

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION)**

**In the matter between:**

**Case No: CA & R**

**238/2007**

**BULELANI FOSI  
And  
THE STATE  
Respondent**

**Appellant**

**Date Heard:**

**21 May 2008**

**Date Delivered:**

**23 May 2008**

**Summary:**

***Rape - appeal against sentence of 15 years imprisonment - magistrate imposing sentence in excess of prescribed sentence - reasonableness thereof.***

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**JUDGEMENT**

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**CHETTY, J**

- [1] The appellant was arraigned for trial in the regional court, East London on a charge of housebreaking with intent to rape and rape. The charge sheet encapsulated the relevant sections of the minimum sentence provisions in the **Criminal Law Amendment Act 105 of 1997** (the Act) and when the charge was put to the accused, those sections as aforesaid were referred to by the prosecutrix. The appellant pleaded not guilty and his attorney informed the court that the appellant's defence was a "bare denial". After the adduction of evidence

by the state and the appellant, the latter was duly convicted and sentenced to a term of imprisonment of 15 years. With leave of the court *a quo* the appellant appeals against the sentence.

- [2] An appellate court's power to interfere with a sentence imposed by a lower court is not unlimited. In the absence of recognized grounds, for example a misdirection or the improper or unreasonable exercise of the sentencing discretion, the sentence imposed stands. In the present matter it is not suggested that there was a misdirection. The sole ground upon which the sentence is assailed is the alleged unreasonable exercise of the trial court's sentencing discretion. In support of the argument advanced counsel has referred to s 51 (2) (b) (i) which prescribes a minimum sentence of 10 years imprisonment on a first offender convicted of rape and fortified thereby has urged us to find that there is such a striking disparity between the prescribed sentence and that ultimately imposed that the only reasonable inference to be drawn is that the magistrate unreasonably exercised his discretion.

- [3] The submission is untenable and one devoid of all merit whatsoever. The preamble to the Act announces that it was enacted "*to provide for minimum sentences for certain serious offences*"

and over the past decade our courts have recognized that the Act merely expresses what the legislature considered the minimum sentence to be imposed on conviction for particular offences. Nowhere in the jurisprudence is there any suggestion that courts of law are bound to impose the sentence prescribed. Thus s 51 (3) provides for the imposition of a lesser sentence where substantial and compelling circumstances militate against the imposition of the ordained sentence. On the other hand, the *proviso* to s 51 (2) permits the imposition of a sentence in excess of that prescribed provided that the increased sentence does not exceed the prescribed sentence by more than 5 years. The rationale for the inclusion of s 51 (2) is not difficult to discern. The legislature was no doubt aware that there may well be cases where, as the present matter so clearly demonstrates that the prescribed sentence may well be disproportionate to the gravity of the offence. The facts of this case ineluctably compels the conclusion that a more severe sentence than the standardized one was imperatively called for.

- [4] Although the magistrate gave a detailed exposition of the factual background, it is necessary to briefly recount the events which unfolded during the evening of 4 June 2006. The complainant, a 44 year old woman lived in a shack together with young children aged 5 and 10. The appellant forcibly

gained entry to the premises and raped the complainant for virtually the entire evening until he left the next morning. During the rape the appellant was armed with a knife wherewith he repeatedly threatened the complainant with death should she resist or divulge what had occurred. Throughout her dreadful ordeal the two young children were present in the room. This synopsis of the evidence elevates this case from many others which come before our courts and the magistrate was thus fully justified in imposing the sentence which he did. In my judgment there is no proper basis warranting interference with the sentence imposed. The appeal is dismissed.

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**D. CHETTY**  
**JUDGE OF THE HIGH COURT**

Roberson, AJ

I agree.

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**J.M ROBERSON  
ACTING JUDGE OF THE HIGH COURT**

Obo the Appellant: **Adv C.A Renaud**

Obo the Respondent: **Adv J.E Van Heerden**