# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**REPORTABLE**
Case no: 93/12

In the matter between:

**EDSON NDOU** **Appellant**

and

**THE STATE** **Respondent**

**Neutral citation:** *Ndou v S* (93/12) [2012] ZASCA 148 (28 September 2012)

**Coram:** **MPATI P, LEWIS, VAN HEERDEN and SHONGWE JJA and ERASMUS AJA**

**Heard:** **11 September 2012**

**Delivered:** **28 September 2012**

**Summary:** Sentence – rape of girl under the age of 16 years – imposition of life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – whether misdirection exists – no substantial and compelling circumstances found by high court – whether appeal court can interfere.

## ORDER

**On appeal from:** Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance):

1 The appeal is upheld.

2 The sentence of the court below is set aside and replaced with the following:

'The accused is sentenced to 15 years' imprisonment'. This sentence is antedated to 5 May 2004.

## JUDGMENT

**SHONGWE JA (… concurring)**

[1] This is an appeal against sentence only. The appellant was convicted by the regional court in Sebasa (Limpopo) of raping a 15 year-old girl. In terms of s 52 of the Criminal Law Amendment Act 105 of 1997 (the Act), the matter was referred to the Limpopo High Court, Thohoyandou, for the imposition of sentence. (Section 52 has since been repealed.) The matter came before Hetisani J who sentenced the appellant to life imprisonment in terms of s 51(1) of the Act. The appeal is with the leave of this court.

[2] In brief the appellant contends that life imprisonment is grossly inappropriate and induces a sense of shock. The court below found no substantial and compelling circumstances that warranted the imposition of a lesser sentence. The appellant argues that the court should have found substantial and compelling circumstances and therefore that it erred. It is contended that the appellant did not use any violence or weapon to force the complainant to submit to having sexual intercourse with him; instead, the argument continues, she accepted money and gifts from the appellant. It was further argued that there was no evidence of 'post-traumatic stress suffered by

the complainant'.

[3] The State, on the other hand, argues that sentencing is pre-eminently a matter for the discretion of the sentencing court and that such discretion should not be lightly interfered with by a court of appeal. It may only interfere if it finds that the sentencing court misdirected itself on the law or facts. The State further contends that rape of a 15 year-old girl falls within the ambit of Part 1 of Schedule 2 to the Act and therefore a court of appeal may not lightly deviate from a prescribed minimum sentence and for flimsy reasons. That the appellant is the stepfather of the complainant and occupied a position of trust and authority over her, the State argues, is an aggravating factor. The State also contends that any sentence less than life imprisonment would undermine the objectives of the Act and would make a mockery of justice.

[4] It is not necessary to deal in any detail with the evidence on the merits. However, one needs to have a brief backdrop in order to appreciate the ultimate sentence. The complainant testified that she was asleep in one of the bedrooms together with her two younger sisters. In the middle of the night the appellant entered the bedroom laid down next to her and inserted his penis into her vagina from behind. She did not scream or cry – she intended to tell her mother, who was asleep in one of the other rooms, in the morning. She also stated that it was not the first time he had done this.

[5] Her mother testified that the appellant came back from drinking and took off all his clothes and slept next to her. In the middle of the night she discovered that he was no longer sleeping next to her. She woke up and went to the children's bedroom. She found the appellant having sexual intercourse with the complainant. She enquired what he was doing and he said that he was waking up the children so that they could go and urinate; she then went back to their room. Later on that day she reported the matter to the police and the appellant was arrested. The complainant was taken to the hospital for medical examination. The mother's

evidence in this regard differs from that of the complainant who testified that when her mother came into the bedroom the appellant had finished having intercourse with her and that he was fast asleep next to her as he was drunk. Other witnesses testified but their evidence did not take the matter any further.

[6] The State did not lead the evidence of the doctor who examined the complainant because the doctor had returned to his/her home country. However, the State and the defence agreed that the contents of the medical report (the J88 form) be read into the record. The clinical findings were, inter alia, that 'she has evidence of previous penetration with a hymen which broke long ago but evidence of recent coitus – a discharge and small tears of the posterior fourchette'. In terms of s 212(4) *(a)* of the Criminal Procedure Act 51 of 1997, the medical report was admitted as evidence. That concluded the State's case. The appellant unsuccessfully applied for his discharge in terms of s 174 of the Criminal Procedure Act. He closed his case without testifying or calling witnesses.

[7] It is significant to record that the complainant testified that it was not for the first time that the appellant had sexual intercourse with her. On the previous occasion the appellant had bought her sandals, panties and had also given her some money. He had threatened to kill her if she divulged the rape. He also told her not to inform her mother about what had happened; indeed she did not inform her mother. On the occasion which forms the subject of the present rape charge, it would appear that there were no threats of violence by the appellant.

[8] When the matter came before the court below for sentencing, Hetisani J found that the conviction was in accordance with justice and confirmed it. In considering an appropriate sentence, the court below correctly pointed out that sexual assault on children is prevalent in that area. The court went on to consider the triad of factors relevant to sentence, namely the personal circumstances of the appellant, the seriousness of the offence and the interests of society (*S v Zinn* 1969 (2) SA 537 (A) at 540G-H). It was suggested by defence counsel that because the complainant's

mother had moved on with her life, and had left the family to stay with another man, and because the complainant is now married, leaving the appellant alone to take care of the other three children, there were substantial and compelling circumstances to justify a lesser sentence. The court below did not agree with this submission and found that substantial and compelling circumstances did not exist.

