THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 764/12

In the matter between Reportable

SAMSON MAWELA MUDAU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013)

Coram: MTHIYANE DP, CACHALIA, MAJIEDT JJA, ERASMUS and SALDULKER AJJA

Heard: **5 MARCH 2013**

Delivered: **9 MAY 2013**

Summary: Criminal law – rape – assessment of evidence in totality – adequacy of evidence to sustain conviction in circumstances where medical evidence inconclusive – sentence – prescribed minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2 – whether substantial and compelling circumstances exist – life sentence – 13 year old complainant – important that each case be considered on its own merits.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Booi AJ, sitting as court of first instance):

1. The appeal against conviction is dismissed.
2. The appeal against the sentence of life imprisonment is upheld and the sentence of the court below is set aside and replaced with the following:
   'The accused is sentenced to 15 years' imprisonment.'
3. The sentence is antedated to 14 March 2011.

JUDGMENT

MAJIEDT JA (MTHIYANE DP, CACHALIA JA, ERASMUS and SALDULKER AJJA concurring):

[1] The appellant, Mr Samson Mawela Mudau, was convicted in the Limpopo High Court, Thohoyandou, of the rape of a thirteen year old girl and sentenced to life imprisonment. He appeals against both his conviction and sentence with leave of the court below.

[2] The facts underlying the conviction are briefly as follows. The appellant is the child's uncle. He had been requested by the child's mother to, in her absence, assist the child with an application for admission to a high school. At the time, the child was residing with her grandmother. On the day of the incident the appellant left a message with the grandmother for the child to go to his house, which was close by, to assist her to complete forms for admission to the school.

[3] The child testified that the appellant was alone when she arrived at his home. He asked her whether she was sexually active. She denied that she was, and added that her grandmother would confirm this. He then asked her to show him her panties. She obliged and he forcefully inserted two of his middle fingers into her vagina. At that point there were voices outside the house. He instructed her to be seated on the bed while he went to investigate. She testified that she was afraid to ask for help because she had heard him say that he had a firearm for which he needed to get a place for safe-keeping.

[4] He returned moments later and instructed her to undress and also to lie down sideways on the bed. Again, she complied with this instruction. He then got onto the bed in a sideways position, unzipped his trousers and forcefully inserted his penis into her vagina. She testified that it was painful, and estimated that it lasted for about five minutes. When she started crying, the appellant withdrew and told her to get dressed so that they could go and make a telephone call to her mother from a nearby public telephone. As they were leaving his house, the appellant sent the complainant back to close the security gate, because the appellant feared that his firearm inside the house would be stolen. They were unable to reach her mother on the telephone and the appellant gave a five rand coin to the child, which she believed was to buy her silence about the rape.

[5] The child returned to her grandmother's house and started crying and, after being questioned, she related to her grandmother what had happened. The incident was reported to the police, who arrested the appellant that same evening. The child was medically examined later. When they returned home that evening she noticed that there was blood on her panty. She showed this to her grandmother.

[6] The medical examination by Dr Clement Ngobeni, recorded as usual on the J88 form, revealed that there were no abrasions, that the child's vagina only admitted the tip of one finger and that the hymen had a crescentic shape which, together with the admission of one fingertip into the vagina, suggested that some penetration may have occurred. His ultimate conclusion, however, as appeared from the J88 form, was that there was 'no obvious evidence suggestive of sexual assault, but cannot exclude it – specimen results still pending'.

[7] The 'specimen results' alluded to by Dr Ngobeni on the J88 form, were the blood samples of the appellant as well as a sexual assault evidence kit containing various specimens taken from the appellant. These, together with the child's panties which was sealed separately in a brown paper bag, were forensically analysed by Ms Mbedzi, an assistant forensic analyst at the police's forensic laboratory in Pretoria. She detected possible traces of semen on the panties, cut out that particular portion of the panties and forwarded it for DNA testing to the relevant department in the forensic laboratory. Ms Maharaj, also employed as an assistant forensic analyst at that laboratory, performed an analysis of the DNA results of both the semen on the piece of the panties and the appellant's blood sample and concluded that there was a match in the DNA results. The outcome was therefore that the forensic evidence showed that the appellant's semen was found on the child's panties.

