Republic of South Africa

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

High Court Case No: A336/2013

Magistrates Court Case No: SWS 21/2009

In the matter between:

LORENZO MARTHEZE **Appellant**

and

THE STATE **Respondent**

Before: Judge Rogers*et* Judge Cloete

Date: Friday, 1 November 2013

Delivered: Tuesday, 5 November 2013

REASONS FOR ORDER

CLOETE J:

[1] The appellant (who had pleaded not guilty) was convicted as charged on 7 June 2011 on one count of rape of a girl who was 7 years and 11 months old. On 1 August 2011 he was sentenced to 18 years imprisonment. The court *a quo*

refused leave to appeal against both conviction and sentence. On petition the appellant was refused leave to appeal against conviction but granted leave to appeal against sentence.

[2] The facts are briefly as follows. The appellant and the complainant's mother had lived together in an intimate relationship and the complainant resided with them. Their relationship was characterised by alcohol abuse and domestic violenceto which the complainant had been exposed. She had also been physically, verbally and emotionally abused by the appellant; and had further witnessed her mother being raped.

[3] On a date between 11 and 14 November 2008 the appellant raped the complainant by having vaginal intercourse with her, after having assaulted and chased her mother away from their home. Subsequent examination by a Sexual Assault Nurse Examiner revealed two recent tears to the complainant's hymenas well as pain in her genital area.

[4] Given that it involved the rape of a minor, the offence attracts a minimum sentence of life imprisonment in terms of s 51(1) as read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (*'the Act'*). At the commencement of the trial it was placed on record that the appellant had been informed thereof.In the court *a quo*it was argued on behalf of the appellant that substantial and compelling circumstances existed which justified a deviation

from the minimum sentence. These were that: (a) the appellant had been under the influence of alcohol; (b) the abuse to which the child had previously been exposed by her mother meant that she was already traumatised before the rape; (c) the appellant had been held in custody awaiting trial for 2 years and 7 months before his conviction; and (d) although he had two previous convictions for assault, the appellant's last conviction had been some 10 years earlier (it should be mentioned that the appellant has 11 previous convictions in all).

[5] S 51(3)(a) of the Act stipulates that if a court is satisfied as to the existence of substantial and compelling circumstances, it must: (a) enter those circumstances on the record of the proceedings; and (b) thereupon impose a lesser sentence.

[6] Although not entirely clear from its judgment, the court *a quo* appears to have found that substantial and compelling circumstances lay in the fact that the complainant's mother had not only exposed her to domestic violence and shockingly inappropriate behaviour, but had also failed to take any steps to protect her. That the appellant had been under the influence of alcohol at the time of the rape was regarded as an aggravating, and not a mitigating, factor. The period that the appellant had spent in custody awaiting trial was however taken to be a mitigating factor.

[7] On appeal it was argued that the sentence imposed by the court *a quo* was

disturbingly inappropriate for the following reasons: (a) although the appellant has a long list of previous convictions, this is the first conviction for a sexual offence; (b) the only physical injuries were the two tears to the complainant's hymen; (c) the complainant's mother was largely to blame for the complainant's trauma as was evident from the degree of anger and ambivalence that the child displayed towards her; and (d) in a number of other cases to which we were referred involving rape of a minor it was found that an appropriate sentence would be between 10 to 15 years imprisonment.

[8] In *Zilwa v S* (an unreported judgment of this court in case no A164/2011 handed down on 14 October 2011) it was said at paras [15] and [16] that:

> *'[15] Rape, particularly of children, is a scourge in our society.Every child has the right to be protected from maltreatment, abuse or degradation (see s 28(1) of the Constitution…). Our courts have repeatedly emphasised the necessity for women and children to be protected and that those who rape these vulnerable members of society can expect to attract the harshest punishment. In* State v Chapman *1997 (2) SACR 3 at 5b-e, Mahomed CJ said that:*
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> *'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights…. The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. We communicate that message in this case by an order that the appeal of the appellant against his convictions and sentences is dismissed.*

[16] These sentiments apply at least equally to the most vulnerable members of our society, namely its children. This was an unprovoked attack on a young, defenceless girl… That the rape of a child should attract the harshest penalty, life imprisonment, was recognised and endorsed by our legislature when it implemented the Criminal Law Amendment Act.'

