CASE NO.: CA 128/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANS LIMBARE
APPELLANT

and

THE STATE
RESPONDENT

CORAM: VAN NIEKERK, J

Heard: 31 May 2006; 6 June 2006

Delivered: 16 June 2006

APPEAL JUDGMENT

VAN NIEKERK, J:

[1] The appellant was convicted on a charge of rape under the Combating of Rape Act, 2000 (Act 8 of 2000) in the Regional Court, Walvis Bay. On 14 February 2002 he was sentenced to ten years imprisonment. The appellant initially lodged an appeal against conviction and sentence, but personally withdrew his appeal against the conviction when the matter was heard in this Court.

[2] Although the appellant was represented by a lawyer in the court *a quo*, he lodged the appeal in person. Before me he was assisted by Mr *Stolze*, who appeared *amicus curiae*. The Court thanks counsel for his assistance.

[3] The facts of the matter may be summarized as follows: On 2 October 2000 the complainant was on the farm where she lived with her husband. The appellant was also a labourer on the farm and resided there with his wife and child. On the day in question the complainant had lunch with her husband, who then returned to work. She lay on her bed on her stomach and fell asleep dressed only in a pair of panties and a petticoat. Later she awoke and found the appellant sitting on her back. She screamed that he should leave her and struggled against him, but he was too strong and he succeeded in putting his penis inside her panties and raping her. Afterwards he got up and she tried to hit him with a broom stick but he blocked the attempt and left. She then ran to one of the other labourers, crying and reported the incident. The appellant also arrived and acknowledged that he had done something wrong. Then she went to report to her husband, who confronted the appellant. The appellant then said that it was the complainant who called him. The husband wanted them merely to discuss the matter and forgive each other, but the complainant insisted that the matter be reported to the police.

According to the complainant she had a pain in her stomach area because the bed was hard and she spent three days in hospital. According to her husband she complained of a pain in the arm as she had been pressed against the bed. He said she only received ointment at the clinic to put on the arm and was not admitted in hospital. No medical evidence was led. The appellant's evidence was to the effect that the complainant wanted him to impregnate her as she had been married to her husband for quite some time, but failed to fall pregnant. He had intercourse with her with her consent and at her request. The magistrate rejected his version and convicted the appellant.

[4] In his notice of appeal against sentence, the appellant relied on a number of grounds, the most important of which in effect are that the magistrate erred by imposing a sentence which is too heavy to the point of breaking the appellant; that the magistrate erred by failing to take into consideration that the appellant had been in custody for thirteen months before he was sentenced; that the sentence is so unreasonable that no other court would have imposed it; and that the magistrate should have imposed a totally suspended sentence.

[5] The record shows that after the appellant was convicted the following occurred:

"COURT: We can proceed with the sentence.

MS FOUCHE PROVES NO PREVIOUS CONVICTIONS

COURT: Mr Olivier you are going to address the court in mitigation of sentence or do you want to (intervention)

MR OLIVIER: As it pleases the court Your Worship I can ask for adjournment to get personal circumstances instructions from my client. I don't think it will have too much of a bearing on the matter. My client is residing In Karibib he is unemployed. Your Worship I don't think there is anything further that I can advance regarding his personal circumstances that will have an impact on the sentence that the court will execute. Those are my instructions Your Worship.

MS FOUCHE: I belief (*sic*) the minimum sentence will be five years.

COURT: Cohesive (*sic*) ["coercive"] circumstances like force yes I see.

SENTENCE

Sir yes neither your lawyer nor the State prosecutor regards it as of any significance to address me on the matter of sentence. The reason for that is very simple, on the new legislation whenever a person is convicted of the crime of rape and force was used as was the case in this matter that force was used then the court is under an obligation to sentence you to imprisonment for not less than TEN YEARS (10). There is apparently no very special circumstances that can be placed before the court to compel the court not to impose such a sentence. And so the courts will continue to punish men until such time hopefully when it may come to their senses that they must treat women with dignity and respect as they deserve such dignity and respect. Your Sir, are therefore sentenced to TEN YEARS (10) imprisonment. You may go."

