THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO 160/2000

Reportable

In the matter between

NHLANHLA NKOMO **Appellant**

and

THE STATE **Respondent**

Coram**:** **CAMERON, LEWIS JJA THERON AJA**

Heard: 21 NOVEMBER 2006

Delivered: 01 DECEMBER 2006

Summary: Sentence of life imprisonment imposed for multiple rape of complainant: court using wrong test to determine whether substantial and compelling circumstances were present: sentence set aside and one of 16 years' imprisonment imposed.

Neutral citation: This case may be cited as Nkomo v The State [2006] SCA 167 RSA

JUDGMENT

LEWIS JA

[1] The appellant was convicted of rape and kidnapping by a regional court in August 1998. The regional court sentenced him to imprisonment for three years for kidnapping but referred the sentence for rape to the Durban High Court in terms of s 52 of the Criminal Law Amendment Act 105 of 1997. That court (per Levinsohn J) sentenced the appellant to life imprisonment in terms of s 51(1) of the Act. The regional court had found that the appellant had raped the complainant five times during the course of a night. Rape, when committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice', attracts a minimum sentence of life imprisonment[1] unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.[2]

[2] The appeal is against the sentence of life imprisonment alone, with the leave of the court below. That court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment. It is significant, however, that the sentence was imposed in 1999 before this court in *S v Malgas*[3] determined the approach to be adopted in finding whether substantial and compelling circumstances exist.

[3] The court below relied heavily on earlier authority which suggested that factors regarded as mitigating prior to the enactment of the Act did not in themselves warrant the imposition of a sentence less severe than that prescribed by the Act. In *Malgas*, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional.

[4] The court below did not consider the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances. In that respect it erred. This court is thus free to impose the sentence it considers

[1] Section 51(1) read with Part 1 of Schedule 2 of the Act.

[2] Section 51((a).

[3] 2001 (1) SACR 469 (SCA), approved in *S v Dodo* 2001 (1) SACR 594; 2001 (3) SA 382 (CC).

appropriate subject to the provisions of the Act, and in the light of the existing post-*Malgas* jurisprudence of this court.

[5] Since the appeal is against the sentence alone, it is not necessary to deal in any detail with the evidence that led to the conviction. However, some background is necessary. The complainant's testimony, accepted by the regional court, was that in the late afternoon before the rapes were committed she went to a hotel bar in Isipingo in order to find a woman to whom she had lent clothing but who had not returned it to her. She found the woman who had suggested that she wait in the bar with the appellant, whom she had not previously met, for her return. She sat with the appellant who was drinking beer. She drank nothing other than a cold drink but it had tasted peculiar, suggesting, albeit implicitly, that it had been laced with alcohol. After a while, when the woman had not returned, she decided to leave. But when she attempted to do so the appellant forced her to go upstairs with him. He hired a room, forced her into it, forced her to undress and had sexual intercourse with her against her will.

[6] The appellant then decided to go back to the bar, and locked her in the room, hence the kidnapping conviction. She escaped from the room by jumping out of a window, and falling, some ten metres to the ground, on her leg, which she injured in the process. The doctor who examined her after she reported being raped noted in the J88 form that her left ankle was injured and swollen. He noted also that she had an arthritic condition. When the complainant testified she said that as a result of her fall she had injured her hip (it had been dislocated, she said) which was still painful, and that she required a crutch to walk. It is not clear whether her hip was painful because of her arthritic condition, because of the injury or because the injury exacerbated her condition. But her evidence that it was the result of the injury was not challenged by the appellant. Nor was the J88 report of the doctor contested. He had recorded bruising of the labia minora and majora and a torn hymen. The State argues that this suggests that force had been used. However, the doctor's oral evidence related only to the bruising and no inference can thus be drawn from the J88.

[7] Unfortunately when the complainant attempted to escape by jumping out of the window of the hotel room she fell where the appellant had been sitting and drinking. He forced her back upstairs into the room, and raped her four more times during the course of the night. He also forced her to perform oral sex on him and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away.

[8] When, the following morning, the complainant managed to escape, she went straight to a police station to report the multiple rapes and kidnapping. Her evidence was corroborated to a large extent by police officers. They confirmed that when she approached them her clothing was dishevelled, and she was very distraught. They returned with her to the hotel room where they found the appellant.

[9] The appellant's version, rejected by the regional court, was that she

consented to having sex with him, and jumped out the window because she was drunk. He had attempted to stop here from injuring herself, but she had slipped.

[10] What, then, are the substantial and compelling circumstances that warrant the imposition of a sentence less than life imprisonment? The appellant argues that his youth (he was 29 when he raped the complainant) and his clean record should count in his favour. So too should the facts that he was employed, and has three dependent children, be regarded as mitigating factors. Moreover, he argues, the complainant was not seriously injured. He also contends that, because after the charge against him was laid, the complainant had considered withdrawing the charge if she were paid compensation, she suffered no serious distress.

