THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: A05/2013

In the matter between: Reportable

GK **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: GAMBLE J, ROGERS J & MATTHEE AJ

Heard: **15 MARCH 2013**

Delivered: **24 MAY 2013**

JUDGMENT

ROGERS J:

[1] I have read the judgment prepared by my colleague Matthee AJ in which he would dismiss the appeal and uphold the appellant's life sentence. For the reasons he gives there is every reason to view the appellant's crime with revulsion but after careful consideration I have come to the conclusion that the trial court erred in finding an absence of substantial and compelling circumstances. I would uphold the appeal and impose a sentence of 17 years' imprisonment.

[2] The facts of the matter are set out in Matthee AJ's judgment. I shall not repeat them but will elaborate where I feel this is necessary.

[3] It is appropriate first to say something concerning the approach of an appellate court to a trial court's finding as to the presence or absence of substantial and compelling circumstances. I do not think a trial court's finding on this question is a matter with which an appellate court can interfere only if there has been a material misdirection or if the sentence is 'disturbingly' inappropriate or induces a sense of 'shock'. That is the approach when an appellate court considers a sentence imposed in the exercise of the trial court's ordinary sentencing discretion. In terms of s 51 of Act 105 of 1997 certain minimum sentences are prescribed and the court is deprived of its ordinary sentencing discretion unless substantial and compelling circumstances are present. The presence or absence of such circumstances is thus the jurisdictional fact (to borrow an expression from administrative law) on which the presence or absence of the ordinary sentencing discretion depends. A determination that there are or are not substantial and compelling circumstances is not itself a matter of sentencing discretion.

[4] The question whether such circumstances are present or absent involves a value judgment but unless there are clear indications in the Act that this value judgment has been entrusted solely to the discretion of the trial court, an appellate court may form its own view as to whether such circumstances are or are not present. The fact that a judicial power involves a value judgment does not in itself mean that it is a discretionary power in the sense that an appellate court's power to interfere is circumscribed (see *Media Workers Association of South Africa & Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 800C-G). For many years, by way of example, the test for the admission or striking off of attorneys and

advocates was whether the person was a 'fit and proper' person. A finding on this aspect was authoritatively held not to involve a discretion entailing that an appellate court could interfere only if the lower court had exercised the power arbitrarily or on a wrong principle. This remains the position insofar as advocates are concerned but was amended in 1984 insofar as attorneys are concerned expressly to make the latter power a discretionary one.[1]

[5] The test on appeal in regard to a trial court's finding concerning the presence or absence of substantial and compelling circumstances was left open in *S v Malgas* 2001 (2) SA 1222 (SCA) – see at para 33 where Marais JA in a footnote referred to the decision in *S v Homareda* 1999 (2) SACR 319 (W) at 326c-d. In the latter case Cloete J (as he then was), with whom Robinson AJ concurred, said that the decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment but that a court on appeal is entitled to substitute its own judgment on the issue if it is of the view that the lower court erred in its conclusion. I respectfully agree. In paragraph 12 of *Malgas* Marais JA set out the well-known grounds on which an appellate court may interfere with the trial court's exercise of its sentencing discretion. However, Marais JA was not in this part of his judgment describing the approach which an appellate court must adopt in assessing a sentencing court's finding as to the presence or absence of substantial and compelling circumstances. What he was dealing with was an argument that the appropriate test for the sentencing court itself to apply in determining whether or not substantial and compelling circumstances are present is to ask whether the prescribed sentence is one which it would have interfered with if it was hearing an appeal against that sentence. In dealing with this argument Marais JA first described the conventional approach to appeals against sentence as background but then went on to say that this was <u>not</u> an appropriate approach to test for the presence or absence of substantial and compelling circumstances.

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[1] In regard to attorneys, see *Kudo v Cape Law Society* 1977 (4) SA 659 (A) at 675; *Nyembezi v Law Society Natal* 1981 (2) SA 752 (A) at 756B-758C and *Law Society Transvaal v Behrman* 1981 (4) SA 538 (A) at 551D-557A. In regard to advocates, see *Kekana v Society of Advocates of SA* 1998 (4) SA 649 (SCA) at 654C-E. In 1984 the Attorneys Act was amended to convert the test into one for the trial court's discretion (see *Law Society of Cape of Good Hope v C* 1986 (1) SA 616 (A) at 636H-637E). No similar change was made in regard to advocates, hence the decision in *Kekana* (which followed *Nyembezi*).

[6] At a time when the death sentence was still applicable in South Africa the question of extenuating circumstances was regarded as being a matter for the discretion of the trial judge so that a court on appeal could not interfere unless there was a misdirection or irregularity (see, for example, *S v Mkhonza* 1981 (1) SA (A) at 959D-H). However, the legislation was differently formulated; it expressly referred to the 'opinion' of the jury or the trial court as to the existence or absence of extenuating circumstances (see *R v Taylor* 1949 (4) SA 702 (A) for the legislation then in force; and see s 277(2) of the Criminal Procedure Act 51 of 1977 prior to its repeal by s 35 of Act 105 of 1997). This meant that the relevant 'jurisdictional fact' to depart from the imposition of the death penalty was the opinion of the jury or of the court convicting the accused. Section 51(3)(a) of Act 105 of 1997 does not use the word 'opinion' or expressly state that the finding is one in the discretion of the trial court. The phrase 'is satisfied' in s 51(3)(a), while it might in a different setting indicate a discretion, does not necessarily have this meaning. In the legislation dealing with the admission and striking-off of legal practitioners, where the language of 'satisfaction' is also used, it has, as noted earlier, been held that the court of first instance does not exercise a discretion in the true sense.

[7] I am aware that in some decisions subsequent to *Malgas*, including by the Supreme Court of Appeal, one will find statements to the effect that the trial court misdirected itself in a particular respect regarding substantial and compelling circumstances and that the appellate court could thus reconsider the matter. However, those cases did not pertinently address the appropriate appellate test. More recently in *S v Bailey* [2012] ZASCA 154, which my colleague cites in a different context, Bosielo JA said that the approach on appeal to sentences imposed in terms of the Act should be different to the approach to sentences imposed under the ordinary sentencing regime. The proper enquiry, he said, is whether the facts which were considered by the sentencing court are substantial and compelling or not, which involves a value judgment on the part of the sentencing court (paras 20-21). The learned judge of appeal naturally did not mean that on appeal the court may take into account only those circumstances which the trial court took into account. All the circumstances bearing on the question must be examined to see whether, as the sentencing court found, there were or were not (as the case may be) substantial and compelling circumstances. I take this to mean that the appellate

court can form its own view as to the correct answer to that question. In my opinion there is nothing in the Act which fetters an appellate court's power to reconsider the matter of substantial and compelling circumstances. The values of the Constitution are better served by an interpretation which does not fetter the appellate court when it comes to the question of the presence or absence of substantial and compelling circumstances. To allow an appellate court to make its own value judgment on appeal provides accused persons with greater safeguards against the imposition of disproportionate punishment. That this is a legitimate concern in the interpretation of the Act is apparent from the judgment of the Constitutional Court in *S v Dodo* 2001 (3) SA 382 (CC), particularly paras 35-41 (in *Dodo* the Constitutional Court dismissed a challenge to the constitutionality of the minimum sentencing legislation and endorsed the interpretation thereof in *Malgas*).

