FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A109/09

In the appeal between:

PULE JOHANNES LEKAOTA Appellant

and

THE STATE Respondent

CORAM: MOCUMIE, J *et* KUBUSHI, AJ

HEARD ON: 14 FEBRUARY 2011

DELIVERED ON: 24 MARCH 2011

APPEAL: JUDGMENT

KUBUSHI, AJ

[1] The appellant appeared in the Regional Magistrate Court in Bloemfontein on a charge of rape of a six year old girl. He pleaded not guilty to the charge but was found guilty as charged. On 3 November 2008 he was sentenced to life imprisonment. He is now, with leave of the trial Court, appealing against the conviction and sentence.

[2] The facts of the case are that on the 24 September 2006 appellant called the complainant and two of her friends to his shack to cook for him. He then sent the two friends to the shop and in their absence raped the complainant. The incident was witnessed by the complainant's brother who was sent to look for her. The matter was reported to the police and the appellant was arrested.

[3] During the hearing of the appeal both counsel were *ad idem* that there are no reasonable prospects of success on the conviction and that it must stand. After considering all the evidence in the case and the reasons for judgment of the trial Court, I also can come to no other conclusion but that the conviction must stand.

[4] In the Heads of Argument appellant's counsel who did not argue the case at the appeal hearing stated that it cannot be argued that a Court *a quo* misdirected itself by not finding substantial and compelling circumstances in favour of the appellant, but committed such by imposing the life sentence.

Ms Smith who argued the case during the appeal hearing however argued that the trial Court erred in finding that there are no substantial and compelling circumstances justifying a deviation from the prescribed sentence. She based her argument on the fact that the trial Court failed to consider the personal circumstances of the appellant and over emphasised the seriousness of the offence.

[5] Counsel for the respondent submitted in his Heads of Argument that the trial Court did not misdirect itself by finding that no substantial and compelling circumstances existed which warranted deviation from the imposition of the sentence of life imprisonment. During the appeal hearing he however conceded that this was a borderline case where the rape did not have permanent psychological effect on the complainant and indicated that he will have no objection if this court considered imposing a sentence of twenty years imprisonment as proper and just in the circumstances.

[6] The question that requires to be addressed by this Court is

whether the trial Court misdirected itself in finding that no substantial and compelling circumstances existed in this case which would have justified a departure from the prescribed sentence.

[7] Section 51 of the Criminal Law Amendment Act, 105 of 1997 (the Act) calls for the imposition of a sentence of life imprisonment. This sentence has been ordained by the legislature and must be applied without any hesitation. The legislature aimed at ensuring severe, standardised and consistent response from the courts to the commission of such crimes. As it was stated in **S v Malgas** 2001 (1) SACR 469 (SCA), it was no longer "business as usual", a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances.

[8] It is however incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon the consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed appropriate to the particular offence. As it was said in **S v Vilakazi** 2009 (1) SACR 552 (SCA) the essence of the decisions such as in **Malgas** above and **S v Dodo** 2001 (1) SACR 594 (CC) is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence.

[9] In **Malgas** above at 477 a – b the court stated that courts are given the residual discretion to decline to pass the sentence which the commission of such an offence will ordinarily attract, in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentence come what may.

[10] The court in **S v Malgas** above set down a "determinative test'' – which was endorsed by the Constitutional Court in **S v Dodo**

above as 'undoubtedly correct' and as a practical method to be employed by all judicial officers faced with the application of section 51 – in deciding whether a prescribed sentence may be departed from. The test was expressed in that case as follows:

> "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."

[11] Section 51 (3) of the Act prescribes that such a deviation can only happen when the court is satisfied that substantial circumstances compelling deviation from the prescribed sentence exist. This section vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed.

[12] In determining whether in a particular case substantial and compelling circumstances exist a court has to follow the **Malgas**

test and consider the well known traditional triad of factors relevant to sentence – the consideration of the crime, the criminal and the needs of society. Marais JA at 477 e – g went on to comment thus:

> "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 and rightly taken into account by the courts when sentencing offenders. The use of the epiteths 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. What they apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure."

[13] If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. It perhaps requires to be stressed that what emerges clearly from the decision in the **Malgas** and the **Dodo** cases above is that if substantial and compelling circumstances are found to exist, life imprisonment

is not mandatory nor is any other mandatory sentence applicable. See **S v Mahomotsa** 2002 (2) SACR 435 (SCA).