[8] In his testimony the appellant denied that he had raped the child. He testified that they had merely gone through the school application forms. When he told her that he would prefer not to get involved further with her admission application because she was 'busy with boys' she denied it. They then attempted to call her mother, but were unable to reach her. He gave her R5 to call her mother later.

[9] The primary thrust of the appellant's attack against the conviction before us concerned the question whether the State had proved beyond reasonable doubt that there had been penetration to constitute the offence of rape. In this regard the appellant's counsel laid heavy emphasis on Dr Ngobeni's inconclusive findings. These contentions are devoid of merit. The trial court's findings that the child and her grandmother were honest, credible and trustworthy witnesses are in my view unassailable. But one must of course be mindful of the fact that the child was a single witness in respect of the rape incident itself and that she is a child. Section 208 of the Criminal Procedure Act, 51 of 1977, provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. It is further trite that the evidence of children must be treated with circumspection. It would therefore not have been safe to convict on her evidence alone.

[10] But there was sufficient corroboration for the child's testimony: first the undisputed DNA evidence that the appellant's semen was found on the complainant's panties; and secondly the appellant's utter inability to explain this. When asked in evidence in chief for an explanation, the appellant was unable to do so. Instead he gave a rather peculiar response: 'You can ask me all the questions, but this one no I will not be able to answer'.

[11] In my view, the State had discharged the onus of proving that the appellant had raped the child. When the evidence is assessed in its totality, as a court is obliged to do,[1] the conclusion is compelling that, even absent any conclusive medical evidence which must be regarded as being neutral, the child's evidence, supported by the DNA evidence and by the appellant's inability to furnish any explanation whatsoever for the presence of his semen on the complainant's panties, constitute adequate proof of the rape. The trial court therefore correctly convicted the appellant.

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[1] *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8.

[12] I turn now to the vexed question of sentence which is always an extremely difficult exercise. Sentencing in cases where a young child has been raped by a family member is no exception and is bound to be contentious.

[13] The court below found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment for the rape of the child and imposed that sentence on the appellant.[2] For the reasons that follow I am of the view that the court below erred in this regard. I deem it necessary to provide a detailed exposition of this court's recent judgments in such cases. I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity, as Corbett JA put it in *S v Rabie*:

'[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and

[2] Section 51 (1) of the Criminal Law Amendment Act, 105 of 1997, read with s 51(3) and Part 1 of Schedule 2 to that Act.

compassionate understanding of human frailties and the pressures of society which contribute to criminality.'[3]

[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In *S v RO*, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within a family context.[4] If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation can never be discarded altogether, in order to attain a balanced, effective sentence. The much quoted *Zinn*[5] dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives. More than 40 years ago, Schreiner JA had the following to say about the balance which has to be struck:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the

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[3] *S v Rabie* 1975 (4) SA 855 (A) at 866A-C.
[4] *S v RO* 2010 (2) SACR 248 (SCA) para 1.
[5] *S v Zinn* 1969 (2) SA 537 (A) at 540G; see also: *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) para 13; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) paras 36, 40 and 116; *S v Samuels* 2011 (1) SACR 9 (SCA) para 9.

aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that, if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'[6]

[15] Crime has undeniably escalated alarmingly since this dictum, but while retribution remains a sentencing objective, this does not mean that disproportionate sentences may be imposed on offenders. As Prof S S Terblanche has correctly pointed out:

'. . . true retribution is effected only by the imposition of an appropriate sentence, by a sentence which is in proportion to what is deserved by the offender.'[7]

[16] The conundrum which minimum sentencing legislation presents (and, one might add, coupled to the present rampant scourge of rape, particularly of young girls) is vividly illustrated by the stark dichotomy of views expressed in the majority and minority judgments of this court in *S v Nkomo*.[8] It is not necessary to regurgitate the facts. Suffice to state that the case has elicited widespread comment and criticism from both lawyers and non-lawyers. In an insightful analysis, the authors of the Commentary on the Criminal Procedure Act conclude, correctly in my view, that the vast difference in the two approaches and ultimate sentences in *Nkomo* can be explained with reference to 'the problems created by minimum sentence legislation, ie, legislative interference in the discretion of courts to determine an appropriate sentence.'[9]

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[6] *R v Karg* 1961 (1) SA 231 (A) at 236A-B. Cf *S v Mafu* 1992 (2) SACR 494 (A) at 497b-d.
[7] S S Terblanche, *A Guide to Sentencing in South Africa*, 2ed, 2007 para 3.3 at p 146.
[8] *S v Nkomo* 2007 (2) SACR 198 (SCA).
[9] Du Toit et al, *Commentary on the Criminal Procedure Act* 2ed (1997) at 28-18D.

