REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE SACR
Case number: **180/2000**

In the matter between:

WILLIAM MPUMELO M FATYI Appellant

and

THE STATE Respondent

CORAM: **NIENABER JA, MELUNSKY and BRAND AJJA**

HEARD: **27 FEBRUARY 2001**

DELIVERED: **26 MARCH 2001**

SUMMARY **CRIMINAL APPEAL - INDECENT ASSAULT - WHETHER SUBSTANTIAL AND COMPELLING CIRCUMSTANCES PRESENT**

JUDGMENT

MELUNSKY AJA:

[1] The appellant, a first offender, was convicted by Schoeman AJ and assessors

in the Eastern Cape Division of the High Court of indecently assaulting the complainant, a six year old girl. In terms of s 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997, read with Part III of Schedule 2, a High Court is obliged to sentence a first offender to imprisonment for a period of not less than ten years if the accused is convicted, *inter alia*, of indecent assault on a child under the age of 16 years, "involving the infliction of bodily harm". A lesser sentence may be imposed only if "substantial and compelling circumstances" exist which justify the imposition of such a sentence. (Section 51(3)(a)). The trial judge, being of the view that no such circumstances existed, imposed a sentence of ten years imprisonment. She refused leave to appeal against both conviction and sentence but on petition to the Chief Justice the appellant was granted leave to appeal against the sentence, "more particularly in respect of the interpretation of 'substantial and compelling circumstances' and the finding that no such circumstances exist."

[2] The facts relating to the conviction can be stated briefly. The complainant lived with her grandmother in Grahamstown and attended a pre-primary school in that city. The appellant, a 51 year old taxi driver, was engaged to collect children from various schools and transport them to an after-care centre, where they remained until they were fetched by parents or minders later in the day. On 24 November 1998 the appellant collected the complainant at her school shortly after 12 noon. She was alone with him in his motor vehicle. He took her to a wooded area where, according to the finding of the trial court, he indecently assaulted her. He then took her to the after-care centre from which she was collected by her grandmother later that afternoon. An examination by the district surgeon at about midnight revealed the following injuries to the complainant's genitalia: bruising of the labia minora, the vestibule and vagina and tearing of the hymen and the fourchette with mild haemorrhaging. The trial court found that the complainant's allegations of rape (which she made in evidence) had not been established and

convicted the appellant of indecent assault on the assumption that his fingers, and not his penis, had penetrated the vagina.

[3] Counsel for the appellant submitted that the injuries suffered by the complainant were of a minor nature. I did not understand him to argue, however, that the complainant did not sustain bodily harm. Nor could such an argument prevail. Indecent assault, as Milton points out in "South African Criminal Law and Procedure", Vol II 3rd ed at 467, is:

> "a generic crime comprehending most forms of unlawful sexual encounters other than rape".

The legislature was obviously aware of the fact that the crime could be committed without force or the infliction of bodily harm to the victim (cf *R v M* 1961 (2) SA 60 (O) at 63 C-D). Although the expression "bodily harm" is not defined in the Act it obviously relates to physical injury as distinct from purely psychological or emotional injury. Secondly the phrase covers every kind of physical injury, however trivial it might appear. This much is obvious from the addition of the word "grievous" in the expression "grievous bodily harm" in Part I and elsewhere in Part III of the Schedule.

[4] The approach of a sentencing tribunal to the imposition of minimum sentences for the offences referred to in Schedule 2 of the Act has recently received the attention of this Court in *Malgas v The State* (case no 117/2000 delivered on 19 March 2001). In a detailed judgment Marais JA considered the criteria that should be taken into account - as well as those that should be ignored - in deciding whether substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum prescribed by s51. It would be superfluous for me to do any more than to set out the main principles appearing in that judgment which are of particular application to the present appeal.

[5] The first is that a court has the duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders (para 9). It follows, too, that for the circumstances to qualify as substantial and compelling they need not be exceptional in the sense of seldom encountered or rare (para 10), nor are they limited to those which diminish the

moral guilt of the offender (para 24). Generally, however, the legislature aimed at ensuring a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response. In other words the prescribed sentences were to be regarded as generally appropriate for the crimes specified and should not be departed from without weighty justification for doing so (paras 8 and 18). Where the court is convinced, on a consideration of all the circumstances, that an injustice will be done if the minimum sentence is imposed, it is entitled to characterise the circumstances as substantial and compelling (para 22).

[6] In applying the aforementioned factors to the circumstances of the case, it is in the appellant's favour that at the age of 51 he has a clean record. He had a stable employment record until an asthmatic condition led him to resign and to start his own taxi business. He is married with children and supports an extended family. He requires constant medication for his asthmatic condition which was classified by his doctor as moderate to severe. Apart from relying on the aforementioned factors, counsel for the appellant correctly pointed out that the trial judge erred in holding that the injuries sustained by the complainant were "the same as one would expect if she [had been] raped", a finding not supported by the evidence. I add that she also erred in holding that the age of the appellant was irrelevant for the purposes of determining whether substantial and compelling circumstances were present.

[7] Despite the trial judge's misdirections, the question that remains is whether the prescribed minimum sentence is an appropriate one. There is no doubt that the appellant's conduct was appalling. For his own sexual gratification he took advantage of a little girl who had been entrusted to his care. Moreover the assault was directed at the complainant's genitals and involved sufficient force to cause injuries which, though not severe, were also not trivial. His actions caused the complainant psychological and emotional trauma which, it is to be hoped, will not be permanent. When these facts are weighed against the appellant's personal circumstances, I am not satisfied that there is any justification for departing from the minimum sentence prescribed by statute. Nor, in my view, are the circumstances such that injustice will result if the minimum sentence is imposed. On the contrary, and if regard is had to the tender age of the complainant, the nature of the assault and the fact that the appellant was in a position of trust, there is no warrant for imposing a sentence other than the statutory minimum. It follows that the trial court was correct in holding that there were no substantial and compelling circumstances which would justify the imposition of a lesser sentence.

[8] The appeal is therefore dismissed.

L S MELUNSKY AJA

CONCUR:

NIENABER JA)

BRAND AJA)