THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 546/2013
Not Reportable

In the matter between:

WILLIAM MUNYAI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Munyai v The State* (546/2013) [2014] ZASCA 36 (28 March 2014)

Coram: Navsa, Theron and Petse JJA

Heard: 5 March 2014

Delivered 28 March 2014

Summary: Sentence - Rape – Minimum sentence in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 imposed by the high court – no substantial and compelling circumstances – appeal against sentence dismissed.

ORDER

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

The appeal against sentence is dismissed.

JUDGMENT

THERON JA (Navsa and Petse JJA concurring):

[1] The appellant stood trial in the Limpopo High Court (Hetisani J) on one count of rape read with provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 and on the alternative count of contravening s 14(1)(*a*) of the Sexual Offences Act 23 of 1957 (having unlawful carnal intercourse with a girl below the age of 16 years). The appellant pleaded not guilty to the main count and guilty to the alternative count. The State did not accept his plea in respect of the alternative count and pleas of not guilty in respect of both counts were entered by the court.

[2] The appellant made a number of admissions at the commencement of the trial. He admitted that he had had sexual intercourse with the complainant on 17 October 2003 but that such sexual intercourse was with the consent of the complainant. At the end of the trial the appellant was found guilty on the main count and sentenced to life imprisonment. He appeals to this court against sentence only, with the leave of the high court.

[3] The complainant was thirteen years at the time of the incident. She and her family knew the appellant as they lived in the same neighbourhood. The appellant had promised to give the complainant R1 which she was required to pay at school in respect of a funeral fee. He had requested that the complainant collect the money from his home on her way to school on the morning of the incident. Instead of giving her the money as promised, he had sexual intercourse with her without her consent. When the complaint's mother came looking for her, the appellant hid her under a bed and threatened to kill her if she responded to her mother's calls. It was only later that the complainant was discovered on the premises.

[4] The complainant testified that she had felt pain during the intercourse and was bleeding profusely afterwards. The District Surgeon, Dr Hadzhi, who examined the complainant after the incident noted bruises on her clitoris and *labia minora*. The *labia majora* was normal but blood stained and there were superficial tears on the vagina. It is recorded in the medico-legal report that the complainant's clothes were blood stained. The District Surgeon's conclusion is recorded as follows: 'possible evidence of vaginal penetration as evident by fresh tears [and] bleeding with irregular hymen'.

[5] No evidence was led by the appellant in mitigation of sentence. The appellant's legal representative addressed the court from the bar. The court was advised that the appellant had been fifty five years old at the time and was a self-employed carpenter. He was separated from his wife. The court was advised that he had consumed alcohol the night before the incident and was still inebriated at the time of the incident. The court was also informed that the appellant was a 'man of ill health'. There was no further clarification regarding his state of health. The appellant admitted his previous convictions, one of which was an undated conviction for common assault in respect of which he paid an admission of guilt fine in the amount of three hundred rand and another in 1997 for assault with intention to do grievous bodily harm in respect of which

he was sentenced to pay a fine of three hundred rand or undergo three months' imprisonment. The previous convictions were not held against him by the court below and do not call for consideration by this court.

[6] On appeal, it was submitted by counsel for the appellant that the sentence imposed was shockingly inappropriate, induced a sense of shock and was disproportionate to the offence. It was further submitted that the high court had over-emphasised the interests of the community at the expense of the appellant's personal circumstances and had the high court had due regard to these circumstances it would have concluded that they were sufficiently compelling and substantial so as to justify a departure from the minimum sentence prescribed by the Legislature.

[7] It was common cause that in terms of the provisions of s 51 of the Criminal Law Amendment Act, the high court was obliged to impose the minimum sentence of life imprisonment unless there were compelling and substantial circumstances justifying a departure from the prescribed minimum sentence. In considering an appropriate sentence, courts must be conscious that the Legislature has ordained life imprisonment as the sentence which should *ordinarily* be imposed for the offence in respect of which the appellant has been convicted and should not be departed from lightly and for flimsy reasons.[1]

[8] No evidence was led of the impact of the rape on the complainant. This court, has in the past, deplored the failure to lead such evidence during the sentencing proceedings.[2] Such evidence constitutes important evidence to assist the sentencing court in arriving at an appropriate sentence. Ponnan JA in *S* v *Matyityi*,[3] explained the value of such evidence.

'By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the

[1] *S v Malgas* 2001 (1) SACR 469 (SCA) paras 8 and 9.
[2] *S v Olivier* 2010 (2) SACR 178 (SCA) para 11.
[3] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 17.

court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim.'

Despite the fact that no evidence was led on the effect of the rape on the complainant, the lack of such evidence should not be construed as an absence of post traumatic stress.[4]

[9] There are a number of aggravating factors in this matter. The appellant deceptively lured the complainant to his home with a promise to assist her. There he took advantage of her and subjected her to humiliating and degrading treatment.[5] She sustained the injuries recorded in para 4 above. In his attempts to avoid being discovered, he threatened to kill her. He also did not show remorse for his actions.

[10] The judge in the court below gave due consideration to the personal circumstances of the appellant and correctly balanced such circumstances against the legitimate interests of the community. Child rape is a prevalent offence in Limpopo.[6] The judge recognised the duty of the court to protect vulnerable persons, particularly young girls, and the need to send a message to society that offenders such as the appellant will be appropriately punished.

[11] In my view, the cumulative effect of the personal circumstances of the appellant, as weighed against the aggravating factors, do not constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. I am not satisfied that the imposition of the

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[4] *S v SMM* 2013 (2) SACR 292 (SCA) para 17.
[5] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5a-b.
[6] For recent cases see *S v MM* 2012 (2) SACR 18 (SCA); *S v SMM* 2013 (2) SACR 292 (SCA), *S v M* 2013 JDR 2747 (SCA); *Thinashaka v S* (65/2013) [2013] ZASCA 127 (25 September 2013); *Rasirubu v S* (651/12) [2013] ZASCA 140 (30 September 2013).

minimum sentence would be disproportionate to the crime, the appellant and the needs of society so as to result in an injustice.

[12] In the result, the appeal against sentence is dismissed.

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L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	M J Manhwadu Instructed by: Justice Centre, Thohoyandou Justice Centre, Bloemfontein
For Respondent:	R J Makhera Instructed by: The Director of Public Prosecutions, Thohoyandou The Director of Public Prosecutions, Bloemfontein