THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 454/2011

In the matter between

PATRICK CLIVE BAILEY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Bailey v The State* (454/11) [2012] ZASCA 154 (01 October 2012)

Coram: Brand, Heher, Malan, Bosielo and Pillay JJA

Heard: **18 September 2012**

Delivered: **01 October 2012**

Summary: Criminal Law – appeal against a sentence of imprisonment for life on a charge of rape under the provisions of ss 51(1) read with Part 1 of Schedule 2 and 51(3)(*a*) of the Criminal Law Amendment Act 105 of 1997 – whether substantial and compelling circumstances exist justifying a deviation from the minimum sentence of imprisonment for life prescribed by the Act.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Schoeman, Roberson JJ and Grogan AJ sitting as a court of appeal)

The appeal against the sentence of imprisonment for life is dismissed.

JUDGMENT

BOSIELO JA (Brand, Heher, Malan and Pillay JJA concurring):

[1] The appellant was convicted on his plea of guilty of the rape his twelve year old daughter in the Regional Court, Port Elizabeth on 29 October 2009. Having found no substantial and compelling circumstances as envisaged by s 51(3)(*a*) of the Criminal Law Amendment Act 105 of 1997 (the Act) the appellant was sentenced to imprisonment for life in terms of s 51(1) of the Act. The appellant appealed to the Eastern Cape High Court, Grahamstown (Schoeman, Roberson JJ and Grogan AJ) which dismissed the appeal on 20 December 2010 by a majority of two to one. The appellant is appealing against that judgment with the leave of the court below.

[2] As the appellant had pleaded guilty to the charge, the material facts surrounding the commission of this offence are very scanty. Suffice to state that the appellant admitted that he had unlawful sexual intercourse with the complainant, and, importantly that he knew that she was below the age of sixteen years at the time of the commission of the offence. In fact she was twelve years old during the sexual intercourse.

[3] The nub of the appellant's attack against the imposition of life imprisonment is that the majority of the members of the court erred in not finding (a) that the sentence imposed is unreasonable and out of kilter with the sentences imposed for similar offences by this court (b) that the facts and circumstances adduced by the appellant amounted to substantial and compelling circumstances which justified a sentence less than life imprisonment. I interpose to record that the minority disagreed, and Roberson J held instead that: 'I cannot say that with its own peculiar circumstances it is a worse case than those to which I have referred, or is devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.' In the circumstances, the minority proposed to set the sentence of life imprisonment aside and replace it with a sentence of imprisonment for 25 years antedated to 10 September 2009.

[4] It became clear that the issue in this appeal is whether the court erred in not finding that the facts put forward by the appellant amounted to substantial and compelling circumstances justifying a sentence other than life imprisonment as envisaged by s 51(3)(*a*) of the Act. In the context of this case, the section requires that if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a sentence less than life imprisonment, it must enter those circumstances on the record of the proceedings and may thereupon impose such a lesser sentence as it deems appropriate.

[5] In argument before us Ms Crouse, appearing for the appellant, referred to three considerations which she submitted qualified as substantial and compelling circumstances, to justify a lesser sentence than life imprisonment. First, that remorse emanated from the fact that the appellant pleaded guilty and further that he verbalised such remorse to the probation officer who interviewed him for a pre-sentence report; second, that there are prospects of the appellant being rehabilitated; and third, that it was mentioned to the probation officer that in 2005, the appellant started to use drugs. It was contended that the fact that the appellant pleaded guilty should be accepted as a demonstration of remorse, more so, that he continued to express some contrition to the probation officer. The argument was developed further that, based on this, it must be found

that the appellant has shown that he has an appreciation of the wrongfulness of his conduct and insight which makes him amenable to rehabilitation. Relying on *S v Sikhipha* 2006 (2) SACR 439 (SCA) counsel argued that life imprisonment would effectively deny the appellant the opportunity for rehabilitation. Regrettably, counsel was not able to explain what role and effect, if any, the alleged use of drugs by the appellant had on his commission of this offence. Therefore no value can be attached to the alleged use of drugs by the appellant.

