IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE

AR221/09

SOSO BHEKIZENZO SANGWENI **Appellant**

versus

THE STATE **Respondent**

Judgment

Delivered on 10 November 2009

Steyn J

[1] The appellant, who was tried in the regional court of the Regional Division KwaZulu-Natal, held at Ulundi, on a charge of rape, read with the sections 51 and 52 of the Criminal Law Amendment Act, 105 of 1997, was convicted on the charge and sentenced to undergo life imprisonment. The appellant, who

has an automatic right of appeal, exercised his right to do so, and now appeals against both conviction and sentence.

[2] Mr Marimuthu, acting on behalf of the appellant, conceded rightly in my view, that the record revealed that the presiding officer in the Court *a quo* had carefully considered all the evidence placed before him, and had dealt appropriately with all the contradictions in the State's case, weighing up the merits and the demerits of the case. I agree that on the merits of the case the court *a quo* cannot be faulted. In his view, however, this court, ought to interfere with the sentence the Court imposed, especially in the light of the guidance given by the Supreme Court of Appeal[1] in the cases of *Mohomotso, Rammoko*, *Nkomo* and *Vilakazi*.[2]

[3] On behalf of the respondent it was argued that the conviction was in order, and that sentence prescribed by statute had to be upheld as the personal circumstances of the appellant failed either singularly or cumulatively to constitute 'substantial and

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1 Hereinafter referred to as the SCA.

2 See *S v Mahomotso* 2002 (2) SACR 435 (SCA); *Rammoko v DPP* 2003 (1) SACR 200 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA) at para [13] and [14] and *S v Vilakazi* 2009 (1) SACR 552 (SCA).

compelling circumstances' that would allow a departure from such a sentence. It was further submitted that aggravating factors, such as the tender age of the complainant, the fact that the appellant was known to the girl and was also in a position of trust, justified the sentence of life imprisonment, that had been imposed by the court *a quo.*

[5] *Ad* conviction

The complainant gave her testimony in a straightforward way, explaining how it came about that she was with the appellant in the hut when she was raped by him. It is evident from the judgment of the learned regional Magistrate that he was cautious in the consideration of the testimony of the complainant and was alive to the fact that he should look for corroborative factors in support of her testimony. On the evidence as a whole, I can find no misdirection, either on fact or on law. In my view the appeal on the merits cannot succeed.

[6] Ad sentence

I shall now turn to the sentence imposed. It is trite law that life imprisonment should only be imposed in very serious cases.

Upon focusing on the sentencing regime introduced by the minimum sentence legislation, introduced by the Criminal Law Amendment Act, No. 105 of 1997, I align myself with the SCA's view in *S v Vilakazi*, *supra*, at 562:

> *"[18] It is plain from the determinative test laid down by* Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in* Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. When the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of* Malgas *and of* Dodo *is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice." (my emphasis).*

[7] The South African Law Commission, as it then was, has expressed its view on the nature of 'life imprisonment' and I consider it to be a very useful way of looking at this form of

punishment. My interpretation of the term, albeit that it is not specifically expressed in the wording of the legislation, is that life imprisonment should be considered in instances where the death penalty would have been an appropriate sentence. The Commission stated its view as follows:

> *"Since the abolition of the death penalty 'life imprisonment' is the most severe sentence that the courts can impose. In* S v T *the court explained that the sentence of 'life imprisonment' authorises the State to keep offenders in prison for the rest of their natural lives. Unless this result is considered to be appropriate this sentence should not be imposed. The question is when is this option appropriate? It is clear though, that the crime has to be very serious and that mitigating factors should have little effect on the blameworthiness of he offender."*[3] *(Footnotes omitted).*

[8] The gravity of the life imprisonment is recognised around the world. As Professor van Zyl Smit, a distinguished author on the subject of sentencing internationally and in South Africa, has remarked, on the basis of an extensive comparative study:[4]

> *"It must be emphasised that life sentences are always very harsh penalties because of their potential to deny liberty indefinitely…. [C]areful consideration of when they are imposed can limit their use to the most serious cases."*

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3 See SALC – Project 82: Sentencing framework at para 3.3.14.

4 D van Zyl Smit "Life Imprisonment: Recent Issues in National and International Law" (2006) 29 *International Journal of Law and Psychiatry* 405-421; The same general conclusion is reached in the Southern African content by J D Mujuzi *Life imprisonment in International Criminal Tribunals and Selected African Jurisdictions – Mauritius, South Africa and Uganda.(*Unpublished PhD thesis, University of the Western Cape, 2009).

Given the gravity of the sentence of life imprisonment, it is important that this Court should ask itself whether the role displayed by the learned magistrate was sufficiently proactive. Did he elicit the necessary information from the appellant to enable him to properly examine all the circumstances, and to exercise his judicial discretion as to what sentence would be proportionate to the crime that was committed. As has been re-emphasised in *Vilakzi*, the prescribed sentence is not the norm:

> *"[16] It was submitted before us that in* Malgas *this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in* Malgas*. The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter* ***'conscious [of the fact] that the Legislature has ordained*** *[the prescribed sentence] as the sentence that should* ordinarily ***and in the absence of weighty justification*** *be imposed for the listed crimes in the specified circumstances' (footnotes omitted emphasis as in original text)"*[5]

As in *Nkomo*[6] there are factors that weigh in favour of the appellant, especially the fact that the appellant was relatively young, 30 years old and before his arrest had been gainfully

[5] See *Vilakazi supra* at para [16].

