THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 576/07

BONGANI PHILLIP VILAKAZI Appellant

and

THE STATE Respondent

Neutral citation:	*Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008)
Coram:	STREICHER, NUGENT, MLAMBO, MAYA JJA and HURT AJA
Heard:	5 MAY 2008
Delivered:	2 SEPTEMBER 2008
Corrected:	3 SEPTEMBER 2008
Summary:	Sentence – rape – sentencing principles.

ORDER

On appeal from: High Court, Transvaal Provincial Division (Els J sitting as court of first instance)

[1] The appeal against sentence is upheld. The sentence imposed upon the appellant is set aside and the following sentence is substituted:

'The accused is sentenced to fifteen years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire.'

JUDGMENT

NUGENT JA (STREICHER, MLAMBO, MAYA JJA and HURT AJA concurring)

[1] Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. In *S v Chapman*[1] this court called it a 'humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim' and went on to say that

'[w]omen in this country…have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[2] Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape

'the evidence points to the conclusion that women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa.'[2]

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[1] 1997 (3) SA 341 (SCA) 345A-B.

[2] Rachel Jewkes and Naeema Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview' *Social Science and Medicine* 55 (2002) 1231-1244.

During 2007 as many as 36 190 reports of rape were made to the police.[3] Perhaps in some cases the report was false but the figure is nonetheless staggering bearing in mind that rape is notoriously under-reported. It is also notorious that relatively few offenders are caught and convicted.

[3] There is considerable risk in those circumstances that excessive punishment will be heaped on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge.[4] But the Constitutional Court reminded us in *S v Dodo*[5] that punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings 'ought to be treated as ends in themselves, never merely as means to an end'.[6]

[4] In the case that I referred to earlier Chapman was said to have 'prowled the streets and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife'.[7] This court (Mahomed CJ, Van Heerden and Olivier JJA) described the sentence that he received as 'undoubtedly severe' but declined to interfere, saying that it was 'determined to protect the equality, dignity and freedom of all women…we shall show no mercy to those who seek to invade those rights'.[8] For each of his crimes Chapman was sentenced to 7 years' imprisonment with the effective sentence being 14 years' imprisonment.[9]

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[3] Crime statistics on www.saps.gov.za.
[4] According to S.S. Terblanche *A Guide to Sentencing in South Africa* 2ed para 8.3.2 the assumption that drastic sentences deter crime has little support.
[5] 2001 (3) SA 382 (CC).
[6] Para 38.
[7] At p 345C.
[8] At p 345D.
[9] The sentence on one count was to run concurrently with the sentences on the other two counts.

[5] Chapman was sentenced before ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (for convenience I will refer to those sections as the Act) introduced a minimum sentencing regime. But the sentence that was imposed in that case is not unduly out of line with the minimum sentence that is prescribed by the Act. The Act prescribes a minimum sentence for rape of 10 years' imprisonment in the absence of specified aggravating circumstances (none of which appear to have been present in that case) and multiple sentences imposed under the Act are capable of being served concurrently.

[6] In the present case the appellant was convicted on one count of rape and sentenced to life imprisonment. What accounts for the enormous disparity between the sentence in *Chapman* and the sentence in this case is that in this case the appellant's victim was under the age of 16 years. The Act prescribes that on that account alone the ordinary minimum sentence for rape of 10 years' imprisonment should instead be the maximum sentence that is permitted by our law, which is life imprisonment.

[7] This appeal is against that sentence. The appellant was convicted in the regional court at Volksrust and was committed to the High Court for sentence as required by s 52 of the Act. The Act prescribes that the minimum sentence must be imposed unless the court is satisfied that substantial and compelling circumstances exist that justify a lesser sentence. In this case the High Court at Pretoria (Els J) found that no such circumstances existed and sentenced the appellant accordingly. An application to that court some three years later for leave to appeal against both the conviction and the sentence failed. Leave was

subsequently granted by this court to appeal against sentence. Why the appeal process has taken so long is not now material.

[8] Leave to appeal was granted by this court with directions that certain issues in particular should be addressed. At the time the appellant petitioned this court he had no legal representation and Mr Trengove SC was requested to act as amicus curiae to assist this court in reaching a proper conclusion. We are grateful to him, and to Ms Steinberg and Ms Goodman who agreed to assist him, for their willingness to accept the appointment. By the time the matter reached this court the Legal Aid Board had appointed counsel (Mr Bredenkamp SC and Mr Alberts) to represent the appellant. The Centre for Applied Legal Studies and the Tshwaranang Legal Advocacy Centre applied for and were granted leave to address this court on issues of general application relating to the Act and were represented by Ms Moroka SC and Ms Pillay. The state was represented by Mr De Meillon. Although leave to appeal was granted only against sentence Mr De Meillon properly accepted that the appeal might be broadened to include the conviction if upon reflection on the evidence we were to be of the view that the appellant should not have been convicted.[10]