[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space.[10]The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.[11] In *S v Vilakazi,*[12] Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape[13] which concluded on the available evidence that 'women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa'.

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in *S v Abrahams* that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'.[14] The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In *Vilakazi* Nugent JA cautioned against the danger of heaping 'excessive punishment on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope of that it will arrest the scourge'.[15] He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities

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[10] The oft quoted dictum of this court in *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345A is apposite.
[11] Section 12 (1)(*c*) and (*e*) of the Constitution.
[12] *S v Vilakazi* 2012 (6) SA 353 (SCA); 2009 (1) SACR 552 (SCA) para 2.
[13] Rachel Jewkes and Naeema Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview, Social Science and Medicine Journal 55 (2002) 1231–1244.
[14] *S v Abrahams* 2002 (1) SACR 116 (SCA) para 29.
[15] *S v Vilakazi,* supra, para 3.

which may result.[16] The judgment also sets out the dramatic effect that the minimum sentencing legislation has had in sentencing, most importantly that statistics show that inmates serving sentences of life imprisonment has increased more than ninefold from 1998 to 2008.[17] And he reiterated that even in the context of minimum sentencing legislation the importance of assessing each case on its own peculiar facts and circumstances and the need for proportionality must never be overlooked. Nugent JA expressed it as follows:

'It is clear from the terms in which the (determinative) 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'[18].

[19] Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender,[19] although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law.[20] As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind.

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[16] Para 13.
[17] Para 51.
[18] Para 15.
[19] *S v Mdau* 1991 (1) SA 169 (A) at 176G; *S v Bull* 2001 (2) SACR 681 (SCA) para 21.
[20] *S v Malgas* 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) [2001] 3 All SA 220 (SCA) para 25. *S v Dodo* 2001 (1) SACR 594 (CC), 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), para 40.

[20] In *S v Abrahams*[21] a sentence of 7 years' imprisonment imposed on a father for raping his 14 year old daughter was increased on appeal to a sentence of 12 years. Cameron JA, writing for a unanimous court, emphasized the reprehensibility of rape committed within a family context. As stated above, the learned Judge also pointed out that 'some rapes are worse than others' (see para 17 above) and, with reference to the dictum of Ackerman J in *S v Dodo*, supra at para 38, emphasized the need for proportionality.

[21] In *Bailey v S,*[22] an appeal against a sentence of life imprisonment imposed on a father for the rape of his 12 year old daughter was dismissed. In distinguishing that case from others such as, inter alia *Abrahams* and *Nkomo*, referred to above, Bosielo JA (Brand, Heher, Malan and Pillay JJA concurring) laid heavy emphasis on the drastic effect which the rape has had on the victim, as evidenced by the victim impact report, which had been handed in by consent. That report enumerated the following severe sequelae of the rape on the complainant: (a) anxiety, fear and sleeping disorder; (b) misplaced feelings of guilt and shame; (c) mood swings; (d) a loss of trust in mankind and a great sense of anger and hostility towards her father. She also had to leave school prematurely when she discovered that she was pregnant and suffered two miscarriages. Bosielo JA emphasized the need to decide on the imposition of an appropriate sentence based on the particular facts of each case. The primary difficulty in the case before us is that no victim impact report was placed before the trial court, an aspect to which I shall revert shortly

[22] *Ndou v S*[23] concerned the rape of a 16 year old girl by her stepfather. The sentence of life imprisonment was set aside by this court, which substituted in its stead a sentence of 15 years' imprisonment. In its judgment

[21] *S v Abrahams*, supra.
[22] *Bailey v S* (454/11) [2012] ZASCA 154 (1 October 2012).
[23] *Ndou v S* (93/12) [2012] ZASCA 148 (28 September 2012).

this court (per Shongwe JA) referred to a misdirection on the part of the trial court which. . .'[created the impression] that the minimum sentence of life imprisonment had to be imposed regardless of the circumstances'.[24] The learned Judge also made mention of the fact that no evidence was led on the effect the rape had on the victim, but accepted that it must have been very traumatic.[25] The court found that a sentence of life imprisonment would be disproportionate and imposed 15 years' imprisonment.

