IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A746/2013

(1) ✓ REPORTABLE: YES / ~~NO~~
(2) ✓ OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) ✓ REVISED.

21/10/2014
DATE

SIGNATURE

22/10/2014

In the matter between:

REGINALD RAMANNE MOKGARA Appellant

and

THE STATE Respondent

JUDGEMENT

DE VOS J:

[1] This is an appeal on sentence to the Full Bench of this Court. It is common cause that the Appellant, aged 27, raped the Complainant when she was in Grade 2. She was 7 years old. The Appellant was well-known to the Complainant and a family friend of her parents.

[2] The facts pertaining to the rape are the following:

2.1 On the 30th May 2009 the Appellant came to the Complainant's house and told the Complainant and her cousin that they must come to his house to collect food that he bought called "relish". The cousin, Karabo Molovi,

accompanied the Complainant to the Appellant's house. At the corner of their house, Karabo Moloyi stopped and waited for the Complainant.. The Complainant proceeded to the Appellant's house.

2.2 On Complainant's arrival at Appellant's house, he took her to his bedroom. He removed her dress and her panties. He told her to lie down on her back on his bed. Appellant then lied on top of her and put his penis into her vagina. He then moved up and down. At some stage she asked him what he was doing. He reacted and gave her a smack on her cheek. After he was finished she dressed. He then gave her R2,00 and the promised food. She left his room. When she met Karabo, she told her what had happened to her. They then walked back to her aunt's house and told them what happened. That same evening they reported the matter to the Police. The next day she was taken to Brits hospital where she was medically examined.

2.3 Karabo Moloyi confirmed the Complainant's version. She testified that she waited for the Complainant at the corner. When Complainant returned she saw Complainant was walking slowly. The Complainant had the food with her as well as R2,00. She asked Complainant what took so long. Complainant then told her that the Appellant did some naughty things to her. She explained to her that he took something in front of him and put it into her private parts.

2.4 The medical examination corroborates the Complainant's version, i.e. that there was vaginal penetration. Dr Motshepe, a qualified medical practitioner employed by the North West Health Department examined the Complainant and completed a J88 form.

That concluded the evidence for the State.

[3] The Appellant also testified. He denied that he raped the Complainant. He testified that Complainant's uncle told him that they did not have relish, and asked the Appellant if he could help. As Appellant was tired he asked the uncle to send the children to come and fetch the relish from his house. The uncle sent the Complainant. At his house he gave the Complainant the relish. She then left his house. Nothing else happened at his house. The next day he was informed by the Complainant's uncle that the Complainant alleged that he raped her. He denied that he gave her R2,00. His next-door neighbour, Sophie Matabane, also testified on his behalf. She saw the Appellant when he returned to his house between 18h00 and 19h00. She never saw the Complainant. The Appellant then closed his case.

[4] The Court *a quo* properly evaluated the evidence and concluded that the State has proved its case beyond a reasonable doubt and found him guilty on the charge of rape.

[5] The Appellant was thereafter sentenced to an effective term of life imprisonment. The Appellant was granted leave to appeal against sentence only.

[6] It is common cause that the Appellant was legally represented during his trail by Mr Maohla. The Appellant did not testify in mitigation of sentence but placed the following information before the Court *a quo*:

6.1 That the Appellant is 27 years of age; and

6.2 That he is a first offender.

6.3 The Appellant's attorney further requested the Court a quo to be merciful on the Appellant.

[7] The Magistrate then put it to the defence that the Appellant qualifies for the minimum sentence of life imprisonment in terms of the Act on Minimum Sentences, Act 105 of 1997, and asked the Appellant's legal representative:

"Are there any substantial and compelling circumstances?",

whereupon the defence replied:

"I do not have compelling or substantial..."

The Court accepts that the Appellant's legal representative then added circumstances which were unfortunately not transcribed.

[8] Thereafter the Prosecutor addressed the Court *a quo* and placed the following aggravating factors on record:

8.1 That the victim was at a tender age of (7 years old) at the time of the commission of the offence – she had just passed the toddler age;

8.2 The victim was unsuspecting whilst being cunningly lured to the raping bed with the prospect of collecting food, not knowing that she will be violated;

8.3 The Appellant planned the offence;

8.4 The Appellant was like family to the victim; he was regarded as an uncle and betrayed the trust of the victim;

8.5 The victim was subdued against her will and was injured in the process.

The Prosecutor requested that life imprisonment be imposed as there are no compelling and substantial circumstances at all.

[9] The Magistrate, after considering the facts and the submissions made, tabulated the aggravating against the mitigating factors. The aggravating factors are those placed before the Court by the Prosecutor as well as:

9.1 The sudden horrifying traumatic and unexpected nature of the event, and the likelihood that it will have a lasting detrimental effect on the Complainant;

9.2 The Appellant showed no remorse indicating that the chances of rehabilitation at the Appellant's age are slim;

9.3 The nature of the offence is that rape is an appalling and utterly outrageous crime which is prevalent in the Brits and neighbouring areas.

[10] In Appellant's favour it was accepted that he was 27 years of age and a first offender.

[11] The Court *a quo* then weighed up the aggravating factors against the mitigating factors and concluded that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence and accordingly imposed a sentence of life imprisonment.

[12] The only issue on appeal is whether the Magistrate misdirected himself to impose life imprisonment on the available facts before him. It is contended by counsel for the defence that the evidence before the Magistrate was incomplete and so little that it was impossible to exercise a proper judicial discretion on the available information obtained via the Appellant's legal representative. It is contended that the Magistrate was obliged to obtain further information regarding the Appellant's personal circumstances and the reasons for his behaviour. This could have been achieved by making proper enquiries and/or the obtaining of a probation officer's report and/or the calling of witnesses to testify in this matter.

In support of his contention, Appellant's counsel relies on the reported case of ***S v Dlamini*, 2000(2) SACR 266 (T)** where it was held by **VAN DER WALT J** that:

> *"Na my mening is daar 'n verpligting op 'n Landdros, al is die Appellant verteenwoordig by die verhoor, om self vrae te vra, ondersoek in te stel, en getuies te roep om daardie dwingende omstandighede vas te stel indien enigsins moontlik".*

[13] The principle enunciated in ***Dlamini supra*** was supported by the SCA in the cases of ***S v Samuels*, 2011(1) SACR 9 (SCA)** and ***The State v Van De Venter*, 2011(1) SACR 238 (SCA)** where the following was said:

> *"That despite the fact that the Appellant was legally represented, there had nonetheless been a duty on the Court a quo to call for such evidence as was necessary to enable it to exercise a proper judicial sentencing discretion. The community's natural indignation warranted recognition in the sentence. But that could not invite a sentence that was out of proportion to the nature and gravity of the offence".*

[14] The Appellant's counsel contended that it was held in ***S v De Kock*, 1997(2) SACR 171 (T)** at **192 h,** that the factors relevant to sentencing and the purpose of punishment must, based on the facts of every case, be placed in particular balance to one another. As the Court *a quo* did not do the necessary investigation, the Court misdirected itself by assuming on face value that there were no substantial and compelling circumstances.

[15] In opposition to the Appellant's argument, the State submits that the imposition of sentences falls wholly within the discretion of a Trial Court. The power to interfere with such discretion is very limited. A Court of Appeal will only do so if the Trial

Court has misdirected itself on the law or the facts in imposing sentence, or it has committed irregularities which vitiate the sentence, or the sentence differs so greatly from a sentence this Court would itself have imposed. See ***S v Rabie*, 1975(4) SA 855 (A)** at **857 d – e**.

The State further contends that the Magistrate was correct in his finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.

[16] I have considered both arguments before me, keeping in mind what was said in ***S v Malgas*, 2001(1) SACR 469 (SCA)** at **477 d – f** regarding the concept of substantial and compelling circumstances.

> *"Whatever nuances of meaning may lurk in these words, their central thrust be obvious. The specified sentences were not to be departed of lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maul in 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 differentiation 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 taken into account by Courts when sentencing offenders".*

In ***S v Vilakazi,* 2009(1)SACR 552 (SCA)** the Supreme Court of Appeal said the following:

> *"Malgas made it clear that the Act signalled that it was not* "business as usual" *when sentencing for the commission of the specified crimes".*

[17] The departure point in my view, is firstly the nature of the crime; secondly against whom it was committed' and thirdly the public view and perspective of how such offenders should be punished. There can be no doubt that on the limited facts before the court these elements were properly considered and dealt with by the Magistrate in his judgement on sentence. The question however is, were there enough facts before the Court *a quo* to arrive at a just and fair decision.