[6] From a reading of the above quoted passage it would seem that the prosecutor, defence counsel and magistrate in the court *a quo* did not properly apply their minds to the issue of sentence because Act 8 of 2000 prescribes minimum sentences for rape. When the appeal was

heard I *mero moto* raised the issue with counsel for both parties and requested them to submit argument on whether the issue of sentence was properly addressed by the trial court, especially in the light of the provisions of section 3(2) of Act 8 of 2000 which states that "[i]f a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed .....it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence." I requested them to consider the following authorities: *S v Dhlamini* 2000 (2) SACR 266 (T); *S v Malgas* 2001 (2) SA 1222 (SCA); *Rammoko v DPP* 2003 (1) SACR 200 (SCA); *S v Ndlovu* 2003 (1) SACR 331 (SCA). Counsel took time to prepare submissions and the Court thanks them for their efforts. Both counsel are in agreement that the matter was not properly dealt with.

[7] In my view it is important to stress that the minimum sentencing provisions contained in section 3 of Act 8 of 2000 limit, but do not take away, the trial court's discretion to impose a proper sentence based on all the circumstances of the case. The Act does not require sentencing according to a formula in which the discretion of the sentencing officer has no role to play. In other words, it is not a matter of placing the particular offence of rape in a certain category according to its circumstances and then to impose the minimum prescribed sentence

as if it follows automatically and without any further consideration of what a proper sentence would be. In *S v Lopez* 2004 (4) NCLR 95 (HC) 116 this Court (*per* HANNAH, J and MARITZ, J (as he then was)) adopted and applied the interpretation of the words “substantial and compelling circumstances” given to them by the South African Supreme Court of Appeals in *S v Malgas (supra)*. In my view it is useful to quote extensively from the *Malgas* case in order to arrive at a proper understanding of the matter and the approach to be followed. In regard to the aspect of the discretion still afforded to sentencing officers MARAIS, JA said the following in regard to similarly worded amending legislation in South Africa (at 1230D-H):

> “It was, of course, open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be 'business as usual' when sentencing for the commission of the specified crimes.
>
> [8] In what respects was it no longer to be business as usual? First, 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. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless

> there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may." [my emphasis]

[8] Where a court is required to sentence an accused under Act 8 of 2000, it must apply the provisions of section 3 of the Act. Firstly it is necessary to determine on the particular facts of the case in which of the categories provided for by section 3(1) of the Act the conviction falls. That would provide a *prima facie* indication of what the prescribed minimum sentence is under the Act. Secondly it is necessary to consider whether any of the provisions of subsections (2), (3) or (4) apply. For the purposes of this appeal I shall deal only with subsection (2). It is part and parcel of the sentencing process under section 3 in every case under the Act to consider whether, in the light of the factual findings made with regard to the conviction, as well as during the sentencing process, there are substantial and compelling circumstances which justify the imposition of a lesser sentence. (See for example the approach taken in the *Lopez* case at p111-112; 117-118).

[9] It is further not required that the circumstances must be “special” or “exceptional”. It also does not mean that the “normal” circumstances which are usually considered by the sentencing court as part of the process of arriving at an appropriate sentence, such as the personal circumstances of the offender, e.g. his age, education, employment and family circumstances, must be excluded or ignored because they are the “usual” circumstances that one encounters in most cases. They are relevant and must be taken in to consideration to be weighed cumulatively with all the other factors in order to decide whether there are substantial and compelling circumstances or not. In *Malgas* it was put this way (at 1230I-1231H):

> “[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381H by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of

participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest 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 courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

[10] To the extent therefore that there are *dicta* in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (for example, age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, 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.” [my underlining]

(For a useful summary of MARAIS, AJ's conclusions see 1235F and further).

[10] In the appeal before me the magistrate in my view erred by taking the stance that the circumstances which should be placed before him were required to be "very special" before he could take notice of them in assessing whether there were substantial and compelling circumstances.

[11] *In casu* a further question which arises is what the trial court's role should be where an accused is legally represented at the sentencing stage. In such a case it is normally so that a court relies to a great extent on what is placed before it by counsel on behalf of the accused and would, in appropriate cases generally be entitled to accept that if there were more mitigating factors than those already apparent from the evidence itself or those placed on record, counsel for the accused would probably see to it that these are brought to the court's attention. However, it remains the ultimate duty of the sentencing officer to consider whether there are substantial and compelling circumstances. If the accused's counsel labours under a misconception regarding the provisions of the Act and therefore makes no or a half hearted effort to address the court in mitigation or to place

facts before the court, the sentencing court is, to my mind under a duty to point that out to the legal representative, who could then rectify the matter, and/or investigate the issue itself. In any event, if there are circumstances which, to the mind of the sentencing officer have a bearing on the matter, he is duty bound to consider them *mero moto*. I agree, with respect, with the stance taken by VAN DER WALT, J in the *Dlamini* case (*supra*) where he said (at 268*d*-*e*):

> "Die hof wat vonnis oplê in 'n strafsaak neem 'n aktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die Strafproseswet 51 van 1977 dat die hof kan op enige stadium van strafregtelike verrigtinge iemand as 'n getuie by daardie verrigtinge dagvaar of laat dagvaar en die hof moet 'n getuie aldus dagvaar of aldus laat dagvaar indien die getuienis van so 'n getuie vir die hof blyk noodsaaklik te wees vir die regverdige beregtiging van die saak. Kragtens art 167 van die Strafproseswet kan die hof ook enige getuie terug roep en weer ondervra."

> [my translation follows]:

> "The court which imposes sentence in a criminal case takes an active role in the trial and does not just sit passively where evidence is led. Indeed sec 186 of the Criminal Procedure Act 51 of 1977 provides that the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such a witness appears to the court essential to the just decision of the case. In terms of sec 167 of the Criminal Procedure Act a court may also recall and re-examine any witness."

[12] This *dictum* was applied in the *Ndlovu* case (*supra* at 337*f*-*g*) and in the *Rammoko* case (*supra* at 205*g*-*h*). The same active approach to adjudication in criminal trials is taken by the courts in Namibia (See *S v Van den Berg* 1995 NR 33 (HC) at 70 and the cases cited there). In *Dlamini* the court went further and said (at 269*a*-*b*):

> "Na my mening is daar 'n verpligting op die landdros, al is die appellant verteenwoordig by die verhoor, om self vrae te stel, ondersoek in te stel, en getuies te roep om daardie dwingende omstandighede vas te stel indien enigsins moontlik."
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> [my translation follows:]
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> "In my opinion there is an obligation on the magistrate, even if the appellant is represented at the trial, to ask questions himself, to investigate, and to call witnesses to determine those compelling circumstances if at all possible."

[13] I respectfully agree with this approach and note that before me both counsel were in agreement that this approach should be followed in our courts. Obviously the extent to which the sentencing magistrate should do the things mentioned in the passage quoted will depend on the facts and circumstances of each case. It may be that in a given case the matter is so fully and thoroughly dealt with by counsel for the accused that the court merely has to apply its mind to the matter and

to satisfy itself of the existence or not of substantial and compelling circumstances without having to ask questions, investigate or call witnesses.

[14] I point out that in the *Dlamini* case the Court of Appeal made a very specific and detailed order when it remitted the matter to the magistrate to consider and impose sentence afresh. In the order it was required that a full explanation be given to the accused, whether he is represented or not. The court further recommended that this procedure and explanation be followed in all cases where the provisions relating to substantial and compelling circumstances are applicable. Although I intend on the specific facts of the appeal before me to make a similarly detailed order, I do not go so far as to say that this should be done in every case where sentence is passed under Act 8 of 2000 even if the accused is represented by counsel. The matter was not argued before me to this extent and I prefer to leave this aspect open. This Court, consisting of two judges, has in any event already set out guidelines to be followed in the case of an unrepresented accused. (See *Levi Gurirab v The State* - Case No CA 190/2004: unreported judgment delivered on 12 July 2005)).

[15] To my mind there were at least three circumstances which warranted serious consideration by the learned magistrate and which

he should have considered *mero moto* as part of a judicial exercise of discretion in sentencing the appellant. The first is that the degree of force used by the appellant during the rape was little. The second is that there were no injuries apart from pain in either the stomach or the arm from pressing on the bed. Coupled with this is the unsatisfactory and contradictory evidence by the complainant and her husband on the matter of whether she stayed in hospital. The magistrate made no finding on this and it seems to me that the appellant should receive the benefit of the doubt leading to the conclusion that the complainant did not spend time in hospital. The third factor is also relied on as a ground of appeal and that is the time the appellant spent in custody awaiting trial. The record shows that the appellant was arrested on 6 October 2000 and that bail was initially fixed at N$3000-00, but that the appellant did not pay it. On 14 May 2001 the trial magistrate reduced the bail to N$700 and still appellant did not pay. Eventually on 12 September 2001 the trial magistrate reduced that bail to N$200-00. On 18 September 2001 the appellant deposited the bail. He was therefore in custody for 11 months. It is trite that the period an accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence. (See *S v Sikweza* 1974 (4) SA 732 (a) 737; *S v Mnguni* 1977 (3) SA 63 (N) 65; *S v Mgijima* 1982 (1) SA 86 (E) 893; *S v Bacela* 1988 (2) SA 665 (e) 676; *S v Banda and Others* 1991 (2) SA 352 (BG) 365; *S v Gqamana* 2001 (2) SACR 28 (C);

S v Matwa 2002 (2) SACR 350 (E) 359; *S v Njikelana* 2003 (2) SACR 166 (c) 171; 174-175; *Abiud Kauzuu v The State* – Case No. CA 19/04 (HC): unreported judgment dated 2 November 2005 at p.14).

[16] Having mentioned these three circumstances, I refer the learned magistrate to the approach taken in the *Lopez* matter, where this Court considered the cumulative effect of all the relevant circumstances in that case and came to the conclusion that to impose the prescribed sentence of ten years in that case, would have been unjust. (See p.117). The approach to be taken is the following:

> "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." (*S v Malgas (supra)* at 1236D)

[17] It is clear from the aforegoing that the sentence must be set aside. I therefore make the following order:

1. The appeal against the conviction having been withdrawn, the conviction is hereby confirmed.

2. The appeal against sentence succeeds and the sentence is set aside.

3. The matter is remitted to the Magistrate to consider and impose sentence afresh along the lines of this judgment, after having complied with the following:

3.1 Irrespective of whether the appellant is legally represented or not the following must be explained to him:

3.1.1 That as a result of his conviction he is liable to a mandatory minimum sentence of 10 years imprisonment in terms of section 3(1)(a)(ii) of Act 8 of 2003;

3.1.2 That if the court is satisfied that there are substantial and compelling circumstances which justify the imposition of a lesser sentence than 10 years imprisonment, the court will enter those circumstances on the record and may impose a lesser sentence.

3.1.3 That in order to enable the court to determine whether there are substantial and compelling circumstances the appellant is at liberty to testify in person or to call witnesses to show the existence of such circumstances.

3.1.4 That the court, if necessary, may itself ask questions or call witnesses to determine if there are such circumstances.

4. In whatever sentence is imposed the Magistrate shall take into consideration the period of the sentence which the appellant has already served.

5. The appellant remains in custody pending finalization of the matter in the court *a quo*.

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VAN NIEKERK, J

ON BEHALF OF THE APPELLANT:	**Mr Stolze**
INSTRUCTED BY:	**Chris Brandt Attorneys**
ON BEHALF OF THE RESPONDENT:	**Ms Herunga**
INSTRUCTED BY:	**Office of the Prosecutor-General**