



**REPORTABLE**

**IN THE NORTH WEST HIGH COURT  
(MAFIKENG)**

**CASE NO.: CAF13/11**

In the matter between:

**MATSHENG JACOB CHAKE**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

**CRIMINAL APPEAL**

**LEEuw JP AND LANDMAN J**

---

**JUDGMENT**

---

**LANDMAN J:**

## **Introduction**

[1] The appellant was sentenced to life imprisonment after being convicted by Regional Magistrate Du Toit at Taung on 2 (two) counts of rape of two minor children, both aged 12 (twelve) years.

[2] The appellant only appeals against the sentences.

## **Condonation**

[3] The appellant's application was struck from the roll on 2 December 2011 by this Court, as he had failed to file an application for condonation for the late filing of his notice of appeal. Condonation was thereafter sought and granted.

## **Leave to appeal**

[4] Mr Skibi, very properly, brought the decision of **S v Alam** 2011 (2) SACR 553 (WCC) to our attention. That court held that section 99(1) of the Child Justice Act 75 of 2008, which came into operation on 1 April 2010, amended section 309B of the Criminal Procedure Act 51 of 1977 (the CPA) so that an adult accused, sentenced to life imprisonment by a Regional Court after 1 April 2010, must apply for and be granted leave to appeal or must successfully petition the Judge President for leave to appeal, before a High Court may hear an appeal.

[5] Mr Skibi submitted that this court is not bound by the decision of the Western Cape High Court. He contended that, that Court had incorrectly interpreted section 99(1) of the Child Justice Act as read with section 84 of the CPA.

[6] The following passage (paras 3 to 9), although slightly long, sets out the history of the amendments to section 309B of the CPA and the reasoning of the Western Cape Court:

“[3] . . . . . The Criminal Law (Sentencing) Amendment Act 38 of 2007, came into effect on 31 December 2007 and which, inter alia, amended the provisions of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA). This amendment introduced an automatic right of appeal against both conviction and sentence for persons sentenced to life imprisonment by a regional court under s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act).

[4] The relevant portion of the amended s 309(1)(a) of the CPA read as follows:

‘(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: *Provided that* –

(i) if that person was, at the time of the commission of the offence –

(aa) below the age of 16 years; or

(bb) at least 16 years of age but below the age of 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and

(cc) sentence to any form of imprisonment as contemplated in section 276(1) that was not wholly suspended; or

(ii) *if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997),*

*he or she may note such an appeal without having to apply for leave in terms of section 309B.’* [Own emphasis]

[5] On 1 April 2010, s 309(1)(a) of the CPA was again amended by s 99(1) of the Child Justice Act 75 of 2008 (the Child Justice Act). The relevant portion of the further amended s 309(1)(a) reads as follows:

*‘Subject to section 84 of the Child Justice Act, 2008 any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction.’* [Own emphasis]

[6] Section 309B(1)(a) of the CPA reads as follows:

‘Subject to section 84 of the Child Justice Act, 2008, any accused, who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.’ [My emphasis]

[7] Accordingly, since the amendment of 1 April 2010, all persons – other than those who fall under s 84 of the Child Justice Act – who wish to note an appeal against any conviction or against any resultant sentence or order of a lower court, have no option but to apply to that lower court for leave to appeal against that conviction, sentence or order.

[8] The relevant provisions of s 84 of the Child Justice Act read as follows:

**’84. Appeals**

(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: *Provided that if that child was, at the time of the commission of the alleged offence –*

- (a) under the age of 16 years; or
- (b) 16 years or older but the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,

*He or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court.*’ [Own emphasis]

[9] The effect of the amendment of 1 April 2010 to s 309(1)(a) of the CPA is thus that persons sentenced to life imprisonment by a regional court no longer have an automatic right of appeal unless, at the time of commission of the alleged offence, such person was (a) under the age of 16 years; or (b) 16 years or older but under the age of 18 years and sentenced to any form of imprisonment that was not wholly suspended.”