[9] The Act came into effect on 1 May 1998 for a period of two years but was capable of being extended for two years at a time by proclamation. It was introduced in response to the upsurge in serious crime and was described by the Minister of Justice at the time as 'drastic' but temporary. Parliament was told by the portfolio committee that the Act

'is to be regarded as a precursor to a fully fledged sentencing guideline system that will inevitably take some time to evolve. Hence the provision to limit the life span of the Act to

[10] The record of the trial was not before this court when the petition was considered.

two years, after which the President with the concurrence of Parliament will be able to extend its operation one year at a time.'[11]

[10] A sophisticated system to construct guidelines for consistency in sentencing that would take account of the views of all interested parties was subsequently recommended by the South African Law Commission in December 2000.[12] The recommendation was made after a comprehensive review of sentencing practice in this country and abroad, where sentencing guidelines in one form or another are common.[13] But drastic legislation has a propensity to become permanent once it has become familiar. The sophisticated guideline-system recommended by the Law Commission, which I suspect would have been welcome to many judges who face the difficult task of sentencing, was not introduced. Instead the temporary regime provided for in the Act was consistently extended and has now been entrenched (with some amendments) by the Criminal Law (Sentencing) Amendment Act 2007.[14]

[11] The sentencing regime that is provided for in the Act bears little relationship to the systems I have referred to, all of which are structured to give due weight to the numerous combinations of variables that accompany the commission of crime. In contrast the Act purports to cover the field of serious crime in no more than a handful of blunt paragraphs.

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[11] Second Reading Debate: Hansard 6 November 1997 column 6089.
[12] Project 82: 'Sentencing (A New Sentencing Framework)'
[13] In South Australia, for example, the Criminal Law (Sentencing) (Sentencing Guidelines) Act 2003 empowers the Full Court to establish sentencing guidelines. In New South Wales the Criminal Court of Appeal has itself assumed jurisdiction to do so (See *R v Henry, Barber, Tran, Silver, Tsoukatos, Kyroglou, Jenkins* [1999] NSWCCA 111). In England the Criminal Justice Act 2003 created a Sentencing Guidelines Council that has established sophisticated guidelines on the recommendation of a Sentencing Advisory Panel (see, for example, 'Guidelines on Sexual Offences' at http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html). Across the Atlantic the Minnesota Sentencing Guidelines Commission (created under 1978 Minn. Laws, ch. 723) has established a sophisticated framework of advisory sentence-ranges that are presumed to be appropriate to particular crimes with scope for the courts to depart from them where that is justified by 'substantial and compelling circumstances'.
[14] That Act took effect on 31 December 2007.

[12] The Act demands the imposition of the prescribed minimum sentences unless a court is satisfied in a particular case that there are 'substantial and compelling circumstances' that justify the imposition of a lesser sentence. I have pointed out that in the case of rape the sentence that is considered to be ordinarily appropriate is 10 years' imprisonment. But there are eight circumstances in which the sentence prescribed for the crime is imprisonment for life. I have mentioned one such circumstance: where the victim is a girl who is under the age of 16 years. The other seven are the following:[15]

'(i) Where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) [When the crime was committed by] more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) [When the crime was committed] by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;

(iv) [When the crime was committed] by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(v) Where the victim is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;

(vi) Where the victim is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973;

(vii) [Where the crime involved] the infliction of grievous bodily harm.'

[13] What is striking about that regime is the absence of any gradation between 10 years' imprisonment and life imprisonment. The minimum sentence of 10 years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present,

[15] Schedule 2 Part I read with s 51(1).

irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender. On the face of it a first-offending 18 year old boy who rapes his 15 year old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist who repeatedly gang-rapes and beats senseless a disabled victim whom he consciously infects with HIV. The 18 year old boy who rapes his 15 year old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes. It requires only a cursory reading of the Act to reveal other startling incongruities. And when the sentences that are prescribed for rape in various circumstances are related to sentences prescribed for other crimes even more incongruities emerge. It is not surprising that the leading writer on the subject of sentencing in this country, Professor Terblanche, advanced the following acerbic observation on the Act ten years after it took effect:[16]

'I have criticised the Act elsewhere[17] and, if anything, have become more critical with time. There is hardly a provision in sections 51 to 53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences.'

[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas*[18] – which was said by the

[16] S.S. Terblanche, above, p. 75.
[17] 2003 *Acta Juridica* 218-220 and (2001) 14 *SACJ* 18-19.
[18] 2001 (2) SA 1222 (SCA).