[14] It is trite that the appeal Court may only interfere with the sentence imposed by the trial court if there is disparity on the sentence imposed or where the trial Court failed to exercise its discretion properly or exercised it unreasonably.

[15] In *casu* the trial Court misdirected itself in two very material respects when meting out sentence. One, the Court interpreted the 'determinative test' as set down in **S v Malgas** to include that

> "the prescribed minimum sentence should only be deviated from if in the mind of the court it feels that it will induce a sense of shock if it is imposed."

The **Malgas** case is very clear on this issue and at page 481 d it is explicitly pointed out that a prescribed sentence need not be "shockingly unjust before it is departed from".

[16] Secondly, the trial Court failed to take the personal circumstances of the offender into account when considering whether there are substantial and compelling circumstances. It concentrated more on the circumstances leading to the commission of the offence and the aggravating factors.

[17] Appellant is a man of 48 years, he is not married and has three minor children. At the time of his arrest he was working at Pellissier doing tiling, he had been employed there for four years, and earning R600-00 per week. The mother of his children passed away in 2002, he could not remember the ages of the other children but could remember that the youngest was born in 1990. He was responsible for his siblings because their parents passed on. His children are attending school but he could not remember in which grades they were in. He was the sole breadwinner and caregiver to the children. In his evidence-in-chief he stated that he had spent a year and few months in jail before he was released on bail. These are all factors which, cumulatively, the trial Court should have

considered as favourable to the appellant.

[18] On each of the grounds stated above in paras [15] and [16] the trial Court materially misdirected itself and the sentence imposed cannot stand. This means that this Court is entitled to evaluate sentence afresh.

[19] Although the complainant was only six years old at the time of the commission of the offence, she did not suffer any physical or serious genital injuries. According to the Social Workers' report the incident had a negative impact on the complainant's behaviour although not of a permanent nature. Whilst it may theoretically be possible that a victim of rape may not suffer psychological damage other than that experienced while the attack is taking place and its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainant was a young girl, it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity, of course, it is not possible in the absence of appropriate evidence, but that does not mean that one should

approach the question of sentence on the footing that there was no psychological harm. **S v Mahomotsa** 2002 (2) SACR 435 (SCA) at 441 h – j.

[20] Section 51 (3) (aA) (ii) of the Act provides that when imposing a sentence in respect of the offence of rape an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. It must however be noted that this section should be read to mean that any one of the factors mentioned on their own may not be regarded as a substantial and compelling circumstance justifying departure from the prescribed sentence, but each of the factors may be considered together with the other factors cumulatively to amount to substantial and compelling circumstances. On this interpretation the court is not precluded from considering the fact that the complainant suffered no serious or permanent injuries, along with a basket of other factors, in order to arrive at a just and proportionate sentence. **S v Nkawu** 2009 (2) SACR 402 (ECG).

[21] The appellant's personal circumstances as set out in para [17] above are not indicative of an inherently lawless character and must be regarded as substantial and compelling. Coupled with this is the fact that the appellant had spent several months in prison awaiting trial, which the trial Court completely ignored. These are substantial and compelling circumstances which warrant a departure from the prescribed sentence. I therefore find that the trial Court misdirected itself in finding that no substantial and compelling circumstances existed.

[22] When considering all the mitigating and aggravating factors of this case I am of the view that an appropriate sentence that will fit the crime, the offender and be in the interest of society will be that of a long term imprisonment.

[23] I therefore consider the sentence of twenty years imprisonment as appropriate and just in the circumstances.

[24] I make the following order:

1. **The conviction stands.**
2. **The appeal succeeds as far as sentence is concerned.**
3. **The sentence imposed by the trial Court is set aside and replaced by the following:**

   "20 (twenty) years imprisonment, antedated in terms of section 282 of the Criminal Procedure Act, 51 of 1977, to 3 November 2008."

E.M. KUBUSHI, AJ

I concur.

B.C. MOCUMIE, J

On behalf of appellant:	Adv. Smith Instructed by: BLOEMFONTEIN
On behalf of respondent:	Adv. Chalale Instructed by:

BLOEMFONTEIN