THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 422/12

Not reportable

In the matter between:

PIET KWANAPE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kwanape v The State* (422/12) [2012] ZASCA 168 (26 November 2012).

Coram: **Nugent and Petse JJA and Erasmus AJA**

Heard: **14 November 2012**

Delivered: **26 November 2012**

Summary: Sentence ─ prescribed sentences ─ minimum sentence ─ imposition of in terms of Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2 ─ whether 'substantial and compelling circumstances' as contemplated in s 51(3)(a) existed.

Life imprisonment on a charge of rape ─ complainant 12 years of age.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Legodi J sitting as court of first instance):

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

JUDGMENT

PETSE JA (Nugent JA and Erasmus AJA concurring):

[1] The appellant was arraigned before a regional magistrate in Modimole, Limpopo on a charge of rape read with ss 51(1) or 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act). Consequent upon his conviction he was committed to the Northern Circuit District of the North Gauteng High Court sitting at Polokwane for sentence in terms of s 52 of the Act.

[2] Section 52[1] as it then stood required a regional court, when it has convicted an accused person of an offence for which life imprisonment is the prescribed sentence, to stop the proceedings and commit the accused for sentence by a high court. The high court (Legodi J), having concluded that the appellant's conviction was supportable on the evidence, proceeded to consider whether substantial and compelling circumstances as intended in s 51(3)(a) of the Act existed. It found that none existed and therefore imposed a sentence of imprisonment for life. The high court subsequently granted the appellant leave to appeal against the sentence to this court.

[1]Repealed by s 52 of Act 38 of 2007.

[3] In granting leave to appeal the high court alluded to two factors: first, it stated that this was not the worst rape imaginable; and second, it said that there was no evidence suggesting that the complainant had suffered serious physical injury as a consequence of the rape. I shall revert to these later.

[4] Before considering the merits of this appeal it is necessary to say something about the disturbing features emerging from the record. The appellant was sentenced on 20 September 2007. On 27 November 2008 he filed, without legal assistance, an application for leave to appeal against his conviction and sentence with the registry clerk at the magistrate's court, Polokwane which was accompanied by an application for condonation of the late filing of such application.

[5] In May 2009, disgruntled at the lack of progress, the appellant wrote to the Minister of Justice and Constitutional Development and the Chief Legal Officer in the minister's office wrote to the Registrar of the North Gauteng High Court requesting the registrar to investigate what had become of the appellant's application for leave to appeal. Similarly the Head of the Prison in which the appellant was incarcerated addressed an enquiry to the registrar. Ultimately, these interventions bore fruit and on 15 October 2010 the application for leave to appeal was heard by Legodi J, which by then was confined to the sentence only.

[6] Once leave to appeal against the sentence had been granted, further delays in prosecuting the appeal occurred. The record of appeal was filed with this court only in June 2012. It appears from the appellant's affidavit in support of his application for condonation of the late filing of the record that the delay was in part attributable to the Registrar of the North Gauteng High Court who seemingly had remained supine until he was prompted by the appellant's legal representatives to prepare the record. Section 316(7)(a) of the Criminal Procedure Act 51 of 1977 imposes a duty on the registrar of the court, granting

leave to appeal, to cause a notice to be given to the registrar of this court without delay and to cause to be transmitted to this court a certified copy of the record. That statutory injunction is also echoed in rule 52(1) of the Uniform Rules of Court.

[7] In the result the determination of this appeal has taken longer than would have been the case had the matter been dealt with expeditiously.

[8] It goes without saying that the delays experienced in this matter are entirely unacceptable for obvious reasons. In terms of s 35(3)(o) of the Constitution[2] the appellant has a right to a fair trial which includes the right of appeal to a higher court. Consequently the delays experienced in this case undermined or compromised those rights in circumstances where there can be no justification therefor in an open and democratic society.

[9] I now turn to the merits of the appeal. The crucial issue before this court is whether the high court should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment. This is a factual enquiry.

[10] The facts of this case are relatively straightforward. On 1 January 2004 the complainant, K, a 12 year-old girl, was playing in the street with her friends when the appellant, who was well-known to her, emerged. Having asked them what they were doing the appellant grabbed the complainant and dragged her to a bush. One of K's friends tried to intervene and enquired of the appellant as to what the latter was doing. The appellant instead pelted the two friends with stones causing them to run away.