[8] I pass then to the question whether substantial and compelling circumstances were present in this case. I naturally accept that the rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the lawmaker has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances. However, the decisions of our courts, including the Supreme Court of Appeal, reflect that not infrequently perpetrators of this type of rape are <u>not</u> sentenced to life imprisonment because substantial and compelling circumstances are found to be present. If one examines the minutiae of leading cases it may be difficult to discern why in some of them life sentences were upheld where in others, not apparently less heinous, substantial and compelling circumstances were found to exist. One may need to accept that even on appeal there is a human element which causes some factors to be accorded greater weight by some judges than by others. In *Bailey supra* Bosielo JA stated that findings in prior cases cannot be elevated to the status of binding precedents or benchmarks or be allowed to become a straitjacket (paras 16-19). One must thus distinguish between the legal principles to be deduced from authoritative judgements and the detailed application of those principles to the facts of particular cases. It is the legal principles with which lower courts should mainly concern themselves. The recent decisions in *S v PB* 2011 (1) SACR 448 (SCA) and *Bailey*, both of which my colleague has cited, did not disapprove any statements of principle or approach laid down in earlier decisions of the Supreme Court of Appeal nor suggest that the

approach should, because of a change in the incidence of crime, become more severe.

[9] In terms of *Malgas* the factors which are to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions. If, after considering all the relevant factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence and to impose a lesser sentence. (The statement in *Malgas* that no factors conventionally relevant to sentencing are excluded from consideration must now be qualified because of the insertion into s 51(3) of the Act of para (aA) (this occurred when s 51 was substituted in terms of s 1 of Act 58 of 2007). Paragraph (aA) sets out certain circumstances which, in the case of rape, shall not constitute substantial and compelling circumstances. The exclusionary effect of this paragraph has been held to convey that any such circumstance on its own will not amount to substantial and compelling circumstances but that such factors may be taken into account together with others in reaching a conclusion that there are substantial and compelling circumstances: see *S v Nkawu* 2009 (2) SACR 402 (ECG) para 15. This view was recently approved by the Supreme Court of Appeal in *Mudau v S* [2012] ZASCA 56 para 26.)

[10] In *S v Abrahams* 2002 (1) SACR 116 (SCA) Cameron JA, after observing that the rape in that case was 'not one of the worst cases of rape', said that '[s]ome rapes are worse than others' and that '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 or unjust' (para 29). A similar sentiment was expressed in *S v Mahomotsa* 2002 (2) SACR 435 (SCA) paras 17-19).

[11] This view was further developed by Nugent JA in *S v Vilikazi* 2009 (1) SACR 552 (SCA), where he remarked upon the fact that there was no gradation in the Act from the category of rapes by first offenders which attracted a sentence of 10 years in terms of s 51(2)(b)(i) read with Part 3 of Schedule 2 and those which attracted a life sentence in terms of s51(1) read with Part 1. A single circumstance may shift the offence from the one category to the other (para 13). It is only by approaching sentencing under the Act in accordance with *Malgas* that it is possible to avoid incongruous and disproportionate sentences (para 14). This means that it is the sentencing court's duty to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence (para 15). *Malgas* rejected the view that the prescribed sentence could be departed from only if the circumstances were 'exceptional'. It is wrong, said Nugent JA, for the sentencing court to assume *a priori* that a life sentence is proportionate for a crime falling into a particular category. Indeed, when the matter is correctly approached it might turn out that the prescribed life sentence is seldom imposed in cases that fall into a specified category. If that occurs 'it will be because the prescribed sentence is seldom proportionate to the offence' (paras 16-18). Nugent JA also said that if (as is the case) the presence of only one of the prescribed circumstances may place a rape in Part 1 rather than Part 3 (for example, because the rape victim was 15 rather than 16), the absence of any of the other prescribed circumstances is capable of lessening the culpability of the offender (para 54). This does not mean that life sentences are only to be imposed when all the prescribed aggravating circumstances are present. There comes a point when a life sentence is proportionate to the offence, even though a greater horror can be imagined (para 54).

[12] The most recent relevant decision of the Supreme Court of Appeal is *Mudau v S supra*. In that case Majiedt JA (with whom the other four judges of appeal concurred) reviewed that court's decisions on rape sentencing. Majiedt JA, while recognising that the country was facing a 'crisis of epidemic proportions in respect of rape, particularly of young children' (para 14) and while emphasising that rape is by its nature a 'degrading, humiliating and brutal invasion of a person's most intimate, private space' even when unaccompanied by violent assault (para 17), repeated the injunction contained in earlier case law that one should not approach punishment 'in

a spirit of anger' and that sentencing must be assessed 'dispassionately, objectively and upon a careful consideration of all relevant factors' (para 13). While the public is rightly outraged by the scourge of rape and while there is increasing pressure on the courts to impose harsher sentences, one cannot sentence only to satisfy public demand for revenge – other sentencing objectives, including rehabilitation, cannot be discarded altogether in order to attain a balanced, effective sentence (para 14). The learned judge of appeal approved the recognition in cases such as *Abrahams* and *Vilikazi* that there are categories of severity of rape (para 18).

[13] While I do not think it is helpful for present purposes to analyse the detailed application of general principles to the facts of specific leading cases, I note that in *Mudau* the Supreme Court Of Appeal was called upon to assess the appropriateness of a life sentence imposed on the appellant for the rape of a child. The appellant, who was 47 at the time of sentencing, raped his 13-year old niece. He first penetrated her vagina with two fingers and shortly thereafter penetrated her vagina with his penis in an episode lasting about five minutes. Semen was subsequently found on the child's underwear. He gave her R5,00 to buy her silence. He denied the rape and apparently expressed no remorse. There was the aggravating feature of an abuse of trust in a family setting. As against this, the rape itself occasioned no serious injury to the victim and there was no additional violence. There was no victim impact report so the psychological trauma could not be assessed. Having weighed the mitigating and aggravating features, the court held that the trial court's imposition of a life sentence was 'grossly disproportionate to the offence'. The life sentence was set aside and replaced with one of 15 years' imprisonment.

[14] I thus must not approach the present appeal with a mind that a life sentence is *a priori* a just punishment for the appellant. Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case, bearing in mind however that even discretionary sentences for crimes dealt with in the Act (ie once substantial and

compelling circumstances have been found to be present) can be expected to be more severe than before. In this regard Cameron JA stated in *Abrahams supra* that the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion' (para 25). If the just sentence, approached in this manner, falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas* (para 23), substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be 'disturbingly' inappropriate or 'induce a sense of shock'. In other words, a discrepancy falling short of the latter test (which applies when an appellate court considers whether it may interfere with a trial court's discretionary sentence) may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.

[15] As to the criminal act itself, I think the rape in this matter falls well short of the most serious types of rape for which a life sentence would ordinarily, in the new regime, be a just sentence:

[a] Firstly, it was oral rape. Disgusting and awful as this must have been for the complainant, it was a form of rape which was far less calculated to injure and cause physical pain to a young girl's body than vaginal or anal rape. As a fact there was no evidence that the complainant suffered injuries or significant pain. Her virginity remains intact. (In making this observation I do not suggest that this circumstance on its own could be the basis for finding of substantial and compelling circumstances but it is a factor to be borne in mind when assessing the circumstances of the case as a whole.)

[b] Second, the evidence does not establish that the appellant ejaculated at all, let alone in the complainant's mouth or on her body. Whether or not the appellant intended to reach orgasm was not explored at the trial but in the event the fact that he did not do so at least spared the complainant some of the horrors associated with oral rape. (Although the complainant would probably not have understood concepts such as orgasm and ejaculation, the magistrate asked her through the intermediary

whether there was anything in her mouth apart from the appellant's penis. She said no.)

[c] Third, the duration of the act appears to have been quite brief. The appellant got the complainant to move her head forwards and backwards. The evidence does not establish how many times she did so but she testified that she stopped doing it because she did not like it. As noted, the appellant did not reach orgasm.

[d] Fourth, the rape was not accompanied by extraneous violence.

[e] Fifth, although my colleague says it was 'cynical' for the appellant to have given the complainant R5,00 to buy her silence, he at least did not resort to violence or threats of violence to silence her (cf *Vilikazi* para 55).