Constitutional Court in *S v Dodo* to be 'undoubtedly correct'[19] – that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in *Dodo* found the Act to be not unconstitutional. For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some case that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in *Malgas*, and in particular its 'determinative test' for deciding whether a prescribed sentence may be departed from,

'makes plain that the power of a court to impose a lesser sentence … can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross' [and thus constitutionally offensive].[20]

That 'determinative test' for when the prescribed sentence may be departed from was expressed as follows in *Malgas* and it deserves to be emphasised:

'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.' [21]

[15] It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear

[19] Para 40.
[20] Para 40.
[21] Para 25.

that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.'[22]

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. That was also made clear in *Malgas,* which said that the relevant provision in the Act

'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. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which *'justify'*…it'.[23]

[16] It was submitted before us that in *Malgas* this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in *Malgas.* The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter '**conscious of the fact that the Legislature has ordained** [the prescribed sentence] as the sentence which should *ordinarily* **and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances'[24] (the emphasis in bold is mine). In the context of the judgment as a whole, and in

[22] Para 37.
[23] Para 14.
[24] Para 25 at part B of the summary of its conclusions.

particular the 'determinative test' that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite 'weighty justification' for the imposition of a lesser sentence.

[17] I need not repeat all the other passages that were selectively relied upon to support the submission. It is sufficient to say that when placed in their context none supports the submission. Indeed, the court could hardly have held that the various sentences are indeed proportionate to the particular crimes – and thus to be imposed as the norm – when it did not even pertinently consider the various sentences for the various crimes. To say that a court must regard the sentence as being proportionate a priori and apply it other than in an exceptional case runs altogether counter to both *Malgas* and *Dodo*. Far from saying that the circumstances in which a court may (and should) depart from a prescribed sentence will arise only as an exception *Malgas* said:

'Equally erroneous…are *dicta* which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.'[25]

[18] It is plain from the determinative test laid down by *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the

[25] Para 10.

circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.

[19] In a variation upon the earlier submission it was also submitted that the prescribed sentence must be imposed in 'typical' cases and may be departed from only where the case is atypical. We were not told what constitutes a 'typical' case nor how such a case is to be identified. All that is typical of cases that fall within a specified category is that they have the characteristics of that category. But for that, no case can be said to be 'typical'. The submission finds no support in *Malgas* or in logic and it has no merit.

[20] I do not think it is helpful to revisit constructions of the Act that were considered and rejected in *Malgas*, as much of the argument before us attempted to do. I have pointed out that the essence of the decisions in *Malgas* and in *Dodo* is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in *Malgas*. It was also pointed out in *Malgas* that a prescribed sentence need not be 'shockingly unjust' before it is departed from for 'one

does not calibrate injustices in a court of law'.[26] It is enough for the sentence to be departed from that it would be unjust to impose it.

[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment[27] must never blunt one to the fact that its consequences are profound.

[22] The case that is before us is characterized by superficiality from beginning to end with the result that it exhibits several disturbing features. Nothing was done to enquire into material matters before the trial commenced. The complainant's evidence was presented with little care for completeness and accuracy. The evidence was subjected to little analysis. And the process of sentencing was perfunctory.

[23] Section 52 of the Act requires a regional court, if it has convicted an accused person of an offence for which life imprisonment is prescribed, to stop the proceedings and commit the accused for sentence by a high court. The

[26] Para 23.
[27] Prisoners serving sentences of life imprisonment increased ninefold from 1998 to 2008 (see para 51 below).

process provided for in that section is 'designed to place the High Court in the same position as the trial court after it has convicted the accused',[28] which contemplates that the high court will familiarize itself sufficiently with the material facts surrounding the commission of the offence to be in that position. The section provides that 'unless the high court is not satisfied that the accused is guilty' it must make a formal finding of guilty and proceed to sentence the accused accordingly.[29] Although that is framed in the negative I venture to suggest that a court that is sufficiently familiar with the material facts to enable it to properly assess the sentence ought never to be in the position of sentencing without having formed the view that the conviction is indeed sound.

[24] In this case the court below recorded that it had read the record and was satisfied that the appellant was properly convicted but features of the subsequent judgment that I presently refer to do not inspire confidence. A finding of guilty having formally been entered that was followed by submissions by counsel for the appellant that were decidedly brief – they take up a mere forty lines in the record. I call them submissions but they were really no more than a recital of the appellant's personal circumstances – that he was 30 years old, lived with a female partner and their three children, was in fixed employment earning approximately R700 per week, and was a first offender.[30] The learned judge then delivered a judgment that takes up 30 lines. Brevity is naturally not a vice but what was said in those lines was mostly formalistic and a repetition of the appellant's personal circumstances. Of the offence itself the learned judge said no more than that raping a girl under the

[28] *S v Dzukuda, S v Tshilo* 2000 (4) SA 1078 (CC) para 18.
[29] Section 52(2)(b).
[30] He has one conviction for possession of dagga but the court below correctly regarded that to be immaterial.

age of 16 years is a serious offence against which society is entitled to be protected, which goes without saying. What he also said in the judgment is that at the time the offence was committed the complainant was 11 years old, that she was a 'sufferer of epilepsy', and that she was 'to a degree mentally impaired', all of which he clearly considered to be aggravating. He concluded by saying that 'taking everything into account' he could not find circumstances that justified a departure from the prescribed sentence of life imprisonment and he sentenced the appellant accordingly.

