IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITBURG

CASE NO: AR465/08

In the matter between:

BUSUSANI SIMON NTANZI **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MSIMANG, J:

[1] The appellant was convicted of rape by the Verulam Regional Court and was sentenced to serve a term of eighteen (18) years' imprisonment. The allegations against him, and which were found by the Regional Court to have been proven were that, on 2 October 2004, he had engaged in unlawful sexual intercourse with a 14 year old. The allegations accordingly placed the conviction within the sentencing regime prescribed in the Criminal Law Amendment Act [1] (the Act). In terms of Section 51(1) of that Act a person convicted of an offence referred to in Part I of Schedule 2 shall be sentenced to serve a term of life imprisonment, unless a Court sentencing him is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, in which event a Court would then impose such a lesser sentence and shall

[1] Act 105 of 1997;

enter those circumstances on the record. Rape, where a victim is a person under the age of sixteen (16) years, is one of the offences enumerated in the said Schedule.

[2] In finding that a term of life imprisonment would be unwarranted in *casu,* the Regional Magistrate opined as follows :-

> "You are still a young man, you have been in custody for three years, you committed one act of rape, you were initially co-operative with the father of the complainant and with the community. The Court is persuaded that a term of life imprisonment would not be just in your case, nonetheless a lengthy term of imprisonment is warranted to reflect the indignation and revulsion of society and to act as a deterrent to like-minded persons. You are accordingly sentenced, then, TO A TERM OF EIGHTEEN (18) YEARS IMPRISONMENT".

[3] The appeal is directed at the severity of the said sentence, leave having been granted by the Court *a quo.*

[4] On behalf of the appellant it was argued that, if one takes into consideration the surrounding circumstances, the sentence is shockingly inappropriate and therefore that the Appeal Court is at liberty to interfere and to ameliorate the same.

[5] Our Courts have repeatedly and consistently emphasized that sentencing remains a matter within the discretion of the Trial Court and that the Appeal Court will not interfere unless it is shown that the Trial Court

exercised its discretion in an unjust or unreasonable manner. [2] However, years of judicial interpretation have produced well recognized grounds upon which a Court of Appeal will interfere in the exercise of this discretion by a Trial Court. Those grounds are the following :- [3]

> "1. Where the trial judge/magistrate as the case may be, has misdirected himself on the law or on the facts; or
> 2. he has exercised his discretion capriciously; or
> 3. upon the wrong principle; or
> 4. be [so] unreasonable as to induce a sense of shock. "

[6] Having perused and carefully considered the record of the proceedings in the Court *a quo,* I could find no misdirection in that Court's judgment on sentence neither could Counsel direct me to one. Also, there are no indications that the said Court exercised its discretion capriciously or that it relied on a wrong principle in exercising the same. Indeed, the only ground upon which the sentence *in casu* was attacked was that it is shockingly inappropriate. **Schreiner J** preferred the expression that the sentence should evince "a sentence of shock and outrage" [4] while **Ogilvie-Thompson, JA** was of a view that an Appeal Court would only interfere :-

> "….. if it considers that there is a striking disparity between the sentence passed and that which the Court of Appeal could have passed. [5]

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[2] Lepholletsa v S [1997] 3 All SA 113 (A);

[3] Phophi v S [1997] 3 All SA 370 (V) at 373 e-b;
[4] Rex v Reece 1939 TPD 242 at 244;
[5] S v Berliner 1967(2) SA 193 (A) at 200 H;

The third version of the same ground is propounded in cases such as **R v Ford** [6] where **de Wet CJ** remarked as follows :-

> "The only question for us to determine, as has been pointed out over and over again, is whether the sentence imposed was such that it could not reasonably have been imposed". [7]

[8] In **R v Zulu and others** [8] **Broome J** expressed a view that the distinction between the two latter versions amounts to a distinction without a difference and that there exists no material difference between them. Reinforcing this view he held that :-

> "A sentence which could not reasonably have been imposed must inevitably induce in a Court of Appeal a sense of shock or outrage, and vice versa." [9]

[9] The enquiry must accordingly be directed as to whether the sentence of eighteen (18) years' imprisonment imposed *in casu* is such that, in the circumstances of the case, it could and should not reasonably have been imposed and, in conducting such an enquiry, the facts underlying the appeal become relevant.

