THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 695/09

THE STATE — Appellant

and

VUYISILE MATYITYI — Respondent

Neutral citation: ***State v Matyityi*** **(695/09) [2010] ZASCA 127 (30 September 2010)**

BENCH: **NAVSA and PONNAN JJA and K PILLAY AJA**

HEARD: **14 SEPTEMBER 2010**

DELIVERED: **30 SEPTEMBER 2010**

SUMMARY: **Criminal Law Amendment Act 51 of 1997 – s 51 - sentence – murder and rape - minimum sentence – life imprisonment - remorse and relative youthfulness found by high court to constitute substantial and compelling circumstances – on appeal – held – no such circumstances – sentenced altered to life imprisonment.**

ORDER

On appeal from: Eastern Cape High Court (East London)
(Matiwana AJ sitting as court of first instance).

1 The appeal by the State against sentence succeeds.

2 The sentence imposed by the court below in respect of the murder and rape is set aside and in its stead is substituted the following:

'a In respect of count 2, the murder, the accused is sentenced to imprisonment for life.

b In respect of count 3, the rape, the accused is sentenced to imprisonment for life.'

JUDGMENT

PONNAN JA (JA and JA concurring):

[1] At approximately 6pm on 16 April 2008, 45-year old Anthony Cannon was seated alone in his motor vehicle enjoying a beer at Leaches Bay, East London when he glimpsed, out of the corner of his eye, someone in close proximity to his vehicle. Before he could react his car window was smashed and he was struck in the face. He was robbed by three assailants of his Nokia cell phone, cash to the tune of R500 and a bank card. A hood was placed over his head and his Honda Ballade vehicle, with him in the back seat, was driven to a secluded spot, where his hands were bound and he was secured to a tree.

[2] To buy himself some time, he deliberately furnished his attackers with a false automated teller machine (ATM) pin code. They set off in his Honda Ballade in search of an ATM. In their absence he managed to remove his hood by working his head against the tree but was otherwise unable to free himself. His assailants returned annoyed at not having been able to access his bank account with the pin number that had been furnished. He was told that they had heard him scream but that he was wasting his time because there was 'not a soul in sight who could assist him'. Realising that his ploy had failed he divulged the correct pin code. Once again they left in his Honda Ballade. After they had left he eventually managed, not without a struggle, to free himself from the tree and with his hands still tied behind his back made good his escape. Being familiar with the area he made his way on foot to the nearby home of his uncle where he sought assistance.

[3] Five days later, on 21 April 2008, Mr Cannon was informed that his Honda Ballade had been recovered by the police. Upon inspecting it he noticed, aside from other damage that it is not necessary to detail, that a JVC CD player had been removed. Later that very day the trio struck once again. This time the victims were Ms KD and her boyfriend Mr MF. Ms KD a 31-year old divorcee and mother of four children had fetched her boyfriend Mr MF from his place of employment and at approximately 5 pm they made their way in her BMW motor vehicle to the tidal pool in the vicinity of Leaches Beach called Water World in East London. She was initially apprehensive about their safety but being reassured by Mr MF she parked the car in a secluded spot.

[4] After they had engaged in some intimacy Mr MF alighted from the motor vehicle. When Ms KD, who was seated in the driver's seat, became concerned that he was taking too long to return to the vehicle, she glanced over her shoulder and observed what she described as two men wrestling with Mr MF. She reached for her car keys that were lying in the console of the motor vehicle but before she could insert the key into the ignition, a third person, whom she described as Rasta, smashed the driver's window and the key was snatched out of her hand. When she looked back once again she saw

Mr MF running followed closely by two men. She observed Mr MF fall but being pre-occupied with Rasta could not tell what caused him to do so. She was then ushered by Rasta onto the back seat of the motor vehicle and whilst doing so she saw Mr MF, with blood trickling down his face, fall to his knees and beg his attackers not to harm her. On the back seat Rasta began to fondle her breasts and touch her inappropriately. When she tried to push him away, he told her to co-operate or he would kill her. Mr MF, who by then was bleeding quite profusely, had been forced into the boot of the motor vehicle. The rear exterior of the motor vehicle was then washed to remove any trace of his blood and with Ms KD wedged between two of the three in the back seat, the vehicle was driven by the third for what seemed like 15 minutes to a more secluded area.

