IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO: 88/2000

In the matter between:

THE STATE Appellant

and

BERNARD ABRAHAMS Respondent

BEFORE: Nienaber, Cameron and Mthiyane JJA

HEARD: 5 November 2001

DELIVERED: Friday 23 November 2001

Appropriate sentence for the rape by a father of his fourteen year-old daughter — application of 'substantial and compelling circumstances' criterion under Act 105 of 1997

JUDGMENT

CAMERON JA:

1. The State appeals against a sentence of seven years' imprisonment imposed on the respondent ('the accused') for the rape of his daughter. The accused who was represented by counsel stood trial in the regional court at Cape Town. Despite his plea of not guilty he was convicted as charged. The rape occurred three weeks after the minimum sentence provisions of the Criminal Law Amendment Act 105 of 1997 ('the Act') came into force on 1 May 1998. Since the victim was a girl under the age of 16 years, the sentencing provisions of that Act applied, and the accused was committed for sentence in the High Court.[1] Foxcroft J confirmed the accused's conviction.[2] Evidence was led and submissions made both in mitigation and aggravation of sentence. Foxcroft J concluded that 'substantial and compelling circumstances' as contemplated by the Act[3] were present. The prescribed minimum sentence of life imprisonment for the rape of a girl under 16 years[4] was therefore not applicable. Instead he imposed a

[1]Section 52(1) of the Act. The trial in the regional court was concluded in November 1998.

[2]Section 52(2). The High Court proceedings took place in September 1999.

[3]Section 51(3)(a).

[4]Section 51(1).

sentence of seven years' imprisonment. The State sought to appeal against this sentence as too light. The judge refused, but this Court on petition granted, leave to appeal.

2. After the appeal was lodged the Rape Crisis Cape Town Trust applied to be admitted to the proceedings as an *amicus curiae* under the rules of this Court. These permit 'any person interested in any matter before the Court'[5] to be granted such status. The Acting Chief Justice granted the Trust leave to submit written argument on the sentence, and we are indebted to it for its assistance in doing so.

3. The accused was convicted on the evidence of his daughter, Doreen, her mother (his wife) and of the district surgeon for Cape Town. Doreen testified about the events of a Friday afternoon in May 1998. She was fourteen at the time, the family's youngest child, and in grade nine at school. On that afternoon, she said, her father returned home after drinking at a nearby shebeen, and went to sleep in her room. On awakening he found her cleaning the kitchen. He started meddling with her. She pushed him away, saying 'Daddy, hou op met my, wat probeer Daddy met my te doen?' He persisted, pushing her

[5]Rule 16(1).

against the sink. Unable to run away, since her father had locked the verandah gate, she pleaded once more: ‘Daddy, hou net op asseblief.’ When he did not relent, she seized the knife she was washing, thinking she could somehow defend herself with it. But the accused struck it from her hand. It fell to the ground. She picked it up, but he pulled her to her room and flung her to the floor. He tried to pull down her school tracksuit pants. She began to cry and scream, but he would not desist:

> ‘En nadat hy so aangegaan het met my en toe, toe begin ek te huil en te skree en hy wil nie my af, hy sê ja hy kan eerste seks hê met my en dan ... [...] en dan kan ek ‘n man vat, ‘n “boyfriend” ..., dan kan ek maar maak met die “boyfriend” wat ek wil, so het hy bedoel.’

4. At this point during the attack Doreen’s friend, Esmerelda, came to the gate and called for her to come and play with their friends. The accused was then lying on top of Doreen on her bed. He lifted himself slightly and shouted to Esmerelda that he was resting and that Doreen was busy with her school work. In fact, he was trying to pull down her tracksuit pants. He had already pulled his own trousers down. Doreen, who still had the knife in her hand, resisted. But he hit the knife from her hand. She held onto her pants. She begged him: ‘Daddy, los my en hou op so aangaan met my.’ But with his weight on top of her she became numb with fear and fright. He jerked her pants and underclothes down and proceeded to have intercourse with her. She

was unable to get away or to cry for help because he was holding her hands and gagging her mouth with his hand.

5. After he had ejaculated inside her she lay crying on the bed. He fetched his face-cloth and told her rudely, 'Dê, vat dit, vee vir jou af.' The bed he wiped himself. Doreen went to run a bath to wash herself. She called a little boy who frequented their home to come and sit outside close to the locked gate. Her father then entered the bathroom. He told her not to tell her mother. He promised to give her anything she wanted 'want ek was nou klaar by jou en nou kan jy maar maak soos jy wil'. When she emerged from the bathroom he took money and left for the shebeen. On her mother's return Doreen told her what had happened. Her mother called the police. Doreen was taken to the hospital and examined. Though she had no marks or injuries she testified that her whole body was painful because this had been her first time.

6. The accused's wife confirmed her daughter's report on her arrival home, and corroborated her evidence in other material details, not only about the family's circumstances and relationships but about the damp patch that was still present on Doreen's bed. The district

surgeon testified that when she examined Doreen on the Friday evening, the girl reacted with pain. From the tearing of the hymen and the abrasion of the perineum it was evident that she had 'just lost her virginity'. There were no other injuries. The doctor's report, admitted at the trial, recorded that the perineal injury was indicative of forced sexual assault. Her evidence was not challenged.

7. The accused's defence as presented during the cross-examination of Doreen and her mother and in his own evidence has some bearing on the question of sentence. He blamed his arraignment on Doreen, her mother and her older brother, the former two for falsely accusing him, the latter as perpetrating the sexual assault upon Doreen. The accused's account was that while sleeping in Doreen's room on the afternoon in question he had a wet dream. When he awoke he had his penis in his hand, having ejaculated onto the bed. While wiping the bed with his handkerchief, he noticed Doreen standing in the doorway watching him. He told her to come and sit next to him because he did not want her to tell her mother what had happened. She refused. He got up and took her by the hand, explaining that his wet dream had soiled her bed. He promised to give her something for her silence. She asked how much. He offered R10,00. She demanded more.

Despite his entreaties she announced that she would tell what had happened. In pleading with her he put his hands on her shoulder and pressed her back onto her bed. He told her that he loved her. While trying to kiss her his cheek grazed hers. He again begged her not tell her mother, and gave her R10,00. He went to fetch a face-cloth, but when he tried to wipe the bed she grabbed the cloth from him and did so herself. Since she had sat in his sperm, she said that she would wash herself. It was he who asked the little boy to sit close by. As for the rape allegations, his wife and his daughter had conspired to fabricate them. Indeed, when on an earlier occasion he disciplined Doreen with a hiding, she threatened to send him to jail. Doreen's loss of her virginity he explained on the basis that his son had confessed some time before to molesting her.

8. This evidence, apart from coming across as palpably figmented, was illogical and inconsequential, since it failed to account for the medical evidence that Doreen had 'just' lost her virginity, at a time when it was not suggested that her brother or indeed any other man had been anywhere near her. It was clear that the sibling abuse the accused sought to invoke related to a long-past incident of innocent and relatively uninvasive exploration by the brother upon Doreen — an

instance (as the accused's wife put it) of children playing 'housey-housey', to which the brother confessed years later after a religious conversion. The accused's cynical attempt to invoke this family history to deflect the charge against him shows the extent of his callousness. The magistrate found Doreen to be a credible and honest witness and her mother a 'notably consistent and responsible' person who gave honest and reliable evidence. He accepted their testimony and rejected that of the accused as completely unconvincing and obviously fabricated.

9. Before Foxcroft J, nearly a year after his conviction in the regional court, the accused remained unrepentant. His counsel did not contend that he had been wrongly convicted and the judge confirmed the conviction. Thereafter a social worker testified to the effect of the rape upon Doreen and her mother was called again, for the same purpose. The social worker's uncontested evidence was that Doreen herself could not be called because a second testimony, nearly a year after her first, would have damaging effects. The accused for his part was adamant in expressing no remorse: 'Ek kan nie sê dat ek jammer voel, want soos ek hierso staan, weet ek dat ek onskuldig is, dat ek nie

die ding met haar gedoen het nie, maar soos die Hof my skuldig gevind het, weet ek [dat] ek niks daaraan [kan] doen nie.'

10. In passing sentence the judge rightly found that alcohol had not played a significant role: indeed, the accused himself in evidence disavowed its effect. While the accused's age — 53 at the time of the rape and 54 at the date of sentence — was not an excuse, the fact that he had reached that age without any previous convictions was 'of great importance'. As far as the offence itself was concerned, the judge did not consider it to be 'one of the worst cases of rape'. While rape of one's daughter was naturally a very reprehensible matter, in this instance 'fortunately the damage was not as great as in many cases':

> 'Daar is wel getuienis in hierdie saak dat hierdie jong dogter haar konsentrasie verloor het; dat sy 'n bietjie opstandig geraak het, maar ek weet nie of dit so buitensporig is nie, en 'n mens weet dat seuns en dogters van daardie ouderdom daardie soort tekens toon. Ek weet nie, want daar was nie volledige psigiatriese getuienis voor my oor presies wat die gevolge van hierdie daar was nie ...'

11. Foxcroft J rejected the State's submission that this was almost 'a textbook case' for the imposition of imprisonment for life. He invoked *S v B*,[6] a judgment before the Act's minimum sentencing provisions came into force, in which he had concurred. There a father over a six-year period had sexual intercourse with his teenage

[6] 1996 (2) SACR 543 (C).

daughters against their will and was convicted of rape. The magistrate's eleven-year sentence was set aside and replaced with eight years' imprisonment of which two were suspended. Van Reenen J stated:

> 'Die misdryf waaraan die beskuldigde skuldig bevind is is slegs tot sy eie dogters beperk en daar was selfs nie eens 'n suggestie van seksueel afkeurenswaardige gedrag buite die familieverband nie. Omdat al die beskuldigde se dogters alreeds hulle ouerhuis verlaat het is die kanse op 'n herhaling van die misdrywe waaraan die beskuldigde skuldig bevind is bykans nie-bestaande. Dit synde die posisie skyn daar nie enige dwingende rede te wees om die publiek teen die beskuldigde te beskerm of hom van die pleging van soortgelyke misdade af te skrik nie.'[7]

12. In the light of the accused's age and clean record and the fact that the deterrent element and protection of the public were of minimal concern, the judge concluded that substantial and compelling circumstances justifying a departure from life imprisonment as prescribed were present, and he imposed a sentence of imprisonment for seven years.

13. Foxcroft J's approach in taking into account all these factors, and considering whether they justified deviation from the prescribed sentence, was subsequently vindicated in *S v Malgas*,[8] where this Court held that the Act did not prohibit weighing all considerations traditionally relevant to sentence.[9] Nor was the legislation so prescriptive that it

[7] 1996 (2) SACR 543 (C) 555*b*.

[8] 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469.

[9] Paras 9-10.

permitted a sentencing court effectively no discretion at all. Instead, the statutory framework left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence,[10] though the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, 'truly convincing reasons for a different response'.[11] In *S v Dodo*[12] the Constitutional Court in rejecting a Bill of Rights challenge to the Act's sentencing provisions confirmed as 'undoubtedly correct' the operational construction of the statute enunciated in *Malgas*.

14. The result is that Foxcroft J's general approach to the duties the legislation cast upon him in sentencing the accused was by no means misconceived. The question the State's appeal raises, however, is whether the manner in which he applied that approach was so misguided as to warrant intervention on appeal. The State contended that the judge had misdirected himself and that he had erred in finding that substantial and compelling circumstances were present. The *amicus*, while emphasising that under the Constitution and in terms of

[10]Para 3.

[11]Paras 8 and 25C, per Marais JA.

[12]2001 (3) SA 382 (CC), paras 11 and 40 (Ackermann J).

international law the courts have a duty 'to act more stringently against offenders who commit crimes that invade the equality, dignity and freedom' of women and children, especially rape, did not explicitly contend that circumstances justifying a sentence less than life imprisonment were absent. Counsel for the accused submitted that while another court might well feel inclined to impose a higher sentence, Foxcroft J's exercise of discretion was not impeachable.

15. The circumstances entitling a court of appeal to intervene in a sentence a trial judge has passed were recapitulated by Marais JA in *Malgas*:

> 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling", or "disturbingly inappropriate".'[13]

The question therefore is whether the manner in which Foxcroft J weighed the factors relevant to determining sentence was materially misdirected or, if not, whether the sentence he imposed was in any event so shockingly inadequate as to give rise to the inference that he failed to exercise his discretion properly. In my view the first leg of the

[13] 2001 (2) SA 1222 (SCA) para 12.

test for intervention is satisfied, and it is unnecessary to consider the second. The record suggests that the learned judge erred in three respects in his approach to sentence, and the conclusion is inescapable that he materially misdirected himself in imposing the sentence of seven years. He omitted to consider one important aggravating factor that emerged from the evidence, gave insufficient weight to another, and finally failed to specify adequately what his invocation of *S v B*[14] entailed, while erroneously conceiving that the sentence there applied provided a benchmark for the present case. I deal with these in turn.

16. As indicated earlier, a feature of the complainant's evidence, corroborated by that of her mother, was the accused's sexual jealousy and possessiveness of his daughter. It was obvious from Doreen's evidence that the accused was determined to be the first person to have sexual intercourse with her. Once during the attack, and again immediately after it, he intimated that he wanted to be the first to have sex with her. Each time he added that once he had accomplished this she was free to do as she wished with others. This attitude seems to have sprung from his jealousy of her other potential young male friends,

[14]1996 (2) SACR 543 (C).

which he frequently and unreasonably expressed. Both the complainant and her mother testified that the accused prevented Doreen from having boyfriends. When she went to church with her friends, and the accused had been drinking, he would ask her mother, 'Waar is die teef?', and on her return home beat her. His possessive jealousy also found expression in inappropriate physical touching of Doreen (though neither mother nor daughter anticipated that this would culminate in rape). What is clear is that the accused was determined to precede other young males in any possible carnal access to his daughter. Her evidence to that effect was not specifically challenged under cross-examination.

17. This attitude reflects an approach to women, and to daughters in particular, as objects or chattels, not merely to be used at will, but once the first entitlement has been exercised, to be discarded for further similar use by others. 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 a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual

access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter. The judgment on sentence accords it no mention. The sentencing judge in my view thus misdirected himself in failing to take into account a most material aspect of the crime.

18. Second, there are the after-effects of the attack upon Doreen. Doreen's mother testified during the regional court trial that after the rape Doreen was reluctant to enter her own room and insisted on sleeping with her. She complained that if she slept alone she woke in fright, sitting straight up. Before the incident, Doreen was a 'normale kind gewees ... skoolkind en 'n kerkkind'. But the rape had changed not only her but the whole household: 'Ons is niemand meer dieselfde in die huis nie.' With Doreen in particular it was sometimes no longer possible to communicate. Whereas there had been intimacy between mother and daughter, now Doreen rejected her mother and repelled physical contact.

19. In the High Court the accused's wife testified that since the rape her daughter's schoolwork had deteriorated. As parent she

received regular messages and letters from the school principal complaining of rebelliousness and disobedience. The regional court trial had prevented Doreen from sitting her examinations the previous year; when re-sitting in January, she failed. This was the first time she had failed her examinations (though her teachers promoted her to grade ten on her past performance). At home she snubbed her mother and brother. She had cast aside all the dolls with which she formerly played. She had withdrawn from the neighbourhood children and no longer played with them in the street: 'Sy het sommer kom grootword net in 'n paar maande tyd.'

20. The State also called a social worker, who prepared a report in September 1999 after interviewing family members. Her findings, upon which she elaborated in her evidence, were that Doreen could not work through the rape. She was still having nightmares and had developed a phobia about her home. She was unable to concentrate for long. Her family members now found her ill-tempered, aggressive and rebellious, and she had withdrawn from them. She resisted discussion of the event. The social worker concurred with the school psychologist's assessment that Doreen needed long-term psychotherapy.

21. None of this was seriously challenged. The judge's apparent equation of the complainant's conduct with other teenagers' similar behaviour did not justly state its import. It is true that no psychiatric evidence was led, but in the circumstances of the case — particularly the absence of challenge to the mother's and the social worker's evidence — none was required. An appropriate assessment entails the unsurprising and indeed obvious conclusion that Doreen had been deeply and injuriously affected by the rape. This was an aggravating factor. In failing to accord it greater weight the judge misdirected himself.

22. Third, there is the learned judge's allusion to *S v B*,[15] where, he said, the accused's conduct 'was confined to his own daughters and there was not even a suggestion of sexually reprehensible conduct outside the family context.' This, the judge said, 'was a similar case'. It appears to have been found in *S v B* that the accused's conduct displayed a very specific familially-confined pathology that, with the passing into adulthood of his victims years later and their departure from home, showed no sign of being repeated, at home or elsewhere. If the

[15] 1996 (2) SACR 543 (C).

judge intended to express this proposition, a fuller exposition may have averted much misunderstanding. Unfortunately the proposition would not have been apposite to the present case, since at the time of the trial Doreen (unlike the daughters in *S v B*) was still an adolescent in her parental home and likely to remain so for a number of years (her unmarried older brother of 23 still lived at home). To the extent, therefore, that the judge may have considered *S v B* (explained as above) applicable to the present case, it seems to me that he further misdirected himself.

23. The suggestion that rape within a family is less reprehensible than rape outside it is of course untenable and I am satisfied that Foxcroft J's comments, though incautiously expressed, did not intend to convey anything to this effect.

(a) First and obviously, a family member is also a member of the wider public and equally obviously as deserving as the rest of the public of protection against rapists, including those within the home. Indeed, where a rapist's victim is within his family, she constitutes the part of the public closest to, and therefore most evidently at risk of, the rapist.

(b) Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. The present case illustrates them with acute force. The rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused did) he can exercise a proprietary entitlement. Though not the case here, a family victim may moreover for reasons of loyalty or necessity feel she must conceal the crime. A woman or young girl may further internalise the guilt or blame associated with the crime, with lingeringly injurious effects.[16] This is particularly so when the victim is the rapist's own daughter, and the more so when the daughter is of tender years.

(c) 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 their victims) grievously complicates its damaging effects. At common law incest is still a crime.[17] Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it

[16]See Anne V Mayne and Ann Levett 'The Traumas of Rape — Some Considerations' (1977) 1 *SACJ* 163 165f and Unit for Gender Research in Law, Unisa *Women and the Law in South Africa — Empowerment through Enlightenment* (1998) p 117.

[17]See JRL Milton *South African Criminal Law and Procedure* Vol II Common Law Crimes 3 ed (1996) ch 12 people 234-247.

exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. The present case illustrates this. It is clear that Doreen loved her father. In fact, in denying under cross-examination that she was lying, she explained: 'Ek is nog steeds lief vir my pa en vir 'n feit kan my pa weet dat ek sal nie so iets opmaak nie'. That the rape should have driven her to raise a knife to him in her own defence must clearly have entailed agonising conflicts. His love for her, on the other hand, included its corrupted expression in sexual possessiveness and inappropriate physical advances, culminating in the rape. When cross-examined about their interaction, she stated: 'Ek en my pa het 'n goeie verhouding gehad, want hy was baie geheg aan my, en ek kon nie eintlik dink dat my pa dit aan my sou kon doen nie, want hy is baie lief vir my en hy het nie toegelaat dat ek met jongetjie vriende, ... hy was te veel oor my, maar [...] is hy die een wat eintlik vir my wou gehad het.' 'Love' thus expressed becomes the negation of love, and the violation of the trust that should sustain it extreme. Its effects may linger for longer than with an extra-familial rape.

These features clearly required particular attention in regard to deterrence and retribution in the sentencing process.

24. The judge's allusion to *S v B* entailed a further misdirection. The judge described that as 'a much worse case of rape'. There it will be recalled a sentence of eight years was imposed. The judge appears to have inferred that a lighter sentence was therefore justified in the present case. In refusing leave to appeal the judge considered that the only debatable question was whether the Act requires a court, once it has found that substantial and compelling circumstances exist, 'to impose a heavier sentence than it would normally impose'. This the judge concluded was 'incorrect'. It is therefore clear that the judge considered that, having found substantial and compelling circumstances, he was at liberty to impose a sentence consonant with those applied before the Act came into force — hence the sentence one year lighter than that in *S v B*.

25. This approach was incorrect. The prescribed sentences the Act contains play a dual role in the sentencing process. Where factors of substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the exercise

of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.

26. This was made clear in *Malgas*. Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as 'ordinarily appropriate' is a consideration that the courts are 'to respect, and not merely pay lip service to'.[18] When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as the 'bench mark'.[19] The Constitutional Court has held that the approach enunciated in *Malgas* steers an appropriate path —

> 'which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently higher sentences are imposed in relation to the serious crimes covered by s 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights''.[20]

27. The judge's approach to the application of the statute was therefore misdirected. In consequence, this Court faces the duty of itself imposing sentence on the accused. (It is unnecessary to decide whether the seven-year sentence the judge imposed would in the circumstances of this case in any event have been inadequate even

[18]2001 (2) SA 1222 (SCA) para 25 (introduction).

[19]2001 (2) SA 1222 (SCA) para 25J.

[20]2001 (3) SA 382 (CC) para 11.

before the Act came into force.) As indicated earlier, the general manner in which the judge determined whether substantial and compelling circumstances existed was correct. He took into account all factors traditionally relevant to sentencing. These included the accused's personal circumstances, the nature of the crime and the circumstances attending its commission. In my view, the judge correctly concluded that factors of substance compelled the conclusion that a sentence other than life imprisonment is appropriate. The accused's age is not in itself a mitigating factor;[21] that he reached his middle years without a criminal conviction certainly is.[22] The fact that the accused's daughter, apart from the ultimate intrusion and violation that are the essence of rape, was not physically injured, is also of importance.

28. A further factor emerges from the record. It is clear from the evidence of both Doreen and her mother that the accused's downward spiral started with the death, by suicide, of the family's younger son at the end of 1996. Doreen volunteered during cross-examination that her parents had had a good relationship until he started

[21] *S v Nkambule* 1993 (1) SACR 136 (A) 144*i*, per Harms JA.

[22] *S v Fatyi* 2001 (1) SACR 485 (SCA) para 6, applying *Malgas*.

drinking again. It became clear from her mother's evidence in the regional court that a turning point in the accused's conduct occurred after her young son's suicide. In the regional court the accused did not himself allude to the tragedy, but explained during his evidence in the High Court that the family's seventeen year-old son had shot himself at the end of 1996, with serious consequences for his work and concentration. Given its corroboration in the evidence of both the complainant and her mother, the State did not dispute this in cross-examination. The conclusion is therefore warranted that the accused's son's suicide less than two years before the rape adversely influenced his conduct within the family and led to a diminution in the judgment he brought to bear as a father.

29. This in no way excuses the accused's conduct. But it does weigh further toward the conclusion that a sentence of life imprisonment would be unjust. In addition, I agree with Foxcroft J that this is not one of the worst cases of rape. This is not to say that rape can ever be condoned. But 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. As Davis J stated in *S v Swartz and another*:[23]

> 'As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so, too, not all rapes deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.'

30. The *amicus* rightly pointed out that our Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime. The Constitutional Court has given these obligations emphasis in recent decisions (*S v Baloyi (Minister of Justice and another intervening)*[24] and *Carmichele v Minister of Safety and Security*),[25] and in the sentencing process in they must be accorded appropriate weight. But Ackermann J has also sounded a timely reminder to sentencing courts:

> 'To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect upon others, bears no relation to the gravity of the offence ..., the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant, and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in the shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the

[23] 1999 (2) SACR 380 (C) 386*b-c*.

[24] 2000 (2) SA 425 (CC) para 13.

[25] 2001 (4) SA 938 (CC) paras 30, 45, 57 and 62.

offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'[26]

31. Weighing all the circumstances of this case, giving due weight to the legislative benchmark the Act creates, and taking into account in particular that at the time he was sentenced in September 1998 the accused had already been in prison for sixteen months, it seems to me that a sentence of twelve years' imprisonment would be appropriate.

1. The appeal succeeds.

2. The sentence imposed on the accused is set aside.

3. In its place, the accused is sentenced to twelve years' imprisonment, antedated in terms of s 282 of the Criminal Procedure Act, 51 of 1977 to 20 September 1999.

E CAMERON
JUDGE OF APPEAL

NIENABER JA)
MTHIYANE JA) CONCUR

[26] *S v Dodo* 2001 (3) SA 382 (CC) para 38.