[25] It is convenient at the outset to deal with the three features relating to the complainant that the court below took account of in weighing what sentence to impose. (All the quotations from the record that follow are my translations with the original evidence in footnotes.)

[26] The complainant was not 11 years old when the offence was committed. According to the complainant she was 15 when she gave evidence,[31] which places her age at between 14 and 16 when the offence was committed. (In answer to a question the complainant, who had no formal schooling, said that she could not remember the date of her birth[32]). A witness[33] who encountered the complainant for a short time on the day the incident occurred said that he 'estimated her age to be about 11 or 12 years' but that evidence naturally carries no weight. The district surgeon who examined the complainant on the day of the incident recorded her age as 13 years. The source of that information was not disclosed and nobody bothered to enquire nor to query its inconsistency with the evidence of the complainant. The magistrate estimated

[31] On 7 June 2000. The offence was committed on 17 September 1999.
[32] 'Ek vergeet wanneer ek is gebore'.
[33] Mr Nkosi, who I will refer to later in this judgment.

her age to be below 16 years and her own evidence of her age was accepted by the prosecution and the defence alike both at the trial and in the proceedings before us. The age of the complainant at the time the offence occurred was clearly a material factor to be taken account of in sentencing. To take account of the fact that she was 11 when in fact she was at least 14 and might have been over 15 was a misdirection.

[27] The evidence that founded the other two statements emanated from the district surgeon who examined the complainant on the day that the incident occurred but what was said by the court below does not accurately reflect that evidence. The evidence of the district surgeon was not that the complainant suffered epilepsy nor that she was mentally impaired. His evidence was that the complainant gave a history of those conditions. The district surgeon made no such diagnosis himself. Precisely what the complainant told the district surgeon was not disclosed and once more nobody bothered to ask either the district surgeon or the complainant. The evidence was strictly not even admissible as proof of the existence of those conditions but the misdirection goes further than that.

[28] It appears from a standard medical textbook[34] that epilepsy is not a single condition but describes a variety of conditions characterized by cerebral seizures that might manifest themselves in various ways and with varying intensity and at varying intervals. In the period between seizures normal functional capacity may be altogether unaffected. In some cases seizures that manifest themselves in early childhood dissipate over time and may abate altogether by the time the child reaches adolescence. I do not pretend to an

[34] Henry L. Barnett MD with the collaboration of Arnold H. Einhorn MD *Pediatrics* 14ed (Meredith) pp. 947-969.

understanding of epilepsy nor do I suggest for a moment that what I have given is a comprehensive or properly informed account. The textbook that I have referred to deals with the matter in no less than 24 pages. I also do not suggest that a court is entitled to school itself in medical matters by referring to textbooks. I have given this account of what appears in a medical textbook only to illustrate that a 'history of epilepsy' is by itself quite meaningless without knowing what that history is. To take account of the fact that the complainant was a 'sufferer of epilepsy' without any evidence that she was, without the slightest knowledge of the form that it took if she was indeed such a sufferer, and without the slightest indication of its relevance to the offence or any consequences of the offence, was a clear misdirection.

[29] The evidence also does not disclose what was told to the district surgeon that caused him to record a history of mental impairment and again nobody bothered to ask. Explaining what the term meant the district surgeon said the following:

'If a person looks at mental impairment it means only that your IQ is lower than 85. So she can function normally, communicate, and so on. It means only that she has limited intellectual capacity.'

It seems unlikely that the complainant would have known what her intelligence quotient was and it is not even certain that it has ever been tested. Certainly there are signs in the record of her evidence that her intelligence is limited but I have found nothing to place it at more than that. Neither the prosecutor nor the magistrate appear to have noticed anything untoward in that regard. (The magistrate remarked upon the matter only once he saw the observation in the medical report.) Nor did anything untoward strike the witnesses who interacted with the complainant. (In his judgment the magistrate recorded that the police officer had said that the complainant

appeared to him not to be altogether normal but in truth the police officer said the opposite.) The only evidence of the district surgeon's own observations emerged in response to the question whether the complainant's ability to communicate was limited in any way, to which he answered:[35]

'I did not do a psychometric evaluation of the patient but she could conduct a meaningful conversation with me and give a reasonably clear history of her background but I did not do a psychometric evaluation.'

To bring to account the fact that the complainant was mentally impaired without any knowledge at all of her mental state was another misdirection.

[30] But I think the court below misdirected itself even more fundamentally. I have pointed out that the judgment of the court below contains no evaluation of the circumstances in which the offence was committed. By itself that does not mean that they were not evaluated for in most cases a judgment will not incorporate everything that exercised the mind of a court. But in this case I am driven to the conclusion – from the misdirections I have referred to, the paucity of the preceding argument, and the tenor and brevity of the judgment – that if there was any evaluation of the evidence it must have been superficial at most. The clear impression I have is that the matter was approached on the basis that the prescribed sentence would be imposed as a matter of course unless the personal circumstances of the appellant disclosed it to be an exceptional case. I think I have made it clear that an approach of that kind is not permissible. The court was required by *Malgas* to apply its mind to whether the sentence was proportional to the offence (in the wide sense that I have described) and I think it is fair to conclude that the court failed altogether to do so.