[5] Once the vehicle had come to a halt the driver removed a set of JVC speakers from the rear of the vehicle and placed it in his back pack. Thereafter each took Ms KD into the surrounding bushes where she was raped. After being raped in turn by each the boot of the motor vehicle was opened and after a long struggle Mr MF, who was by that stage unconscious and soaked in blood from head to feet, was removed and placed on the back seat. The vehicle was then driven back in the direction from whence they had come. After ascertaining if she was familiar with their whereabouts and receiving an affirmative response, the vehicle was stopped and the three men alighted. Ms KD then drove to the Frere Hospital but by the time that she got there it was already much too late for Mr MF who was pronounced dead on arrival.

[6] On 23 April 2008 acting on information received, the investigating officer, Captain Alexander, visited an informal settlement in Fort Grey, East London, where the respondent, Vuyisile Matyityi, allegedly lived with his girlfriend. A search of the premises in his absence yielded the JVC speakers that had been removed from Ms KD's BMW and the JVC CD player that was missing from Mr Canon's Honda Ballade when it was recovered. During the early hours of the next morning the other two alleged perpetrators were arrested. A visit to the home of the respondent then followed. Upon gaining forcible entry to his home the police discovered that the respondent had fled. That evening, however, the respondent handed himself over to the police.

[7] All three were indicted in the Eastern Cape High Court (East London) on one charge each of murder and rape and two charges of robbery. At the commencement of the trial the respondent, unlike his co-accused, expressed a willingness to tender a plea of guilty to all of the charges and after the trials were separated he was convicted as charged by Matiwana AJ on his guilty plea. He was sentenced to 25 years' imprisonment on each of the murder and rape charges. And in respect of each of the robbery counts to 13 years' imprisonment. The sentences were ordered to run concurrently. He was thus sentenced to an effective term of 25 years' imprisonment.

[8] Aggrieved by the sentences imposed in respect of the murder and rape that were regarded as being too lenient, the appellant, the Director of Public Prosecutions (Eastern Cape), appealed in terms of s 316B of the Criminal Procedure Act with the leave of the court below. The sentence imposed in respect of the robbery is not before us. But it matters not, for, were the appeal to succeed the sentence imposed in respect of it will naturally be subsumed by that imposed in respect of the murder and rape.

[9] The nature of the offences brought the matter within the purview of s 51 of the Criminal Law Amendment Act 105 of 1997 which prescribes minimum sentences, namely life imprisonment for each of the murder and rape convictions unless substantial and compelling circumstances were found to be present. Matiwana AJ identified the issue thus:

'The question, therefore, that I am faced with, is whether there are any compelling circumstances in this case, which, if present, would justify a departure from the prescribed sentences laid down by the legislature.'

Accepting that by the epithet 'compelling' he meant 'substantial and compelling' that is a correct identification of the issue. He answered that question as follows:

'As I have stated, in my mind, the court should not impose the prescribed minimum sentence in [this] case, in view of the accused's age, and in the light of the remorse displayed by him during the trial here.'

On a thorough reading of the record I could find no other factors that could be relied on as constituting substantial and compelling circumstances within the meaning of that expression. Nor was counsel able to suggest any in argument before us.

[10] Aside from whether the trial judge was justified in his conclusion that a departure from the prescribed minimum sentences was warranted in this case, there appear to be at least two other respects in which he appears to have misdirected himself. First, although the respondent had a previous conviction, it was not taken into consideration against him on the basis that it 'is not much related to the offences of which he has been found guilty'. Why that was thought so is not entirely clear to me. The SAP 69 shows him to have been convicted during 2005 of being in possession of an unlicensed firearm in contravention of the Arms and Ammunitions Act.[1] He was sentenced to a fine of R1500 or 12 months' imprisonment. He evidently appears to have spurned the mercy shown him by the court then. Second, the trial judge appears to have accepted that Ms KD sustained no injuries. To the extent that he may have been referring to permanent physical injuries one can hardly quarrel with that conclusion. But, with respect, to restrict the enquiry to permanent physical injuries, as the learned judge appears to have done, is to fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance for the victim. As it was put by this court in *De Beer v S*:[2]

'Rape is a topic that abounds with myths and misconceptions.[3] It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.'