[6] The further argument raised by Ms Crouse was that life imprisonment was out of kilter with sentences imposed on other similar cases by this court. In support of this argument she referred, amongst others, to *S v Abrahams* 2002 (1) SACR 116 (SCA), *S v Sikhipha* (above) and *S v Nkomo* 2007 (2) SACR 198 (SCA). The crux of this argument was that, notwithstanding the fact that all these matters involved rape which fell within the purview of s 51(1) of the Act, where, absent substantial and compelling circumstances, the court was obliged to impose life imprisonment, this court notwithstanding, did not impose imprisonment for life. In fact the court set aside the sentences of life imprisonment which had been imposed by the trial courts and replaced them with different custodial sentences.

[7] On the other hand, Ms Packery for the respondent submitted that the facts placed before the court by the appellant did not qualify as substantial and compelling to justify a lesser sentence than life imprisonment. She argued that the mere fact that the appellant pleaded guilty did not necessarily support the conclusion that he was remorseful as the plea of guilty could have been motivated by various factors eg that the appellant realized that the evidence against him was overwhelming and that it would be futile to plead not guilty.

[8] Concerning the prospects of rehabilitation, Ms Packery contended that the appellant placed no facts before the court to demonstrate any probability of rehabilitation. To the contrary, the appellant had two previous convictions for theft for which he was sentenced to six months and three years imprisonment respectively. He was also convicted of or attempting to escape and on two counts of fraud. Moreover, he was convicted on a count of attempted rape for which he received a 5 year sentence of which 3 years were suspended. Based on this, she submitted that, instead of providing support for the prospects of rehabilitation as argued the record of the appellant's previous convictions manifested quite the contrary.

[9] In responding to the argument that life imprisonment in this case is out of kilter with sentences imposed in, for instance, *Abrahams, Sikhipha* and *Nkomo,* Ms Packery contended that the facts of this case, in particular the serious psychological and emotional impact which this rape had on the complainant as described in the Victim Impact Report, distinguishes it from those cases and calls for life imprisonment as mandated by the legislature. In particular, she submitted that the mere fact that the complainant did not suffer any physical injuries could not be said to be mitigating as the complainant suffered serious emotional and psychological harm.

[10] In support of this submission, Ms Packery referred us to the Victim Impact Report which was handed in by consent, which depicts a sad and painful picture of the complainant after the rape. Amongst the most severe of the after-effects of the rape are that: she suffers from (a) anxiety, fear and sleeping disorder; (b) misplaced feelings of guilt and shame; (c) mood swings. She has also lost her trust in mankind and harbours a great sense of anger and hostility towards her father, whom she feels has abused her trust. In addition she has developed hatred for her brother as he reminds her of her father and sadly, she no longer trusts her own mother.

[11] She argued further that, as a result of the rape, the complainant left school prematurely when she discovered that she was pregnant. She furthermore suffered two miscarriages. The rape left the complainant with a distorted understanding of love and she confuses sexual intercourse with love.

[12] It is clear to me that the rape has had a very serious and deleterious effect on the complainant. One gets the picture of her whole life in tatters. Although the social worker did not indicate whether the complainant could through counselling be cured of these after-effects, it cannot be gainsaid that the impact is both devastating and far-reaching. Undoubtedly, this makes this case heinous and different from those referred to. To my mind, any comparison of this case with the three referred to is misguided if the intention is to use them as precedent binding any court not to impose life imprisonment as a sentence, particularly where the offence falls within the purview of s 51(1) of the Act.

[13] It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously threatening the well-being and proper

growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric.

[14] Dealing with the rape of a minor by her father, Cameron JA described it graphically as follows in *S v Abrahams* para 17:

'Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in the daughter's best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter's body, constitutes deflowering in the most grievous and brutal sense.'

Later in the judgment para 23 Cameron JA proceeded to say:

'Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes.'

Importantly in para 23(*c*) dealing with the effect of incestuous rape as is the case here, he states that:

'Third, and lastly the fact that family rape generally also involves incest (I exclude foster and step-parents, and rapists further removed in family lineage from victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture.'

The facts of this case amply demonstrate this.

[15] It is true that *Abrahams*, *Sikhipha* and *Nkomo* all involved rapes that fall under s 51(1) of the Act. Yet the court after having considered all the relevant facts came to the conclusion that, in those cases, a sentence of life imprisonment was disturbingly disproportionate to the offence to a point where it could be described as unjust. The court then imposed various terms of imprisonment in respect of each of the cases in the place of the ordained life imprisonment.

