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

CASE NO. A543/2009

In the matter between:

ANGELO DAVIDS **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON 25 MARCH 2010

DLODLO, J

[1] On the night of 1 May 1998 and at the premises of Rio Grande School in Manenberg, Cape Town, the Appellant caught and threw the complainant to the ground near a tree. He proceeded to pull down her panties and undressed himself of his trousers. The Appellant then forced himself on the complainant and had sexual intercourse with her without her consent. The Appellant whilst busy having intercourse with the complainant withdrew his penis from her vagina

and forced same into her mouth directing her to suck the penis. She did it. When he wanted to penetrate her anally, she successfully pleaded with him not to do so. He then proceeded penetrating her vaginally. After he finished having sex with her vaginally, he did proceed to turn her around and had sexual intercourse with her per anus forcing her to submit thereto by hitting her in the face. He was convicted of rape as well as indecent assault. The Appellant was sentenced to undergo imprisonment for life on the rape count. He was sentenced to undergo imprisonment for seven years on the indecent assault count. However, the Court directed that the sentence on the indecent assault count shall run concurrently with the sentence of life imprisonment. The Appellant has appealed to this Court against sentence imposed on him.

[2] Before dealing with issues relevant to sentence I find it necessary to briefly set out the complainant's evidence. The portion I deem necessary for purposes of Judgment is the following:

"Hy het toe vir omtrent vyf minute met my omgang gehad. Toe hy klaar is toe lig hy vir hom op, toe trek hy my kop so, toe druk hy sy penis in my mond. Toe sê hy ek moet dit suig. Toe hy klaar is toe sê hy ek moet vir my omdraai...Ek het vir hom gesê hy moenie vir my gebruik van agter af nie. Toe sê hy vir my as hy nie vir my gaan gebruik van agter af nie dan gaan hy dit weer doen van voor, seks het saam met my. Hy het toe weer seks gehad saam met my vir die tweede keer. Wat hy klaar is toe vat hy my so...Hy het my so by my skouers gevat, toe draai hy vir my om. Ek het gesê hy het gesê hy gaan my nie gebruik van agter af nie, toe sê hy vir my dit gaan net vir die eerste

keer gaan dit seer wees maar ek moet net stil lê. Ek het toe aangegaan, want ek wil my nie omgedraai het nie en toe slaan hy my in die gesig met sy hand. Hy het toe vir my gebruik van agter af. Sy penis agter in my, hoe is daai ander woord? ...in my anus gebruik. Toe hy klaar is het daar twee klongens gekom en gesê hy moet klaar maak."

See record pages 26-27.

[3] It is important to mention that this matter was referred to this Court for sentence by the Regional Magistrate in terms of Section 52 (1) (b) of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act"). The only reason why the Magistrate referred this matter to this Court for sentence is because he seemingly found that the Appellant had sexual intercourse with the complainant more than once. This seemingly was also accepted to be the position by the sentencing Judge. I, however, must hasten to mention that it is not my understanding of this matter. In my understanding there was only one continuous act of sexual intercourse. This leads me to the case quoted also during the sentencing stage of the Appellant in this matter, namely, ***S v Blaauw*** 1999 (2) SACR 295 (W) where the Judge stated that mere and repeated acts of penetration cannot without more be equated with repeated and separate acts of rape. In the ***Blaauw*** case *supra* the Judge even gave an example in order to drive this point home. He stated that a rapist who, in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not have committed rape twice.

[4] In the instant matter there appears to have been no determinable time between the initial penetration and a second one which followed immediately upon failure on the part of the Appellant to penetrate the complainant per annum. There was, therefore, one continuous rape performed against the complainant. This finding alone makes it clear that the matter did not fall within the provisions of the Minimum Sentences Act. It could therefore have been disposed of by the Regional Court Magistrate without the need to have had to refer it to the High Court. Even if the Minimum Sentences Act did infact apply to this matter, there is yet another impediment that prevented its applicability. The perusal of the Charge Sheet and the whole record of proceedings in the instant matter does not indicate to us that the Appellant was pertinently alerted to the fact that he stood in peril of the sentencing regime of the Minimum Sentences Act being applied if he should be convicted of the crime concerned. In ***S v Ndlovu*** 2003 (1) SACR 331 (SCA) at 337, Mpati JA after having referred to decisions such as ***S v Legoa*** 2003 (1) SACR 13 (SCA) and ***S v Seleke en Andere*** 1976 (1) SA 675 (T), held as follows:

"...Where the state intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that

what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly."