[11] I turn now to the central issue in the appeal, namely whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances as contemplated by that expression were indeed present. *S v Malgas*[4] is where one must start. It, according to Navsa JA, is 'not only a good starting point but the principles stated therein are enduring and uncomplicated' (*DPP KZN v Ngcobo*).[5]

1 75 of 1969.
2 *Stephen Bryan de Beer v The State* (121/04) (Delivered on 12 November 2004) (Unreported judgment of the Supreme Court of Appeal) para 18.
3 A Nicholas Groth *Men Who Rape – The Psychology of the Offender* (1979).
4 2001 (1) SACR 469 (SCA).
5 2009 (2) SACR 361 (SCA) para 12.

Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*:[6] The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.

[12] The respondent elected not to testify. Nor was any evidence led on his behalf in mitigation. From the bar it was placed on record that he was 27 years of age at the time of the commission of the offences. He was married with three children, the oldest of whom was 10 years and the youngest one month. His highest level of education was Std 7 (Grade 9). As I have already indicated the only circumstances entered on the record of the proceedings as substantial and compelling by the trial judge were the remorse displayed by the respondent and his age.

[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor.[7] The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse.[8] Many accused persons might well regret their conduct but that does not without more translate to genuine remorse.[9] Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the

6 Paras 7 and 8.
7 *S v Barnard* 2004 (1) SACR 191 (SCA) at 197.
8 *S v Martin* 1996 (2) SACR 378 (W) at 383g-i.
9 *S v Mokoena* 2009 (2) SACR 309 (SCA) para 9.

extent of one's error.[10] Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look.[11] In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.[12] Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.

[14] Turning to the respondent's age: What exactly about the respondent's age tipped the scales in his favour was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness' without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature[13] and that the youthfulness of an offender will invariably be a mitigating factor,[14] unless it appears that the viciousness of his or her deeds rule out immaturity.[15] Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult.[16] It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness.[17] The question, in the final analysis, is whether the offender's immaturity, lack of

10 *S v D* 1995 (1) SACR 259 (A) at 261a-c.
11 SS Terblanche *A Guide to Sentencing in South Africa* 2 ed (2007) p 203-4; *S v Volkwyn* 1995 (1) SACR 286 (A).
12 *S v Seegers* 1970 (2) SA 506 (A).
13 *S v Ngoma* 1984 (3) SA 666 (A) at 674E-F.
14 Terblanche p 196.
15 *S v Dlamini* 1991 (2) SACR 655 (A) at 666b-f.
16 *S v Mohlobane* 1969 (1) SA 561 (A) at 565C-E.
17 *S v Lehnberg* 1975 (4) SA 553 (A) at 561A-C.

experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness.[18] Thus whilst someone under the age of 18 years is to be regarded as naturally immature[19] the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.[20] At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did.

[15] In *Dlamini*[21] Nicholas AJA made the following observation: 'whereas criminal trials in both England and South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, the procedure at the sentencing stage is almost perfunctory.' That by and large continues to be the position. This matter was conducted somewhat differently. Notwithstanding the respondent's guilty plea, evidence ostensibly in proof of aggravation was led by the state. Much of it though went to guilt not sentence. We thus know little, if anything, about Mr MF. Was he a breadwinner? Were others dependent on him? If so, how many? What were his scholastic or other achievements? What type of work did he do? What was the effect of his death on his family, employer and community? I hazard that the value of the sum of his life must have been far greater than the silent crime statistic that he has come to represent in death. It surely would therefore be safe to infer that in some way or the other his death must have had devastating consequences for others. Although she testified, we know as little about the harm done to Ms KD by the respondent's deeds. All of those questions regrettably remain unanswered in respect of her as well.

