IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A214/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
..... DATE	..... SIGNATURE

In the matter between

ANTHONY KEARNS **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

JAJBHAY J:

[1] On 18 July 2005 the appellant was convicted in the Regional Division of Southern Transvaal in Johannesburg on one count of rape read with the provisions of section 52(1) of the Criminal Law Amendment Act 105 of 1997 ("*the Act*"); one count of indecent assault read with the provisions of section 52(2) (b)[1] of the Act and one count of assault with intent to do grievous bodily harm.

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[1] Sections 51 and 53 of the Criminal Law Amendment Act 105 of 1997 provide:
'51. Minimum sentences for certain serious offences.
(1) Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.
(2) Notwithstanding any other law but subject to ss (3) and (6), a regional court or a High Court shall

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of -
(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of -

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of -

(i) a first offender, to imprisonment for a period not less than five years;

(ii) a second offender of any such offence, to imprisonment for a period not less than seven years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) *(a)* If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in ss (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in s 297(4) of the Criminal Procedure Act 51 of 1977.

(6) The provisions of this section shall not be applicable in respect A of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) . . .

53. Saving.

(1) Sections 51 and 52 shall, subject to ss (2) and (3), cease to have effect after the expiry of two years from the commencement of this Act.

(2) The period referred to in ss (1) may be extended by the President, with the concurrence of Parliament, by proclamation in the *Gazette* for one year at a time.

(3) Any appeal against -

(a) a conviction of an offence referred to in Schedule 2 of this Act and a resultant sentence imposed in terms of section 51; or

(b) a sentence imposed in terms of s 51,

shall be continued and concluded as if s 51 had at all relevant times been in operation.'

[5] Schedule 2 is as follows:

'PART I

Murder, when -

(a) it was planned or premeditated;

(b) the victim was -

(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in F committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) Rape; or

(ii) robbery with aggravating circumstances; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape -

(a) when committed -

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution of furtherance or a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

[2] The sentencing of the appellant was referred to the High Court in terms of s 52(1) of the Act.

[3] On 19 June 2006 Borchers J confirmed the conviction on counts 1 and 2 but not on count 3. The conviction on count 3 the learned judge found constituted a duplication of convictions and was accordingly set aside.

[4] The appellant was subsequently sentenced as follows: in respect of count 1, (rape) – life imprisonment; and in respect of count 2 (indecent assault) – 10 years imprisonment. He was further declared unfit to possess a firearm.

[5] The appellant now appeals with leave of the court below in respect of sentence imposed.

[6] The traumatic events that unravelled on 24 November 2001 at approximately 17h00 may be summarised as follows. The complainant was playing with her friends outside a block of flats. The complainant knocked on the appellant's door and ran away. The appellant opened the door, followed her and apprehended her. He forced her into his apartment. In the apartment the appellant forced the complainant to view pornographic material. He assaulted her in the process. The evidence indicates that the complainant

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(i) is a girl under the age of 16 years;
(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973; or
(c) involving the infliction of grievous bodily harm.

PART III

Rape in circumstances other than those referred to in Part I.
Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.
Assault with intent to do grievous bodily harm on a child under the age of 16 years. G
Any offence in contravention of s 36 of the Arms and Ammunition Act 75 of 1969, on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in s 39(2) *(a)* (i) of that Act.

was strangled during the traumatic turn of events. Thereafter the appellant raped and sodomised the complainant. The evidence further established that the complainant's clothing was stained with blood. The entire event as will become apparent was extremely painful and traumatic for the complainant.