[11] When K tried to scream, the appellant closed her mouth with his hand. He pushed her to the ground, undressed her, and after undressing himself, he raped

[2] Constitution of the Republic of South Africa Act 108 of 1996.

her three times albeit at different spots. K said that she felt pain as the appellant was raping her. The appellant subsequently took her to his home where she slept with the appellant's sister. The next day, whilst returning home, K met her father enroute. She then reported the incident to him and upon reaching home she made a report to her mother. She was taken to Tabazimbi Hospital where she was examined by Dr Schreuder who described the complainant's vaginal examination as having been painful. The doctor also recorded that the complainant sustained, inter alia, scratch marks on her knees and elbows and a small tear at the posterior angle of her vestibule.

[12] The gravamen of the appellant's submissions in this court is that the cumulative effect of the mitigating factors weighed against the aggravating features, of which the court below should have taken cognisance, constituted substantial and compelling circumstances. Consequently, concluded the submissions, the court below should have found that it was free to depart from the prescribed minimum sentence of life imprisonment under s 51(3) of the Act. These factors were that the appellant was:

(a) a first offender;
(b) 24 years of age when the rape was perpetrated;
(c) gainfully employed and earning R500 fortnightly;
(d) had attended school up to grade 5;
(e) HIV positive;
(f) a primary care giver;
(g) running a tuck-shop from which he generated R400 per month;
(h) capable of being rehabilitated.

[13] The circumstances in which an Appellate Court will interfere with a sentence imposed by a court of first instance are trite. They were restated by this court in *S v Sadler* 2000 (1) SACR 331 (SCA).[3] But as the appellant was sentenced in terms of s 51(1) of the Act it is important to keep the objectives of

[3] At 334d-335g.

the Act uppermost in one's mind. These were described by Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA)[4] as a measure aimed at responding to:

'[A]n alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society.'

[14] As to the approach that must be adopted in a case such as the present *Malgas* is instructive. There Marais JA stated the following:[5]

'It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be 'business as usual' when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence.

. . .

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[4] *S v Malgas* 2001 (1) SACR 469 (SCA); (SA 1222; [2001] 3 All SA 220) para 7.

[5] At 476e-477f.

Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. 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. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'

[15] Recently this court reiterated in *S v Matyityi* 2011 (1) SACR 40 (SCA)[6] that 'the crime pandemic that engulfs our country' has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that 'ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed.

[14] Before us counsel for the appellant placed much store in some decisions of this court in support of his contention that the sentence imposed by the court below was out of kilter with sentences imposed in those decisions.[7] Discussing the value of decided cases on sentence in *Malgas* Marais JA stated at 480h-481a:

'[21] 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

[6] At 53c-g.

[7] *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Sikhipha* 2006 (2) SACR 439 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA).

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 criterion and that something more than that is needed to justify departure, no great harm will be done.'

But as this court made plain in *S v Fraser* 1987 (2) SA 859 (A)[8] 'it is an idle exercise to match the colour of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. Ultimately each case must be decided in the light of its peculiar facts.

[15] Rape is undeniably a despicable crime. In *N v T* 1994 (1) SA 862 (C)[9] it was described as 'a horrifying crime and . . . a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In *S v Chapman*[10] this court said it is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. Its gravity in this case is aggravated by the fact that the victim was a 12 year-old child. In *S v Jansen*[11] rape of a child was said to be 'an appalling and perverse abuse of male power'. The court there went on to say:

[I]t is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background . . . and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer the added psychological trauma which resulted in a marked change of attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

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[8] At 863C-D.
[9] At 864G.
[10] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5a-d (1997 (3) SA 341) (at 345A-B).
[11] 1999 (2) SACR 368 (C) at 378h-379a.

I wholeheartedly align myself with these sentiments.

[16] In similar vein *S v D*[12] underscored the vulnerability of children and went on to say:

'Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and too often do.

. . .

Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the Court's strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.'

Pretty much the same situation obtains in his case.

[17] Accordingly, it is in the light of the foregoing backdrop that this appeal must be considered. The court below did not consider the appellant's mitigating factors to constitute substantial and compelling circumstances. Those mitigating factors must of course be weighed against the aggravating circumstances of the case. The following may be mentioned. The appellant steadfastly maintained that he was innocent even in the face of overwhelming evidence against him. He brazenly abducted the complainant in the presence of her friends to satisfy his sexual desires without using a condom. He subjected the complainant to the agony, pain and indignity of rape. The age of the complainant when she was raped, coupled with her immaturity and anatomical under-development render this rape a dreadful one. The complainant was effectively held hostage the whole night thus exacerbating her anguish.

