IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR140/14

In the matter between:

BONGINKOSI MTHOMBENI **APPELLANT**

And

THE STATE **RESPONDENT**

J U D G M E N T

STEYN J

[1] The appellant was convicted on 3 July 2013 in the regional court sitting at Dundee on a charge of kidnapping and 5 counts of contravening Section 3 read with Sections 1, 55, 57, 58, 59, 60 and 61 of Act 32 of 2007 – rape (read with Section 51 and Schedule 2 of Act 105 of 1997 in that the complainant was under the age of 16).

[2] On the same date the appellant was sentenced to a term of 5 years' imprisonment for the kidnapping and 20 years' imprisonment for all five counts of rape. He appeals against the sentences imposed, leave was granted by the trial court to appeal against the sentences in terms of Section 309B of the Criminal Procedure Act, 51 of 1977.

[3] Ms Anastasiou who appeared on behalf of the appellant submitted that the learned magistrate was misdirected in applying the prescribed minimum sentence legislation, since the record insufficiently indicated that the appellant was charged with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, hereunder referred to as the CLAA. This submission is based on the fact that each of the rape counts *inter alia* reads as follows:

"The provisions of Section 51 and Schedule 2 of Act 105 of 1997 are applicable in that the complainant is 13 years of age."

Much reliance was placed by her on *S v Ndlovu and Another*[1] and *S v Mashinini and Another.*[2] She also submitted that the said omission by the State deprived the appellant of a fair trial as enunciated in *S v Legoa.*[3]

[4] Ms Naidu, acting on behalf of the respondent, strongly opposed the appeal and argued that the record is clear that the appellant was charged with raping a 13 year old victim and that a careful reading of Section 51 and Schedule 2 of the CLAA clearly shows that Part 1 of Schedule 2 is applicable if the victim is under the age of 16. She concedes that it would have been far more difficult to have advanced this argument had the appellant been charged with murder where the relevant part of the schedule must be specified, since the CLAA distinguishes between various kinds of murders.[4] Accordingly she submitted that the submissions that the learned magistrate had erred and was misdirected on the law, is unsound and not borne out by the record.

[5] The appellant had been charged with rape in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. More importantly the State averred that the provisions of Section 51[5] of Schedule 2 of the CLAA finds application. It is necessary to stipulate the relevant part of Schedule 2 relating to the specific sexual offence to consider the submissions made by Ms Anastasiou. The relevant part of Schedule 2 of the CLAA reads as follows:

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[1] 1999 (2) SACR 645 (W) at 649f-650b.
[2] *S v Mashinini and Another* 2012 (1) SACR 604 (SCA).
[3] 2003 (1) SACR 13 (SCA) para 20-22.
[4] See Schedule 2 Part 1.
[5] Section 51 of the CLAA provides:
(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.

*"**Schedule 2***

PART 1

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) when committed –
- *(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- *(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- *(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
- *(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*

(b) where the victim-
- *(i) is a person under the age of 16 years;*
- *(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or*
- *(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

(c) involving the infliction of grievous bodily harm."

(My emphasis.)

[6] Before dealing with the salient facts relied upon by the learned regional magistrate when he sentenced the appellant, it is necessary to focus on the crime of rape. Despite the fact that the victim was a young male the words of Justice Thomas remain apposite:

> *"Rape is the most vicious and reprehensible crime in the criminal calendar. Every individual possesses a core persona which makes up the essence of their being. It is an intensely personal and private self which necessarily includes the individual's sexuality and anatomy. Victims suffer acute trauma and endure lifelong psychological and emotional scars."*[6]

[6] See Justice EW Thomas in *Was Eve merely named; or was she forsaken*, 1994 New Zeeland LJ 368 at 368.