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[35] 'Ek het nie 'n psigometriese evalusie van die pasiënt gedoen nie maar sy kon 'n sinvolle gesprek met my voer en redelik duidelike geskiedenis gee van haar agtergrond maar ek het nie 'n psigometriese evaluasie gedoen.'

[31] On each one of the grounds that I have referred to the court below materially misdirected itself and the sentence that it imposed cannot stand, which means that we must ourselves evaluate whether life imprisonment is indeed a proportionate sentence, in accordance with the approach that was laid down in *Malgas*.

[32] A singular feature of the complainant's evidence is that she pointedly refrained from identifying the appellant in the course of her evidence. It is abundantly clear that the man she was referring to was indeed the appellant and for convenience I will narrate her evidence with that adaptation.

[33] The complainant lived in a place called Driefontein. She had no formal schooling and quite evidently lived in poor circumstances. On the day in question she had been visiting at a nearby mine and she was walking home in the late afternoon. The appellant came driving by in what appears to have been a tanker-truck that is used for spraying water onto gravel roads and he stopped to give her a lift. After traveling for a while the appellant turned the truck off the road into a plantation where he stopped.

[34] According to the complainant both she and the appellant alighted from the truck and sat in the plantation for some time. For how long they sat in the plantation, and what was occurring while they sat there, does not appear from the evidence because nobody bothered to ask. The complainant said that the appellant then went to the truck and returned with a condom which he put on. She said that he then 'caught me and had sexual intercourse with me'[36] on two

[36] 'Hy het my gevang en vleeslike gemeenskap met my gehad.'

occasions. She said that this occurred without her consent.[37] On being asked in cross-examination whether the appellant had covered his face when he raped her the complainant answered: 'He covered my mouth'.[38] Once intercourse was completed the appellant departed in his truck saying that he was going to fetch water (meaning, apparently, that he was going to fill the tanker).

[35] Meanwhile the complainant waited in the plantation for the appellant to return. It appears that she was waiting for him to return so that she could be driven home, because in response to the question whether she was cross that she had to wait for what she said was a 'long time' she said:

'Yes. I was cross and I decided let me rather get a lift from another vehicle.'[39]

She then walked to the road where she was encountered hitch-hiking by a passing motorist, Mr Nkosi, who stopped to give her a lift.

[36] Mr Nkosi's evidence as to what then occurred does not altogether coincide with a written statement that he signed the same day nor with the evidence of the complainant. The magistrate found that Mr Nkosi was an honest witness and I have no doubt that that is correct. But even honest witnesses have the capacity for error and reconstruction and at times place events in the incorrect sequence.

[37] According to Mr Nkosi the complainant was hitch-hiking when he encountered her and he stopped. As she was approaching him he said she must make haste as he was in a hurry. In evidence he said that she was walking 'as if her legs were stiff', that she was crying, and that she looked from time to

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[37] 'Ek het nooit toestemming gegee nie.'
[38] 'Hy het my mond toegemaak.'
[39] 'Ja, ek was kwaad en ek het besluit laat ek liewers geleentheid kry by 'n ander voertuig.'

time into the bushes. In his statement he said that before he stopped he 'noticed that [she] is scared or looked like a person who is injured and she was looking or suspicious looking in the bushes', but made no mention of the fact that she was crying.

[38] The complainant herself did not say that she was crying, and from her account of why she came to be hitch-hiking, there is no reason to think that she was. It is likely that she was in tears at a later stage, when she was being questioned by Mr Nkosi, but that is something else. No doubt the complainant exhibited signs of pain, or at least discomfort, as she walked towards Mr Nkosi, bearing in mind the findings at a medical examination that I will come to presently. There is also no reason to doubt that she indeed glanced into the bush as she approached or entered the vehicle. On her account of what had occurred I do not think that is significant, though it undoubtedly prompted Mr Nkosi to suspect that she had been with someone else.

[39] I think it is clear that the further interchanges to which Mr Nkosi testified took place after the complainant had entered the vehicle and they had driven off. I think it is also clear that the complainant did not volunteer an account to Mr Nkosi of what had occurred, but that the account she gave him emerged in response to questioning on his part.

[40] Mr Nkosi said that he asked the complainant what she had been doing in the plantation and she replied that she was afraid to tell him. His statement records that when he asked her that 'she became shy' and he 'immediately suspected there is something wrong.' That is broadly consistent with the evidence of the complainant, who said that after she boarded the vehicle Mr

Nkosi asked her what she had been doing in the plantation and with whom had she been, to which she replied that she had been sitting alone after the person who had taken her there had left.

