IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: GRAHAMSTOWN

CASE NO. CA144/2017

SIKHUMBUZO XHAKA **Appellant**

And

THE STATE **Respondent**

JUDGMENT

BROOKS J

[1] The appellant was charged with rape in contravention of section 3, read with sections 1, 56 (1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in that on or about 7 February 2016 and at or near [...] R. S., Ndlovini, in the district of Port Alfred, the appellant unlawfully and intentionally committed acts of sexual penetration

with a fourteen year old boy, by having sexual intercourse with him *per anum* on more than one occasion, without his consent and against his will.

[2] According to the indictment, in the event of a conviction the provisions of section 51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) would be applicable, prescribing a minimum sentence of life imprisonment in that the complainant was under the age of sixteen years and was raped more than once by the appellant. The minimum sentence is discretionary in the sense that, in terms of the Act, it may be departed from if the court imposing the sentence comes to the conclusion that substantial and compelling circumstances exist which would entitle the court to impose a less severe sentence.

[3] In due course the appellant was convicted and sentenced to life imprisonment. The present appeal is directed against the sentence imposed upon him. It comes before this court by way of an order of the Supreme Court of Appeal granted on petition, leave to appeal having been refused in the court *a quo*.

[4] The appellant was represented in the court *a quo*. After the charge had been put to the appellant and before he pleaded thereto, the learned judge established that the appellant was aware of the possibility that the minimum sentence of life imprisonment may be imposed in due course. This was established from the appellant personally and confirmed by his legal representative.

[5] The appellant pleaded not guilty to the charge. Outlining the basis of the plea briefly, the appellant's legal representative explained that the appellant would state that the sexual intercourse had occurred with the complainant's consent.

[6] Evidence was then placed before the court *a quo*. Upon the conclusion thereof, and after hearing argument, the learned judge convicted the appellant as charged.

[7] Three previous convictions were proved against the appellant. One was of possession of stolen property, one of a statutory form of trespass concerning unauthorised access to public premises and one of housebreaking with intent to steal and attempted theft. These were admitted by the appellant.

[8] In aggravation of sentence a report prepared by a social worker was placed before the court *a quo*. This was done with the agreement of the appellant's legal representative. It dealt *inter alia* with the impact which the rape has had upon the complainant. The unchallenged content thereof reveals that ever since the incident the child suffers from flashbacks and nightmares. He feels fearful and unsafe. He lacks concentration in class and his school work had been adversely affected. He reported to the social worker that he receives threats from members of the appellant's extended family, which make him feel uncomfortable. It has been recommended that he undergo counselling so as to empower and assist him in dealing with the trauma he has experienced.

[9] The appellant did not give evidence in respect of sentence. Reliance instead was placed upon an address by his legal representative in mitigation of sentence. His personal circumstances were outlined therein and can be listed shortly as follows. He was born on 31 March 1993, meaning that he was a month away from the age of twenty three at the time of the incident. At the time of the trial he was a month over the age of twenty four. He is unmarried and has no children. He left school in Grade 5 and prior to being taken into custody he worked as a farm labour earning approximately R1 500 per fortnight.

[10] The personal circumstances of the appellant and the nature of the particular offence of which he had been convicted were carefully considered by the court *a quo.* The learned judge prefaced his evaluation of the relevant factors by referring to well established principles.[1] They bear repeating. The sentence prescribed by the Act should ordinarily be imposed. It should be regarded as generally appropriate unless weighty justification exists for departing from it. The prescribed sentence must not be departed from lightly and for flimsy reasons. If, however, a trial court is satisfied that, in the circumstances, the imposition of the prescribed sentence would be unjust because it is disproportionate to the crime, the criminal and the needs of the society, it may impose a sentence that is less severe than that prescribed.

[11] The learned judge came to the conclusion that there is nothing in the personal circumstances of the appellant that qualifies as a substantial and compelling circumstance.

[1] S v MALGAS 2001 (1) SACR 469 (SCA) *par* [25]

[12] The correct approach to be adopted towards the appellant's appeal against the sentence of life imprisonment has been enunciated by the Supreme Court of Appeal[2] as follows:

> "What is then the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court exercising its discretion properly simply because it is not the sentence which it would have imposed, or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows, therefore, that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

[13] Ultimately, the question to be answered is whether "the court below erred in failing to find that the circumstances of this case were so substantial and compelling as to justify a departure from imprisonment for life".[3] In considering what response would be appropriate to such an enquiry in the present matter, I have had regard to the following useful restatement[4] of the nature of the enquiry:

> "Substantial and compelling circumstances means truly convincing reasons. There must not be marginal differences in personal circumstances or degrees of involvement. At the end of the day, the ultimate cumulative impact of the circumstances must be such as to justify a departure."