[7] The learned Judge describes the injuries sustained by the complainant, in her judgment as follows:

> Die fisiese beserings wat sy opgedoen het is skokkend en grusaam. Haar hele gesig en nek het kneus wonde getoon en daar was kneusings tussen haar skouerblaaie. Haar maagdevlies was totaal vernietig en haar vagina het drie vingers toegelaat. Daar was 'n derde graad se skeur van die slymvlies wat getrek het deur die spierwand van die vagina tot in die klaagster se anus. Die eksterne knypspier van die anus is totaal vernietig. Die wonde het tydens die ondersoek vrylik gebloei, hierdie ondersoek moes onder verdowing uitgevoer word omdat die klaagster getraumatiseer was en omdat die besering baie pynlik was. Weens die erns van hierdie beserings is 'n spesialis ginekoloog ingeroep en, volgens haar verslag, het sy 'n groot laserasie van die vaginale slymvlies amper tot die cervix waargeneem, asook 'n laserasie van die anus slymvlies wat vier tot vyf sentimeter lank was. Die peritoneum wat tussen die vagina en anus geleë is, was ook geskeur. Sy moes hierdie beserings met hegsteke behandel. Gelukkig het die klaagster oor die weke goed herstel. Ongelukkig bly die klaagster op hierdie stadium nogsteeds sielkundig baie erg getraumatiseerd.

[8] The complainant was 9 years old at the time of the commission of the offence. He was a friend of the complainant's father and they resided in the same vicinity.

[9] The psychological report indicates the extent to which the complainant has been psychologically injured. She dreams about what happened all the time and this makes her very uncomfortable. She is unable to get over this horrible episode. The psychological report states that:

> According to her she never wants to have a husband, and never wants to have a special relationship with anyone, not even someone who loves her and cares for her.

[10] The physical injuries sustained by the complainant included a swollen and bruised face. The doctor was only able to examine the extent of the injuries sustained by the complainant under general anaesthetic. More importantly, a gynaecologist had to operate on the complainant in order to attend to her injuries. There were injuries on both sides of her neck and behind her left ear which were consistent with strangulation.

[11] It was contended on behalf of the appellant that there were substantial and compelling circumstances which warranted a deviation from the prescribed minimum sentence in the present matter. In amplification thereof it was argued that the learned Judge in the court below did not take into account the time spent (almost five years) awaiting trial in custody, that the learned Judge did not take into consideration that the appellant was a first offender and that he was 59 years at the time of the imposition of the sentence, and finally that the sentences imposed should have been ordered to run concurrently.

[12] In this matter the Act prescribes that the minimum sentence must be imposed unless the court is satisfied that substantial and compelling circumstances exist that justify a lesser sentence. The issue of what constitutes substantial and compelling circumstances was recently dealt with in the Supreme Court of Appeal in *S v Vilakazi* 2009 (1) SACR 552 (SCA). I take into consideration the sentiments expressed in that matter. In applying the principles articulated in that matter to the facts of the present case, I have considered the principles that follow.

[13] In imposing the appropriate sentence, a judicial officer should neither strive after severity, nor should the judicial officer surrender to misplaced pity. While not flinching from firmness, where this is called for, the judicial officer should approach the task on hand with a humane and compassionate understanding of human frailties and the pressure of society which contribute to the criminal conduct.

[14] Rape in circumstances such as the present is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. In *S v Chapman* 1997 (3) SA 341 (SCA) 345D-E Mahomed CJ held that:

> The courts are under a duty to send a clear message to the accused in rape cases, to other potential rapists and to the community that the courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those rights.

[15] A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. It is violation with violence of the private person of a woman. This constitutes an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

[16] The security of persons and their property is an essential function of the State. This must be achieved through the instrumentality of criminal law. In a society ravaged by criminal conduct and violence such as ours, the living law must find answers to the new challenges and it is here that the courts are required to mould the sentencing system to meet these challenges. The contagion of lawlessness undermines social order and then may lay it in ruins. The protection of society and the stamping out of criminal proclivity must be the object of law which must be achieved by imposing the appropriate sentences. Therefore, our law as a corner-stone of the edifice of "*order*" should meet the challenges confronting our society.

[16] In operating the sentencing system, our law should adopt the corrective machinery or the deterrence based on the factual matrix. By dint of deft modulation sentencing processes should be stern where this is necessary, and be tempered with mercy where it warrants this to be necessary. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for the commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the arena of consideration.

