REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 245/2001

In the matter between:

GEORGE RAMMOKO Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CORAM: **HOWIE, FARLAM and MPATI JJA**

HEARD: **19 SEPTEMBER 2002**

DELIVERED: **15 NOVEMBER 2002**

Rape – minimum sentencing legislation, Act 105 of 1997 – role of presiding officer in relation to finding of substantial and compelling circumstances.

JUDGMENT

MPATI JA:

[1] The appellant appeals against a sentence of life imprisonment imposed on him for the rape of a 13½year old girl. He stood trial in the regional court sitting at Welkom and was convicted on 6 April 1999. The rape was perpetrated on 23 September 1998, almost four months of the minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 ('the Act') having come into force on 1 May 1998. Since the complainant was under the age of 16 years a sentence of imprisonment for life had to be imposed on the appellant (s51(1)) unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence (s51(3)). The regional magistrate accordingly committed the appellant for sentence in the High Court.

[2] On 12 August 1999 Cillie J (in the Orange Free State Provincial Division), having satisfied himself that the appellant's conviction was in order, confirmed it (s52(2)(b)). No evidence was led before him and after argument was presented by

counsel, both in mitigation and aggravation of sentence, Cillie J concluded that no substantial and compelling circumstances were present. He duly sentenced the appellant to imprisonment for life. The learned Judge subsequently (on 26 November 1999) granted the appellant leave to appeal to this Court against the sentence, for the reason that ‘`n ander Hof tot `n ander bevinding , ten aansien van die vraag of the sogenaamde wesenlike en dringende omstandighede in die onderhawige geval aanwesig is, kan kom as dít waartoe ekself gekom het’.

[3] In considering the question of the existence or otherwise of substantial and compelling circumstances Cillie J referred to his earlier judgment in *S v Shongwe* 1999 (2) SACR 220 (O), in which he approved as being correct the interpretation given by Stegmann J to the concept of ‘substantial and compelling’ circumstances in *S v Mofokeng* 1999 (1) SACR 502 (W). In the latter case the learned Judge held 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 "compelling" the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified' (at 523 c-d). Cillie J accordingly said, in the present matter, 'dat wesenlike en dwingende omstandighede darem iets meer moet wees as die gewone versagtende omstandighede en werklik iets moet wees wat die oplegging van `n mindere vonnis inderdaad noodsaak ten einde `n onreg teenoor die beskuldigde te voorkom'. After a brief reference to the appellant's personal circumstances and the circumstances under which the rape was committed the learned Judge said:

> 'Ek meen nie dat hierdie `n geval is waar gesê kan word dat elke regdenkende en ervare vonnisoplegger die oplegging van die voorgeskrewe vonnis as `n skokkende onreg teenoor die beskuldigde sal aanvoel nie.'

In this regard Cillie J had in mind what he said in *S v Shongwe*, *supra*, that 'indien die

wetlik voorgeskrewe vonnis sodanig verskil van die vonnis wat andersins deur `n ervare en gebalanseerde vonnisoplegger as gepas beskou sou word dat die oplegging van die wetlik voorgeskrewe vonnis tot `n skokkende onreg teenoor die beskuldigde sou lei daardie feit wel wesenlik en dwingend die nie-oplegging van die wetlik voorgeskrewe vonnis regverdig'.

[4] In *S v Malgas* 2001 (1) SA 1222 (SCA); 2001 (1) SACR 469 (SCA), this Court held that the imposition of the prescribed sentence need not amount to a shocking injustice ('skokkende onreg') before a departure from it is justified. That such a sentence would be an injustice is enough (para [23]). The suggestion that for circumstances to qualify as substantial and compelling they must be exceptional was also rejected (paras [10], [30] and [31]). It follows that the interpretation given by Cillie J to the concept 'substantial and compelling' circumstances is erroneous and amounts to a misdirection. This Court is thus at large to consider the question of

sentence afresh.

[5] The regional magistrate's factual findings were not challenged on appeal. They are fairly straight forward. The complainant lived with her grandfather in Lusaka Park, Theunissen. After she had returned from school (she was in Grade 4) during the afternoon of 23 September 1998 she played outside her home with two young boys and a young girl. She was then called by the appellant, whose house was right behind her home. He was known to her. When she entered his house the appellant closed the door. There was no-one else inside. He grabbed hold of her hands and took off his leather belt from his waist while ordering her not to scream. Because she was shocked she screamed, whereupon he struck her a number of times on her back with the belt. He pushed her onto a bed so that she lay on her back. As she was still screaming he covered her mouth with one hand and with the other removed her panties completely. She was wearing a skirt and a blouse. The appellant opened the zip of his trousers and

thereafter had full sexual intercourse with her. After he had done his deed she put on her panties and went home. When her grandfather returned from work later that afternoon she reported to him that the appellant had raped her. Her grandfather requested a female visiting family friend to examine her. The family friend obliged and confirmed to him that there was semen on the complainant's panties. She did not, however, conduct a physical examination on the person of the complainant. A complaint was thereafter made to the police.

[6] On 24 September 1998 the complainant was examined by Dr Hendrik Willem Storm, who testified that the complainant had at least five weals on her back as though she had been struck with a sjambok. Because of her age he examined her superficially. He did not examine her internally, but found that she had a bruise ('velbars') on her genitalia, externally. From this he concluded that it was probable that there had been penetration. He also found that the hymen had been perforated previously and

concluded from this that the complainant had been penetrated before, but not within the two weeks preceding his examination of her. When it was put to him that the complainant had testified that she bled from her genitalia as a result of the rape Dr Storm said that she would have bled from the bruise.

[7] Except for the regional magistrate's observation that the complainant '`n skraalgeboude en anatomies onderontwikkelde dogter is' and that she was 'nog pure kind in houding en in voorkoms', as well as the complainant's testimony that she felt pain inside her vagina during the rape, there was no further investigation pertaining to the after-effects the ordeal has had or will have on the complainant in the future.

[8] As to the appellant, he was 34 years old at the time of the trial. He testified that he lived with the complainant's maternal aunt as his wife, but that they had separated at the time of the commission of the offence. He had no fixed employment. He had progressed only to standard one at school. He had one previous conviction of theft for

which he was sentenced, in 1991, to a fine of R100 or two months' imprisonment.

[9] From a perusal of the record in this matter one cannot but conclude that the case for the State was presented casually, both in the regional court and in the court *a quo*. As I have already stated no evidence was led before Cillie J. The evidence reveals that following the rape the complainant's grandfather sent the complainant away to live with her mother. Her mother was called as a witness but was never asked how and to what extent the complainant had been affected by the rape. Dr Storm was never invited to comment on the likely effect the ordeal will have on the complainant as she grew older. As to her post-rape condition the sum total of the complainant's evidence is the following:

> 'Q [H]ierdie voorval wat die beskuldigde of dit wat die beskuldigde aan jou gedoen het. Hoe ervaar jy dit, ek sien jy het netnou begin huil, hoe ervaar jy dit, kan jy vir ons dit in woorde uitdruk, is dit reg wat hy gedoen het?
>
> A Nee, dit is nie reg nie.
>
> Q Maar, kom ek vra vir jou so, slaap jy gemaklik, beweeg jy maklik

tussen maatjies, seuns na hierdie voorval of hoe ervaar jy dit, of gaan jy normal voort?

A Ek slaap normaal, ek kon nog met my vriende kommunikeer.'

[10] Apart from the fact that these are multiple questions directed at a 14 year old girl (she was 14 at the time of the trial) the answers illicited are not surprising. What more could have been expected?

[11] Prior to the Act coming into force the High Courts were free, in the exercise of their discretion, to impose sentences of life imprisonment. But the very fact that the 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 (here rape) (*Malgas, supra,* para [7]).

> '[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, standardized, 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.'

(Per Marais JA in *Malgas*, para [8].)

[12] For the rape of a girl under the age of 16 years (as in the present case) the prescribed sentence is life imprisonment. However, the court's discretion to impose a different sentence has not been eliminated by the Act, but in the absence of weighty justification the prescribed sentence must be imposed (*Malgas*, para [25]). In the matter of *The State v Boesman Mahomotsa* (case number 85/2001, 31 May 2002, yet to be reported), a case where the respondent, a 23 year old man, had raped two 15 year old girls, I had occasion to say the following:

> '**[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.'

What emerges from this is that the fact that a victim may be under the age of 16 years is not the only criterion necessary for the imposition of a sentence of life imprisonment. Further in the *Boesman Mahomotsa* case:

> 'Even in cases falling within the categories [of rape] 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).'

The objective gravity of the crime, therefore, plays a role, indeed an important role.

[13] Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present. In the present matter evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.

[14] And the placing of this important information before the sentencing court is not

the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility. Van der Walt J, in *S v Dlamini* 2000 (2) SACR 266 (T), correctly sums up the position, when he says (at 268 d-e):

> 'Die Hof wat vonnis oplê in `n strafsaak neem `n aktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die Strafproseswet 51 van 1977 dat die hof kan op enige stadium van strafregtelike verrigtinge iemand as `n getuie by daardie verrigtinge dagvaar of laat dagvaar en die hof moet `n getuie aldus laat dagvaar indien die getuienis van so `n getuie vir die hof blyk noodsaaklik te wees vir die regverdige beregting van die saak.'

In the present case nothing prevented the court *a quo* from directing, for example, that the complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, present and future.

[15] Although this Court is at large, by reason of the misdirections mentioned earlier

in this judgment, to consider sentence afresh, it cannot be in the interests of justice to do so in this matter in view of what has been discussed above. It would be proper, in my view, to remit the matter to the court *a quo* for reconsideration of the sentence.

The following order is made:

1. The appeal succeeds to the extent that the sentence of life imprisonment imposed on the appellant is set aside.

2. The matter is remitted to the court *a quo* for re-consideration of the question of sentence and to do so in line with what has been set out above.

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L MPATI JA

CONCUR:

HOWIE JA)

FARLAM JA)