[23] Lastly there is the judgment of *Kwanape v S.*[26] I must immediately point out that the rape in that matter had not been perpetrated in a family setting. This court (per Petse JA, Nugent JA and Erasmus AJA) dismissed an appeal against a sentence of life imprisonment imposed on a 24 year old first offender who had raped a 12 year old girl. One of the numerous aggravating factors in that case was the fact that the appellant had abducted the complainant while she was in the company of her friends and effectively held her hostage for an entire night. In this matter too, a victim impact report was handed in by consent, from which it appears that the rape has had a devastating impact on the complainant. She was forced to leave school, compelling her mother to give up her employment in order to render emotional support to the complainant. The latter had become a recluse so as to avoid being ridiculed by her peers.

[24] The appellant in the present matter testified in mitigation of sentence. He was 47 years old at the time of sentencing, a taxi driver by occupation, earning R1 000 per week. His wife was also employed, earning R1 200 per month. They have four children, all of them still dependent on their parents for financial support. The appellant has one previous conviction, dated 1998, for assault with intent to do grievous bodily harm, for which he had been sentenced to a R500 fine or 3 months imprisonment, which may be

[24] Para 11.
[25] Para 12.
[26] *Kwanape v S* (422/12) [2012] ZASCA 168 (26 November 2012).

disregarded for present purposes. It can therefore be accepted that he has no propensity to commit crime, which increases his chances for rehabilitation.

[25] It must also be accepted that this was not the most severe form of rape and that the appellant desisted when he realized that the child was crying. There is also no evidence that the child suffered any ongoing trauma, over and above the trauma that she would inevitably have experienced as a result of what had happened. In this regard I must mention that it is troubling that the State seems to have made no attempt to place such evidence before the trial court, eg by way of a victim impact report, despite the fact that this court has emphasized its importance.[27]

[26] In respect of the severity of the rape, referred to in the preceding paragraph, it is plain from the medical report that the doctor did not find any serious physical injuries (see para 6 above). And there was no further violence in addition to the rape. Similarly in *S v Nkawu*[28] the complainant had not suffered any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances exist justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51 (3) *(aA)*(ii) of the Criminal Law Amendment Act, 105 of 1997, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J, expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences. I agree with the learned Judge that 'to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and

[27] *S v Vilakazi,* supra, paras 56 and 57.
[28] *S v Nkawu* 2009 (2) SACR 407 (ECG).

just sentence it would infringe the fair trial right of accused persons against whom the provision was applied'[29]. He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually.

[27] As against these mitigating factors it must also be considered that the appellant abused his position of trust. Instead of helping the child with her application forms for school he used the opportunity to violate her and showed no remorse by denying in court that the incident had taken place. Instead of taking responsibility for what he had done, he sought to make the child a liar. In effect, he victimised her again.

[28] Having weighed the mitigating factors against the aggravating ones, the imposition of the statutorily prescribed minimum sentence by the high court was in my view grossly disproportionate to the offence. This court is therefore obliged to set it aside and impose a fresh sentence. The offence is, nonetheless, deserving of severe punishment so as to convey the gravity of the offence and society's justified abhorrence thereof. I am of the view that a sentence of 15 years' imprisonment would meet the objectives of sentencing and would fit the crime, the criminal and the needs of society. The appellant has been serving his sentence since the date of sentencing, namely 14 March 2011 and the sentence should consequently be antedated accordingly.

[29] In the result the following order is made:

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[29] Para 15.

1. The appeal against conviction is dismissed.
2. The appeal against the sentence of life imprisonment is upheld and the sentence of the court below is set aside and replaced with the following:
   'The accused is sentenced to 15 years' imprisonment.'
3. The sentence is antedated to 14 March 2011.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant:	L M Manzini Instructed by: Polokwane Justice Centre Bloemfontein Justice Centre
For Respondent:	R J Makhera Instructed by: Director of Public Prosecutions, Limpopo Director of Public Prosecutions, Bloemfontein