[9] In *S v Nkunuma & Others* (101/13) [2013] ZASCA 122 (23 September 2013) the Supreme Court of Appeal had the following to say at paras [16] and [17]:

'[16] Rape and robbery have become serious social problems. It is not difficult to take judicial notice of this phenomenon in the light of the number of such cases dealt with by the regional courts, the High Courts and those which eventually come to this court. The shocking statistics regarding rape (albeit some eight years old), dealt with in S v De Beer [2005 JDR 0004 (SCA) para 19] *and referred to in* Matyityi [2011 (1) SACR 40 (SCA)]*, are set out in the following quote:*

"It is widely accepted that the statistics of reported rape reflect only a small percentage of actual offences. NICRO estimates that only 1 out of every 20 rapes is reported, whilst the South African Police Service puts the figure at 1 out of 35. For the first six months of 1998, 23 374 rapes were reported nationally. As an annual indicator of rape employing the lower 1 out of 20 estimate, the figure was a staggering 934 960. Research at the Sexual Offences Court in the Western Cape, for the same period, reveals that of the reported rape cases: 56.62% were referred to court; 18.67% were prosecuted; and, only 10.84% received guilty verdicts."

[17] Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the

> *publication of the statistics referred to above. The same can be said of robbery. No matter how they are viewed, society has called, on more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively.'*

[10] These sentiments have been reaffirmed in *Makatu v S* (612/2012) [2013] ZASCA 149 (25 October 2013) at para [30]:

> *'[30] For some time now this country has witnessed an every-increasing wave in crimes of violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the very social and moral fabric of our society. As a result our society is seriously fractured. The majority of our people, particularly the vulnerable and the defenceless which include women, children, the elderly and infirm live under constant fear. It is no exaggeration to say that every living woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes happen against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and the breadth of our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be exterminated with their roots.'*

[11] I turn to consider the arguments advanced on appeal against the backdrop of these authorities. First, the fact that this is the appellant's first conviction for a sexual offence is not relevant, given the clear provisions of s 51(1) of the Act. Second, s 51(3)(aA)(ii) thereof stipulates that an apparent lack of physical injury to a complainant shall not constitute a substantial and compelling circumstance in a case of rape (eeven though it might in combination with other mitigating factors go into the mix in determining whether substantial and compelling

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circumstances exist). Third, the appalling behaviour of the complainant's mother cannot possibly minimise the appellant's own blameworthiness for the rape, and to the extent that this was indeed the court *a quo*'s finding, I am in respectful but complete disagreement therewith. In any event, the complainant's mother was not even in the house when the rape took place. Fourth, the Supreme Court of Appeal in *Nkunkuma* at para [9], referring to *S v Malgas* 2001 (1) SACR 469 (SCA) at paras [7] – [9], reiterated that there have to be *'truly convincing reasons'*to depart from the imposition of a minimum sentence.

[12] In my view none of the grounds advanced, both in the court *a quo* and on appeal, constitute truly convincing reasons for a departure from a sentence of life imprisonment. Nor are there any other factors which could constitute substantial and compelling circumstances such as to result in the imposition of a lesser sentence. The appellant was 33 years old. He was supposed to nurture and protect this young girl. Instead he physically, verbally and emotionally abused her over an extended period. He gave no thought to the physical and psychological consequences to the complainant when he raped her. These consequences are well documented in the record and accordingly do not need to be repeated. Suffice it to say that the long term psychological damage to this defenceless child is severe, and cannot – and should not – be underestimated. It is a poor excuse for the appellant to argue that a lesser sentence should be imposed because of the social worker's opinion contained in the Victim Impact Report that it is difficult to differentiate between the extent to which the damage

was caused by the pre-rape trauma, and the rape itself. Even if there had been no pre-rape trauma, the long term psychological damage as a result of the rapeis both self-evident and significant.

[13] In *Makatu* the court did not consider the appellant's state of intoxication to be a substantial and compelling circumstance such as to justify the imposition of a lesser sentence. It is also to be noted that the appellant flatly denied having raped the complainant; then alleged that he had been intoxicated; and during a later interview for purposes of the pre-sentence report, he denied any such intoxication. He showed no remorse, and his personal circumstances which were dealt with in the court *a quo*'s judgment do not of themselves constitute truly convincing reasons for the imposition of a lesser sentence. The period that the appellant spent in custody awaiting trial (partly his own doing) is more than neutralised by the sentence of only 18 years imprisonment.

[14] It is accordingly my view that the appellant can count himself lucky to have escaped with a sentence of 18 years imprisonment. Indeed, it is not understood why the state did not appeal the sentence imposed.

[15] **In the result I propose the following order:**

1. **The appellant's appeal against his sentence of 18 years imprisonment is dismissed.**

2. The conviction and sentence are confirmed.

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J I CLOETE

ROGERS J

I agree and it is so ordered.

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O ROGERS