REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO A130/12

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

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DATE SIGNATURE

In the matter between

ABRAM ROOI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

Summary

Criminal Procedure – Minimum sentence – Rape – Applying the principles set out in *S v Vilakazi* 2009 (1) SACR 552 (SCA) – Test whether substantial and compelling circumstances exist to impose a lesser sentence than the prescribed minimum one, not only based on traditional factors - The test for appropriate sentence includes whether the sentence is proportional to the offence.

WEPENER J:

[1] The appellant was convicted of one count of rape in that he had unlawful intercourse with a 15 year old girl. The evidence showed that the complainant, although 15 years old, was a person who functioned at a mental age of a 5 year old person. The facts are briefly that on the complainant's version she went to the appellant's residence of her own accord. When she arrived there, the appellant undressed her and proceeded to have intercourse with her. Afterwards he told her not to tell her parents what had happened. However, the complainant who experienced pain during the incident reported to her friends what had happened when she left the appellant's place of residence.

[2] Because of the incident the complainant received at least ten sessions of counselling. The appellant's version that he and the complainant were lovers and had previously had an affair was rightfully rejected as false.

[3] The evidence showed that the complainant was suffering from mild mental retardation. She was attending a school for mentally handicapped persons. The magistrate found that the appellant had knowledge of the fact that the complainant was mentally retarded at the time of the intercourse. Once he had convicted the appellant the magistrate advised him that his conviction falls under s 52 of the Criminal Law Amendment Act 105 of 1997 ('Criminal Law Amendment Act') and that the matter would be referred to the High Court for purposes of sentencing. Section 52 of the Criminal Law Amendment Act was then still applicable having been repealed after the date of conviction and referral to the High Court. The matter came before Satchwell J, who confirmed the conviction on the basis that the complainant was under the age of sixteen and because she was mentally retarded and fell within the provisions of Part 1 of Schedule 2 to the Criminal Law Amendment Act. The learned judge said that, having regard thereto i.e. that the complainant was under the age of sixteen and that she was mentally disabled as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, the minimum sentence of life would be applicable unless the court

was of the opinion that '*substantial and compelling circumstances exist, which justify the imposition of a lesser sentence'*. After analysing the facts the court came to the conclusion that there were no such substantial and compelling circumstances.

[4] During the sentencing stage the appellant testified that he was 30 years old, single with no children. He had a standard 7 education and was working 'at a boiler engineering'. A senior probation officer of the Department of Social Development testified that after the incident the complainant presented with the following behaviour:

1. she was frightened of minor things;
2. she had a loss of appetite;
3. there was a negative effect on her speech.

It was said that the complainant was adjusting well and was progressing well with tasks given to her.

[5] After considering the evidence Satchwell J came to the conclusion that despite being treated as a first offender the appellant was to be imprisoned for life as provided for in the Criminal Law Amendment Act. She found no substantial or compelling circumstances to deviate from the minimum sentence. Satchwell J referred to what was said in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 8:

> '*Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances.*'

[6] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) Nugent JA said at paras 4, 5, 6 and 15:

> *'[4] In the case that I referred to earlier Chapman was said to have "prowled the streets and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife." This court (Mahomed CJ, Van Heerden and Olivier JJA) described the sentence that he received as "undoubtedly severe" but declined to interfere, saying that it was "determined to protect the equality, dignity and freedom of all women… we shall show no mercy to those who seek to invade those rights". For each of his crimes Chapman was sentenced to seven years' imprisonment with the effective sentence being 14 years' imprisonment.*

> *[5] Chapman was sentenced before ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (for convenience I will refer to those sections as the Act) introduced a minimum sentencing regime. But the sentence that was imposed in that case is not unduly out of line with the minimum sentence that is prescribed by the Act. The Act prescribes a minimum sentence for rape of ten years' imprisonment in the absence of specified aggravating circumstances (none of which appear to have been present in that case) and multiple sentences imposed under the Act are capable of being served concurrently.*
>
> *[6] In the present case the appellant was convicted on one count of rape and sentenced to life imprisonment. What accounts for the enormous disparity between the sentence in Chapman and the sentence in this case is that in this case the appellant's victim was under the age of 16 years. The Act prescribes that on that account alone the ordinary minimum sentence for rape of 10 years' imprisonment should instead be the maximum sentence that is permitted by our law, which is life imprisonment.*
>
> *…*
>
> *[15] It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)*
>
> > *"consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."*
>
> *If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which "justify" . . . it.'*

Also see para 31:

> '*On each one of the grounds that I have referred to the court below materially misdirected itself and the sentence that it imposed cannot stand, which means that we must ourselves evaluate whether life imprisonment is indeed a proportionate sentence, in accordance with the approach that was laid down in Malgas.*'

[7] It is consequently also the duty of the court to evaluate whether life imprisonment is indeed a proportionate sentence for the offence, the latter term which includes all the factors set out in *Vilakazi* at para 15. The test was set out in *Malgas* at para 25 as follows:

> *'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.*'

[8] In *Vilakazi* the fact that no extraneous violence and physical injury were caused other than the physical injury inherent to the offence, was taken into account, together with the little measure of the emotional impact upon the complainant, despite her trauma, to be such that it should be considered whether the maximum sentence is proportionate to the offence. I take into account that the evidences shows that the complainant was adjusting well after the incident. The appellant is a 30 year old person with an unblemished record and seen together with the fact that he was employed, it is an indication that he is not inherently a lawless character. (See *Vilakazi* at para 58). I also agree with Satchwell J that the appellant must be treated as a first offender by virtue of the fact that his previous conviction for assault is in relation to an offence that was committed many years ago and is not related in any way to the behaviour for which he stood trial in this matter.

[9] I am of the view that this is not a matter where the enquiry should only have been whether substantial and compelling reasons existed having regard to the well-established factors. The enquiry should also have incorporated that which was laid down in *Vilakazi*, namely, whether the sentence is proportionate to the offence. If it is not, such would unjust (see *Malgas, supra; Monageng v S* [2009] 1 All SA 237 (SCA) at 248 para 38*)* or constitute a substantial and compelling reason to deviate from the minimum sentence. This aspect was not considered by the court below and this court is consequently at liberty to interfere with the sentence imposed on the appellant.

[10] Applying the test laid down in *Vilakaz*i, I am of the view that a sentence of life imprisonment is not proportionate to the offence. Having regard to the facts of this matter, I am of the view, that a sentence of 18 years imprisonment would be an appropriate sentence for the offence committed by the appellant.

[11] It is now trite that the period of incarceration of an accused prior to his sentence should be taken into account when sentence is imposed (see

Vilakazi at para 60) and I take into account that the appellant was in custody for a period of 19 months whilst awaiting the finalisation of the trial.

[12] In all the circumstances I propose that the sentence of the appellant be set aside and be substituted with the following:

> 'The accused is sentenced to a period of 18 years imprisonment from which nineteen months are to be deducted when calculating the date upon which the sentence is to expire.'

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WEPENER J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG

I agree, it is so ordered

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CLAASSEN J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG

I agree.

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SALDULKER J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG

COUNSEL FOR APPELLANT: *Adv. Henzen-Du Toit*

APPELLANTS ATTORNEYS: *Legal Aid South Africa*

COUNSEL FOR THE STATE: *Adv. Khumalo*

DATE OF HEARING: *10 September 2012*

DATE OF JUDGMENT: *13 September 2012*