[18] In the present case the Appellant was legally represented. The normal rule is that once an Accused has placed his or her case in the hands of a legal representative, the representative normally has full control over the case and the Accused cannot afterwards repudiate the conduct of the Legal Representative. See in this regard ***R v Matonsi*, 1958(2) SA 450 (A)**. This incorporates an Accused's right to be involved in and to make decisions in connection with all matters at the trial. When there is a disagreement between a legal representative, or an Accused insists on acting against the latter's advice, the representative might have to withdraw from the case. It is further common cause that before the start of the trial the Appellant was properly warned and was aware that upon a conviction he could be sentenced to life imprisonment, unless he proves substantial and compelling circumstances.

[19] A Presiding Officer often has to deal with a situation where an Accused, whether he is defended or appearing on his own, decides not to give evidence under oath in

mitigating of sentence. In cases where a legal representative is present, a Presiding Officer can only rely on what defence counsel places before him. The Presiding Officer is not entitled to question the Accused directly. In matters where the Accused is without legal representation, the situation is different. The Presiding Officer can and is obliged to make the necessary enquiries *vis a vis* the Accused to determine if there are facts supporting a finding of substantial and compelling circumstances.

[20] That brings me to the issue what should be done by a Presiding Officer if and when an Accused's legal representative fails to prove substantial or compelling circumstance whether it is due to an Accused's refusal to give proper instructions as it may jeopardise the chance on appeal on the merits, and/or a lack of taking proper instructions, and/or lack of experience, or for various other reasons.

The law is clear and cannot be faulted. In such instances the legal duty remains on the Presiding Officer to ensure that all available facts are properly enquired into before a decision is made that the ultimate prescribed sentence of life imprisonment can be imposed.

[21] In the present case the only mitigating factors placed before the court was that the Appellant is 27 years of age, and a first offender. There is no evidence regarding the upbringing of the Appellant, his family, whether he went to school or not, is he employed, does he earn a salary, is he married, does he have any dependants, is he a sole breadwinner, can he be rehabilitated ,etc. What is also glaringly absent is the effect of the rape on the Complainant. I do not know if she was traumatised as

a result of the event, was there a change in her personality, how did she deal with her ordeal after the event, and what is the prognosis for her future development.

[22] In my view there was simply not enough evidence placed before the Magistrate to make an informed decision. In such instances, there rests a duty on a Presiding Officer to put pertinent questions to the Appellant's legal representative in order to determine facts that might be relevant to the issue. Depending on what information can be extracted, a Presiding Officer must also consider obtaining a probation officer's report and/or a victim impact report if necessary. In the present case there is a specific lack of evidence regarding the injuries caused, the level of violence perpetrated and the emotional trauma caused. Nothing is known about the Appellant's background, his marital status, whether he was employed and whether he can be rehabilitated. See in this regard ***S v Mahomotsa*, 2002(2) SACR 435 (SCA)** at **441[10]** and **442[17][18]**.

Traditional mitigating factors that are universally applicable in criminal matters can and may in suitable cases establish substantial and compelling circumstances. See in this regard ***S v Ndlovu*, 2007(1) SACR 535 (SCA)** at **538[12]** to **539[14]** where it was held that even though *"it may be difficult to imagine a rape under much worse conditions... the prospect of rehabilitation and the fact that the Appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence"*.

It seems to me that in the present case, evidence might be obtained to prove that the Appellant can be rehabilitated. In such an event the justification to impose the minimum prescribed sentence could not be sustained.

[23] The Appellant in this matter has been subjected to the risk that there are no substantial and compelling circumstances. This conclusion is based on inadequate or insufficient information / evidence, and accordingly the sentence imposed should be set aside.

I THEREFORE PROPOSE THE FOLLOWING ORDER:

1. The conviction on Count 1 is confirmed.
2. The sentence of life imprisonment on Count 1 is set aside and the matter is referred back to the Magistrate to consider sentence afresh, and after hearing evidence and/or obtaining facts relevant to the imposition of sentence, to impose a proper sentence.
3. The sentence imposed on Count 1 must be antedated to the date of the original sentence.

I agree.

MOTHLE J

JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

I agree.

TEFFO J

JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

It is so ordered.

DE VOS J

JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

Date of Hearing:	22 October 2014
Date of Judgement:	22 October 2014
On behalf of the Appellant:	Mr S Moeng
On behalf of the Respondent:	Adv R Molokoane