REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case number: **85/2001**

In the matter between:

THE STATE Appellant

and

BOESMAN MAHOMOTSA Respondent

CORAM: **MARAIS, CAMERON and MPATI JJA**

HEARD: **4 MARCH 2002**

DELIVERED: **31 MAY 2002**

Summary: Rape – Act 105 of 1997 – sentences – circumstances justifying sentences less than life imprisonment

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JUDGMENT

MPATI JA:

[1] The respondent was arraigned before the regional court sitting at Puthaditjhaba on two counts of rape. He was undefended. Despite his pleas of not guilty he was convicted as charged. I shall, for convenience, refer to the respondent as "the accused". The offences were committed on 7 June 1998 and 11 August 1998 respectively, after the Criminal Law Amendment Act 105 of 1997 (the Act), which provides for minimum sentences for certain specified offences, came into effect on 1 May 1998. In convicting the accused the regional magistrate found as a fact that he (the accused) had had non-consensual sex with each of the two complainants more than once. In terms of s 51(1) of the Act the mandatory sentence in such circumstances is imprisonment for life, unless "substantial and compelling circumstances" exist that justify the imposition of a lesser sentence (s 51(3)(a)).

[2] After the accused and the State prosecutor had addressed the regional magistrate

on sentence (the accused's address was very brief as would be expected from an undefended and unsophisticated accused) the magistrate came to the conclusion "dat hier nie omstandighede is wat die Hof noop om 'n ander vonnis op te lê as wat voorgeskryf word in Artikel 52(1) nie". The accused was accordingly committed for sentence in the High Court (Orange Free State Provincial Division). Having heard the evidence of a probation officer and argument on behalf of the accused, who was now legally represented, and the State, Kotze J concluded that "substantial and compelling circumstances" were present. He therefore sentenced the appellant to 6 years' imprisonment on the first and 10 years' imprisonment on the second count and ordered that the sentence imposed on count one run concurrently with the sentence on count two.

[3] Approximately two months after sentencing and on 2 September 1999 (the sentences were imposed on 30 June 1999) the State filed a notice of application for

leave to appeal to this Court against the sentences imposed by the court *a quo.* Condonation of the late filing of that notice was also sought. The applications were argued before Kotze J on 26 November 1999. Regrettably the learned judge died before he could make his ruling, but leave was subsequently granted by Malherbe JP.

[4] The regional magistrate's factual findings were not challenged. The facts upon which the accused was convicted were the following. At approximately five in the afternoon of 7 June 1998 the complainant in the first count was walking home from church when she met the accused who was heading in the opposite direction. He grabbed her and pulled her to his parental home which was nearby. The complainant resisted, cried and shouted for help but no one came to her rescue. The accused threatened her with what appeared to her to be a firearm. She was shocked and feared that she might be injured. The accused succeeded in forcing her to his room where he ordered her to lie down on a bed and to take off her clothes. When she refused to do so

he removed her skirt and panties. He thereafter forcefully had full sexual intercourse with her without her consent. Later, the accused left his room and when he returned he again had sexual intercourse with her without her consent. At one stage he slapped her and kicked her. He again left her in the room. On these occasions he locked the door from outside with a padlock. When he returned at night he washed himself, forced her to sleep in his room and had sexual intercourse with her without her consent for the third time. The next morning, a Monday, he once again had sexual intercourse with her against her will.

[5] During the early evening on the Monday she saw one Magweng Jack Mohlape (Magweng) through a window. She called out to him for help. She asked him to send one Sylvia to tell her parents that she was being held captive by the accused. When Magweng went to knock on the door of the accused's room he told him in no uncertain terms that "jy steek nie jou neus in my sake nie". Magweng then proceeded to the

complainant's home where he made a report to her parents. According to the complainant when Magweng left the accused's room the accused assaulted and insulted her. After Magweng had made the report to the complainant's parents, he accompanied them so as to show them where the accused lived. Upon their arrival at the accused's room the accused was still insulting the complainant, who was crying. When they knocked on his door the accused, in an aggressive mood, appeared with a firearm (or what appeared to be one) in his hand. A scuffle broke out between him and the complainant's father. The complainant seized the opportunity and ran out of the room.

[6] On 11 August 1998 and during the school break at approximately eleven o'clock in the morning the complainant in the second count was on her way home, accompanied by another girl, when the accused, who was unknown to her, grabbed her. He requested her to accompany her. When she refused to do so he drew a knife and

threatened her with it. He accused her of spreading rumours about him. He pulled her to his parental home where he ordered her to sit on a bed in his room, whereafter he removed her panties, pinned her down onto the bed and had sexual intercourse with her without her consent. Having satisfied his lust he stood up and swept the floor of the room, whereafter he again had non-consensual sex with her, making rude remarks about her private parts. She managed to run out of the room when the accused's friends arrived some time later.

[7] In the charge sheets both complainants were alleged to be 15 years old at the time of their ordeals. At the trial both testified that they were 15 years old. The regional magistrate accepted their ages as alleged by them. Kotze J found that the magistrate had erred in this regard since the ages of the complainants "was glad nie behoorlik bewys nie". He held that both the prosecutor and magistrate had never given attention to the issue.

[8] This finding by the court *a quo* was not challenged before us. It is, however, of no significance in this case for purposes of ascertaining whether the crimes or any one of them falls within the ambit of Part 1 of Schedule 2 to the Act, i.e. whether it is an offence or offences for which a sentence of imprisonment for life should be imposed in the absence of substantial and compelling circumstances (s 51(1) of the Act). Both complainants were raped more than once. Those are circumstances which, in respect of each count, require the imposition of the prescribed minimum sentence of life imprisonment unless substantial and compelling circumstances are present to justify the imposition of a lesser sentence.

[9] Kotze J accepted, rightly so in my view, that the magistrate correctly committed the accused for sentencing in the High Court. He concluded, however, that substantial and compelling circumstances were present. He preceded his examination into the existence or otherwise of substantial and compelling circumstances by referring to a

judgment of Stegmann J in *S v Mofokeng and Another* 1999 (1) SACR 502 (W), which Kotze J approved as being correct, and where Stegmann J said (at 523 C-D) that "for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified".

[10] In *S v Malgas* 2001 (2) SA 1222 (SCA); 2002 (1) SACR 469, this Court disavowed the suggestion that for circumstances to qualify as substantial and compelling they must be "exceptional". Such requirement does not appear from the legislation (paras 10, 30 and 31). In as much as Kotze J accepted and followed the test enunciated in *Mofokeng's* case, he erred materially. But in enquiring whether or not substantial and compelling circumstances were present Kotze J considered the

mitigating and aggravating features in the case. These were, according to the learned judge, that the accused was relatively young and had already spent eight months in prison at the time of sentencing; that the complainants sustained no physical injuries and had suffered no psychological damage as a result of the rapes, and that they had not lost their virginity from the rapes as they had already been sexually active, one of them having had sexual intercourse two days before she was raped by the accused. The aggravating features were that the accused had a relevant previous conviction of having had sexual intercourse, in 1994, with a girl of less than 16 years of age and for which he was sentenced to five strokes with a light cane; that he committed the second offence while he was awaiting trial on the first count – he had been released in the custody of his grandmother – and that he had lied about his age in court (he had said that he was 17 years old while he was in fact 23) in order to secure a light sentence.

[11] The learned judge meant, no doubt, that no serious or lasting physical injuries

had been sustained and that no evidence as to the extent and likely duration of psychological damage was placed before the court. If, on the other hand, he meant to find that no physical injury or psychological damage whatsoever was done, he erred. While it may theoretically be possible that a victim of rape committed in the circumstances and manner I have described may not suffer any psychological damage other than that experienced while the attack is taking place and in its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity is of course not possible in the absence of appropriate evidence, but that does not mean that one should approach the question of sentence on the footing that there was no psychological harm.

[12] In deciding whether substantial and compelling circumstances within the meaning of that expression in the Act existed, the learned judge said:

> "Ek bevind dat die volgende omstandighede in hierdie geval as 'n 'wesenlike en dringende omstandigheid', soos bedoel in Artikel 51 (3)(a), aangeteken moet word. Alhoewel daar hier met elke klaagster meer as een keer gemeenskap gehou is, was dit die gevolg van die viriliteit van 'n jongman wat nog op skool is wat met ander skoliere teen hulle sin gemeenskap gevoer het en, let wel, skoliere wat reeds tevore seksueel aktief was. Die bedoeling van die Wetgewer wat in hierdie Wet langs snaakse paaie loop kon na my mening nooit ooit gewees het dat so 'n skolier lewenslange gevangenisstraf opgelê word nie, en dit selfs nie waar dit blyk dat die beskuldigde die klaagsters met wapens of iets wat soos wapens lyk na sy woning geneem het nie."

Hence, in the exercise of his discretion, the learned judge imposed the sentences which he did.

[13] Counsel were agreed that the court *a quo* misdirected itself in finding that the accused's repeated non-consensual sex with each of the complainants was "die gevolg van die viriliteit van 'n jongman wat nog op skool is wat met ander skoliere teen hulle sin gemeenskap gevoer het en … skoliere wat reeds tevore seksueel aktief was", constituted substantial and compelling circumstances. I endorse their submissions. A

man's virility, irrespective of his age, can never be a mitigating factor when he chooses to satisfy his lust by sexually violating a woman against her will. As counsel for the State correctly pointed out, were virility to play a role in sentencing in rape cases it would imply the grotesque result that the moral blameworthiness of an accused person convicted of rape would be assessed according to the strength of his libido. In my view the court *a quo* committed a material misdirection in this regard. It follows that this Court has itself to consider sentence afresh.

[14] 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*, *supra*, paras 8-10; *S v Dodo* 2001 (3) SA 382 (CC) paras 11 and 40). However, in considering the question, a court is not prohibited by the Act from weighing all the usual considerations traditionally relevant

to sentence.

[15] What Kotze J regarded as mitigating factors have been mentioned above (para 10). They require qualification as I have said in para 11. Moreover, I do not consider the fact that the complainant in count one had had sexual intercourse two days before she was raped by the accused is a factor to be taken into account in favour of the accused. That I consider to be an irrelevant fact. The fact that the accused had lied about his age was taken as an aggravating factor – but I think that it was neutralised by the fact that before sentence, and of his own volition, he gave his correct age, 23 years. According to the report of the probation officer, Ms Matubatuba, who was called by the State, the accused was born out of wedlock and was raised by his maternal grandmother in the village where the offences were committed. He never knew his father until he went to live with his mother, who was living with another man, in Sasolburg. His natural father also lives in Sasolburg with another woman. The

accused attended school in Sasolburg and used to visit his grandmother during school holidays. The rape of the first complainant occurred during one of those visits to his grandmother.

[16] Concerning the offences committed by the accused, rape is obviously a very serious offence, "constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (*S v Chapman* 1997 (2) SACR 3 (SCA) 5 b). As was said in that case, women in this country have a legitimate claim "to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come to work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives" (at 5 c). In both instances in the present matter the accused confronted the complainants while they were minding their own business, walking peacefully in the street. He pulled them to his room where he repeatedly (four times)

raped the first complainant. In between those he locked her in his room. The second complainant was raped twice. The accused's conduct can be described as nothing less than that of a sexual thug who considered young girls – they were in standard 4 and 5 respectively at school – as objects to be used to satisfy his lust. The repeated rape of the complainants shows that he exploited to the full the position of power which he held over them (cf *S v Swart* 2000 (2) SACR 566 (SCA) par 27. With regard to the first count he even had the audacity to show aggression towards and to fight the complainant's father when he came to rescue his daughter.

[17] 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.

[18] 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).

[19] One must of course 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 always be cases which, although differing in their respective degrees of seriousness, none the less 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.

[20] Whilst I am persuaded that in respect of the first count the factors mentioned in para 17 above, taken together with the accused's relative youth and his other personal circumstances, the fact that his previous conviction, though of a sexual nature, did not involve non-consensual sex, are such that a departure from the prescribed sentence is

justified on the basis that such a sentence would be disproportionate to the crime, the criminal and the legitimate interests of society, the same cannot be said without more about the second count. Here the accused had been arrested on the first count, appeared in court where he was released in the custody of his grandmother, but within a period of just over two months he committed a similar offence in almost similar fashion. What must be remembered, however, is that at the time of the second rape, the accused had not as yet been convicted on the first count. Again this is of course no excuse. But the Legislature has itself distinguished him from persons who, having been convicted of two or more offences of rape but not yet sentenced, commits yet another rape. If, for example, the accused in the first instance had not raped the first complainant more than once and he then in the second instance raped the second complainant only once while awaiting trial on the first count the prescribed sentence of life imprisonment would not have come into the reckoning.

[21] In his heads of argument counsel for the State submitted that no substantial and compelling circumstances were present in this matter. However, he did not persist in that argument before us. In fact he frankly conceded that life imprisonment would be disproportionate to the crimes, the criminal and the legitimate interests of society. Although a court is of course not bound by counsel's submissions regarding sentence, the appellant here is the State and I am of the view that a concession of that nature by counsel for the State for which there is some foundation in the facts of the case should be given due weight.

[22] I have given careful consideration to all these factors. The case is a borderline one. However, I am satisfied that the circumstances of this case render the prescribed sentence of life imprisonment too severe to be just even in respect of the second count.

[23] What, then, is the appropriate sentence for each offence? This appeal is in effect against the alleged leniency of the sentences imposed by the court *a quo*. Counsel for

the accused submitted that the only aspect on which Kotze J misdirected himself was the question of the existence or otherwise of substantial and compelling circumstances. She argued that the misdirection was not such as to warrant an interference with the sentences imposed. Substantial and compelling circumstances were indeed present, so it was contended by counsel for the accused, and the sentences imposed by the court *a quo* were not excessively lenient.

[24] In *S v Gqamana* 2001 (2) SACR 28 (C) a 23 year old accused was convicted of raping a complainant aged 14 years and 10 months. He had thought that she was 18 years old. He had no previous convictions. The facts of that case are very similar to the present one. The accused and the complainant were strangers to one another. He induced her to accompany him to his shack by swearing at her and threatening to shoot her although he did not produce a firearm. At his shack he raped her. Approximately 30 minutes later he had sexual intercourse with her again at the same place. He left the

shack, locking her inside. She made her escape when the accused's friend arrived and let her out. Having concluded that the prescribed sentence of life imprisonment would be "utterly disproportionate" to the sentence which he would regard as appropriate, Thring J sentenced the accused to 8 years' imprisonment.

[25] In *S v Abrahams*, *supra*, the accused had been convicted in the regional court of raping his daughter who was under the age of 16 years. The State appealed against the sentence of 7 years which had been imposed upon the accused by Foxcroft J in the Cape Provincial Division and where the learned judge had found that substantial and compelling circumstances were present. This Court, having concluded that the sentence of 7 years was inappropriate, increased it to 12 years.

[26] These are but two cases from which it is clear that courts view these kinds of offences in a very serious light. What is disturbing in the present matter is that the cumulative effect of the sentences imposed by the court *a quo* does not adequately

reflect the seriousness of the offences, particularly the fact that the accused committed the second offence at a time when he was awaiting trial on a similar offence. I accept that the court *a quo* gave some recognition to this by imposing a sentence in excess of the one imposed on the first count. But the fact remains that the sentences imposed are collectively woefully inadequate.

[27] In considering what are *the* appropriate sentences in this case I take heed of what was said in *S v Sadler* 2000 (1) SACR 331 (A) para 10, *viz*:

> "[I]t is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been *an* appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is *the* appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail."

In my view the circumstances of this case call for the imposition of a period of direct

imprisonment which cumulatively is substantially longer than that imposed by the court *a quo*. I consider a sentence of 8 years' imprisonment on the first count and 12 years' imprisonment on the second count to be *the* appropriate sentences.

[28] I make the following order:

1. The appeal succeeds.

2. The sentences imposed by the court *a quo* are set aside and replaced with the following:

"(a) On count 1 : 8 years' imprisonment.

(b) On count 2 : 12 years' imprisonment."

The sentences are ante-dated to 30 June 1999.

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L MPATI
JUDGE OF APPEAL

CONCUR:

MARAIS JA)
CAMERON JA)