[11] The complainant had indeed considered withdrawing the charge and had discussed the question of compensation with the appellant and his family. But that, she said, was because pressure was put on her by the appellant's family. In my view the fact that the complainant had discussed the question of compensation with the appellant is a neutral factor. It does not in itself show that she had not suffered emotional distress.

[12] There are, however, a number of aggravating factors that must be taken into account in determining the appropriate sentence for the appellant. He not only raped her more than once, but five times during the course of the night. He held her captive in a room while he demeaned and hurt her, forcing himself on her repeatedly through the night, even after she had seriously hurt herself when jumping out of the window, and was in pain. And he showed no remorse, claiming throughout the proceedings that the complainant had lied about being raped and about the events that had happened in the bar. At the same time he was prepared to pay her in order to persuade her to withdraw the charge of rape. The complainant had in fact not appeared when the trial was due to commence, because she claimed she was threatened, and had even stayed at the appellant's home town over that period. Eventually she was persuaded to proceed with the charge by a senior prosecutor.

[13] The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however.

[14] Nonetheless these are substantial and compelling circumstances which the sentencing court did not take into account. A sentence of life imprisonment – the gravest of sentences that can be passed, even for the crime of murder – is in the circumstances unjust and this court is entitled to interfere and to impose a different sentence, one that it considers appropriate.

[15] In *S v Mahomotsa*[4] this court pointed out that even in the case of a serious and multiple rape a sentence of life imprisonment need not necessarily be imposed. If there are compelling and substantial circumstances

[4] 2002 (2) SACR 435 (SCA).

the appropriate sentence is within the court's discretion. Mpati JA said:[5]

'The present being a case where the complainants were each raped more than once, the prescribed period of imprisonment for life is the sentence which should *ordinarily* be imposed. It should not be departed from lightly and for flimsy reasons which cannot withstand scrutiny (*S v Malgas* . . .; *S v Dodo* . . .). However, in considering the question, a Court is not prohibited by the Act from weighing all the usual considerations traditionally relevant to sentence.

. . . .

The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer - she interviewed both complainants - they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.

It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. *Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams 2002 (1) SACR 116 (SCA), 'some rapes are worse than others and 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 and unjust' (para [29]).* (My emphasis.)

Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand

[5] Paras 14, 17, 18 and 19. See also *Rammoko v DPP* 2003 (1) SACR 200 (SCA).

should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.'

[17] In *Mahomotsa*, where the State had appealed against the sentences imposed in respect of the multiple rapes of two complainants (and where the respondent had raped the second complainant while awaiting trial on the first charge) this court imposed a sentence of eight years' imprisonment on the first charge and twelve years' imprisonment on the second. It regarded the trial court's sentences in respect of both counts (six and ten years' imprisonment respectively, but to run concurrently) as 'collectively woefully inadequate'.[6]

[18] In *S v Sikhipha*[7] this court, setting aside a sentence of life imprisonment where the appellant had raped a 13 year old girl, regarded as substantial and compelling circumstances the facts that the appellant was regarded as capable of rehabilitation and that the complainant was not seriously injured. The court imposed a sentence of 20 years' imprisonment because of the age of the complainant.

[19] On the other hand, as I have said, in Ma*homotsa* sentences of eight years on the first conviction, and twelve on the second, were considered just. Counsel for the appellant argued that the case before us and that in *Mahomotsa* are not dissimilar. The appellant in *Mahomotsa* had also kept his victims captive, and he had raped each of them repeatedly. He had also threatened them with weapons, in the first case a firearm and in the second a knife. Neither had been seriously injured, however. The appellant did have a previous conviction for rape.

[20] It is trite, however, that each case must be considered having regard to its particular facts. In this case the appellant did not use any weapon although he did assault the complainant. And he did not seriously injure her, though he callously and cruelly disregarded her injury caused when she tried to escape from the hotel room. While the complainants in *Mahomotsa* were raped in very similar circumstances to the complainant in this case, I consider that a number of aggravating factors distinguish the appellant's position from that in *Mahomotsa.*

[21] I have already referred to these. I emphasise, in particular, the brutality with which the appellant treated the complainant, raping her four times after she had been injured when trying to escape from him; that he forced her to perform oral sex on him, assaulting her when initially she refused; that he

[6] Para 26.
[7] 2006 (2) SACR 439 (SCA).

showed absolutely no remorse; and that he was in a comparatively better position than her, with education and a permanent job. He should have known better. He behaved, in the words of Mpati JA in *Mahomotsa*, like a 'sexual thug'.[8] These circumstances warrant a heavier sentence than those imposed in *Mahomotsa*;

[22] That said, I do not believe that his crime should attract the heaviest sentence permitted by our law, life imprisonment. I recognize that it may be difficult to imagine a rape under much worse conditions. But it is possible, and I consider that the prospect of rehabilitation and the fact that the appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence. What must be borne in mind as well, is the statement of this court in *S v Abrahams* (cited in the passage from *Mahomotsa* above*)* that life imprisonment as a sentence for rape should be imposed only where the case is 'devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'.