Rape remains a brutal invasion of privacy.[7] A plethora of material exists on the topic of rape most of it is based on feminist jurisprudence.[8] In my view the trauma of a young man like the victim in this matter is no different to the trauma suffered by women. In fact many theories exist that more courage is required by a male complainant to report an offence of rape since they are supposedly perceived as the stronger gender. Certain scholars have argued that men have long been marginalised in the context of sexual violence, more so since their sexual exploitation had been diminished on the grounds that it had not been recognised as rape.[9] I agree. It should be borne in mind that previously "male rape" has been treated in our law as either sodomy or indecent assault which could have impacted on the lack of research on male rape cases. In 1998 however the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[10] declared the common law offence of sodomy as unconstitutional.

Had the legislature not intervened by creating a gender neutral sexual offence, the victim *in casu* would not have received equal justice, nor would his human dignity have been protected in the same manner as the dignity of women.[11]

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[7] See *S v Chapman* 1997 (2) SACR 3 (SA) at 5a.

[8] See generally Susan Estrich *Real Rape* (1987); C Smart *Feminism and the Power of Law* (1989); Susan Brownmiller *Against Our Will; Men Woman and Rape* (1976); Z Adler *Rape on Trial* (1987); Lisa Frohmann 'Discrediting Victims' Allegations of sexual assault; Prosecutorial Accounts of Case Rejections' (1991) 38 *Social Problems* 213; Pamela L Wood *The Victim In a Forcible Rape Case: A Feminist View* in Leroy G Schultz (ed) *Rape VIctimology* (1975) 194; V Bronstein 'The Cautionary rule: an aged principle in search of contemporary justification' (1992) 8 *SAJHR 558*; P Schwikkard 'Sexual Offences-the questionable cautionary rule' (1993) 110 *SALJ* 46.

[9] See K Phelps and S Kazee *'The Constitutional Court gets anal about rape – gender neutrality and the principle of legality in Masiya v DPP'* SACJ (2007) 341 at 344.

[10] 1998 (2) SACR 556 (CC).

[11] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and another, amici curiae)* 2007 (5) SA 30 (CC) at para 84 Langa CJ in the minority judgment dealt with rape as follows:

> *"Women have always been and remain the primary target of rape. That is not a fact that this Court can or should ignore. Nor can we deny that male domination of women is an underlying cause of rape. But to my mind that does not mean that men must be excluded from the definition. Firstly, as was noted above, this case goes to the very reason for the existence of rape as a crime. To the extent that Nkabinde J*

Ad sentence

[7] In *S v Mtungwa en 'n Ander*[12] the Court held that the appeal court will only interfere with the imposed sentence if that sentence is:

(a) disturbingly inappropriate;
(b) blatantly out of proportion to the magnitude of the offence.
(c) sufficiently disparate;
(d) when the trial court was misdirected in exercising its discretion;
(e) is so otherwise that no reasonable court would have imposed it.

[8] In *S v Sadler*[13] Marais JA writing for the unanimous court emphasised that the circumstances under which an appellate court will interfere with the exercise of the discretion of the trial court in sentencing an appellant are circumscribed:

> *"The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in S v Shapiro.*
>
> *'It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S v Rabie:*
>
> > *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –*
> >
> > *(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court': and*
> > *(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if*

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concludes that the 'object of the criminalisation of [rape] is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group', I part ways. To my mind the criminalisation of rape is about protecting the 'dignity, sexual autonomy and privacy' of all people, irrespective of their sex or gender. When considering the boundaries of the definition of rape, the ICTY held that '(t)he essence of the whole corpus of … human rights law lies in the protection of the human dignity of every person, whatever his or her gender'. I agree."

[12] 1990 (2) SACR 1 (A) at 3f-4b. See also in this regard *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

[13] 2000 (1) SACR 331 (SCA) at para [6] and [8].

the discretion has not been 'judicially and properly exercised',

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".'

The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have impost a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial Court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial Court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised." (Original footnotes omitted.)

[9] The following circumstances were taken into account by the court *a quo* as aggravating in passing sentence:

(a) The victim was a 13 year old boy at the time of the offence.

(b) He was kidnapped from the forest and held captive by the appellant and his companion.

(c) He was raped five times, three times by the appellant and twice by the other accused who is also the appellant's twin brother. They also kissed the victim.

(d) He was assaulted.