[17] In circumstances such as the present, where the appellant indicated scant regard for the dignity of his victim, it will be a mockery of justice to permit him to escape the extreme penalty of law when faced with the evidence of such cruelty. To impose anything than a lesser punishment as

contemplated by our law, in the circumstances of this case, would be to render the justice system of our country suspect. Ordinary people in our country will lose faith in our courts. In matters such as the present, ordinary people understand and appreciate the language of deterrence more than the reformative jargon.

[18] The imposition of a sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, for example where it relates to offences against women, children, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interests, cannot be lost sight of and therefore require exemplary treatment.

[19] The following factors are important in the present matter in the consideration of an appropriate sentence. At the time of the commission of the offence the appellant was 54 years of age. He is a first offender. The appellant completed Standard 4 at school after which he assisted his mother. He was mostly employed throughout his life. However, at the time of his arrest he was unemployed. The appellant was in custody for approximately 4 years and 6 months awaiting the finalisation of his case. The probation officer who compiled a pre-sentence report set out that pursuant to an investigation into the personal circumstances of the appellant, it appeared that he was aggressive when under the influence of alcohol. The appellant is a very lonely person.

[20] In imposing the sentence the learned Judge in the court below set out the following:

> Die Hooggeregshof van Appèl het besluit dat die vonnis van lewenslange gevangenisstraf slegs in die ergste gevalle opgelê behoort te word. As ek die verswarende omstandighede, dit wil sê die jeugdigheid van die klaagster, die feit dat sy hom vertrou het, die mate van geweld en brutaliteit betrokke, die fisiese en emosionele skade wat berokken is, teen die versagtende omstandighede, naamlik die beskuldigde se ouderdom en sy skoon rekord oorweeg, is ek van mening dat geen wesenlike en dwingende omstandighede in hierdie geval bestaan nie. Die voorgeskrewe vonnis pas die misdaad en die misdadiger en hierdie hof is nie by magte om 'n mindere vonnis op te lê nie.

[21] The imposition of sentence falls within the direction of a trial court. A court of appeal may interfere when such discretion is not properly exercised. A court of appeal can interfere with a sentence imposed by a trial court if for example one of the following exists:

21.1 if an irregularity took place during the trial which resulted in a failure of justice; or

21.2 if the court misdirected itself in relation to the law or the facts of the case which resulted in a failure of justice; or

21.3 if the sentence imposed by the court induces a sense of shock or is shockingly inappropriate.

[22] A court when considering a sentence should exercise its discretion judicially and properly, taking into account all relevant factors, including the personal circumstances of the offender, the crime and the interests of society and blend the sentence with a measure of mercy according to the circumstances. These factors are equally relevant in determining the presence of substantial and compelling circumstances. In the present matter the learned Judge in the court below correctly found that there were no

substantial or compelling circumstances which justified the imposition of a lesser sentence.

[23] The argument on behalf of the appellant that the sentences imposed by the learned Judge in the court below ought to have been ordered to run concurrently overlooks the provisions of s 39(2)(a) of the Correctional Services Act 111 of 1998, which reads as follows:

> Subject to the provisions of paragraph (b), a person who receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but –
> *(i)* any determinate sentence of imprisonment to be served by any person runs concurrent with a life sentence.

[24] Counsel on behalf of the State correctly submitted that the 10 years imprisonment in respect of count 2 (indecent assault) will in any event be served concurrently with the sentence of life imprisonment imposed in respect of count 1. In those circumstances, the learned Judge in the court below did not commit any irregularity or misdirection insofar as the sentence was concerned.

[25] In all of the above circumstances the appeal against sentence is dismissed.

M JAJBHAY
JUDGE OF THE HIGH COURT

I agree.

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F H D VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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MP TSOKA
JUDGE OF THE HIGH COURT

Date of Hearing	*7 September 2009*
Date of Judgment	*10 September 2009*
For the Appellant	*Mr J Penton*
For the State	*Adv (Ms) M van Heerden*