NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: CA & R 80/2010

KHUMBULANI NTOBELA **Appellant**

And

THE STATE **Respondent**

Coram: **Chetty, Revelas JJ and Conjwa AJ**

Date Heard: **8 November 2010**

Date Delivered: **10 November 2010**

Summary: Appeal – Murder – Sentence – Minimum Sentence – Life imprisonment – Complainant young girl aged five – Appellant's conduct premeditated – Psychological trauma – No basis for interference with sentence – Appeal dismissed

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JUDGMENT

Chetty, J

[1] This is an appeal against a sentence of life imprisonment imposed upon the appellant by the court below (Pickering J) following his conviction on a charge of raping a five year old female child. The principal submission advanced on behalf of the appellant before us was that the sentence imposed was unduly harsh in the sense that it was so disproportionate to the offence that appellate interference is warranted.

[2] The sentencing regime ushered in by the **Criminal Law Amendment Act**[1] has, since its inception triggered a veritable avalanche of legal discourse and the law reports themselves abound with learned judgments on the issue. As far back as 2001 however the determinative test for departure from the ordained sentence was articulated by Marais JA, in **S v Malgas**[2] as:-

> "[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been imposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -
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> A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
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> B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
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> C. 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.
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> D. 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.
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> E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for

1 Act No 105 of 1997
2 2001 (2) SA 1222 (SCA)

> effective sanctions against it, this does not mean that all other considerations are to be ignored.
>
> F. All factors (other than those set out in D above) 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.
>
> G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from he standardised response that the Legislature has ordained.
>
> H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
>
> I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
>
> J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

The judgment has consistently been followed and adopted for the past decade but for some unfathomable reason, notwithstanding its clarity of reasoning, it is often misunderstood. This is unfortunately one of those cases.

[3] The court below's judgment on sentence is thorough and well reasoned. It commenced by according recognition to the guiding principles enunciated in **Malgas** and lamented upon the endemicity of crimes of rape against women and children. The law reports themselves bear silent witness to the scourge of such

crimes. Although no *viva voce* evidence, either in mitigation or aggravation of sentence, was adduced prior to the imposition of sentence, the learned judge had the benefit of hearing the evidence of the complainant and members of her family concerning the actual rape and addition, the testimony of the district surgeon who examined the complainant, albeit two days after the rape. During the sentencing stage, two further reports, the first, a pre-sentence report and the second, a psychological assessment of the complainant was handed in by consent of the parties.

[4] The court below's finding that the rape was premeditated is fully supported by the evidence. The circumstances under which the complainant came to be in the appellant's home was narrated by a young boy whose evidence was summarized in the judgment as follows:-

> "It appears from his evidence that he lived at number 775, a house situated in the same yard as the accused's house number 776. Xhanti knew the accused well and would on occasion together with the siblings sleep over at the accused's house. He state that on a particular Saturday the accused called him to his house and told him that he must call the complainant for him. He went to look for the complainant but discovered that she had gone to fetch wood. When he reported this to the accused the accused told him that he must wait for her to return. He did so, he eventually found the complainant at her home with her twin sister. He told the complainant that Boetie Khumbulani namely the accused was calling her. He accompanied the complainant to the accused's house. The accused was present, the accused gave him R10, 00 and told him to go and buy sweets. Xhanti accordingly left and proceeded to the

> shop which was far away. When he came back with the sweets he found the accused sitting on the bed and the complainant standing near the door. They were both fully dressed. The accused gave him and the complainant sweets and then sent him to go and buy tobacco."

[5] The medical evidence established that the complainant suffered physical injury and although these were in themselves of a serious nature considering the tender age of the complainant, it paled into relative insignificance given the extent of the psychological trauma the rape occasioned. The learned judge summarized the clinical psychologist, Ms Sakaza's evidence as follows:-

> "It is clear from the report that there has been significant changes in the complainant's behaviour since the incident. Complainant is now irritable, tearful and cries easily. She has become forgetful and sometimes confused. Her attention span has been adversely affected. She has become clingy and dependent on her mother and sister. Episodes of tearfulness and temper tantrums mark her response to be left alone even for a short while. She could not sleep or eat properly for two weeks after the incident although this has apparently now improved. Miss Sakaza concludes that complainant has been significantly affected by the rape. The trauma thereof has affected the psychological and social domains of her development and functioning. This will further adversely affect her ability to form and maintain good relationships. In short therefore the accused has not only taken from complainant her childhood innocence he has also severely compromised her future. Her life will never be the same again."

[6] The appellant's personal circumstances were fully ventilated in the pre-sentence report and the absence of any remorse for his conduct, a feature of his

case. What is particularly disturbing is the evidence of the young boy that before he left the appellant's home with the complainant, the appellant had ordered him to bring another young girl to his room. Does this indicate a predilection for sexual gratification from young girls? Given the immediately preceding incident involving the complainant, such an inference may, in my view, legitimately be drawn. However, in determining whether a proper basis has been established for interference with the sentence imposed, it is unnecessary to pronounce thereon. This is precisely a case where the sentence imposed is entirely proportionate to the crime. Unjust, it certainly is not.

[7] In the result the following order will issue:-

The appeal is dismissed.

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D. CHETTY
JUDGE OF THE HIGH COURT

Revelas, J

I agree.

_____
E. REVELAS
JUDGE OF THE HIGH COURT

Conjwa, AJ

I agree.

_____
N. CONJWA
ACTING JUDGE OF THE HIGH COURT

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