[16] What then is the value of such a comparative analysis of previous cases. Can this trend, if it can be called that, qualify to be elevated to the status of a precedent which is intended to bind all the courts which have to consider sentence whilst sentencing an accused who has been convicted of rape read with s 51(1) of the Act? Is a court expected, without proper consideration of the peculiar facts of this case, to slavishly follow the so-called trend not to impose life imprisonment for rape? By doing so, a court would be acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court albeit in a similar case. It follows in my view that such a sentence would be appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all. Commenting on the utility of such a comparative approach Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA) para 21 said the following:

‘It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done.’ (own emphasis.)

[17] Van den Heever JA put it more succinctly in *S v D* 1995 (1) SACR 259 (A) at 260e when she stated that: ‘I agree that decided cases on sentence provide guidelines not straightjackets.’ I also agree with this correct approach.

[18] Our everyday experience in the criminal courts proves that, save where multiple accused are charged as co-accused in one case for having committed the same offence, no two cases present exactly the same factual matrix. To compound the problem further, it is hard to imagine two accused persons who have exactly the same personal circumstances. Further still in a case involving rape for instance, it is unthinkable that

two different complainants in two different cases would manifest the same physical, emotional or behavioural problems after the rape. Evidently, these are important matters which must be considered in the determination of an appropriate sentence as they have a direct bearing on what an appropriate sentence should be. It follows in my view, that the sentence in such matters will be different because of the variation in personal circumstances of the accused, the nature and gravity of the offence and all other factors germane to sentencing.

[19] The minority judgment in the court below appears to reflect the misunderstanding that the refusal by this court to endorse the life imprisonment imposed in the three cases of *Abrahams, Sephika* and *Nkomo* constitutes a benchmark or a precedent binding other courts. That is a misconception. Such an approach or trend can never be elevated to a benchmark or binding precedent. Those cases remain guidelines. Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing as enunciated in a long line of cases which includes *S v Zinn* 1969 (2) SA 537 (A) which espoused a proper consideration and balancing of the well-known triad; *S v Rabie* 1975 (4) SA 855 (A) at 862;

and *S v de Jager and another* 1965 (2) SA 616 (A) at 628-9. This salutary approach has recently been endorsed by Marais JA in *S v Malgas* para 12.

[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.

[21] The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part the sentencing court. I have, however, found the following definition in *S v Malgas* (above) para 22 to be both illuminating and helpful:

‘The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.’

[22] Reverting to this appeal the question to be answered is whether the majority of the court below erred in failing to find that the circumstances of this case were so substantial and compelling as to justify a departure from imprisonment for life.

[23] This makes a consideration of the appellant’s personal circumstances necessary. He was 38 years old at the time of the commission of the offence; he was 40 years old during sentencing. He is married to the complainant’s mother and they have 3 children including the complainant. He was gainfully employed before his arrest and he was responsible for the maintenance of his children. He had a drug habit which was caused by the death of his father. He also pleaded guilty and

expressed remorse for his actions. The appellant had previous convictions for theft, fraud, attempted rape and other offences.

[24] On the other hand, the complainant was twelve years old when she was raped; the appellant is her biological father. This rape therefore is incestuous, which is found to be morally repugnant by many if not all right thinking people. In addition before the rape the appellant had performed improper sexual practices on her twice. The full extent of the emotional and psychological suffering, as they appear from The Victim Impact Report had already been discussed earlier. Undoubtedly, these are seriously aggravating circumstances which deserve to be given appropriate weight in the consideration of an appropriate sentence. Like the majority of the court below I am not persuaded that the appellant's circumstances meet the threshold of substantial and compelling circumstances set out in s 51(3)(*a*) of the Act.

[25] In the result, the appeal against the sentence imposed is dismissed.

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L.O. BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	L Crouse (with her DP Geldenhuys) Instructed by: Legal Aid, Grahamstown Legal Aid, Bloemfontein
For Respondent	:	W Packery Instructed by: Director Public Prosecutions, Bloemfontein Director Public Prosecutions, Bloemfontein