[41] The complainant then gave an account of events that she said had occurred, which unfolded in response to Mr Nkosi's questions. According to Mr Nkosi the complainant told him that she had been given a lift by the driver of a truck and that he had driven into the bush and raped her. She also told him that 'they said that they were going to kill her if she spoke about what had happened in the bush'.[40] Her reference to more than one person puzzled him at first and on further questioning she confirmed that only one person had been present. In the course of their interchange she also told him that after she had been raped she noticed that 'she was bleeding and had semen on her private parts'.[41] His statement records her having said that 'even though she screamed [he] continued to have sex with her' and that 'she was bleeding through her vagina'. In his evidence he said that she was crying as she related these events.

[42] What the complainant told Mr Nkosi, when compared to the evidence that she gave to the court, was not an altogether full and accurate account of what had occurred. She seems not to have told him that she sat with the appellant in the plantation for some time, nor that she had been waiting for the appellant to return so that he could drive her home. There was no suggestion in her evidence that threats had been made to kill her. Nor did she say in her evidence that she was screaming. That might be obliquely suggested by her remark in cross-examination that the appellant had covered her mouth, but had

[40] 'Sy het verder gesê dat hulle het gesê hulle gaan haar doodmaak as sy kan praat wat het gebeur in die bos.'
[41] 'Sy het my meegedeel dat na die persoon haar klaar verkrag het sy het opgemerk dat sy bloei en semen op haar privaatdele'.

she indeed been screaming I would expect that to have emerged directly even before she was cross-examined. That there would have been semen around her vagina seems doubtful given her evidence that the appellant had used a condom. And the evidence of the doctor who examined the complainant later that day makes it plain that she was not bleeding.

[43] Not surprisingly Mr Nkosi was concerned at the account he had been given and he very properly drove directly to the police station where a report was made to Sergeant Ndlangamandla that the complainant had been raped. After questioning the complainant Sergeant Ndlangamandla went to the appellant's place of work in the company of the complainant. Upon seeing them the appellant immediately came forward and acknowledged that he had had sexual intercourse with the complainant. He said that what he had done was not rape because he had used a condom and the complainant had consented.[42] According to Sergeant Ndlangamandla it was only upon being informed that the complainant was a minor that the appellant 'understood that it was wrong'.[43]

[44] The complainant was then taken to a district surgeon who examined her. He said that the examination was painful but that he found no lacerations or bruising or indeed any injuries. She had not bathed before she was examined and the examination revealed no external signs of bleeding. He said that her underpants were soiled, and that he sent a sample for analysis, but there was no suggestion that the soiling was blood. He also observed a white vaginal discharge but was unable to say what it was. He took a vaginal smear and a

[42] '…hy het by my beweer dat dit is nie mos verkragting as hy 'n kondom gebruik het nie. En dat as sy toegegee het dit is nie verkragting nie, dit is hoekom hy het gepraat.'
[43] 'En dat totdat ek vir hom sê die kind is minderjarig, hy verstaan dit is verkeerd gewees'.

swab, which were sent for analysis, but he did not know what the result was. (The prosecutor was not in possession of the results of the analyses and they were never presented to the court.) There was no suggestion in the evidence of the district surgeon, or in his contemporary notes of his examination, that the complainant was emotional or in a state of distress. In the space on the standard form reserved for observations concerning the 'state of the person as regards physical powers, general state of health and mental state' he made a mark indicating that there were no observations to record.

[45] In his explanation to his plea of not guilty the appellant acknowledged that he had given the complainant a lift but denied that he had raped her. In his evidence he changed his mind. He said that he had indeed given a lift to a woman but that she was not the complainant. He had seen the complainant alongside the road but had not even spoken to her. I think it is clear that when it became apparent to the appellant in the course of the proceedings that the complainant declined to identify him the appellant latched upon it and altered his evidence so as to distance himself altogether from the scene. The magistrate correctly rejected the appellant's evidence and I need say no more about it.

[46] There is no doubt that the appellant was indeed the person in the truck who gave the complainant a lift. Leaving aside his admission to that effect in the explanation to his plea[44] it was not disputed that he acknowledged that he was that person (in circumstances that made the statement admissible)

[44] It was held in *S v Jama* 1998 (2) SACR 237 (N) at 239e-f that unless admissions made in a plea-explanation are formally recorded as admissions they may not be used against the accused. It is not necessary in this case to decide whether that is correct (cf *Hiemstra: Suid Afrikaanse Strafproses* 6ed by Johann Kriegler and Albert Kruger p 591).

immediately before he was arrested. There is also no doubt that he had sexual intercourse with the complainant.

[47] Once having rejected the evidence of the appellant the magistrate appears to have considered that to be the end of the matter and did not pertinently direct his mind to whether all the elements of the offence had been established. Rejecting the exculpatory evidence of an accused does not end the enquiry in a criminal case. Before convicting a court must always be satisfied not merely that the exculpatory evidence of the accused is not true but also that every element of the offence has been established by evidence that is truthful and reliable beyond reasonable doubt and that applies as much to the crime of rape. In the case of rape those elements include both absence of consent and knowledge by the accused of the absence of consent (or at least knowledge of that possibility[45]). As Howie P said in *S v York* [46] in relation to the absence of consent:

'It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless.'

That applies as much to the presence of mens rea and this court said as much in *S v S*.[47] In that case the accused denied that sexual intercourse had occurred, in circumstances in which an admission to that effect would have exposed him to conviction under the Immorality Act. After finding that sexual intercourse had indeed occurred the court said the following (my translation):

'However, this finding is not by itself sufficient to bring home a conviction of rape. Although the appellant had sexual intercourse with the complainant without her consent

[45] Jonathan Burchell *Principles of Criminal Law* 3ed 712-3; CR Snyman *Strafreg* 5ed 455; *R v K* 1958 (3) SA 420 (A); *R v Z* 1960 (1) SA 742 (A).
[46] 2002 (1) SACR 111 (SCA) para 19.
[47] 1971 (2) SA 591 (A) 597B-F.

and against her will he is not guilty of rape if he *bona fide* believed that she consented… In the present case the appellant does not allege that he believed that the complainant consented to intercourse and he could not allege that, given his denial that he had intercourse with her. That does not relieve the state however of the obligation to prove *mens rea,* although the appellant's false denial that intercourse occurred makes the state's task in that regard considerably easier.'

[48] Where an accused person advances a false defence, as the appellant did in this case, a court might ordinarily infer that the reason for doing so is that he or she has no other defence. But on the ordinary logic of inferential reasoning[48] that inference could not properly be drawn if another reason presents itself. The most that could then be said is that he or she might have advanced a false defence for either of those reasons. Needless to say an accused person in that position takes a considerable risk. For if there is unchallenged evidence of all the elements of the offence a court would be perfectly justified in accepting the evidence. It is if there is no evidence on the issue that the onus that rests on the state will accrue to the benefit of the accused for the gap in the evidence could not be filled by an inference drawn against the accused. That is not a matter of law but only a consequence of ordinary inferential reasoning.

[49] In the present case the evidence of Sergeant Ndlangamandla indeed discloses a reason why the appellant might have advanced a false defence that is not consistent only with his guilt. For it was made clear to him by Sergeant Ndlangamandla that the explanation that he first gave – which was that the complainant had consented – would not assist him to avoid conviction but would assure a conviction at least of contravening s 14(1)(a) of the Sexual

[48] See *R v Blom* 1939 AD 188 AT 202-3.

Offences Act 23 of 1957.[49] In the circumstances I do not think that the fact alone that the appellant advanced a false defence takes the remaining elements of the crime out of the equation.

[50] With regard to those elements it is unfortunate that the evidence was presented only in blunt outline without much in the way of detail. The only direct evidence on the question of consent was the complainant's answer to the question 'was it with your consent' to which the complainant replied 'I never gave consent'[50] but I see no reason not to accept that evidence in the absence of any challenge. There is no evidence, however, that the complainant expressed that to the appellant verbally, which raises the question whether the appellant was aware that the complainant was not a consenting party, bearing in mind particularly that his explanation to Sergeant Ndlangamandla was that the complainant had consented. But there are two further items of evidence that are relevant in that regard. The first is the complainant's evidence that the appellant 'caught me' and then proceeded to have sexual intercourse. The second is her evidence that the appellant 'covered my mouth'. In the absence of any challenge to that evidence, or a contrary explanation, I think it can be inferred from the fact that the appellant found it necessary to place some form of restraint upon the complainant (whatever the precise form of that restraint might have been) both before and during intercourse, that he must have known that she was not consenting, or at least have foreseen that possibility. In those circumstances the appellant was properly convicted and I turn to the matter of sentence.

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[49] 'Any male person who has…unlawful carnal intercourse with a girl under the age of 16 years…shall be guilty of an offence.'

[50] 'Was dit met u toestemming? – Ek het nooit toestemming gegee nie.'

[51] *Malgas* made it clear that the Act signaled that it was not to be 'business as usual' when sentencing for the commission of the specified crimes. That it has indeed not been 'business as usual' is reflected in the dramatic change in the profile of the prison population since the Act took effect. Published figures indicate that the number of prisoners serving sentences of imprisonment between ten and fifteen years increased almost three times from 1998 to 2008.[51] Those serving sentences of life imprisonment increased over nine times.[52] As for the crime of rape Parliament was told at the time the Act was introduced that for rape 'generally a sentence of three or four years would be imposed, or six to ten years in very serious cases'.[53] That is consistent with my own experience of cases that came before the high courts on appeal at that time. Naturally I am not aware of all the cases in which sentences have been passed but my firm impression from cases that come before this court is that if there are still sentences falling within that range it would be most unusual. I think it is fair to say that sentences from ten to twenty years are now common and life imprisonment is by no means rare.

[52] We were referred to sentences that have been imposed or confirmed in various cases that have come before this court. While I have read those decisions I do not think any purpose would be served by examining them in this judgment. It is sufficient to say that I do not think any relevant principles of law emerges from those cases that must guide us in our decision.