[16] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the

18 *S v Van Rooi & andere* 1976(2) SA 580 (A).
19 *S v Machasa & andere* 1991 (2) SACR 308 (A).
20 *Dlamini* at 666e.
21 At 666i-667a.

unique circumstances of the case before court.[22] To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.[23] The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person.[24] The Service Charter for Victims of Crime in South Africa[25] seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity.[26] It enables us as well to vindicate our collective sense of humanity and humanness. The Charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and in future is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim. (See generally Karen Müller and Annette van der Merwe 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court'.)[27]

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent

22 *Samuels v The State* (262/03) [2010] ZASCA 113 (22 September 2010).
23 Resolution 40/34 Adopted by the General Assembly on 29 November 1985.
24 SA Law Commission Discussion Paper 7 Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment) (1997).
25 Approved by Cabinet on 2 December 2004.
26 S 7(1) of our Constitution.
27 (2006) 22 *SAJHR* 647 p 650.

evidence from the victim the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence but also the impact of the crime on the victim be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim.[28] As Müller and Van der Merwe put it:

'It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'[29]

[18] The trial judge appeared not to fully appreciate that the starting point in respect of each of the murder and rape convictions was not a clean slate upon which he was free to inscribe whatever sentence he thought appropriate, but imprisonment for life. As *Malgas* emphasised:

'[A] court was not 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.'[30]

. . .

'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

28 *S v Gerber* 2001 (1) SACR 621 (W); *S v R* 1993 (1) SACR 209 (A).
29 Pages 253-254.
30 Para 8.

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.'[31]

[19] I cannot discern why the trial judge displayed such a marked reticence to impose the prescribed minimum sentences. The two incidents were five days apart. Sufficient time one would have thought for pause and reflection. Each was breathtakingly brazen and executed with a callous brutality. One shudders to think of what would have become of Mr Canon had he not succeeded in making good his escape. In each instance the material spoils were small. Hardly worth the substantial loss and destruction left in its wake. On both days the respondent played a prominent role in the commission of the offences. Mr Cannon described him as the ringleader. On each occasion he drove the motor vehicle, the subject of the robbery. According to Mr Cannon when the respondent and his accomplices returned after their first failed venture to the ATM, he was the most aggressive. According to Ms KD it was he who: was armed with a knife during the attack on the deceased; shouted at the deceased to get into the boot of the BMW; directed her to tell the deceased to enter the boot when he refused to do so; handed the deceased's wallet, which must have been removed from the deceased's person earlier, to Rasta; and removed the speakers from Ms KD's BMW. And it was at the home of his girlfriend that the more valuable stolen items were found. Moreover, whilst in Ms KD's company he insisted on kissing her, professing his love for her and treating her as one would a love-interest. When driving he turned off the tarred road when he noticed a car behind them. It was he who supplied Ms KD with toilet paper to clean herself after having had non-consensual sexual intercourse with her. Before leaving her motor vehicle he first cleaned the steering wheel and door handles to remove evidence of his fingerprints. That reflected an awareness, presence of mind and sophistication that his co-perpetrators did not manifest.

[20] The offences in question were heinous. According to Dr Zondi, who performed the post mortem examination, the deceased had sustained four incised wounds. The fatal stab had been inflicted with considerable force from behind causing the deceased's

31 Para 9.

left lung to collapse. He would have been in considerable pain for all of the 30 to 40 minutes that it would have taken for him to die after its infliction. He therefore, as Dr Zondi explained, would have suffered a slow and agonising death. Given the fact that he was bleeding profusely, it could hardly have escaped unnoticed that he had sustained life-threatening injuries. And yet he was forced into the boot of the car. By the time the boot was re-opened his body was limp and his clothes were blood-soaked. In the intervening period his female companion was frog-marched on three different occasions into the adjoining bushes to be raped. None of her rapists used condoms. Each ejaculated. Although not properly explored during her evidence it is obvious that her ordeal must have been a horrific one. She had to submit to the brutal and naked invasion of her person in the knowledge that her boyfriend may have been mortally wounded. What we do know is that the trauma she suffered was so severe that by the time of the trial, approximately one year after the incident, she was still receiving counselling. According to her, the experience had made her deeply afraid and had even impacted negatively on her relationship with her family. As this court has previously sought to make clear, women 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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives' (*S v Chapman*).[32]

[21] What we have not been told by the appellant is why it was necessary for the deceased to have been killed or Ms KD raped. We know from Ms KD's evidence that the deceased was attempting to flee. And we know from Dr Zondi's evidence that the fatal blow was inflicted from behind. For the rest there are significant gaps. The one person who could have filled those gaps was the respondent. He chose not to. That was his right.[33] But it is not without its consequence, for, as the Constitutional Court has endeavoured to stress (*S v Jaipal)*:[34]