[18] The Victim Impact Report handed in by consent in the court below also reflects a sad account of the devastation suffered by the complainant and her family. The complainant was forced to drop out from school, compelling her mother to give up employment to offer her emotional support. The complainant

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[12] *S v D* 1995 (1) SACR 259 (A) at 260f-i.

has been driven to becoming a recluse to avoid being ridiculed by her peers, thus exacerbating the consequential emotional and psychological trauma she suffered.

[19] Counsel for the appellant argued that the complainant did not sustain any permanent physical injuries and even advanced a speculative contention that the period that has elapsed since the rape was perpetrated was long enough for the complainant to emotionally heal. To my mind this submission manifests a misconception about the psychological and emotional consequences of rape for the victim. In *S v De Beer*[13] this court said the following:

'Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at least becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.'

[20] It was further submitted on behalf of the appellant that this was not the worst rape imaginable. Thus, concluded the argument, that consideration, viewed with other mitigating factors, justifies a lesser sentence. I do not agree. In *S v Mahomotsa*[14] this court made plain that the fact that more serious cases than the one under consideration are imaginable is not decisive. Mpati JA said:

'[19] 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 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 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

[13] At para 18 (unreported judgment, SCA case no 121/2004).
[14] *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 19.

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.'

Accordingly this case, on its facts, is indeed horrendous enough to justify the imposition of the maximum penalty.

[21] In *S v Vilakazi* 2009 (1) SACR 552 (SCA), Nugent JA put it thus:

'[I] should not be understood to mean that the absence of any one or more of the various aggravating features specified in the Act necessarily justifies a departure from the prescribed sentence for that would suggest that the maximum sentence is reserved for only extreme cases. That was not so prior to the Act and is not the case now. <u>There comes a stage at which the maximum sentence is appropriate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more</u>. Whether, and if so to what extent, the absence of other aggravating circumstances might diminish the offender's culpability will naturally depend upon the particular circumstances.'[15] (My underlining.)

[22] This brings me to the final argument advanced on behalf of the appellant, namely, that he was a primary care giver to his minor son born out of wedlock on 22 August 2003 whose mother is deceased. It appears from the record that the minor child was previously in the care of its deceased mother's family who cared for it. The appellant took over the care of the child after his family had paid the customary damages. When this occurred is, however, not apparent from the record. The appellant has been in incarceration since 20 September 2007. It is now more than five years since the appellant was separated from his minor son.

[23] In *S v M*[16] the Constitutional Court made plain that whilst the sentencing court must ensure 'that the form of punishment imposed is the one that is least damaging to the interests of the children, *given the legitimate range of choices in the circumstances available to the sentencing court*', this obligation does not avail parents who invoke it 'as a pretext for escaping the otherwise just consequences of their own misconduct'. (My emphasis.) In the context of this

[15] Para 54.

[16] *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 539 (CC) paras 33-35.

case the court below did not enjoy any legitimate range of choices in regard to the sentence given that the prescribed period of imprisonment for life was the sentence ordinarily to be imposed. Moreover the little information apparent from the record suggests that the incarceration of the appellant could not have left his minor child destitute.

[24] Whilst persisting in his argument in this regard counsel for the appellant nevertheless accepted that long term imprisonment is called for on the facts of this case. In dealing with a similar argument in *Vilakazi* this court said:

'[O]nce it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided.'[17]

Thus the appellant's argument on this score cannot be upheld.

[25] For all the foregoing reasons I am not persuaded that the court below erred in its conclusion that substantial and compelling circumstances were absent. To come to a contrary decision in this case would constitute a failure to heed the caution in *Malgas* that the 'specified sentences are not to be departed from lightly or for flimsy reasons' and that 'speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders . . . are to be excluded'.[18] Although the court below did not say so in terms, it is evident from the tenor of its judgment that before it imposed the prescribed sentence, it had assessed, upon a consideration of all the circumstances of this case, whether the prescribed sentence was indeed proportionate to the offence charged (see eg *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15).

[26] In the result the appeal against the sentence of imprisonment for life is dismissed.

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[17] At 574d-e.
[18] At 481j-482a.

X M PETSE
JUDGE OF APPEAL

Appearances:

Appellant:	M P Legodi Instructed by: Legal Aid, Polokwane Legal Aid, Bloemfontein
Respondent:	P Vorster Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein