

SOUTH AFRICA / JUDGMENT

Manqola v S (A22/2010) [2011] ZAWCHC 563 (13 June 2011)

[2011] ZAWCHC 563**COURT**

Western Cape High Court, Cape Town

BEFORE

Sven Olivier, PL Goliath

CASE / FILE NUMBER

A22/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A22/2010

In the matter between:

SIMON MANQOLAAppellant

and

THE STATERespondent

Judgment handed down on 13 June 2011

1. The appellant was convicted in the regional court, Paarl, of a contravention of section 3 of Act 32 of 2007 (the Criminal Law (Sexual Offences and Related Matters) Amendment Act, “the Act”) on a count of rape of a mentally disabled minor. The prosecution had relied upon the provisions of sections 51 and 52 as well as schedule 2 to the Criminal Law Amendment Act, 105 of 1997, (“the Minimum Sentence Act”) which provides for the imposition of minimum sentences. The learned magistrate sentenced the appellant to 20 years imprisonment.
2. Section 3 of the Act provides that “any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of “B” is guilty of the offence of rape”.
3. “Sexual penetration” \s defined as “any act which causes penetration to any extent whatsoever by - (a) the genetical organs of one person into or beyond the genetical organs, anus, or mouth of another person”.

4. The victim was a young boy, T, 14 years old. His mental age was assessed to be that of a 3 year old child. He was sodomised in the presence of his young sister, 6 years old, and despite being mentally retarded he had the presence of mind to lock the door of the house when they went to call their mother who was playing cards elsewhere. But for that fact the prosecution would probably not have ensued.
5. Part 1 of schedule 2 to the Minimum Sentence Act provides that in the case of rape as contemplated in section 3 of the Act, where the victim is a person under the age of 16 years or is a person who is mentally disabled as contemplated in section 1 of the Act then, in terms of section 51(1) of the Minimum Sentence Act, a person who is convicted shall be imprisoned for life.
6. It is not in dispute that section 51(1) of the Minimum Sentence Act found application and that the appellant was properly warned of its application at the commencement of the proceedings.
7. The learned magistrate did not impose a life sentence, but a sentence of 20 years imprisonment. In arriving at that finding that there were substantial and compelling circumstances, the learned magistrate found that, having regard to the age of the appellant, 49 years, the fact that he was a first offender and that he has been in custody since 2G08 (for a year and 10 months) constituted substantial and compelling circumstances not to impose a sentence of imprisonment for life;
8. In *SvM (centre for child law as amicus curiae) 2008 (3) SA232 (CC)* Sachs J stated as follows: “[10] Sentencing is innately controversial.¹ However; all the parties to this matter agreed that the classic Zinn² triad is the paradigm from which to proceed when embarking on ‘the lonely and onerous task’³ of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence⁴ in *Banda Friedman* J explained that: ‘The elements of the triad contain an equilibrium and tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try; to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.’⁵
8. In *SvM (centre for child law as amicus curiae) 2008 (3) SA232 (CC)* Sachs J stated as follows:

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“And, as Mthiyane JA pointed out in P,6 in the assessment of an appropriate sentence the court is also required to have regard to the main purpose of punishment, namely, its deterrent, preventative, reformatory and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution.⁷ It is this last observation that lies at the centre of this case.”

9. The magistrate gave careful consideration to the function of the court when it comes to sentencing, with reference to *S v Banda* 1991 (2) SA 352 (B) where Friedman J, with regard to the interests of the community, said the following: “The Court fulfils an important function in applying the law in the community, It has a duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no sphere of life it does not include. The Court must by its decisions, and the imposition of sentence, promote respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender ” (At 356D-F)
10. The learned magistrate also had regard to cases where children had been the victim, such as *State v E* 1992 (2) SACR 625 (A).
11. In *S v Fatvi* 2001 (1) SACR 485 (SCA) the Supreme Court of Appeal upheld the imposition of the minimum sentence of 10 years imprisonment for indecently assaulting a 6 year old girl. The appellant was a first offender, a 51 year old taxi driver, had a stable employment record, was married with children and supported an extended family. Melunsky AJA (as he then was) weighed up the facts of the commission of the offence and the resultant psychological and emotional trauma which the complainant suffered, although not of a permanent nature, against the appellant’s personal circumstances. He found that he was not satisfied that there was any justification for departing

from the minimum sentence prescribed by the statute. 12. In *S v Swartz and Another* 1999 (2) SACR 380 (C) Davis J pointed out that rape is a cancer within our society: "This epidemic is reflective of the kind of society which our past has shaped and which must be transformed in order for South Africa to become a truly open and democratic society based on freedom, dignity and equality" (at 385d-e).

13. In considering sentence the learned magistrate referred to the prevalence of rape. He did so with reference to *S v Jansen* 1999 (2) SA 368 (C) at 378g where Davis J held as follows: "Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society.... The community is entitled to demand that those who perform such perverse acts of tensor be adequately punished and that the ; punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution" (at 379b).
14. In the case before Davis J, the complainant was 9 years old, the accused who had a clean record, was convicted of a crime which Jies, at the borderline of the classification of rape. Davis J sentenced him to 18 years imprisonment. 15. In *S v G* 2004 (2) SACR 296 (W). Borchers J was concerned with the sentence after a conviction of the rape of a 10 year old girl. The accused was 32 years old and a first offender. He showed no remorse. Borchers J found that mitigating was the fact that the accused was a first offender, that the violence employed was not excessive and that the accused had been in custody for almost two years. Having regard to the fact that, in the case before Borchers J, the rape was not of the most serious manifestations of the crime and that the sentence of life imprisonment would, be disproportionate to the gravity of the offence and therefore unjust, she found that sentence of life imprisonment would for this reason not be imposed, but instead 18 years imprisonment was imposed. In aggravation of the sentence regard was had to the fact that the complainant was a young sexually immature child: "There is general outrage in South Africa at the moment over child abuse, and the prevalence thereof and the damage done by such crimes to society justifies that outcry. People are being exhorted to adopt the motto, 'your child is my child'. All that this amounts to is that the public knows that its children are vulnerable and often cannot be protected for every moment of their lives. Decent people recognise these facts and help and protect children. They do not harm them, as the accused had done" (300h-301b); and that "the complainant has suffered and is still suffering psychological harm and emotional pain as a result of the rape and so is her mother and immediate family; " and that 11 she was raped in the safety of her own home and that the accused was unrepentant. " 16. Eighteen years imprisonment was imposed by Borchers J.