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as

32 1997 (3) SA 341 (SCA).
33 *S v Dzukuda & others; S v Tshilo* 2000 (4) SA 1078 (CC) para 40.
34 2005 (4) SA 581 (CC) para 29.

represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

His silence thus leads irresistibly to the conclusion that there was nothing to be said in his favour. But even if one were to be charitable and infer in his favour that the robbery had been motivated by stark economic deprivation, that hardly explains the violence meted out to both Mr MF and Ms KD, which was unnecessary to achieve that end and therefore plainly gratuitous. Nothing in the manner in which the offences were committed could thus have served to lessen the moral blameworthiness of the respondent and his cohorts. It was therefore to the personal circumstances of the respondent that the judge looked. In it he appears to have found two reasons for departing from the sentences prescribed by the legislature. Neither, as I have sought to show, are truly convincing. Each lacked any factual foundation and was thus more illusory than real. Moreover, to have viewed those two factors (whether individually or cumulatively) in isolation as the judge did, was to ignore the objective gravity of those offences, its prevalence in this country and the legislature's quest for severe and standardised responses by the courts. It is thus hard to resist the conclusion that the judge was motivated by maudlin sympathy for the respondent. Being so motivated, it would seem that he overemphasised the interests of the respondent at the expense of the public interest in a just and proportionally balanced sentence.

[22] Despite our particularly strong commitment to the promotion of the rights of victims of sexual crimes, particularly rape, we still do not have a clear strategy for dealing inclusively with it either at a primary preventative or secondary protective level.[35] The result is that as alarmed as we may be by the reported incidence of rape the true extent of the scourge appears far more widespread. In *De Beer* it was put thus:

'It is widely accepted that the statistics of reported rape reflect only a small percentage of actual offences. NICRO estimates that only 1 out of every 20 rapes is reported, whilst the South African Police Service puts the figure at 1 out of 35. For the first six months of 1998, 23 374 rapes were reported nationally. As an annual indicator of rape employing the lower 1 out of 20 estimate, the figure was a staggering 934 960. Research at the Sexual Offences Court in the Western Cape, for the same period, reveals that of the reported rape cases: 56.62% were referred to court; 18.67% were prosecuted; and, only 10.84% received

35 SA Law Commission Project 107 Discussion Paper 102.

guilty verdicts.'[36]

Those statistics although somewhat dated offer a more accurate indicator of the extent of the incidence of rape in this country. The reason, in part, is the introduction of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The sexual assaults covered by this new Act extend beyond phenomena previously covered by the definition of rape to include male rape and sexual penetration of a whole range of orifices. It also covers human trafficking, pornography and prostitution (including charges against clients of sex workers).

[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas,* it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.

[24] In this case the respondent and his cohorts conducted themselves with a flagrant

36 Para 19.

disregard for the sanctity of human life or individual physical integrity. All three of them acted in a manner that is unacceptable in any civilised society, particularly one that ought to be committed to the protection of the rights of all persons including women. Had more relevant evidence been placed before the court as to: the prevalence of these types of offences; the public desire for protection from the kind of wanton criminality encountered here; the public interest in suitably fair, just and balanced punishment; and the harm suffered by Ms KD and those who survive Mr MF, the traditional triad of the crime, the criminal and the interests of society would have been better served. Instead the trial court emphasised the personal interests of the individual respondent above all else. In doing so it failed to strike the appropriate balance. It thus imposed a sentence that was disproportionate to the crime and the interests of society. In my view there were no substantial and compelling circumstances present that warranted a departure from the prescribed statutory norm. It follows that the contrary conclusion reached by the high court cannot stand. Having regard to all of the circumstances encountered here the minimum sentence is a manifestly fair and just one. To my mind this is precisely the type of matter that the legislature had in mind when it enacted the minimum sentencing legislation.

In the result:

1 The appeal by the State against sentence succeeds.

2 The sentence imposed by the court below in respect of the murder and rape is set aside and in its stead is substituted the following:

‘a In respect of count 2, the murder, the accused is sentenced to imprisonment for life.

b In respect of count 3, the rape, the accused is sentenced to imprisonment for life.’

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	G G Turner
	Instructed by: The Director of Public Prosecutions Grahamstown The Director of Public Prosecutions Bloemfontein
For Respondent:	E Crouse (Ms)
	Instructed by: Legal Aid Board King William's Town Legal Aid Board Bloemfontein