[16] Regarding the prelude to the criminal act, my colleague says that the appellant 'lured' the complainant to his home. This would be indicative of significant premeditation and would, I agree, be an aggravating factor. However, I do not think the finding of enticement is factually secure. The appellant asked the complainant to go and buy him cigarettes. She went to his gate and he gave her money. He was a trusted neighbour, and he had made such requests on prior occasions without incident. Although it is possible that the appellant sent her to the shop with the intention of grabbing her once she came back, it seems equally plausible that his decision to seek sexual gratification was a spur-of-the-moment act on her return. Otherwise he might as well have grabbed her at the gate without asking her first to go to the shop (since it was at the gate that he grabbed her on her return).

[17] It may be said that it is for the accused person to show that there are substantial and compelling circumstances and thus (for example) to rebut the inference of premeditation. My colleague discusses the question of onus in a different context (in relation to the presence or absence of long-lasting emotional and psychological damage), suggesting that it might be for the accused person to show that there has been no such harm. In my view it would be incorrect to approach the matter on the basis that the court must impose the prescribed sentence unless the convicted person proves ameliorating circumstances. The

court's duty is to see that justice is done and this means considering the circumstances of the matter to determine whether the imposition of the prescribed sentence would give rise to injustice. The power to depart from the prescribed sentence if substantial and compelling circumstances are present is coupled with a duty to investigate those circumstances. Insofar as the circumstances of the crime itself are relevant to the enquiry (as they undoubtedly are), the State must prove the offence, and the court in sentencing must work with what has been proved. I thus think that it would be wrong to assume that the crime was premeditated unless on the evidence such an inference can be drawn beyond reasonable doubt (which I do not think is the case here).

[18] There is the further circumstance, relevant not only to the question of premeditation but also to the appellant's moral culpability in general, that alcohol may have played some part in the appellant's conduct on the day in question (which was a Saturday). At the commencement of the trial he initially pleaded guilty, adding however that he could not remember what had happened. After a short consultation the plea of guilty was changed to one of not guilty. In his lawyer's cross-examination of the complainant he put to the girl that the appellant said he was drunk and could not remember anything about what she claimed to have happened. She denied he was drunk. However she initially said that she did not know how to tell whether someone was sober or drunk and that she did not know how wine smelt. The appellant's evidence was that he had had a few drinks. He claimed not to be able to remember what happened after the complainant returned with the cigarettes. He said he had once received a blow to the head as a result of which he often forgot things, adding that he did not know whether the alcohol he drank on the day in question had perhaps had an effect so that he could not remember what he had done. He said: 'Ek wil net vir die Hof sê dat ek sal nou nie sê as ek die ding gedoen het, dan stry ek ek het dit nie gedoen nie.'

[19] There was evidence that on the night of Wednesday 5 October 2011, the day on which he was arrested, he made a statement in which he told the policeman he pleaded guilty to everything, adding that he was drunk and had an alcohol problem. The appellant agreed with this when it was put to him in cross-examination. There was also evidence that on the day of his arrest he had been drinking (he described

himself as ‘babelaas’ when he made the police statement). In cross-examination he said that he had told the policeman taking his statement that he was guilty because he wanted to be done with the case and come before court as soon as possible as he could not believe he had done the alleged deed. Later in his cross-examination he said he had never previously had trouble with children. Upon being asked why he then had done to the complainant what was alleged on 1 October 2011 he replied: ‘Dis wat ek ook graag wil opklaar’. The magistrate, in her judgment on conviction, expressed the view that the loss of memory was a ‘suspicious last-minute defence created by the accused in order to exculpate himself’. While the supposed loss of memory has its suspicious features (particularly since the appellant seems to have had a fair recollection of what happened immediately before and after the critical period), it is not entirely fair to accuse him of a ‘last-minute defence’. Already in his statement to the police on 5 October 2011 he referred to the role which alcohol may have played.