[23] In all the circumstances, I consider that a sentence of 16 years' imprisonment serves the purposes of punishment, deterrence and the protection of the interests of society.

[24] The appeal is upheld. The sentence imposed by the court below is set aside and replaced with the following:

'The accused is sentenced to 16 years' imprisonment.'

C H Lewis

Judge of Appeal

Concur: Cameron JA

[8] Above, para 16.

THERON AJ (DISSENTING)

[25] I have read the judgment of Lewis JA. I do not agree with the conclusion that there are substantial and compelling circumstances in this matter and that we should interfere with the sentence imposed by the court below.

[26] The approach to an inquiry such as this is by now well settled. A court has a discretion to depart from the prescribed sentence where there are substantial and compelling circumstances which compel the conclusion that the imposition of the minimum sentence would be unfair or unjust. Such departure from the prescribed sentence should not made 'lightly and for flimsy reasons'.[9] Marais JA in *S v Malgas* cautioned:
'Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances'.[10]
Given the facts here present, the prescribed sentence of life imprisonment is the sentence which should *ordinarily* be imposed.

[27] The background facts underlying the conviction have been adequately dealt with in the judgment of Lewis JA and I do not intend to repeat them. I do, however, intend to highlight certain aspects thereof; aspects which emphasise the brutality of this rape and the indignity and humiliation to which the complainant was subjected. The fact that the complainant jumped from the second floor, despite the possible threat of physical injury or worse to herself, is indicative of the desperation that she felt and the lengths to which she was prepared to go to escape from the clutches of the appellant. The complainant was deprived of her liberty for the entire night, during which she was forced to remain naked, her clothes having been hidden by the appellant. During the course of the night she was subjected to a physical assault to overcome her resistance to performing oral sex on the appellant. She was raped a further four occasions. When she finally made good her escape she made her way to the police station in obvious pain and discomfort.

[28] This court in *S v Abrahams*[11] and *S v Mahomotsa*[12] recognised that while all rapes are serious, 'some rapes are worse than others'. In my view, the rape of the complainant is one of the worst imaginable.[13] If life imprisonment is not appropriate in a rape as brutal as this, then when would it

[9] *S v Malgas* 2001 (1) SACR 469 (SCA) para 9.
[10] Ibid.
[11] 2002 (1) SACR 116 (SCA) para 29.
[12] 2002 (2) SACR 435 (SCA) paras 17-19.
[13] Lewis JA, in para 22 above, says that 'it is difficult to imagine a rape under much worse conditions'.

be appropriate? I am of the view that this is precisely the kind of matter the legislature had in mind for the imposition of the minimum sentence of life imprisonment. Courts must not shrink from their *duty* to impose, in appropriate cases, the prescribed minimum sentences ordained by the legislature.

[29] Against the backdrop of the unprecedented spate of rapes in this country,[14] courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women.[15] Society's legitimate expectation is 'that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because [substantial and compelling] circumstances are, unwarrantedly, held to be present.'[16] In our constitutional order women are entitled to expect and insist upon the full protection of the law.

[30] I agree with Lewis JA that this case is distinguishable from that of *S v Mahomotsa*.[17] In my view, the aggravating factors in this matter distinguish the appellant's position from that in both *Mahomotsa* and *S v Sikhipha*,[18] warranting the imposition of a heavier sentence than that imposed in the said cases.

[31] I respectfully adopt the view that what is set out in paras 13 and 14 of the judgment of Lewis JA do not substantiate the conclusion contended for. There is hardly a person of whom it can be said that there is no prospect of rehabilitation. The appellant was 29 years old at the time and would ordinarily not be regarded as a youthful or immature offender. Employment in itself would not necessarily qualify as a substantial and compelling circumstance. In following the approach adopted in *Malgas*[19] of balancing societal and personal interests, I can see no room to conclude that the totality of facts in this case are such that they constitute substantial and compelling circumstances. The basis therefore suggested by Lewis JA in para 4 of her judgment for interfering with the sentence is unwarranted.

[32] I cannot agree 'that the prospect of rehabilitation (of which there is no evidence) and the fact that the appellant is a first offender'[20] constitute substantial and compelling circumstances within the meaning of that expression and are truly convincing reasons for departing from the minimum sentence ordained by the legislature. Given the prevalence of rape in our society and the brutality of this particular rape, even in the absence of a

[14] According to crime statistics released by the South African Police Service, 52 733 rapes were *reported* during the period April 2003 to March 2004. In an unreported judgement of this court, *De Beer v S* (Case Number 121/04 delivered on 12 November 2004) para 19, Ponnan JA states: '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.'

[15] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5d-e.

[16] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 13.

[17] 2002 (2) SACR 435 (SCA).

[18] 2006 (2) SACR 439 (SCA).

[19] 2002 (1) SACR 469 (SCA) paras 8-9.

[20] Per Lewis JA para 22 above.

directive from Parliament, life imprisonment would not, in my view, have been an inappropriate sentence.

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LV THERON
Acting Judge of Appeal