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[51] Chris Giffard and Lukas Muntingh *The Effect of Sentencing on the Size of the South African Prison Population* (Open Society Foundation for South Africa) for 1998 figures and website of the Department of Correctional Services for 2008 figures.
[52] Sources above.
[53] Reference above, column 6089.

[53] In a case of this kind the objective features of the crime come to the fore in determining a proper sentence. The fact alone that the complainant was under 16 is considered by the legislature to warrant what might otherwise have been a sentence of 10 years' imprisonment being increased to the most severe punishment that our law knows. The legislature considered that to be warranted also in each of the other circumstances that I referred to earlier.

[54] That each of those circumstances is indeed an aggravating factor is beyond question. But if the presence of any one of those circumstances is indeed so aggravating as to have that profound effect then on the approach in *Malgas* their absence is also capable of lessening the culpability of the offender and that was accepted by all counsel who appeared before us. I should not be understood to mean that the absence of any one or more of the various aggravating features specified in the Act necessarily justifies a departure from the prescribed sentence for that would suggest that the maximum sentence is reserved for only extreme cases. That was not so prior to the Act and it is not the case now. There comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more. Whether, and if so to what extent, the absence of other aggravating circumstances might diminish the offender's culpability will naturally depend upon the particular circumstances. That their absence might have that effect is merely affirmation of the recurrent theme in *Malgas* that of the factors traditionally taken into account in sentencing 'none is excluded at the outset from consideration in the sentencing process.'[54]

[54] Para 25 at F.

[55] I have given a full account earlier in this judgment of the material facts that emerge from the record and will only highlight some of them in weighing whether the maximum sentence will indeed be proportionate in this case. In this case there was no extraneous violence and no physical injury was caused other than physical injury inherent in the offence. There was also no threat of extraneous violence of any kind. The appellant at least minimized the risk of pregnancy and the transmission of disease by using a condom. The complainant's evidence that she was raped twice is curious bearing in mind that the appellant was charged with only one count. Once more the evidence on that issue is scant and in the absence of evidence to the contrary I think we are bound to accept that if two acts indeed occurred they might have been so closely linked as to amount in substance to the continuation of a single event and ought not to be given undue weight. Indeed, all who are concerned in this case placed no weight on that aspect of the evidence.

[56] In this case there is very little upon which to measure the emotional impact of the offence upon the complainant. It would not be possible to encapsulate in this judgment the range of emotional responses that rape might evoke as it is described in the considerable literature on the topic and I make no attempt to do so. It is sufficient to say that it is evident from the literature that emotional distress and damage that accompanies rape might be extensive even if it is not manifested overtly and even more is that so in the case of young girls. What also needs to be borne in mind is that the literature shows that emotional responses vary as is demonstrated by a revealing empirical study of the impact of violence (including sexual violence) against women in

the metropolitan areas of this country.[55] But while a court must inform itself sufficiently to be alive to the range of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample.

[57] It is most unfortunate that no attempt was made before the trial to establish the complainant's intellectual capacity and other aspects of her background in view of the history that she related to the district surgeon for that might have cast further light on the emotional impact of the crime. I have pointed out that the evidence is not sufficient for any meaningful assessment of the complainant's intellectual capacity and on the evidence it is possible to say no more than that there is some indication that it is limited. What we have before us in assessing the emotional impact of the crime upon the complainant is that after the event the complainant felt herself able to await the appellant's return and to be in his company once more while he drove her home and became exasperated when he did not return. No doubt she was in tears when being questioned by Mr Nkosi but it is difficult to assess the degree to which that was attributable to being questioned persistently by a stranger and the degree to which it is to be attributed to the crime. When she was examined by the district surgeon a little later he observed no signs of distress. 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 traumatized, but the evidence does not reveal anything more specific than that. I might add that if the complainant was indeed prone to epileptic seizures in one form or another I do not think that can be said to be

[55] Sandra Bollen, Lillian Artz, Lisa Vetten and Antoinette Louw: 'Violence Against Women in Metropolitan South Africa: a study on impact and service delivery' Institute for Security Studies (1999) Monograph 41.

an aggravating feature because there is no indication that any such seizure played any role in this case.

[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.

[59] When viewed as a whole the only material feature that the evidence discloses as having aggravated what is inherently a serious crime was the complainant's age. Bearing in mind where the complainant's age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of 10 years imprisonment being raised to the maximum sentence permitted by law. A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his

crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.

[60] There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years.[56] While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed. In the circumstances I intend ordering that the sentence – which for purposes of considering parole is a sentence of fifteen years' imprisonment commencing on the date that the appellant was sentenced – is to expire two years earlier than would ordinarily have been the case.

[61] The appeal against sentence is upheld. The sentence imposed upon the appellant is set aside and the following sentence is substituted:

> 'The accused is sentenced to fifteen years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire.'

R.W. NUGENT
JUDGE OF APPEAL

[56] The appellant was taken into custody on 17 September 1999 and sentenced on 8 October 2001.

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