Therefore the Minimum Sentences regime cannot be applied in the instant case because the Appellant was never so alerted. This finding further strengthens the fact that this matter fell to be finalized by the Regional Court. The then sentencing jurisdiction of the Regional Court was a term of imprisonment not exceeding fifteen years.

[5] It ordinarily does not follow that the Appellant would have been sentenced to undergo imprisonment for the period of fifteen years. Regard would have been had to his personal circumstances, the seriousness of the crime of which he had been convicted, the interests of the community etc. The question of the seriousness of this rape would have played a pivotal role. Rape was described by the Supreme Court of Appeal in ***S v Chapman*** 1997 (2) SACR 341 (SCA) as a very serious offence which constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. I accept that every rape is very serious. But, there are degrees of seriousness in any matter. I cannot put it any better than the Supreme Court of Appeal which described it in ***S v Mahomotsa*** 2002 (2) SACR 435 at 443 f – 444 e (as per Mpati JA as he then was), as follows:

"[17] The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife

in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer – she interviewed both complainants – they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.

[18] It perhaps requires to be stressed that what emerges clearly from the decisions in ***Malgas*** *and* ***Dodo*** *is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognizance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the*

categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in ***S v Abrahams*** *2002 (1) SACR 116 (SCA), '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' (para [29]).*

[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."

[6] Similarly in ***S v Sikhipha*** 2006 (2) SACR 439 (SCA) the Supreme Court of Appeal set aside a sentence of life imprisonment in a matter where the victim of rape was a thirteen year old girl. The Court regarded the Appellant as capable of rehabilitation and that the injuries inflicted on the complainant were not of a serious nature. These two considerations taken together were regarded by the Supreme Court of Appeal as constituting substantial and compelling circumstances. The sentence imposed by the Supreme Court of Appeal is an imprisonment for twenty years. I accept that the Regional Court in its exercise of the sentencing discretion would certainly punish the Appellant appropriately even though not visiting him with the maximum sentencing jurisdiction. It is clear from the above that this Court must interfere on the question of sentence. The sentence of life imprisonment imposed upon the Appellant must, as a matter of necessity, be set aside. Sentencing of the Appellant must therefore be revisited and a new sentence determined by this Court.

[7] The Appellant, a first offender, was twenty years old at the time of the commission of the offence. He was in custody prior to the hearing and finalization of the matter. The Appellant is a father of one minor child. He was employed prior to the commission of the offence. The period spent in custody prior to sentencing was taken into account by Nugent JA in ***S v Vilakazi*** 2009 (1) SACR 552 (SCA). It is apparent from the Appellant's youthfulness and the fact that he was gainfully employed at the time of the commission of the offence, that he is clearly a candidate for rehabilitation. In ***S v Nkomo*** 2007 (2) SACR

198 (SCA) Lewis JA (who wrote the majority Judgment) had regard to the personal circumstances of the Appellant which were almost similar to these applicable to the instant matter and imposed a sentence of sixteen years imprisonment.

[8] In the circumstances the Appeal against sentence in the instant matter succeeds. The sentence imposed by the Court *a quo* is set aside. In its place the following is substituted:

"The Appellant (Accused) is sentenced to undergo imprisonment for the period of fifteen years for the rape charge and seven years for the indecent assault charge. The period of imprisonment for the indecent assault is ordered to run concurrently with the sentence on the rape count – in terms of Section 280 (2) of the Criminal Procedure Act 51 of 1977 as amended. It is further ordered that this sentence is antedated to 29 May 2000."

DLODLO, J

I agree.

YEKISO, J

I agree and it is so ordered.

CLEAVER, J