[20] Turning to the complainant, my colleague emphasises that she was seven at the time of the rape. He says that given this fact alone it is difficult to imagine a more heinous crime. I disagree. The fact that the victim is under the age of 16 is the circumstance which, in a case such as the present one, places the rape in Part 1 of the Schedule. However, the authorities make clear that within this category of crime there are degrees of severity. The rape of a child is by definition an egregious crime but there are nevertheless often instances where a life sentence will be disproportionate. I find it difficult to discern why, within the range of ages from newborn infant to a child just before her or her his 16th birthday, the age of seven should be singled out. It will depend on all the circumstances of the case. Of course, the younger the victim the greater the chance of serious injury (cf *S v Nkawu* 2009 (2) SACR 402 (ECG) para 10) but the aggravating feature will then be the injury and pain caused to the young child.

[21] My colleague rightly points to the evidence of adverse emotional and psychological effect on the complainant. Some of these adverse effects have to do with the behaviour of others and are not the direct consequence of the appellant’s conduct. I refer here to the fact that the complainant has been the subject of vulgar comments by other children and that certain members of the community who

apparently support the appellant have displayed hostility towards the complainant's family. Such conduct is to be deprecated but there is no evidence that the appellant himself (who was arrested shortly after the incident and has remained in custody) organised a campaign against the complainant's family. On the contrary, the social worker's report records that the appellant's wife was supportive towards the complainant's family. There is, however, evidence of more direct negative effects on the complainant – feelings of fear and shame, changes in mood, becoming withdrawn and less trusting. The complainant received therapy for six months. The social worker who compiled the report said that the complainant might require further therapy. The report reflects, unlike the case of *S v PB supra*, that the complainant has a loving and stable family environment. The social worker was not called to testify so that her report could be interrogated. The impacts described in the report appear to me to be significant without being of an extreme or debilitating kind. The fact that the social worker could not confidently say that future therapy was needed may indicate that the complainant, with the love and support of her family, will make a good recovery from her ordeal. It is also not without significance that the complainant's mother did not herself notice anything amiss with her child after the incident on Saturday 1 October 2011 and only learnt of the alleged sexual assault on Tuesday 4 October 2011 (I think her reference to Thursday 6 October 2011 was an error), after the complainant had spoken of the incident with one of her friends who in turn told the mother.

[22] My colleague quotes in his judgment certain passages from the judgment of Satchwell J in *S v M* 2007 (2) SACR 60 (W) where the learned judge highlights the difficulty in fully ascertaining the after-effects of rape and also queries why a perpetrator should be treated more leniently because the rape victim fortuitously is more resilient than might otherwise have been the case. I acknowledge that the adverse effects of rape may only come to the fore, or become more pronounced, with the passing of time. This is a factor which a court will need to bear in mind in determining whether substantial and compelling circumstances are present. I would not accept, however, that the resilience of the victim has no bearing on the enquiry. The fact that a perpetrator must take his victim as he finds him or her cuts both ways. An assault which a robust victim might survive might lead to the death of a victim with a frailer constitution; in the one case the perpetrator will be convicted and

punished for assault (or assault with intent to cause grievous bodily harm) while in the other case he may be convicted and punished for murder. The leading decisions of the Supreme Court of Appeal on minimum sentencing are replete with examples where the effect of the crime on the victim has been taken into account. In the most recent decision of that court in *Mudau* there was no victim impact report. I am sure that the court was alive to the fact that rape is always likely to be accompanied by some emotional or psychological trauma but the absence of clear evidence of significant trauma of that kind was clearly regarded by the court, in conjunction with other factors, as militating against the imposition of the most severe sentence.

[23] My colleague observes that the appellant expressed no remorse and that this must count against him. I agree. Whether the failure to express remorse is, as my colleague considers, indicative of a lack of insight into his reprehensible conduct is less clear to me. Persons who face serious charges may consider that their best course is to deny the charge, since even a guilty plea will not spare them a heavy sentence. The court naturally cannot condone the putting up of a false version, and the fact that an accused person lies and makes the complainant re-live her experience in court must certainly go into the scales against him. However, once an accused person follows this course he effectively makes it impossible to throw himself on the mercy of the court and to express remorse. In the present case it cannot really be said that the appellant put up a false version in the sense of positively denying what the complainant alleged. His defence was that he could not remember, so in effect he put the State to the proof of its case. Although he did not (in view of his not guilty plea and the nature of his defence) expressly articulate remorse, the general tenor of his evidence reflects in my view a recognition that if he really did what was alleged it would be appalling.

[24] As to the appellant's prior convictions, my colleague places some emphasis on his conviction for attempted rape in 2002 for which he was sentenced to 4 years' imprisonment, apparently in terms of s 276(1)(i).[2] Unfortunately the circumstances relating to the earlier offence were not explored in the court *a quo*. It cannot be

[2] I say apparently, because the SAP 69 form refers to the sentence having been in terms of 'Art 276(I)'. In the court below the magistrate and the legal representatives appear to have assumed that this was a reference to s 276(1)(i).

assumed that the complainant in that case was a child. Given that the conviction was for attempted rape, one can accept that no form of penetration occurred. The sentence was imposed after Act 105 of 1997 came into force. Although attempted rape is not a crime attracting a prescribed sentence, the legislature's attitude to rape can be assumed to have affected the sentence. In those circumstances, and given the relatively light sentence imposed, it is fair to conclude that the act was not particularly heinous. It certainly counts against the appellant but should not in my view be given undue prominence.

[25] The prior conviction for attempted rape is to some extent offset by the fact that the appellant was 56 when he committed the crime in the present case and about 45 when he committed the attempted rape. He had three unrelated convictions dating back to 1975 and 1986 for which he received very light sentences. The present case is thus only his second serious encounter with the law over a 40-year period of adult life.

[26] My colleague considers that the prior conviction, coupled with the appellant's lack of remorse and inferred lack of insight, makes the prospect of his rehabilitation remote. I regard this view as speculative. I have already pointed out that the manner in which the appellant chose to defend himself made it difficult simultaneously to express remorse or to display the insight which he might well have had. I have already suggested that the general tenor of his evidence appears to entail recognition that the alleged act would be utterly unacceptable. I have already said that he seems, in 40 years of adulthood, to have had only two serious brushes with the law, the first one when he was 45 years of age. He was by all accounts a trusted neighbour who had frequent interactions with children over the years. The complainant's mother said that the appellant loved children, he loved buying them sweets, that the family would often sit with him and he would send the children to the shop. Prior to his arrest he had been working as a painter for 20 years, most recently earning R250 per day.

[27] Although there was a victim impact report, there was no pre-sentencing report concerning the appellant's circumstances. Given the heavy sentence which the appellant was likely to face, there would have been considerable merit in

obtaining such a report. The report could have explored the extent of the appellant's abuse of alcohol, the blow to the head which he mentioned in passing, his earlier conviction and other personal circumstances which would have put the trial court in a better position to assess whether substantial and compelling circumstances were present and to determine a just sentence.

[28] In all the circumstances, to write off the appellant as an irredeemable recidivist appears unduly harsh and not factually grounded. There is every reason in this case to bemoan, as Nugent JA did in *Vilikazi*, the superficial manner in which the question of sentencing was investigated in the court *a quo*. The transcript of the appellant's attorney's address to the magistrate on sentence covers only 48 lines of transcript and could not have lasted more than five minutes. The attorney said that it was very hard to contend that substantial and compelling circumstances were present. As I hope will be apparent from my judgment, the gloomy brevity of the attorney's address is hardly justified by the circumstances of the case viewed in the light of leading authorities.

[29] When I weigh all these factors I am convinced that life imprisonment would be unjust and disproportionate to the crime, the offender and the legitimate needs of society. Prior to the coming into force of Act 105 of 1997 on 13 November 1998 and then the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on 16 December 2007, the appellant's crime would have constituted indecent assault and probably been penalised by a few years' imprisonment, in all likelihood less than five years (see the review of indecent assault sentences in *Coetzee v S* 2010 (1) SACR 176 (SCA) paras 18-25 and the sentence imposed in *Coetzee* itself). Having regard to the enactment of the legislation just mentioned and the escalation in this country of sexual crimes against children, sentences would now need to be more severe. Even so, to say that life imprisonment is currently the just sentence for a crime which only a few years ago would have been punished with (say) five years' imprisonment seems to me to be going considerably too far. Just a few years ago a sentence of, say, 18 years' imprisonment in the present case would in all likelihood have been described on appeal as shockingly severe and disturbingly inappropriate. It is a mark of the rapid adjustment which our courts have made to harsher sentencing for crimes covered by Act 105 of 1997 that we can now contemplate

such a sentence as an appropriate 'more lenient' one in place of the prescribed life sentence. However, we should not allow ourselves to be numbed into ignoring the severity of the sentences that are now routinely passed, even those where substantial and compelling circumstances are present. Imprisonment of 18 years is a very harsh punishment. That is the sentence I regard as in principle appropriate but I would deduct one year for the period of about 13 months which the appellant spent in custody awaiting trial, giving a sentence of 17 years' imprisonment antedated to 7 November 2012 (the date on which he was sentenced in the court *a quo*).

[30] It follows that in my view the magistrate erred in finding that there were no substantial and compelling circumstances. Her focus on the scourge of sexual violence towards young children and the community's outrage at such conduct resulted, in my respectful view, in her failing to pass sentence in the dispassionate and objective manner required of our courts and in placing all the emphasis on retribution without properly considering the degrees of severity of rape or the appellant's personal circumstances.

[31] Given the nature of the issues in this appeal, my judgment may appear to focus on the circumstances favourable to the appellant which justify a departure from the prescribed life sentence. I thus wish merely to say once again that the crime was a repugnant one, which is reflected in the harsh sentence of 17 years' imprisonment. While comparisons with sentences imposed in other cases are of limited utility given the infinite variety of the circumstances bearing on an appropriate sentence, I may observe that the sentence I propose in the present case is more severe than the 15 years' imprisonment imposed by the Supreme Court of Appeal in *Mudau*. The rape in that case was, I think, in a more heinous category than in the present case. On the other hand, we are dealing here with a younger child in respect of whom clear evidence of significant psychological trauma was adduced and where the appellant has a prior conviction in respect of a sexual offence.

[32] Towards the end of his judgment my colleague says that he is not prepared to risk allowing the appellant back into a community where he has access to young girls and that central to his oath as a judge and as an upper guardian of children is

to do whatever he can to give content to s 28 of the Constitution. I would respectfully suggest that the judge's oath requires her or him to impose a just sentence, guided by the principles laid down by our courts over the years. It is an unfortunate reality that persons convicted of serious crimes may reoffend upon their release but that has never to my knowledge been viewed as a justification in itself for the imposition of life sentences. A just punishment attempts to reduce the risk of reoffending by bringing home to the convicted person the disadvantages and unpleasantness associated with serving a prison sentence. Prisons run programs aimed at rehabilitation. Parole conditions may provide a further inducement to refrain from crime. The offender comes out of prison older and hopefully a little wiser. But inevitably the risk of reoffending remains. If a judge is required to view her or his duty as being to ensure that persons who might reoffend and thus violate the fundamental rights of others (whether the right to life, physical safety or property) are never released back into the community we shall be sending a great many people to prison for life for all sorts of crimes. The leading judgments of the Supreme Court of Appeal, some of which have been mentioned in this judgment and in the judgment of Matthee AJ, do not suggest to my mind that the judge's oath of office and the court's role as an upper guardian of children requires a judge to impose a life sentence for rape if a risk of reoffending cannot be excluded. (The position would be different where a pre-sentencing report in respect of the convicted person were obtained and the evidence revealed the picture of a sexual predator with no or poor prospects of rehabilitation.)

[33] I would thus make the following order: 'The appeal succeeds. The sentence imposed by the court a quo is set aside and there is substituted therefore a sentence of 17 years' imprisonment antedated to 7 November 2012.'

GAMBLE J:

[34] I concur and it is so ordered.

ROGERS J

APPEARANCES

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