[10] Complainant's testimony, which was accepted by the court *a quo,* was that, at the time when the incident occurred, she had just turned 15 years old, that on the occasion she had been awaiting transport at a bus stop. At dusk when she realized that no transport was in sight, she decided to

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6 1939 AD 559;
7 Ibid. at 561;
8 1951(1) SA 489(N);
9 Ibid. 497 B-C;

walk home. While walking, she heard the sound of footsteps behind her and started walking faster. At the same time she turned and noticed a person walking behind her. This person apparently overtook her, greeted her and they started walking together. When they reached a place where there were stones the person pushed her down and pressed her onto a stone. He started undressing himself and, when the complainant cried out, he covered her mouth. He thereafter sat on her thighs and raped her. After the ordeal the complainant went home. On the following morning she reported the incident to her grandmother, giving a description of a person who had accosted her. Her father was called and the complainant and her father repaired to a homestead where they believed the suspect resided. Upon their arrival thereat they found the appellant present and he was positively identified by the complainant as the person who had raped her during the previous evening. Upon questioning by the father, the appellant admitted that he had seen the complainant the day before. The party (which now included the appellant) then proceeded to the Chief's homestead, presumably for the purpose of reporting the incident. Unfortunately, however, upon their arrival thereat the Chief was not present. The story of the incident was, however, related to the Chief's wife by the complainant and, in response to questioning, the appellant admitted having raped the complainant.

[11] The rape had lasted for a short time. A district surgeon who had examined the complainant on the following day testified that his external examination and his questioning of the complainant had revealed no history of assault and that there were no injuries on her body. There was, however, a small tear in the posterior fourchette, approximately one centimetre by half a centimetre and an abrasion of the same dimension on the fossa navicularis. Though the hymen was dilated, there was no evidence of any injuries. These findings were, according to the district surgeon, consistent with a recent enforced penetration. The complainant testified that, prior to the incident, she had not engaged in any sexual activity.

[12] When questioned as to her state of mental anguish at the time of the examination, the district surgeon testified that, due to the fact that the examination had occurred approximately four years previously, he could not remember the details thereof but could confirm his finding as recorded on the J88 form, namely, that during the examination the complainant had been anxious.

[13] Ms. **Anastasiou,** who argued the appeal on behalf of the appellant, submitted that, together with the above circumstances relating to the incident, the Court *a quo* ought to have taken into consideration that the appellant was a first offender, who in his 27 years of existence had not

had a single brush with the law, that he has a minor child to support and that, at the time when he was sentenced, he had been in custody awaiting finalization of the matter for approximately three years. Had the Court *a quo* taken those factors into consideration, so the argument proceeded, it would have concluded that such a lengthy sentence was not warranted. To bolster her argument, she referred to two recent decisions of the Supreme Court of Appeal [10] and submitted that the circumstances in those cases were much graver than the circumstances in the present case and yet the Supreme Court of Appeal had in those casers imposed much lighter sentences, namely, a term of sixteen years' imprisonment in **Nkomo** (a case in which the accused locked a victim in a room after raping her and when she tried to escape by jumping out of a window, she was noticed by the accused who forced her back to the room and raped her four more times, slapped her, pushed her and kicked her) and a term of eight years' imprisonment on count 1 and a term of twelve years' imprisonment on count 2, in **Mahomotsa** (a case involving the abduction by the accused of two victims on two separate occasions who raped each one of them more than once).

[14] Perhaps to the list should be added the decisions in **S v Gqamana,** [11] **S v Abrahams** [12] and **S v Sikhipha.** [13]

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[10] S v Nkomo 2007(2) SACR 198 SCA; S v Mahomotsa 2002(2) SACR 435 (SCA);
[11] 2001(2) SACR 28 (CPD);
[12] 2002(1) SACR 127 (SCA);
[13] 2006(2) SACR 439 (SCA).

[15] **Gqamana** is a decision of the Cape Provincial Division. In that case the accused had been convicted of raping a complainant who was fourteen years and ten months old. At the time when she had been sexually molested, she had been a virgin. Finding that substantial and compelling circumstances existed and taking into consideration the fact that the accused had been in custody awaiting trial and sentencing for a period of approximately two years and eight months, the Court sentenced him to serve a term of eight years' imprisonment.

[16] In **Abrahams** the accused, who was a first offender, had been convicted of raping his fourteen year old daughter. The Trial Court had found that substantial and compelling circumstances existed and sentenced him to a term of seven years' imprisonment. On appeal the Court confirmed the Trial Court's finding on the existence of those circumstances but set the sentence of seven years' imprisonment aside, replacing it with a sentence of twelve years' imprisonment.

[17] Finally, in **Sikhipha,** the accused, who was also a first offender, had been convicted of raping a thirteen year old girl. The Trial Court had found that substantial and compelling circumstances did not exist and had sentenced the accused to life imprisonment. On appeal the Trial Court's finding on the absence of those circumstances was set aside as was the

sentence of life imprisonment, replacing it with a term of twenty years' imprisonment.

