IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: **AR118/2014**

In the matter between:

CELEMPHILE WELCOME ZONDO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

(delivered on 19 February 2015)

KRUGER J

[1] The Appellant was convicted in the Regional Court, Vryheid, of raping a girl who was under the age of sixteen years. In terms of Section 52 of the Criminal Law Amendment Act 105 of 1997 (hereinafter

referred to as the Act) (which section has now been repealed), the Appellant was committed to the High Court for sentencing. It is worth mentioning that he was convicted on the 25th November 2003. On the 20th September 2004, some ten months later, he was sentenced to life imprisonment. The Court *a quo* found that there were no substantial and compelling circumstances which existed and which would justify the imposition of a sentence lesser than that prescribed by the Act. On the 20th September 2013, exactly nine years later, he was granted leave to appeal against the sentence imposed. No reasons have been forthcoming why the application for leave to appeal took so long nor were any reasons forthcoming why the appeal was set down some seventeen months after leave to appeal was granted.

[2] The judgment on sentence is very scant and is eighteen lines long. Apart from reference being made to the Appellant's age, there is no indication that the Court considered his personal circumstances. Most of the sentence, although brief, centred around the interests of society and the reason why the Minimum Sentences Act was passed. The Court *a quo* concluded by holding that although it was established that the complainant "was not injured in any other way than the injuries occasioned by the rape itself", this was not sufficient to warrant a departure from the imposition of the minimum sentence of life imprisonment. The Court was of the view that as a girl under the age of sixteen years was raped, it automatically called for a sentence of life imprisonment.

[3] At the time of sentencing, the Supreme Court of Appeal in **S v Malgas, 2001(1) SACR 469 (SCA)** and the Constitutional Court in **S v Dodo 2001(1) SACR 594 (CC)** had provided some guidelines to the courts with regards to the imposition of the sentences as prescribed in Act 105 of 1997. In paragraph 25 in **S v Malgas** it was held:

> "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."

[4] It is accordingly clear from the passage quoted in **S v Malgas** that it is incumbent upon the court, before imposing a prescribed sentence, to assess, upon a consideration of all the circumstances of that case, whether the prescribed sentence is indeed proportionate to the offence committed. The Court *a quo*, in my opinion, failed to take this into consideration and accordingly misdirected itself. Given this misdirection, this Court is entitled to reconsider the sentence imposed and to evaluate whether life imprisonment is indeed an appropriate sentence, regard being had to the test as set out in **S v Malgas**, outlined earlier in this judgment.

[5] The complainant testified that the Appellant was well known to her. They were neighbours. On the day in question the Appellant arrived at

her homestead and requested permission from her mother or grandmother to send her to the shop to purchase a cigarette. The complainant purchased the cigarette and proceeded to the Appellant's homestead where she handed the cigarette to him. Once she had entered the rondavel, he requested to sleep with her. She did not agree. He then placed her on the bed, extinguished the candle, removed her panty and then had sexual intercourse with her. After he had finished, they both got dressed, he opened the door and she left. She proceeded to her homestead and informed her grandmother of what had taken place. The matter was later reported to the police and the following day she was examined by the District Surgeon. The Court *a quo*, in its judgment, remarked that "the incident had no adverse effect on her school work".

[6] The complainant's grandmother confirmed most of the complainant's evidence which related to the request and the subsequent purchase of the cigarette. She also confirmed that the child returned home, in tears, and had reported to her what had transpired. The Appellant denied that he ever went to the complainant's homestead and requested permission to send her to the shop to purchase the cigarette. He denied raping the complainant and averred that on the night in question he had been drinking heavily and subsequently fell asleep. He was awoken by the police and it was then that he had learnt that the complainant had been raped.

[7] The Court *a quo* correctly rejected the Appellant's version and, in my view, correctly convicted the Appellant.

[8] As found in the Court *a quo*, there was no extraneous violence and no physical injury was caused to the complainant other than the physical injury occasioned by the act of rape itself. There was also no threat of any extraneous violence of any kind. The complainant certainly did not testify that she was threatened not to reveal to any person what had happened to her. As mentioned earlier in this judgment, the Court *a quo* found that the entire incident had no adverse effect on her school work. This finding was made following a question by the Prosecutor to the complainant, in her evidence in chief, whether her school work had suffered as a result of the incident. The complainant replied in the negative. No other evidence was adduced to prove or disprove this. Apart from this oblique reference, there is nothing on the record to measure the emotional impact of the offence upon the complainant. Notwithstanding this, I agree with the sentiments of Nugent JA in **S v Vilakazi 2009(1) SACR 552**, at paragraph 57, where he remarked that:

> "I think 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 traumatised ……".

[9] The Appellant was twenty-seven years old at the time and was a first offender. I agree with the submission by counsel on his behalf that the Appellant's actions on the day was a singular brief lapse of behaviour on his part. The Court *a* quo failed to take into consideration that the Appellant had spent two years in custody awaiting the finalisation of this matter. The only aggravating feature is the

complainant's age. This alone, in my view, does not warrant an automatic imposition of life imprisonment.

[10] Bearing in the mind test as set out in **S v Malgas**, as outlined earlier in this judgment, I am of the view that the imposition of the prescribed minimum sentence would be unjust and would be disproportionate to the crime, the criminal and the needs of society.

[11] I accordingly propose that:

1. The appeal be upheld.
2. The sentence be set aside and be substituted with the following:

    (i) The Appellant is sentenced to fifteen years imprisonment.
    (ii) The sentence is antedated to the 20th September 2004.

KRUGER J:

Date of Hearing:	30th January 2015
Date of Judgment:	19 February 2015
Appellant's Counsel:	A A Nohiya
Respondent's Counsel:	N E S Buthelezi