From the sentencing judgment it appears that the court duly considered the following in mitigation:

(a) The appellant was 22 years old at the time of the offence.

(b) He was employed doing odd jobs in the area.

(c) He has two children who were at the time of sentencing aged 3 and 5 years but who lived with their mothers. He supported the children until his arrest.

(d) He is a first offender.

(e) He passed grade 10 but did not go on to finish his scholastic career.

[10] In *S v Kolea*[14] much of the conflicting views regarding the reference to specific parts of the CLAA have been put to rest. Mbha AJA, as he then was, dealt decisively with this issue:

> *"In S v Seleke en Andere (referred to by Cameron JA) it was held that although it was desirable for a charge to contain a reference to a penalty, this was not essential, and that the ultimate test was whether the accused had had a fair trial. And the presence of prejudice to the accused will point to an unfair trial. Thus the question that should be posed should be the following: Did the appellant have a fair trial and more specifically, was the appellant sufficiently apprised of the charge he or she was facing and was he or she informed in good time, of any likelihood of his or her being subjected to any enhanced punishment in terms of the applicable legislation. This of necessity, entails a fact based enquiry into the entire proceedings of the trial.*[15] *(Original footnotes omitted.)*

[11] The majority of this court in *S v Langa*[16] followed the approach which accords with the earlier approach of the SCA in *S v Mashinini and Another:*[17]

> *"I am therefore of the view that, for a trial court to apply a sentencing regime of which the accused has not had adequate and timeous knowledge, qualifies par excellence, as a material misdirection. In my view, therefore, the consequence of a trial court applying the provisions of the Act, in a situation where the requisite knowledge was lacking, amounts to a misdirection, warranting the setting-aside of the sentence and fresh adjudication of an appropriate sentence." (My emphasis.)*

[14] 2013 (1) SACR 409 (SCA).
[15] *Ibid* at para 9.
[16] 2010 (2) SACR 289 (KZP) at para [27].
[17] 2013 (1) SACR 604 (SCA).

[12] It is not assumed[18] that the appellant before us was merely informed of the provisions of the CLAA, it is accepted as a fact, given the content of the charge sheet and the record that he was duly appraised of the application of the CLLA, and acted upon such knowledge.

[13] In my view *S v Mabaso*[19] is also distinguishable from *Mashinini supra*. The majority in *Mabaso* was mindful that form must be placed above substance. Koen J on behalf of the majority held:

> *"Form must obviously not be placed above substance. Ultimately, the question is whether the accused had a constitutionally fair trial, which will include the sentencing stage. Whether this right has been infringed will require 'a vigilant examination of the relevant circumstances'. If an accused is not advised adequately in the charge sheet of the intention to apply the Act, then the enquiry becomes one as to whether he was advised otherwise, either by such notification being given by the state when he is required to plead, or possibly the application of the Act being raised mero motu by the presiding magistrate or judge, or knowledge of the application of the Act on the part of an accused being evident from his plea explanation, or some other source. But proper and adequate notification should not be assumed lightly. The constitutional imperative of a fair trial must be shown to exist, not assumed."*[20]

[14] Ms Anastasiou has argued that the appellant was first appraised of the applicability of the CLAA's application at the sentencing stage when the learned magistrate asked the legal representative about the Act. This submission is factually incorrect. The appellant was made aware of the CLAA and its application right at the onset of the trial when the charges were put to him when he pleaded not guilty. Without the necessary knowledge of the averments he would not have been in a position to plead. The age of the young victim was not only stipulated in each of the counts but was repeated when the content of the report in support of the Section 170A application was

[18] *S v Mseleku* 2006 (2) SACR 574 (D) at 581d-e.
[19] 2014 (1) SACR 299 (KZP).
[20] *Ibid* para 74.

read out and handed in as an exhibit in court.[21] The appellant in my view given these circumstances was duly informed.