[9] The question which arises on appeal is whether, in the circumstances of this case, life imprisonment is an appropriate sentence. The appellant denied having had sexual intercourse with the complainant. His conduct, as it was proved, attracted a sentence of life imprisonment unless the court was satisfied that substantial and compelling circumstances that justify a lesser sentence exist.

[10] The court below asked itself the following question. 'In this case that we are dealing with, the court must ask itself, is there anything that makes it different from any other case where an adult male person has raped a minor female person? More so when one looks at the fact that the rape was continuous when it was done, the day that it was discovered was not the first day, there had been previous occasions when this abuse had been going on'.

The formulation of the question is questionable, in my view, because it assumes and suggests that the complainant was raped continuously and that there had been previous occasions on which she was raped. This conclusion is clearly incorrect and constitutes a misdirection. The appellant was charged and convicted of one count of rape only. The evidence of the complainant was that it was not for the first time that the appellant had had sexual intercourse with her and she testified under cross-examination about one previous occasion. She said that it happened when her mother was away and came back the following day. This suggests that when the appellant was apprehended it was the second time. It is therefore incorrect, as the court below found, that the 'rape was continuous' and that there had been 'previous occasions' on which the appellant sexually abused the complainant. It was this reasoning that led to the misdirection that entitles this court to consider the sentence afresh (see *S v Malgas* 2001 (1) SACR 469 (SCA) para 12).

[11] The court below also reasoned that '(i)t is not this court's discretion to impose a life sentence, it is the discretion of the community via the legislator that these types of things should please stop …'. The impression created is that the minimum sentence of life imprisonment had to be imposed regardless of the circumstances. In *Malgas* (para 25) this court said:

'Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 ….'

It is indeed the sentencing court that is empowered to exercise a discretion to depart from the prescribed sentences. The 'determinative test' for departure from the prescribed sentence was articulated in *S v Dodo* 2001 (1) SACR 594 (CC) para 40 where the Constitutional court, referring with approval to *Malgas* said:

'On the construction that *Malgas* places on the concept "substantial and compelling circumstances" in s 51(3), which is undoubtedly correct, s 51 does not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by s 12(1)*(e)* of the Constitution. The whole approach enunciated in *Malgas*, and in particular the determinative test articulated in paragraph I of the summary, namely:

"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."'

The above approach was also endorsed and followed in *S v Vilakazi* 2009 (1) SACR 552 (SCA) paras 14 – 15.

[12] It is trite that rape is a very serious offence (see *S v Chapman* 1997 (3) SA 341 (SCA) at 344I-J where it was described as 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'). In the present case a 15 year-old girl who was the victim regarded the appellant as a father figure from whom she expected protection, but he had abused that position. No evidence was led on the effect the rape had on her. The lack of such evidence should not and

cannot be construed as absence of post-traumatic stress at all. It would be unrealistic to think there was none.

[13] On the other hand the complainant did not suffer any serious physical injuries. She submitted to the sexual intercourse on the occasion in question without any threat of violence. The fact that she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse. When she was asked whether she had screamed for help, she said that she had not resisted or screamed but simply waited for the appellant to finish what he was doing. She also confirmed that the appellant was drunk and fell asleep next to her after the rape. Thus the degree of the trauma suffered by her cannot be quantified. All these factors must be taken into account in considering whether in this case the ultimate sentence of imprisonment for life is proportionate to the crime committed by the appellant. A balance must be struck on all the factors to avoid an unjust sentence. In my view the sentence imposed is disproportionate to the crime committed and the legitimate interests of society.

[14] Trial courts take months, and in some instances years, dealing with evidence and principles of law to establish the guilt or innocence of an accused person. However, my observation is that when it comes to the sentencing stage, that process usually happens very quickly and often immediately after conviction. Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence. In *S v Siebert* 1998 (1) SACR 554 (A) Olivier JA at 558i - 559a said:

'Sentencing is a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

(See also *S v Dodo* supra para 37 and *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 15 – 17.)

[15] In *S v Dodo* supra para 38 Ackerman J said:

'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 … the offender is being used essentially as a means to another end and 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.'

[16] I have already mentioned that rape is a very serious offence, especially when perpetrated against a minor. It deserves severe punishment. However, the circumstances under which it took place are relevant in the consideration of an appropriate sentence. There is no doubt that there is a public outcry to stop the scourge of rape. The appellant was 46 years of age when he committed this offence. He is the step father of the complainant. He is a first offender and self-employed. In my view the circumstances in this case are such that a sentence of life imprisonment is disproportionate to the crime. I therefore find that there are substantial and

compelling circumstances justifying a lesser sentence than the one prescribed.

[17] In the result, having considered all the relevant factors and the purpose of punishment I consider 15 years' imprisonment to be an appropriate sentence.

[18] I make the following order:

1 The appeal is upheld

2 The sentence of the court below is set aside and replaced with the following:

'The accused is sentenced to 15 years' imprisonment'. This sentence is antedated to 5 May 2004.

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**J B Z SHONGWE**

**JUDGE OF APPEAL**

APPEARANCES

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|---|---|
| FOR APPELLANT: | M J Manwadu |
| | Instructed by: |
| | Justice Centre, Thohoyandou; |
| | Justice Centre, Bloemfontein. |
| FOR RESPONDENT: | R J Makhera |
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| | Director of Public Prosecutions, Thohoyandou; |
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