***FORM A***

**FILING SHEET FOR ESTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT**

ECJ:

PARTIES**:** **PATRICK BOOYSEN**

**And**

**THE STATE**

- Registrar: **CA 216/08**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **16/03/09**

DATE DELIVERED: **25/03/09**

JUDGE(S): **JONES J, PICKERING J, DAMBUZA J**

LEGAL REPRESENTATIVES –

*Appearances:*

1. for the Appellant(s): **ADV: J.G. Brisley**
2. for the Respondent(s): **ADV: L. Williams**

*Instructing attorneys:*

- for the Appellant(s): **PORT ELIZABETH JUSTICE CENTRE**
- for the Respondent(s): **DIRECTOR OF PUBLIC PROSECUTION (P.E)**

CASE INFORMATION -

1) *Nature of proceedings* : **APPEAL**

# THE HIGH COURT OF SOUTH AFRICA

Not reportable
In the Eastern Cape High Court
Grahamstown CA 216/08

In the matter between

**PATRICK BOOYSEN** **Appellant**

and

**THE STATE** **Respondent**

**Coram JONES, PICKERING and DAMBUZA JJ**

**Summary** Appeal – sentence – rape – life imprisonment – substantial and compelling circumstances for the imposition of a lesser sentence – on appeal it was argued that the trial court committed material misdirections by ignoring prospects of rehabilitation, ignoring the absence of extra-genital injury to a 10 year old victim, and inferring that the offence was premeditated from insufficient facts – it was also argued that a sentence of life imprisonment was unjust and disproportionate by reason of the offender's personal circumstances, prospects of rehabilitation, remorse, and lack of premeditation and despite the aggravating features of the rape, the absence of real mitigation, and the legitimate interests of society – sentence of life imprisonment upheld.

## JUDGMENT

## JONES J

[1] On 4 June 2008 the appellant was charged before the Eastern Cape High Court, Port Elizabeth (Jansen J) with the rape of a 10 year old little girl on 3 July 2006. The indictment alleged the applicability of the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997, which prescribe a sentence of life imprisonment in the case of the rape of a girl under the age of 16 years. The appellant was found guilty as charged. The learned trial judge came to the conclusion that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than the sentence prescribed by section 51. He therefore imposed the compulsory sentence of life imprisonment. The appellant now appeals against that sentence, with leave from the trial court.

[2] Mr *Brisley* argued on behalf of the appellant that the learned trial judge erred in coming to the conclusion that there were no substantial and compelling circumstances within the meaning of section 51(3) of the Act, and in particular that he misdirected himself in four respects:

2) by inferring that the appellant was not a useful member of society, that he did not mean much to the community, and that since he had turned from a life of crime in 1980s he had not made the most of the opportunity presented to him for rehabilitation;
3) by holding that the prospects of rehabilitation should be ignored in considering whether substantial and compelling circumstances were present;
4) by holding that the rape was premeditated;
5) by holding that the absence of serious physical injury was not a substantial and compelling circumstance.

[3] It is so that the complainant did not suffer physical injuries other than those which follow upon the act of rape, and that Jansen J did not take that consideration into account in the appellant's favour. In my opinion his failure to do so was not a misdirection. The complainant was 10 years old. She was a tiny child, slender and slightly built, and quite incapable of offering resistance to a sexual assault by an adult. These would presumably be among the considerations which motivated section 51(3)(aA) of the Act which says that the apparent lack of physical injury shall not constitute substantial and compelling circumstances for the purpose of the Act in the case of the rape of a girl under the age of 16 years. (This section was not in force on the date of the commission of this offence.) In the circumstances of this case the

learned judge was in my view perfectly justified in ignoring lack of injuries. The absence of the additional aggravation of serious physical injury does not in the circumstances of this case amount to mitigation. It does not in my opinion provide grounds for concluding that the prescribed sentence is a disproportionate and unjust sentence.

[4] It was suggested in the defence argument at the trial that the absence of premeditation was part of the factual complex which constituted substantial and compelling circumstances. The facts were that the child had spent a considerable amount of time alone with the appellant at the appellant's home prior to the rape. She had been instructed to do the laundry. I think that there is merit in Mr *Brisley*'s submission that the trial judge may well have gone further than merely rejecting the defence argument. The wording of his judgment suggests that he found by inference that the appellant, knowing that he was alone in the house with the child, could well have planned to rape her if the opportunity arose, and that he had probably done so. If that is so, it was a finding that should not have been made. The inference of premeditation was not the only reasonable inference to be drawn from the facts, and it should not have been held against the appellant for purposes of sentence. As I read the judgment, however, if it was taken into account it played no more than a minor role in the sentencing process. I do not regard it as a material misdirection.

[5] The first two alleged misdirections relate to the issue of rehabilitation. The first comes down to this, that the appellant's character is such that the prospect of rehabilitation is remote. The second is that the issue of rehabilitation is to be ignored because the prescribed sentence is life imprisonment. It is convenient to deal with

them together. The learned judge's *ex tempore* judgment indeed indicates that he considered the question of rehabilitation to be irrelevant to the issue of substantial and compelling circumstances. He said:

> In elk geval die kwessie van rehabilitasie . . . is 'n aspek wat by oorweging van lewenslange gevangenisstraf eintlik geen rol speel nie, want anders sou die wetgewer nie gese het vir sekere misdrywe moet lewenslange gevangenisstraf opgele word nie behalwe as daar wesenlike and dwingende omstandighede is nie, want die wetgewer sou altyd gedink as 'n persoon so 'n ernstige misdryf pleeg dat hy lewenslange gevangenisstraf opgelê moet word dan maak ons nie voorsiening vir rehabilitasie nie. So dit is nie 'n aspek wat ek in aanmerking kan neem nie.

The logic behind the learned judge's remarks is easily understood. The point he makes emphasises one of the many anomalies of this legislation which causes difficulty in dealing with the highly problematic imposition of compulsory minimum sentences. See the remarks of Nugent JA in *Vilakazi* v *S* [2008] 4 All SA 396 (SCA) in paras 9 to 13. The fact remains that rehabilitation is one of the considerations which traditionally plays a role in the imposition of sentence and which, in line with the principle of *S* v *Malgas* 2001 (2) SA 1222 (SCA), the courts are enjoined to consider in spite of any possible logical exclusion thereof in life imprisonment cases which common sense would ascribe to the legislature. Thus at para 25 F of the *Malgas* judgment Marais JA says that 'all factors . . . traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process'. See also *S* v *Fatyi* 2001 (1) SACR 485 (SCA) at 488d to the same effect which is quoted in the judgment of the learned trial judge. The relevance of rehabilitation to sentence in a given set of circumstances is illustrated by the majority judgment in *S* v *Nkomo* 2007 (2) SACR 198 (SCA) paras 13 and 14 where Lewis JA said

13 The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however.

14 Nonetheless these are substantial and compelling circumstances which the sentencing Court did not take into account. A sentence of life imprisonment - the gravest of sentences that can be passed, even for the crime of murder - is in the circumstances unjust and this Court is entitled to interfere and to impose a different sentence, one that it considers appropriate.

The judgment refers to other judgments where the prospect of rehabilitation has been regarded as a substantial and compelling circumstance. In the minority judgment Theron AJA remarked (para 30) that 'there is hardly a person of whom it can be said that there is no prospect of rehabilitation' and expressed the opinion that in the light of the aggravating circumstances of the case she did not consider the appellant's youth, employment and unspecified prospects of rehabilitation as substantial and compelling circumstances.

[6] While I conclude that in the light of the authorities the learned trial judge's remarks about the irrelevance of rehabilitation must be regarded as incorrect, I am by no means certain that his sentence is vitiated by a material misdirection. Reading the judgment as a whole and in context, his conclusion is that there were no real prospects of rehabilitation on the facts, and that in any event the question of rehabilitation was not a relevant consideration. He did not ignore the question of rehabilitation. I shall nevertheless embark upon the exercise, which is a necessary step by a court of appeal in cases of a material misdirection, of re-examining the facts in order to determine whether there are substantial and compelling

circumstances. In other words I shall assume for the time being in favour of the appellant that there has been a material misdirection.

[7] The most aggravating feature in this case is the age of the victim (10 years), seen against the learned judge's description of her as tiny, fragile, and slight of build. From her appearance and according to the medical evidence and the findings recorded in the medical report she showed virtually no signs of sexual development. This made the act of rape, always serious in itself, all the more serious. This is particularly because the victim was very young, small, and undeveloped; particularly because it involved penetration beyond the entrance into the vagina; and particularly because the child was fully penetrated by an adult male. This child was examined by the doctor some four days after the rape. There were still signs of redness to the *labia majora,* bleeding in the vagina, and three fresh tears of the hymen. The intercourse would have been painful and the damage to the genital organs was serious. The doctor noted no signs of emotional instability and there was no psychological assessment done of the effects of the rape on this child. In the absence of this kind of expert assistance one is left with the general and well-known fact that 'it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault and that in this case the complainant must indeed have been traumatized' (*Vilakazi* v *S supra* para 57). That this was the case here is shown by the trial judge's careful account of his observation of the complainant and the difficulty she had in giving her evidence. This is taken further by his description of the complainant's reaction when, after having given evidence in the children's witness room through the medium of an intermediary and closed circuit television, she was brought into court to give the judge a better impression of her size and stature and

was unexpectedly confronted by the accused. She became totally hysterical, screamed, clung to the court orderly and would not come further into the court room. A dramatic reaction like that, after a period of about a year since the rape, shows that the trauma was then still with this child and was still very real. It illustrates that courts imposing sentence for rape should not under-estimate the emotional scarring which results from this kind of offence. At the same time the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next, and that it is unfair to an accused person to place too much weight on its effect in a given case in the absence of expert evaluation. No more should be made of it than the general observation such as the one made in *Vilakazi*'s case *supra* that some degree of emotional trauma will inevitably follow upon a rape.

[8] The result of the above considerations is that this was a bad rape, made worse by the victim's age and stature, by the physical damage to her caused by the act of penetration, and by the observations of the learned judge which show that she suffered some degree of psychological trauma as a result.

[9] There is nothing about the commission of the rape which can be regarded as mitigating. The appellant suggested in his plea explanation (he did not give evidence) that although he accepted that the complainant was 10 years old, he thought that she might have been about 14 years. This was correctly dismissed out of hand by the trial judge. So also was the suggestion that this little girl played some sort of seductive role in the incident. The appellant's attitude to this crime displayed by these two features does not operate to his advantage in the enquiry into the issue of substantial and compelling circumstances. They take away somewhat from the

favourable inference of remorse which arises from his plea of guilty. More than that, they show that the appellant has no insight into the seriousness of what he did to this little girl, and this, in turn, raises questions of the possibility of repeat offences and reinforces the opinion of the trial judge that the prospects of rehabilitation are not good. That opinion was made after an assessment of the appellant's personal circumstances. The appellant was 46 years old at the time of sentence, married with an adult child and a 12 year old. He was not in employment and received a disability grant because of an injury to an arm which prevented him from working. He used the grant to support himself and his family. His wife is employed as a domestic servant. He is virtually uneducated having progressed no further than standard 1 at school. All of this places him in the lowest of income brackets, and it is fair to infer that his socio-economic circumstances are poor and that his chances in life have been negligible. He has a bad criminal record: 5 previous convictions of assault with intent to do grievous bodily harm between 1979 and 1982 for which he was sentenced once to juvenile corporal punishment and thereafter to imprisonment for periods ranging from 4 months to 9 months (25 months' imprisonment in all); a conviction of culpable homicide in 1984 for which he was given 6 years' imprisonment, 2 years' suspended; a conviction of malicious injury to property (3 months' imprisonment) in 1980; and a conviction of housebreaking with intent to steal and theft (2 years' imprisonment, 1 year suspended) in 1987. He stopped his criminal career thereafter until the commission of this offence, but he was not able to place evidence before the court to show that he has ever been a pillar of the community and a solid worthwhile citizen. His history as a whole no doubt induced Jansen J to comment that he was hardly a useful and valued member of society, and that although he has given up a life of crime he has not done anything to show that he is truly a candidate