Fair Trial

[15] Substantive fairness has always been granted to any person accused of committing a criminal offence in terms of our criminal law.[22] As much as fairness of the trial was recognised in the past, it is now guaranteed in terms of the final Constitution.[23] The fair trial rights of an accused person are enumerated in section 35(3) of the Constitution. The appellant was aware at the onset of the trial that the CLAA finds application and at no time was he deprived of a fair trial, nor was he prejudiced. Whilst it is prudent and preferable that reference be made to a specific part of the Schedule of the CLAA, the omission does not *per se* in every case result in an irregularity that would vitiate the proceedings. As stated by the learned scholar on sentencing *S Terblanche*[24] it is not an absolute requirement that every specific part of the CLAA be stipulated, as long as it is clear that the offence falls under the descriptions contained in Schedule 2.

[16] In my view the charge sheet was clear in that the CLAA would find application since it stipulated that the complainant was younger than 16 years. From the charge as put there should have been no doubt that the appellant's conduct falls squarely within the ambit of Part 1 of Schedule 2 of the CLAA. Having considered the principles as spelled out in *Kolea (supra)* and taking into account the information supplied to the appellant when he pleaded, the appellant could have been in no doubt that his alleged conduct attracted the prescribed sentence as provided for in Part 1 of Schedule 2 of the CLAA. The appellant was legally represented, which is another factor that this court takes

[21] See page 24 of the record.
[22] See *S v Langa (supra)* at 296e-f and *S v Thobejane* 1995 (1) SACR (T).
[23] See the Constitution of the Republic of South Africa, 1996, more specifically section 35(3) of the Constituion.
[24] See "*Aspects of minimum sentence legislation. Judicial Comment of the Courts jurisdiction* (2001) 14 SACJ 1 at 18.

into account in determining whether he received a fair trial. *Ex facie* the record the representative was competent and acted in the interest of the defence's case.

[17] The court *a quo* after a careful consideration of all the facts and circumstances found that the appellant's youth and that he was a first offender, cumulatively constituted substantial and compelling circumstances. It held:

> *"I am not entirely convinced that there are substantial and compelling circumstances justifying a lesser sentence. If one considers the extreme abuse that the complainant was subjected to. The only aspect that I find relevant is that you are both quite young still and first offenders. Perhaps this is an appropriate situation where another sentence may be justified or where suitable punishment would be a sentence that is less than the prescribed sentence."*[25]

[18] It has to be said that the judgment on sentence does not expressly reveal that the learned magistrate in express terms found the existence of substantial and compelling circumstances. However a fair reading, in my view, shows that the learned magistrate applied his mind to the question and was satisfied that substantial and compelling circumstances existed that justified the imposition of a lesser sentence.

[19] I shall now deal with the appropriateness of the sentences imposed. The offences committed by the appellant were appalling and the young victim will carry the psychological scars long after the appellant has served his sentence. The serious and heinous nature of rape can never be overemphasised. The appellant's moral blameworthiness is of a severe nature and the record not only shows the psychological impact of the acts on the appellant but also the impact it had on his father who, in the early hours of the morning, had to search through the forest with hunting dogs for his son.

[25] See record page 154.

The father was the first to meet up with his son who was at that time severely traumatised and who immediately reported the crimes to his parent. The father called the police to render the necessary assistance to his son. What is most disturbing is the fact that the appellant not only impaired the dignity of this young victim, he also impaired his dignity by giving him R27 (twenty seven rand) after he had raped him. In my view the sentences imposed are not only proportional but just, given all the circumstances.

[20] I am not persuaded that the court *a quo* was misdirected in imposing the sentences it did. In fact the appellant was very fortunate, given the said circumstances, to have received the sentences he did. The fact that this court may have imposed different sentences does not justify interference by this court since none of the requirements stipulated in *Ntungwa supra* find application.

[21] I therefore propose the following order:

The appeal is dismissed.

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STEYN J

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D PILLAY J : I agree

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STEYN J : It is so ordered.

Appeal heard on :	4 November 2014
Counsel for the appellant :	Ms Z Anastasiou
Instructed by :	Pietermaritzburg Justice Centre
Counsel for the respondent :	Ms C Naidu
Instructed by :	Deputy Director of Public Prosecutions
Judgment handed down on :	18 November 2014