore, it is an established practice in our criminal justice system that unless there are exceptional circumstances, all trials must be held in open courts. This is in line with the hallowed principle of open justice. The benefit of holding trials in open courts is to afford the public the opportunity to attend and observe how our courts function. This also resonates with the constitutional principles of openness, transparency and accountability. Judges should never be seen to be conducting the affairs of the courts in secrecy unless in exceptional circumstances where both sides have been consulted. Such conduct will undermine the public confidence in our justice system.

[27] Importantly it is crucial that judges be seen to be independent and impartial. It is equally important that witnesses who testify in our courts testify freely and without any undue influence. It is trite that once a witness has taken the witness-stand that nobody should be allowed to consult with such a witness, as there might be a reasonable fear that he/she might be influenced to change his/her evidence. It follows that it was inappropriate for the presiding judge to speak to the complainant secretly in his chambers in the absence of other interested parties. I hasten to add that I do not intend to attribute any malice or mala-fides to the presiding judge. It might well be that he was

motivated by the interests of the complainant. But still that does not make his intervention free of adverse reasonable perception of impropriety.

[28] One other aspect which merits special attention is the conditions imposed on the sentence to be served by the appellant. Both counsel were agreed that some of the conditions were impractical to implement. Some are so over-broad and onerous that they are patently unfair to the respondent. I agree. It is an established principle that conditions for the suspension of a sentence must be crafted in such a clear manner that it is easy for the accused to know what they entail and to be so practical that an accused will be able to comply with them without being exposed to undue hardship.

[29] In conclusion s 51(2) read with Part III of Schedule 2 of the Act provides for a prescribed minimum sentence of not less than 10 years for a first offender unless the court finds substantial and compelling circumstances to justify a lesser sentence. As a first offender this is the sentence for which the respondent ordinarily qualified. In terms of s 51(5)(a) of the Act such a sentence cannot be suspended as contemplated in s 297(4) of the Criminal Procedure Act.

[30] Having weighed all the circumstances of this case against the legislative benchmark explicitly set by the Act and endorsed in *S v Malgas* 2001 (1) SACR 469 (SCA), I am of the view that the appropriate sentence for the respondent is a term of imprisonment of 10 years.

[31] In the result, I make the following order:

(a) The appeal against sentence is upheld.

(b) The sentence imposed by the court below is set aside and replaced with 10 years' imprisonment.

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	FC Roberts SC
	Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	Mr HF Alberts
	Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein