FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT

ECJ:

PARTIES**:** **DAVID WILLIAMS**

AND

THE STATE

- Registrar: **CA&R 86/09**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **22/02/10**

DATE DELIVERED: **08/03/10**

JUDGE(S): **JONES J, TSHIKI J & EKSTEEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): **ADV: E. Theron**
- for the Respondent(s): **ADV: Z. Swanepoel**

Instructing attorneys:

1. for the Appellant(s): **LEGAL AID BOARD (PE)**
2. for the Respondent(s): **DIRECTOR OF PUBLIC PROSECUTION (PE)**

CASE INFORMATION -

a. *Nature of proceedings* : **APPEAL**

Not reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown CA&R 86/09

In the matter between

DAVID WILLIAMS **Appellant**

and

THE STATE **Respondent**

Coram JONES, TSHIKI AND EKSTEEN JJ

Summary Appeal – rape and attempted murder – sentences of life imprisonment for rape and 15 years' imprisonment for attempted murder – the finding that there were no substantial and compelling circumstances was attacked on appeal and, further, it was argued that the sentences were unjust and excessively severe in the circumstances – there were no misdirections by the trial court – the sentences were not disproportionate or unjust or excessively severe in the light of the gravity of the offences and all the facts and circumstances of the case – the sentences were upheld on appeal.

JUDGMENT

JONES J

[1] On 1 November 2006 the appellant was convicted by Jansen J in the Eastern Cape High Court, Port Elizabeth of raping the complainant and then attempting to murder her by manual strangulation. The offences allegedly occurred in the vicinity of a place called Bingo near the village of Hankey in the Eastern Cape Province in the early hours of Sunday, 8 January 2006. The learned trial judge found that serious bodily injuries were inflicted during the course of the rape and that the complainant was raped twice, which made a sentence of life imprisonment mandatory unless there were substantial and compelling circumstances within the meaning of section 51(3) of the Criminal Law Amendment Act No 105 of 1997 which justified the imposition of a lesser sentence. He found that there were none, and passed a sentence of life imprisonment for the rape. He imposed a sentence of 15 years' imprisonment for the attempted murder.

[2] The appellant applied unsuccessfully for leave to appeal against the sentences. He then submitted a petition to the Chief Justice for leave to appeal against the conviction and sentence. The Supreme Court of Appeal granted the application. Insofar as leave to appeal against the conviction is concerned, it did so *per incuriam*. It is not competent for the Supreme Court of Appeal to grant an application for leave to appeal against a conviction unless the trial court has entertained and refused such an application (*S* v *Cassidy* 1978 (1) SA 687 (A) 690). This had not been done. The appeal on conviction is therefore not properly before us, and we have no power to entertain it. Counsel for the appellant recognized this and did not pursue it. There is no irregularity, however, in respect of the appeal against the sentences.

[3] Counsel for the appellant referred to the decision in S *v Nkomo* 2007 (2) SACR 198 (SCA) 205 and argued that in the light of that judgment the trial court erred in not finding that there were compelling and substantial circumstances to justify a lesser sentence than life imprisonment for the rape. She submitted, further, that both sentences were shockingly and unjustly severe, and that we should accordingly reduce them.

[4] It is well-known that an appeal court does not have a free hand when it comes to reducing a sentence imposed by the trial court (*S* v *Glannoulis* 1975 (4) SA 867 (A) Holmes JA 868 and *S* v *Kgosimore* 1999 (2) SACR 238 (SCA) 241 para [10], where Scott JA restated the principles. He said:

> It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate

> analysis this is the true inquiry. (Compare *S* v *Pieters* 1987 (3) SA 717 (A) at 727G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.

Although the legislature has circumscribed the discretion of a trial judge by requiring mandatory sentences in the case of specific crimes which have been singled out because of their seriousness, the leading authority of *S* v *Malgas* 2001 (1) SACR 469 (SCA), as explained in *S* v *Dodo* 2001 (3) SA 382 (CC), emphasizes that the imposition of a compulsory sentence is still a matter of discretion. The courts are given a discretion to depart from the compulsory sentence if satisfied that this is justified by circumstances which are substantial and compelling. The authorities referred to above, and many other cases, lay down and illustrate how that discretion should properly be exercised. Generally, the courts will not impose a prescribed sentence if to do so would be unjust. The test of whether or not a prescribed sentence is unjust is a proportionality test: is the sentence disproportionate to the offence, regard being had to the facts of the case? In applying it, substantial and compelling circumstances are not to be equated with exceptional circumstances. In determining whether or not they are present all relevant facts should be taken into account, including the considerations which the courts have over the years traditionally taken into account in the exercise of their discretion in the imposition of sentence. These are the triad of *S* v *Zinn* 1969 (2) SA 537 (A) 540G, namely the nature of the crime (including the degree of its seriousness and the moral blameworthiness of the perpetrator); the interests of the society; and the interests of the offender; which are to be viewed against the general purposes of criminal punishment, namely the protection of society from crime, deterrence, the reformation and rehabilitation of offenders, and retribution. A value judgment is necessary in assessing the seriousness of the offence and whether the compulsory sentence is in the circumstances just or unjust. It involves a careful and balanced assessment of the crime in relation to the interests of society and the effect of the sentence

on the offender. It requires a compassionate understanding of the weakness of human nature and the reasons for the criminal transgression in question. All of this is well known.

[5] The question in this case is whether, in the light of the above considerations, Jansen J can be said to have failed to exercise a proper judicial discretion in imposing sentence? Is his sentence vitiated by material misdirection? Is it inappropriate because it is shockingly or unreasonably severe?

[6] A proper reading of Jansen J's judgment on sentence shows that there were no material misdirections. He correctly concluded that, from the facts found proved in the judgment on the merits, a sentence of life imprisonment was prescribed by the Act because the complainant was raped more than once and because the appellant inflicted grievous bodily injury during the course of the rape. He held that the provisions of sections 51(1) and (3) therefore required him to impose life imprisonment unless he was properly able to conclude that for good and sufficient reasons (i.e. substantial and compelling circumstances) the imposition of a sentence of life imprisonment would amount to an injustice. He held that in coming to a conclusion one way or the other he should take into account the factors traditionally taken into account in the imposition of sentence, and that if he should conclude that there was a marked disparity between the prescribed sentence and the sentence which he considered should be imposed, he could properly hold that there were substantial and compelling circumstances which justified the lesser sentence.

[7] The learned judge then proceeded to consider the traditional factors which must be taken into account. First, he had regard to the personal circumstances of the appellant, which, he noted, should play a very important part because one was here concerned with the character of the person to be sentenced, with all his weaknesses and shortcomings. He referred to the appellant's age (28 years), his responsibilities – he was a family man with a

wife and two children (aged 4 and 2 years) of his own to support, and also his wife's two other children (aged 12 and 8 years) by a previous relationship, for whom he had assumed responsibility. He earned a living by using his motor car as a taxi and from doing odd jobs on farms in the area. He had recently obtained a position as a driver at the local market. He was known to be a God-fearing person who took part in the religious activities of the community. Indeed, the complainant knew him in that capacity, and thought – ill-advisedly, it turned out – that she and her companion could safely accept a lift in his motor car. He noted the submission by counsel on behalf of the appellant that these considerations called for the imposition of a sentence that would not break him or remove him from society, because he could possibly one day resume a role in the community and be of service to it. While taking these factors into account, he was also mindful of the fact that the appellant showed no remorse for what he had done. He remarked that while the absence of remorse was not in this case to be regarded as aggravating, it was nevertheless one of the considerations to be taken into account in the imposition of sentence. In my view, this is indeed so. Remorse has bearing, *inter alia*, on the character of the offender and, insofar as the prevention of crime is concerned, on the prospects of a repeat offence.

[8] With regard to the interests of society, the learned judge confined himself to remarking that, especially in view of the high incidence of cases of violence against women and children, those who commit rape and invade the most personal and cherished attributes of womanhood should expect no mercy but, on the contrary, should expect the courts to deal with them severely. This is in line with many judicial pronouncements. See, for example, the judgments in *S* v *C* 1996 (2) SACR 181 (C) 186e-f; *Holtzhauzen* v *Roodt* 1997 (4) SA 766 (W) 778 G-H; and *S* v *Chapman* 1997 (3) SA 341 (SCA) 345 C-D.

[9] This brings me to the third member of the triad, the seriousness of this particular offence. The court held that the offence was planned, though not necessarily in the sense of

premeditation. When he saw the complainant outside the tavern, he decided there and then to have his way with her, if necessary against her will. He induced her to get into his motor car on the pretext of taking her and her companion home. Then, he sped off with her in the car into the darkness of the small hours of the morning. He forcibly kept her in the car and took her along a desolate country road, assaulted her with fists and a stone, and raped her. During the course of the rape he bit her five times in the face. She resisted to the point of kicking out the rear window pane, but to no avail. He then dragged her out of the car and raped her a second time. He must then have realised the enormity of what he had done, and decided to silence her by strangling her. He told her he was going to kill her, and commenced to choke her with his hands. She held her breathe and pretended to go limp. He tested her breathing with his hand to her nose, and decided that he could safely leave her for dead. That is what he did. He subsequently removed the vehicle's licence and number plates. He also told the police that his car had been stolen. This was obviously an attempt to make it look like somebody had stolen the car and then picked up and killed the complainant.

[10] The learned judge remarked during the course of describing the offence that this was one of the most atrocious crimes of its kind that he had come across. This was a statement of fact. It was not an exaggeration, and, as I point out later in this judgment, it does not amount to overemphasizing the gravity of the offence. If the appellant had killed the complainant, it would properly have been regarded as among the very worst of murders. As it is, it is among the very worst cases of rape and attempted murder. The learned judge concluded that an injustice would not be committed if he imposed the compulsory sentence prescribed by law. He therefore held that there were no substantial and compelling circumstances present to justify the imposition of a lesser sentence than life imprisonment.

[11] I can find no grounds for departing from this conclusion. This was a particularly bad case of rape. This is apparent from the description of the crime in the judgment on the merits. There, the trial judge also noted signs of emotional and psychological trauma after the rape, which were still evident to the trial judge when she gave evidence. Carefully and critically balancing the gravity of the offence against the interests and personal circumstances of the appellant, and taking into account the legitimate interests of society in respect of retribution, the prevention of crime, the protection of women, and the rehabilitation of offenders does not in my view produce a sense of shock or injustice, and does not lead to any disparity between the prescribed sentence of life imprisonment and the sentence which we, sitting as a court of appeal, consider an appropriate sentence in the circumstances. The test of a striking disparity in sentence is referred to by the trial judge and used by him in weighing up whether life imprisonment was an unjust sentence. It is one of the tests that can properly be applied by an appeal court in these circumstances, as was explained, for example, by Ackermann J in *S* v *Dzukuda*; *S* v *Tshilo* 2000 (2) SACR 443 (CC) para 23 .

[12] I have dealt at some length with the trial judge's judgment on sentence. As I have said, it contains no misdirections, latent or patent. Ms *Theron* suggested in her heads of argument that the trial judge over emphasized the brutality of the offences whilst under emphasizing the appellant's personal circumstances. In my view, a reading of the judgment shows clearly that he did no such thing. The seriousness of the crime was described in clinical and objective terms, and the stated conclusion that, because of the attempt to kill the victim in order to silence her, this was among the most atrocious (afskuwelikste) crimes that he had come across was as much a conclusion of fact and logic as a justifiable statement of revulsion. It is not overemphasis to classify a crime as being among the worst category of crimes, if that is where it belongs. The judgment, furthermore, dealt with the bite injuries in an objective manner, and concluded that they constituted the infliction of grievous bodily

harm. The judgment said that the appellant bit the complainant five times in the face, four of them with such force that they tore the skin and caused the profuse bleeding that was evident from the blood stains in the car afterwards. Although not life threatening, they were regarded as very serious injuries inflicted on a sensitive portion of the body, with clear signs of disfigurement. They must have been acutely painful. Once again, I can find no indications of exaggeration in respect of what can only be described as brutal injuries inflicted in a vicious manner during the course of an ugly crime.