[2] S v P B 2013 (2) SACR 533 (SCA) *par* [20].
[3] NOTE 2 (supra) par [22].
[4] S v MAHLANGU AND OTHERS 2012(2) SACR 373 (GSJ) 377 (g)-(h).

[14] In argument, emphasis was placed upon the fact that at the time of the commission of the offence the appellant was twenty two years of age. It was submitted in heads of argument filed on behalf of the appellant that the "seed of rehabilitation lies in his very young age."

[15] The fact that the appellant was twenty two years of age at the time of the offence was considered pertinently by the court *a quo*. To be as accurate as possible, in my view the consideration of the appellant's age must be a little broader. At the time of the offence the appellant was a month away from the age of twenty three years. At the time of the trial, when decisions were made by the appellant about his approach to the matter, he was a month older than twenty four years of age.

[16] It is significant that the appellant showed no remorse. Emphasising this aspect, the learned trial judge cited authority[5]for the view that while a lack of remorse is not aggravating, it is indicative of a failure on the part of an accused person to take responsibility for his or her actions and points to an absence of prospects for rehabilitation. In my view, this is a sound principle.

[17] It is clear from the judgment of the court *a quo* that in evaluating this apparent failure on the part of the appellant to show remorse the learned judge had regard to the nature of the particular offence. He highlighted the seriousness and prevalence thereof. In addition, he had regard to the fact that in this particular instance there was evidence before the court that the complainant

[5] S v DYANTYI 2011 (1) SACR 553 (ECG) *para* [26].

suffered significant injuries which caused him pain and trauma. He had regard to the young age of the complainant and the psychological impact of the rape upon him. In my view this was the correct approach.

[18] Emphasising the importance of a victim centred approach to sentencing the Supreme Court of Appeal has held[6] that "the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness.[7]….a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."[8]

[19] Collectively, these principles demonstrate the importance of placing acceptable evidence before a trial court to enable it to determine whether a young adult, such as the appellant, may legitimately claim his or her age as a mitigating factor. A mere assertion in argument that the "seed of rehabilitation" lies in "his very young age" is insufficient. The following statement by Ponnan JA[9] bears repeating:

> "Many accused persons might well regret their conduct. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse

[6] S v MATYITYI 2011 (1) SACR 40 (SCA) *para* [14].
[7] S v LEHNBERG EN N ANDER 1975 (4) SA 553 (A) at 561 A – C.
[8] S v DLAMINI 1991 (2) SACR 655 A at 666 e.
[9] NOTE 6 (supra) *para* [13].

> to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined."

In my view, the principle underlying this statement can be extended to be of application where the enquiry is whether or not the fact that the offender is a young adult is a factor which reduces his or her moral blameworthiness in respect of the commission of the offence. Where age is relied upon to indicate that an accused person is a candidate for rehabilitation, here too the inquiry is a factual one and in order that it may be conducted meaningfully the accused must take the court fully into his or her confidence. The court must be in a position to assess the extent to which an accused person has taken responsibility for his or her actions. Considerations of age, remorse and prospects of rehabilitation are inextricably intertwined.

[20] In the present matter, the appellant placed no evidence before the court *a quo* from which it might have been determined that a measure of immaturity at the time of the commission of the offence could be accepted as a substantial and compelling circumstance, justifying the imposition of a lesser sentence. Nor was there any evidence from which it might have been determined that there were good prospects for the rehabilitation of the appellant which could be accepted for the same purpose. The learned trial judge was correct in concluding that there is nothing in the personal circumstances of the appellant that qualifies as a substantial and compelling circumstance.

[21] Moreover, in my view the trial judge was correct in finding that given the age of the complainant, the impact of the rape upon him, both physically and

psychologically, the appellant's lack of remorse and the interest of the society, the prescribed sentence of life imprisonment is not disproportionate to the crime, the criminal and the needs of the society.

[22] In the circumstances, the appeal against that sentence is without merit.

[23] The following order will issue:

> "1. The appeal is dismissed.
>
> 2. The sentence of life imprisonment imposed upon the appellant on 21 April 2017 is confirmed."

RWN BROOKS

JUDGE OF THE HIGH COURT

Beshe ADJP

I agree

NG BESHE

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Dawood ADJP

I agree

FBA DAWOOD

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances

For the plaintiff:	Adv E. Crouse Legal Aid South Africa Port Elizabeth
For the respondent:	Adv SS Mtsila Office of the Director of Public Prosecution GRAHANSTOWN
Date heard:	23 April 2018
Date delivered:	08 May 2018