for rehabilitation. I share the view that he is not a good candidate for rehabilitation. At 46 years of age he is set in his ways and mindset, his personality does not have the responsiveness of youth towards change, and his history does not demonstrate a willingness or ability for self-betterment. That he stopped committing crimes of violence is more likely to be attributable to a fear of further imprisonment rather than a change of heart. There is nothing to suggest that he has come to terms with the inherent wrongfulness of crimes of violence. This is also shown by his lack of insight into the seriousness of this crime as revealed by the attitude displayed in his plea of guilty. The prospects of rehabilitation must therefore play a relatively small role. Furthermore, because no sentence other than either life imprisonment or long term imprisonment is appropriate for an offence of this gravity, this is one of those cases where the personal circumstances of the offender, his degree of remorse, and his prospects of rehabilitation must inevitably recede in importance when regard is had to the seriousness of the crime and the legitimate concerns of the community (*Vilakazi*'s case para 58).

[10] Counsel suggested in argument that the lack of injuries other than genital injuries, and the fact that no violence or threat of violence or weapon was used, can be put into the melting pot to determine the issue of substantial and compelling circumstances. I believe however that these considerations do not take the enquiry any further, one way or the other, where the victim of the rape is a tiny child. He also raised the appellant's intake of alcohol which may have reduced the appellant's normal inhibitions. But in the absence of any evidence from the appellant about what he had had to drink and its effect upon him, this also takes the enquiry no further. I

shall accept counsel's suggestion that the lack of proof of premeditation may be raised in the appellant's favour.

[11] The question is whether, on a conspectus of all the evidence, the personal circumstances of the appellant, his prospects of rehabilitation, his remorse, and the absence of premeditation amount to substantial and compelling circumstances which justify the imposition of a lesser sentence than life imprisonment. Do they make the imposition of the prescribed sentence an unjust sentence because it is out of all proportion to the gravity of the offence? In my view they do not. They fade into insignificance when measured against

- the inherently serious nature of the crime of rape;
- the highly aggravating features to which I have referred which make this rape even worse;
- the absence of any real mitigating features; and
- the interests and legitimate concerns of society in the protection of little children, the prevention of crime, the deterrence of offenders, and a proper measure of retribution.

I am not able to find the existence of any circumstances which can properly amount to substantial and compelling circumstances as contemplated by section 51(3). The position is governed by the terms of the *Malgas* judgment (para 25 B, C and D):

> Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment . . . as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
>
> Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

> The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

I am of the view that a sentence of life imprisonment is a proper and appropriate sentence, and that a lesser sentence would not be an adequate sentence, regard being had to all the circumstances of the case. I am satisfied that this is one of those cases where, to borrow the language of *Malgas* (para 25 I), the circumstances of the case do not render life imprisonment unjust because it is disproportionate to the crime, the criminal and needs of society, that an injustice will not be done by imposing it, and that we are accordingly not entitled by the provisions of section 51 to impose a lesser sentence.

[12] In the result the appeal is dismissed.

RJW JONES
Judge of the High Court
17 March 2009

PICKERING J I agree.

JD PICKERING
Judge of the High Court

DAMBUZA J I agree

N DAMBUZA
Judge of the High Court