18] Much as it is sometimes useful, when assessing punishment, to make comparisons with sentences imposed for similar offences, one should not lose sight of the rule that :-

> "….. each case, should be dealt with on its own facts connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for a Court to depart from ……" [14]

[19] It is difficult to imagine a situation which would illustrate the utility of this rule more than in the comparison of some of the cases referred to above. The analysis of the facts and a sentence imposed in one case and the comparison thereof with the facts and sentence imposed in anyone of the four other cases have shown the futility of such an exercise.

[20] For instance, in the present case the victim had not only been younger than 16 years of age at the time of the incident but she had also been a virgin. These factors were not present in **Nkomo.** The same discrepancy applies in **Mahomotsa,** where though the charge sheet had made the allegations that the complainants had been fifteen years old which allegations were later confirmed in the evidence of those

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[14] R v Karg 1961(1) SA 231 (AD) at 236 H; see also S v Dhansay 1963(3) SA 259 (C) at 260 H – 261 B; S v Fallison 1969(1) SA 477 (RAD) at 478 D-E;

complainants, the High Court had found that the Regional Magistrate had erred when he accepted those allegations as having been proven.

[21] A factor which was present in **Gqamana** and which was apparently one of the factors which the Supreme Court of Appeal took into consideration in assessing an appropriate sentence, is that, at all material times, the accused had laboured under a misapprehension that the complainant was approximately eighteen years old, a factor which is wanting in the present appeal.

[22] When assessing an appropriate sentence in **Abrahams** the Supreme Court was impressed by the evidence adduced during the trial, namely, that the downward spiral in accused's behaviour had started when a family's younger son had committed suicide and concluded that the said incident had adversely influenced the accused's conduct within the family and had led to a diminution in the judgment he brought to bear as a father. This factor is not present in the facts of the present case.

[23] The crime of rape is an extremely serious transgression. As the crime was aptly described by **Mohamed CJ** in **S v Chapman,** [15] it constitutes :-

> "…… as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim ….
> Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from

[15] 1997(2) SACR (SCA) at 5 b-d;

> work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[24] The crime of rape perpetrated against a young girl, like it is the case in the present matter, is even more serious. It was for this very reason that this type of crime was identified and included in Part I of Schedule 2 as meriting a sentence of life imprisonment, unless a court finds that substantial and compelling circumstances exist. Even if the court find that those circumstances exist, a court should take into account –

> "…….the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided." [16]

[25] It accordingly behoves of the judiciary to always keep the said bench mark in mind when deciding on appropriate sentences for the crimes contained in the said schedule and in so doing –

> "…..send a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message." [17]

[26] It is of no moment to argue, as Ms. **Anastaniou** did before us, that the prosecution had not adduced evidence of any psychological harm suffered by the complainant as a result of the incident and that it should therefore be inferred that she had suffered no such harm. This was exactly the

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[16] Per Marais JA in S v Malgas 2001(1) SACR 469 (SCA) at 482 g;
[17] Sikhipha (supra) at 446 d;

position in **Sikhipha (supra)** and yet the Supreme Court of Appeal refused to make such an inference, holding that :-

> "…….. there can be no doubt that the rape was traumatic for her. She was only 13 when a neighbour, a married man, more than twice her age, dragged her across his yard and had sexual intercourse with her against her will. Her injuries may have been minor, but she must have been severely affected." [18]

There is not much difference between this ordeal and the one suffered by the complainant *in casu.*

[27] In **Mahomotsa (supra) Mpati JA** (as he then was) added his voice to the debate and made the following remarks :-

> "While it may theoretically be possible that a victim of rape committed in the circumstances and manner I have described may not suffer any psychological damage other than that experienced while the attack is taking place and its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm." [19]

[28] The period of eighteen years is a long period and, had I sat as a Court of the first instance, I would, in all probability, have imposed a lesser sentence. However, that is not the issue. The enquiry is whether I would have imposed a sentence which would have been strikingly disparate from the sentence which was imposed by the Court *a quo* in this matter. Having carefully considered the facts of the case my response to the said enquiry must be in the negative. I honestly cannot say that the sentence

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[18] Ibid. at 446 b;
[19] Mahomotsa (supra) at 441 i – j:

of eighteen years' imprisonment imposed by the Regional Magistrate could not reasonably have been imposed. The appeal must accordingly fail.

I would accordingly dismiss the appeal, and confirm the sentence of eighteen (18) years' imprisonment which was imposed by the Court *a quo* herein.

I agree

MARNEWICK, AJ:

MSIMANG, J:

It is so ordered.

For the Appellant:	**Adv. Z Anastasiou (instructed by Legal Aid Board)**
For the Respondent:	**Adv. J H du Plessis (instructed by Director of Public Prosecutions)**
Matter argued:	**25 March 2009**
Judgment delivered:	**31 March 2009**