[13] Counsel's heads also suggest that the learned judge did not take into account that the appellant had a clean record because 'his first offender status' was not mentioned in the judgment, and, further, that he failed to take the prospects of rehabilitation into account. In the first place, the appellant was not a first offender. He has an old previous conviction (1991) for possession of dagga, and two convictions in 2005 for theft. It is so that the judgment does not refer to them, but this is not, in the circumstances, a proper criticism: no judgment can be expected to be all-embracing in the sense of referring to every detail. It is clear from the terms of the judgment that the learned judge had little, if any, regard to them, and it can safely be accepted from the failure to refer to them that he treated the appellant as a first offender in respect of crimes of violence. Although he does not refer in terms to the question of rehabilitation, the learned judge clearly had rehabilitation in mind when dealing with counsel's submission that the appellant should not be broken by a sentence which removed him permanently from society, because, so it was submitted, there was reason to believe that he might yet play a role in and be of service to the community. The judgment took this submission in consideration.

[14] In the course of her argument Ms *Theron* placed considerable emphasis on the facts of S *v Nkomo supra* (para 3) where a sentence of life imprisonment was reduced by the Supreme Court of Appeal to one of 16 years' imprisonment for a bad rape. Counsel sought

to draw a number of parallels with that case. There, the appellant was 29 years old with no previous convictions for serious crimes of violence, and a family man, the breadwinner of a wife and three children. It could not be said that he had no prospect of rehabilitation. As in this case, the complainant was raped more than once (indeed, she was raped five times), and no dangerous weapon was used. Unlike in this case, however, the complainant was not seriously injured. Whatever similarities there may be, it is usually unhelpful to seek more than very general guidance from the facts of other cases when it comes to the imposition of criminal sentence. No two cases can ever be equated, and a similar combination of features may on one set of facts constitute substantial and compelling circumstances, but be entirely inadequate on another. As Lewis JA pointed out in paragraph 19 of the *Nkomo* judgment 'it is trite that each case must be considered in the light of its particular facts'. What is always required is a detailed analysis of all relevant considerations of the case in hand. They should be considered individually, and then cumulatively, and then comparatively in relation to each other. In S *v Nkomo*[1] the Supreme Court of Appeal found that on the facts substantial and compelling circumstances were present which the sentencing court did not take into account but would no doubt have taken into account if it had had the benefit of the *Malgas* judgment. These included personal circumstances and the chances of rehabilitation, which Ms *Theron* incorrectly suggests were not properly considered in this case. The failure to consider relevant facts induced the Court in that case to conclude that the sentence was unjust and that the Court was entitled to interfere on appeal. Here, there was no failure by the sentencing court to take into account any relevant considerations; there were no misdirections; and there is no legal basis for a court of appeal to impose a different sentence.

[1] *Supra* paragraph 3 above. Para 2 of the judgment of Lewis JA puts the judgment in its proper context: 'The appeal is against the sentence of life imprisonment alone, with the leave of the Court below. That Court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment. It is significant, however, that the sentence was imposed in 1999 before this Court in *S* v *Malgas* determined the approach to be adopted in finding whether substantial and compelling circumstances exist'.

[15] In the result the appeal is dismissed.

RJW JONES
Judge of the High Court
4 March 2010

TSHIKI J I agree.

P TSHIKI
Judge of the High Court

EKSTEEN J I agree.

JW EKSTEEN
Judge of the High Court