17. In *S v Sikhapha* 2006 (2) SACR 439 (SCA) the appellant was convicted of raping a 13 year old girl. Lewis JA concluded at paragraph [19] The sentence of life imprisonment required by the Legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover; the mitigating factors are not speculative or flimsy. in my view, life imprisonment is not a just sentence for the appellant. However; a lengthy sentence of imprisonment is warranted. I consider that a period of 20 years' imprisonment will be sending a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message."
18. Though it was submitted on behalf of the appellant that the learned magistrate had erred in not having regard to the fact that the difference between the prescribed minimum sentence and the sentence that would be imposed in the ordinary course under the common law was striking, and that, itself would constitute substantial and compelling circumstances. (*S v Shonawe* 1999 (2) SACR 220 (O)). It is clear that, where the learned magistrate had found that there were substantial and: compelling circumstances present, that he had not erred in this regard. I am not satisfied that sentence imposed is at all

discordant with a sentence which would otherwise - that is but for the minimum sentence legislation - have been imposed.

19. The magistrate has given proper consideration to the fact that the appellant was a first offender, that, he had been in custody for one year and ten months before conviction, that he was almost 50 years old, that he could be rehabilitated and that he had been beaten and humiliated by the community. He even had regard to the fact that, despite the denial on the part of the appellant, that alcohol had played a role. Though 20 years may be a more than I would have imposed, there are no grounds to interfere with the sentence. I associate myself with the sentiments expressed by Borchers J in *S v G* and the sentence of 18 years there imposed. In the circumstances I am not satisfied that the learned magistrate had imposed a sentence which is susceptible to interference by this court.
20. In the premises I would dismiss the appeal and confirm the conviction and the sentence of 20 years imprisonment. Sven Olivier, AJ I agree PL Goliath J

"And, as Mthiyane JA pointed out in P,6 in the assessment of an appropriate sentence the court is also required to have regard to the main purpose of punishment, namely, its deterrent, preventative, reformatory and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution.⁷ It is this last observation that lies at the centre of this case."

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Sven Olivier, AJ

I agree

PL Goliath J

1South African Law Commission Report on a new sentencing framework project 82 (November 2000) at paragraph 1.1. The report explains at paragraph 1.2 that individual decisions are announced to a critical public who analysed them against a variety of expectations. They not only ask whether the sentence expressed public condonation of the crime adequately; and protected the public against future crimes, by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness. In addition there is a growing expectation that the sentence must be restorative, in the sense both of compensating the individual who suffered as the result of a crime and of repairing the social fabric that criminal conduct damages. All these concerns are inevitably

particularly prominent amongst victims of crime, who have a special interest in the offences that they themselves have suffered. Since January 2003 what was previously known as the South African Law Commission (the SALC) has been called the South African Law Reform Commission. Because the publications by the Commission referred to in this judgment were brought out before its name was changed, I use the former designation,

2In *S v Zinn* 1969 (2) SA 537 (A) at 540G-H the Appellate Division formulated the triadic sentencing formula as follows: "What has to be considered is the triad consisting of the crime, the offender and the interests of society. The Zinn triad has subsequently become the mantra when pronouncing sentence, but courts have been criticised for invoking it perfunctorily as an

invocation. Nevertheless, the triad still retains its status as the sentencing north star (see, for example, *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469; [2001] 3 All SA 220) at 232A (SA) where the triad once again received the Supreme Court of Appeal's imprimatur

3Malgas above note 2 at 125H (SA) quoting Hogarth "sentencing as a human process" University of Toronto Press, Toronto 1971 at 5.

4"Thus, placing over emphasis on the nature of the crime at the expense of the personal circumstances of the offender was regarded in *Zinn* (above note X(ex?)) at 540F-G as a misdirection, rendering the sentence susceptible to being set aside by a court of appeal. This court has also held in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (1) SACR.594[2001] ZACC 16; ; 2001 (5) BCLR 423) at paragraph 38 that if carried to disproportionate extremes, it would amount to disregard of the interests of the convicted person since it is to ignore, if not to deny, that which lies at the very heart of human dignity'. It has been suggested that the triad is incomplete because it leaves the victim out of the equation (*S v Isaacs* 2002

(1) SACR 176 (C) at 178B-C). This issue is not before us, and need not be further entertained. Linked to this is the need to reconfigure the sentencing process in appropriate cases in keeping with the principles of restorative justice (SALC Report on a new sentencing framework above note 1 at 24-5), a matter which is considered below at paras

[64] and [71].

55 v Banda and Others 1991 (2) SA 352 (V) at 355A-C.

6Director of Public Prosecutions. *KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); 2006 (1) SACR 243; [2006] 1 All SA 446) at para 13. P, a 12 year old girl,, had paid two men to suffocate and then slit the throat other grandmother; with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial court had imposed a correctional-supervision order; and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the Rights of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of 7 years imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In P it was held at paragraph 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the child be detained only for the shortest period of time' and that the child be 'kept separately from detained persons over the age of 18 years'. The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention."

7id at paragraph 13.

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