A Kruger **Hiemstra’s Criminal Procedure** loose leaf pages 30 – 64 (issue 4) is to the same effect.

[7] The decision is obiter because the appeal before the Court did not necessitate a decision on the issue. The appellant in that case did not require leave to appeal regardless of the effect of section 99(1) of the CJA. But in the appeal before this court, the Regional Court was not requested to grant leave to appeal and therefore the appellant appeals without leave. If the reasoning in **S v**

**Alam** is correct, and as the appellant did not apply for leave we are precluded from hearing the appeal.

[8] Mr Skibi submits that section 309B of the CPA has not been amended and that as the Regional Court imposed life sentence the appellant falls squarely within section 309B.

[9] I am of the view that Mr Skibi's submission are correct and that the reasoning in **S v Alam** is incorrect. The unusual framework and structure of the CJA has led the Court in **Alam** astray.

[10] The flaw in the reasoning in the **Alam** judgment lies in its basic premise that the CJA amended section 309B of the CPA, in so far as persons who do not fall within the ambit of the CJA, is concerned. When the CPA is viewed for child offenders certain sections of the CPA appear amended by the CJA. When viewed as regards adult offenders the CPA remains as it is; unaltered by the CJA. Both realities exist contemporaneously but for different viewers.

[11] Section 3 of the CJA sets out five objects of the CJA. The golden thread running through them is that children are to be protected and to be prevented from exposure to the adverse effects of the formal criminal justice system (more accurately the correctional system).

[12] The CJA provides in section 99(1) for the repeal or amendment of the laws specified in Schedule 4 of the CJA. Section 99(1) reads:

“(1) The laws specified in Schedule 4 are hereby repealed or amended to the extent set out in the third column of that Schedule.”

One of the laws is the CPA and one of the sections in the CPA which it “amends” is section 309B by also permitting, in circumstances, a right of appeal for a child offender without the necessity to obtain leave to appeal.

[13] The CJA, in terms of section (4) applies basically to child offenders. Section 4 (1), (2) and (3) reads:

**“4. Application of Act.** – (1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and –

- (a) was under the age of 10 years at the time of the commission of the alleged offence; or
- (b) was 10 years or older but under the age of 18 years when he or she was –
  - (i) handed a written notice in terms of section 18 or 22;
  - (ii) served with a summons in terms of section 19; or
  - (iii) arrested in terms of section,
 for that offence.

(2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 91(4) (a)(i)(aa), in the case of a person who –

- (a) is alleged to have committed an offence when he or she was under the age of 18 years; and
  - (b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),
- direct that the matter be dealt with in terms of section 5 (2) to (4).

(3) (a) The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except in so far as this Act provides for amended, additional or different provisions or procedures in respect of that person.”

[14] The CJA does not apply to anyone else. All the sections of the CJA are governed by the ambit of the Act as provided for in section 4. In the absence of a provision to the contrary, the CJA including section 99, has no application as regards adult offenders.

[16] In the result I am of the opinion that an adult offender, who is convicted by a Regional Court and sentenced to life imprisonment, has a right of appeal and does not require the leave of that Court to do so. The appeal is properly before this Court and I turn to deal with it.

### **Appeal against sentence**

[17] Mr Skibi submitted that:

- (a) The magistrate did not consider the impact or effect the rape had on the victims. No evidence was presented by the State about the effect the rape had on the complainants. The medical reports of each complainant find that the complainants' respective injuries had to their private parts had healed but left scars.
- (b) The magistrate erred by over-emphasising the seriousness of the offence at the expense of the personal circumstances of the appellant.
- (c) The magistrate erred and misdirected himself in holding that because prescribed sentences of life imprisonment for this type of offence can be imposed on a first offender and therefore, the fact that the appellant is a first offender, cannot be a compelling fact.
- (d) In the circumstances the magistrate failed to exercise his discretion properly by finding that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence.