[6] *Supra* note 1.

employed. Most importantly, he has never been convicted of any offence. These factors all weigh heavily in favour of a finding that the appellant is a candidate for rehabilitation. These listed factors were, however, not considered by the court *a quo* as 'substantial and compelling circumstances'.

I have carefully considered the submissions made on behalf of the appellant and interestingly, Mr Marimuthu did not advance any listed factors as being 'substantial and compelling'. He did, however, refer this Court to a number of decisions of the SCA where lesser sentences were imposed.

[9] This court is acutely aware of the principle that decided cases should be of value not for the facts but the principle of law which they lay down.[7]

[10] In my view it is incumbent on every presiding officer when imposing a minimum sentence to consider all the circumstances of the case at hand, and then to determine whether the

[7] See *R v Wells* 1949 (3) SA 83 (A) at 87-88 and *S v Sinden* 1995 (2) SACR 704 (A) at 708 A-B.

punishment prescribed by the legislature is proportional to the crime committed case. This is done by applying the *Malgas*[8] test. In applying the 'determinative test' it is evident that if the minimum sentence is disproportionate to the offence, given the specific circumstances of the case, then a court should deviate from the prescribed sentence. Such an approach is also in line with the view of our Constitutional Court. In *Dodo* the Court explained it as follows:

> *"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para 37 above) the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."*[9] *(original footnotes omitted)*

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[8] See *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Vilakazi*, *supra* at para 15.

[9] *Dodo* 2001 (1) SACR 594 (CC) at para 38.

[11] In *Vilakazi* Nugent JA highlights the test with reference to *Malgas*:

> *"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"*[10]

In my view the learned Magistrate misdirected himself when he considered the minimum sentence as the norm without taking due consideration of all the facts and applying the proportionality test to depart from the minimum sentence. This is how he dealt with the factors when passing the sentence:

> *"But what happened in this case is what we listen to just about in every rape case. Just about every day as well. No wonder that the minimum sentence is life imprisonment. Because obviously something must be done to try and protect children. Something must be done about those who for some reason or other deem it necessary to rape a child, a seven year old child. What sexual pleasure can be derived from raping a child, I personally fortunately do not know. A seven year old child should not even be a sex object for a man."*[11]

[12] For the above reasons I find that the learned magistrate was at fault when he concluded, without applying the *Malgas* test that

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[10] See *Vilakazi, supra* par 14.

[11] See record at 90.

life imprisonment is proportional and appropriate. The record does not reveal any consideration of rehabilitation of the appellant nor of considering the proportionality of the sentence that he imposed.

[13] In my view the appeal against the conviction should be dismissed as being without merit but the appeal against sentence should be upheld. In light of the aforementioned misdirection of the court *a quo*, this Court will have to determine afresh on the facts of this case, paying due consideration to the existing personal circumstances of the appellant, and taking into account the needs of society, an appropriate sentence. In doing so, I shall be mindful of all relevant factors, including the fact that rape remains and offensive and very serious offence. I am mindful of the words of Justice Thomas, who so succinctly states the repulsiveness of the crime:

> *"Rape is the most vicious and reprehensible crime in the criminal calendar. Every individual possesses a core persona which makes up the essence of their being. It is an intensely personal and private self which necessarily includes the individual's sexuality and autonomy. Rape shatters a woman's sexual integrity and personal autonomy. Victims suffer acute trauma*

and endure lifelong psychological and emotional scars."[12]

[14] At the time of sentencing the appellant was 30 (thirty) years old, and at the time of his arrest gainfully employed. He supported his family, which consisted of his brothers and one sister. He was the only breadwinner at the family homestead, and also a first offender. A long term of imprisonment should emphasise the seriousness of the offence sufficiently and, at the same time serve the community interest. Such a sentence will also take due account of the need to give the appellant an opportunity and a chance to rehabilitate himself.

[15] The conviction is hereby confirmed. The appeal against the imposed sentence of life imprisonment is upheld. In the result the following order should be made:

[16] Order

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12 EW Thomas *'Was Eve merely framed; or was she forsaken'* 1994 New Zealand LJ 368 at 368; also see E Steyn *'Witnesses in South Africa, The Stepchildren of the Criminal Justice System'* (unpublished LLM thesis, UCT, 1999) chapter 5 for a discussion of the trauma that rape survivors experience in the criminal justice system.

The conviction on rape is hereby confirmed, the sentence is set aside and substituted with the following sentence:

1. Appellant is sentenced to 18 (eighteen) years' imprisonment.
2. The sentence is antedated to 29 July 2008.

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Steyn J

Jappie J: I agree, it is so ordered.

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Jappie J