IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no A165/07

In the Appeal of:

BENJAMIN NXUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON 21 AUGUST 2009

VAN DEN HEEVER AJ

[1] The Appellant was convicted on 16 May 2006 in the Regional Court in George on a single count of rape and after finding that no substantial or compelling circumstances existed the Magistrate sentenced the Appellant to the minimum sentence prescribed in terms of the provisions of **Section 51 of the Criminal Law Amendment Act no 105 of 1997 ('The Act')** of 10 years imprisonment on 18 May 2006.

[2] The Appellant applied for leave to Appeal on 7 July 2006 against both the conviction and sentence but the application was refused by the trial Magistrate.

[3] Appellant's subsequent petition to the High Court was successful and leave was granted on 24 January 2007 to Appeal against both the conviction and sentence.

[4] The Appellant has in writing withdrawn his Appeal against the conviction and now appeals against his sentence only.

[5] The Act prescribes a minimum sentence for the crime of rape of ten (10) years imprisonment in the absence of certain aggravating circumstances. Those aggravating circumstances are the following:

i) Where the victim is a girl who is under the age of 16 years;

ii) Where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

iii) When the crime was committed by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

iv) When the crime was committed by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;

v) When the crime was committed by a person, knowing that he has the aquired immune deficiency syndrome or human immuno-deficiency virus;

vi) Where the victim is a physically disabled woman and due to her physical disability, is rendered particularly vulnerable;

vii) Where the victim is a mentally ill woman as contemplated in s **1 of the Mental Health Act, 1973;**

viii) Where the crime involved the infliction of grievious bodily harm.

[6] The minimum sentence progresses immediately to the maximum sentence that our law allows once any of the above aggravating features is present, and irrespective of how many of those circumstances are present, irrespective of the degree in which the feature is present and irrespective of whether the convicted person is a first or repeat offender.[1]

[7] The facts upon which the Magistrate based the Appellant's conviction upon proper assessment include two of the aggravating circumstances referred to above. Firstly, the Magistrate accepted the evidence of the complainant that he raped her and after he ejaculated, penetrated her for a second time. He also tried to force himself on the complainant for a third time but she managed to resist and flee from the scene. In considering whether more than one rape has occurred each case must be determined on its own facts. Where, as in this case, the Appellant has ejaculated, and soon thereafter penetrated her again at the same venue, it should be inferred that the Appellant has formed the intention to rape her again. [2] The Magistrate also found that the injuries that the complainant sustained should be regarded as serious.

[8] The Magistrate, after convicting the Appellant was obliged to stop the proceedings and commit the Appellant for sentence by the High Court.[3]

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[1] *S v Vilakazi* 2009 (1) SACR 552 (SCA) 558 [12];
[2] *S v Blaauw* 1999 (2) SA SACR 295 (W) 300
[3] *S v Mugeri* 2004 (1) SACR 371 (T); *S v Sekgobela and Four other cases* 2006 (2) SACR 309 (W)

[9] He, however, proceeded to sentence the Appellant on the basis that he did not regard the circumstances surrounding the commission of the offence as serious enough to exercise his discretion to impose more than the minimum sentence. Having found no substantial or compelling circumstances to impose a sentence other than the minimum sentence, he proceeded to sentence the Appellant to ten years imprisonment.

[10] Where, as in this case, the Magistrate neglected to stop the proceedings and refer the matter to the High court, there is authority to the effect that such sentences ought to be regarded as null and void, should be set aside and then be referred to the High Court to apply the provisions of the Act.[4]

[11] The charge sheet alerted the Appellant that the provisions of Section 51 of the Act were applicable and the Magistrate at the inception of the proceedings explained the effect of the Act to the Appellant as follows:

> "*... but should he be found guilty he is liable to a sentence of not less than ten years imprisonment which may be less than ten years if there are compelling and substantial circumstances, but which may be up to 15 years if the court decides to exercise the discretion and add a further five years to the minimum sentence*"

It is common cause that the Appellant was not alerted to the provisions of Part 1 of Schedule 2 of the Act which became applicable upon conviction based on the aggravating circumstances discussed *supra*.

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[4] *S v Sekgobela and Four Other cases supra* 309

[12] Since the enactment of the Act it has become incumbent on the State to specify the case to be met so that the accused person can appreciate the charge and the consequences of a conviction. Such knowledge would inevitably impact on decisions regarding the conduct of his or her defence and may affect his or her right to a fair trial.[5]

[13] The fact that the Appellant was not alerted to the possibility that he could face life imprisonment upon conviction would result in an unfair trial if the relevant provisions of the Act were applied to him now. The setting aside of the sentence and a referral to the High court under these circumstances would be pointless and essentially a waste of time.[6] I therefore now proceed to consider whether the Magistrate's imposition of the minimum sentence was justified (the Appellant having abandoned his appeal against the conviction)

[14] The Appellant's personal circumstances when he was sentenced were the following: He was 28 years old (25 at the time of commission of the offence) and had completed grade 11 at school. He was unmarried but had fathered a child with his girlfriend with whom he lived and maintained. He also supported his late sister's child. At the time he had been employed by Oubaai Golf Estate near George where he earned a salary of R3000.00 per month. He was a talented golfplayer and had toured extensively. He was a first offender and had consumed 5 glasses of intoxicating liquor prior to raping the complainant.

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[5] ***S v Legoa*** **2003 (1) SACR 13 (SCA);** ***S v Ndlovu*** **2003 (1) SACR 331 (SCA);** ***S v Makatu*** **2006 (2) SACR 582 (SCA);** ***S v Erskine*** **2008 (1) SACR 468 (C)**

[15] Certain facts and the circumstances underlying the conviction are of an aggravating nature. Not only did the Appellant rape the complainant twice but also tried to force himself on the complainant for a third time before she resisted and fled the scene. The complainant was also assaulted and sustained injuries to her face, shoulder and ankle. She also suffered an injury to her private parts and was severely traumatized. The Appellant maintained his innocence even after conviction and showed no remorse whatsoever.

[16] The Supreme Court of Appeal has described rape as a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim' and went on to say:

"[w]omen in this country...have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without fear, the apprehension and the security which constantly diminishes the quality and enjoyment of their lives" [6]

[17] The fact that the instant case, although of a serious nature may not be classified as an extreme or worst category of rape does not mean that the minimum sentence imposed is to be regarded as unjust.[7]

[18] In determining whether substantial and compelling circumstances justifying a less than the prescribed sentence under the Act exist I have considered all facts relevant to

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[6] ***S v Chapman*1997 (3) SA 341 (SCA) at 345 A-B. See also *S v Vilakazi* supra 552;**
[7] ***S v Ncheche* 2005 (2) SACR 386 (W)**

sentence, both aggravating and mitigating and in the light thereof considered whether the minimum sentence is grossly disproportionate to the crime committed.[8]

[19] After having considered all the relevant factors cumulatively, I am of the view that the minimum prescribed sentence is not disproportionate to a sentence which would have been appropriate and would accordingly dismiss the Appeal against the sentence.

VAN DEN HEEVER AJ

I agree and it is so ordered

HJ ERASMUS J

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[8] ***S v Homareda*** **1999 (2) SACR 295 (W)**