[18] Counsel for the respondent submitted that:

- (a) The magistrate considered the personal circumstances of the appellant carefully before imposing a sentence. It is therefore incorrect to say that the magistrate incorrectly over-emphasised the seriousness of the offence

over the personal circumstances of the appellant. The seriousness of this offence and the interest of society outweigh the personal circumstances of the appellant.

- (b) The submissions by Adv Skibi that the children were not harmed or threatened are strictly speaking not mitigating factors.
- (c) The appellant instilled fear into the complainants by promising them that should they scream he will “kill them” and further that should they tell anyone he will “kill them”. The first complainant (Kutlwano) was petrified and too scared to report the incident at all. The second complainant (Thsepiso) reported the incident after about a week to a child neighbour. The report of healed injuries in the medical examination reports cannot be used as a mitigating factor.

## **Evaluation**

[19] It is common cause that the appellant was convicted of two counts of rape which carry a prescribed minimum sentence of life imprisonment unless the court finds the existence of substantial and compelling circumstances which justify a lesser sentence. See section 51(1) read with section 51(3) of Act 105 of 1997 (the Act) as amended. The issue to be determined is whether the presiding Regional Magistrate erred in finding that there were no substantial and compelling circumstances which justify a deviation from the imposition of the prescribed minimum sentence. The following are the considerations which must be taken into account to determine this question.



**(a) The crime**

- (i) The appellant raped two little girls, one after the other. The appellant knew what he was doing. He subjected his victims to humiliation and the brutal invasion of their privacy and bodily integrity.
- (ii) The sequence of the events shows that the rape was pre-meditated. The appellant planned this offence by luring the complainants to his home for the purpose of raping them. The appellant had on about four occasions called the complainant (Kutlwano) to his house to collect money. In doing so, he intended to and did gain her trust. The appellant carefully planned the offence and attempted to protect himself by informing Kutlwano that she should not tell anyone that he is giving her money. The result is that on the day of the offence, the complainants went to his house fully trusting that nothing on toward would happen. He then abused this relationship of trust and raped the complainants. This is an aggravating circumstance.
- (iii) No evidence of a permanent psychological effect of the rape on the complainants as a result of the rape was tendered. But no evidence is needed to prove that the rapes will remain in the minds of the complainants for the rest of their lives. The psychological effect of the rapes may manifest themselves years later.

**(b) The personal circumstances of the appellant**

- (i) The appellant is an adult. He was 46 years of age on the date of sentence; 44 years old at the time of the commission of the offence.
- (ii) At the time of his arrest he was doing odd jobs, fencing and earning R600.00 per yard.

- (iii) He has three children ages 24, 20 and 15 years old respectively.
- (iv) He spent almost 21 months awaiting trial in prison.
- (v) He is a first offender.

**(c) Society**

- (i) In the case of serious crimes, society's sense of outrage and the need to deter the offender and other potential offenders must weigh with the court.
- (ii) Rape is a humiliating, degrading, brutal invasion of privacy and dignity of a person. Society deplores rape especially that of small children like the complainants.
- (iii) Society looks to the courts to punish offenders and so protect innocent children.

[20] The fact that the appellant is a first offender is a significant factor. But this is outweighed by the aggravating factors which include the age of the complaints, the rape of one after the other and the care preparation and planning of the rapes.

[21] I am of the view that the learned Regional Court Magistrate did not misdirect himself and that he was entitled to find that there were no compelling and substantial circumstances present. The sentence is appropriate and does not engender a sense of shock.

[22] In the result I am of the view that the appeal must be dismissed.

[23] I make the following order:

The appeal against conviction and sentence is dismissed.

A A LANDMAN

JUDGE OF THE HIGH COURT

I concur

M M LEEUW

JUDGE PRESIDENT

**APPEARANCES:**

DATE OF HEARING : 18 May 2012

DATE OF JUDGMENT : 04 JUNE 2012

COUNSEL FOR APPELLANT : ADV N L SKIBI

COUNSEL FOR RESPONDENT : ADV VAN NIEKERK

ATTORNEYS FOR APPELLANT : MAFIKENG JUSTICE CENTRE

ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS