THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 268/10

In the matter between:

PATRICK BOOYSEN **Appellant**

and

THE STATE **Respondent**

Neutral citation: **Patrick Booysen v The State (268/10) [2010] ZASCA 162 (1 December 2010)**

Coram: PONNAN, MHLANTLA and TSHIQI JJA

Heard: **22 November 2010**

Delivered: **1 December 2010**

Summary: Appeal against sentence – s 51(1) of the Criminal Law Amendment Act 105 of 1997 (as amended) – whether substantial and compelling circumstances present justifying a departure from the prescribed minimum sentence.

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Jones, Pickering and Dambuza JJ as a full court):
The appeal is dismissed.

JUDGMENT

TSHIQI JA (PONNAN AND MHLANTLA JJA concurring):

[1] The appellant, Patrick Booysen, a 43 year old male, was indicted in the Eastern Cape High Court (per Jansen J) on a charge of rape of a ten year old girl. He was convicted and sentenced to life imprisonment in terms of the minimum sentencing legislation, s 51(1) of the Criminal Law Amendment Act 105 of 1997 (as amended).[1] He appealed, with leave of that court (Jansen J) to the full court against sentence only. His appeal was dismissed. The present appeal also against sentence only is before us with leave of this court.

[2] The pertinent question before the full court and presently before us is whether the trial court should have found substantial and compelling circumstances to be present, justifying a departure from the prescribed minimum sentence of life imprisonment.

[3] The circumstances in which the rape occurred are not disputed and may be summarised as follows:
The complainant, who referred to the appellant as 'Oom Pat' throughout her testimony during the trial, was the daughter of the appellant's neighbour and a

[1] Section 51(1) of The Criminal Law Amendment Act 105 of 1997 (as amended) prescribes a minimum sentence of life imprisonment for the rape of a person under the age of 16 years (Schedule II Part 1).

family friend. She testified that her mother had forced her to sleep at the appellant's home the evening before the rape. The following day, this ten year old child did the laundry, hung it to dry and folded it. Thereafter, she was called by the appellant who then raped her in a room in his house.

[4] Her account of her ordeal shows that she was in a lot of pain when she was being raped. This is not surprising considering that she was a virgin and was being violated by a drunken man old enough to be her father. She testified that she screamed and that the appellant covered her mouth to muffle her screams. Her ordeal was interrupted when two young men came and knocked on the appellant's door.

[5] The brutal nature by which the complainant was robbed of her virginity is proved by the gynaecological evidence that shows that the labia majora was tender, that the hymen was torn in three places and that she had a blood stained discharge from her vagina. It is significant that her hymen still showed three fresh tears three to four days after the rape.

[6] At the commencement of the trial, the appellant pleaded guilty to the charge and in amplification of his plea his counsel read out a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1997. A plea of not guilty was however entered in terms of s 113. At the conclusion of the State case he did not testify but simply closed his case.

[7] It was submitted on behalf of the appellant that the following personal circumstances cumulatively constituted substantial and compelling circumstances and that they ought to have been recognised as such by the court below. These were that the accused was 46 years old at the date of sentencing, was unemployed and received a social grant for a disability to his arm. He had passed standard one. His wife was gainfully employed as a domestic worker. He had no criminal convictions since 1987. It was further submitted that the fact that he had consumed alcohol and drugs during the course of the morning before the rape should also be taken into account. But no details were furnished of the extent of the consumption or its effect on him.

His counsel further submitted that his guilty plea should be taken into account. She was however constrained to concede that it cannot be objectively viewed as a sign of remorse because, apart from the fact that the s 112 statement attempted to portray the complainant as a seductress, the guilty plea was probably entered because the appellant was in effect caught in the act by the boys who interrupted him.

[8] It may be helpful at this stage to deal with the approach adopted by our courts in applying the minimum sentencing legislation. The purpose of the legislation was described by Marais JA in *S v Malgas*[2] as a temporary measure aimed at dealing with 'an 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'.

[9] The approach to an enquiry such as the present appears at 476e-477b of the judgment and the legislation has been followed consistently by the courts in applying the minimum sentence legislation. The learned judge of appeal stated at 476f – 477f:

'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.

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

[2] 2001 (1) SACR 469 (SCA) at 476e.

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…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.'

(See also *S v Abrahams*[3]*)*

[10] In *S v Matyityi*[4] approximately nine years after *Malgas* this court noted that criminality is still on the rise in our country despite the imposition of minimum sentences and has again stressed the relevance of the legislation as follows (para 23):

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas,* it still is "no longer business as usual". And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order

[3] 2002 (1) SACR 116 (SCA) para 26.
[4] (659/09) [2010] ZASCA 127 (30 September 2010).

can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, 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. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[11] It is against this background that the appeal should be considered. There is no suggestion that the personal circumstances of the accused were not taken into account by the trial court. The issue is whether they are such that they amount to substantial and compelling circumstances. The personal circumstances of the appellant cannot be viewed in isolation. They have to be weighed against the aggravating circumstances of the offence.

[12] The aggravating circumstances were the following:
The appellant was viewed as a father figure by the complainant. This is apparent from her reference to him as 'Oom Pat' throughout her testimony. The families are neighbours. The rape took place at the appellant's home while the complainant had been sent by her mother, apparently against her will, to go there for a visit. The significance of this evidence is that when the appellant raped the complainant, he did not only abuse a position of trust but also took advantage of the complainant's neglect by her family; as described by his neighbour, Ms Lindoor, in her testimony. Ms Lindoor testified that everyone at the complainant's home abused alcohol and fought all the time. She also stated that she frequently gave the complainant food. A day after the rape incident, she yet again called the complainant from the street and offered her food. Ms Lindoor, who must be commended for the mature manner in which she handled the incident, also contacted the welfare authorities in order to offer further assistance to the minor child.

[13] What happened to the complainant in this matter can be compared to *S v D*[5], where Van Den Heever JA stated:

'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 all too often do. Even where an offence is brought to light, our adversarial system often results in the courts failing the victims. Had appellant (presumably confident that he could bribe the impoverished children to silence) not taken the whole group with him, and had not, as a result, one of the boys been able to give good evidence of the events of that evening, appellant would indeed have got away with it. Mar was found to be as incompetent to testify as E. It would probably have taken very little, even had they been rated capable of testifying, for appellant's attorney to show them up as unreliable witnesses.

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. His victim was doubly vulnerable. Not only was she very young, but she had neither a safe haven to return to nor any of the armour caring parents try to provide for their children. She was perhaps chosen for that very reason: sexually attractive she certainly was not.'

[14] As in *S v D*, the complainant in this matter was victimised simply because she was vulnerable. It was noted by the trial court, that the complainant was small and had not yet developed sexually. Her breasts were very small and her pubic hair was barely visible. The complainant was therefore simply a child. It was fortunate that the two young men arrived at the time, because had this not occurred, the appellant would probably have managed to get away with the crime.

[15] There was no victim impact report presented into evidence by the State. However, the trial judge noted in his judgment that when the child was brought into the court for him to observe her closely, she unexpectedly came into contact with the appellant and became hysterical, screamed and clung to the court orderly. Such a reaction by the child, a year after the rape had occurred, is a clear indication that the consequential emotional and

[5] 1995 (1) SACR 259 (A) at 260g-261d.

psychological trauma was profound. The trial judge was correct in my view, in his conclusion that the complainant at the age of ten years was old enough to realise what was happening to her and to conclude that the stigma and the emotional and psychological scars will remain with her for the rest of her life.

[16] In *S v Jansen*[6], Davis J encapsulated the horrific nature of rape perpetrated on children as follows:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. It is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background (for example her mother killed her father at an earlier stage in her life) 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.'

[17] Although Ms Lindoor, a neighbour, testified in this matter, none of the complainant's parents testified. It is not clear from the record whether they attended the trial to offer her emotional support. There is paucity of information on the emotional and psychological consequences of the rape, except for that observed and noted by the trial judge.

[18] In *S v Matyityi* (para 17) stressed the benefits of a balanced perspective achieved by considerations of both the circumstances of the perpetrator and the victim as follows:

'By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus

[6] 1999 (2) SACR 368 (C) at 378g-379a.

have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence but also the impact of the crime on the victim be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim. As Müller and Van der Merwe put it:
"It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse." '

[19] The achievement of such a balance is extremely difficult when the complainants are young victims, as Nugent JA remarked in In *S v Vilakazi*[7]:
'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.'

[20] The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and AIDS pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living

[7] 2009 (1) SACR 552 (SCA) para 21.

with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects. It is not clear ex facie the medical report (J88) whether or not this precaution was taken with regard to this young girl. No evidence was led in this regard.

[21] Not having found substantial or compelling circumstances to be present, the trial court found no justification to depart from the prescribed minimum sentence. Clearly there are none. To find otherwise would be to fall into the trap of doing so for 'flimsy reasons' and 'speculative hypothesis favourable to the offender' as was cautioned against in *Malgas*. This the trial judge did not do, and consequently did not err in that regard. It follows that the appeal must fail.

[22] In the result the appeal is dismissed.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

APPELLANT:	J M COERTZEN Instructed by Legal Aid Board Port Elizabeth; Legal Aid Board, Bloemfontein.
RESPONDENT:	J N THYSSE Instructed by The Director of Public Prosecutions, Port Elizabeth; The Director of Public Prosecutions, Bloemfontein.