



JUDGES MATTER

Judicial Service Commission interviews

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Limpopo Division of the High Court

Interview of Ms M V Semenya

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Chairperson, Chief Justice Mogoeng: Good afternoon Ms Semenya.

Ms Semenya: Good afternoon Chief Justice.

Mogoeng: Are you well?

Semenya: I am well Chief Justice, thank you.

Mogoeng: What are your qualifications?

Semenya: I did a BJuris degree with the University of the North, now the University of Limpopo. I started working as a prosecutor, and I studied part time to complete my LLB through UNISA.

Mogoeng: Yes, and what have you been doing over the years which has prepared you for the position you are now applying for?

Semenya: I started as a prosecutor in 1985 up to 1991. I was then appointed a district court magistrate up to 1991, from 1991, sorry, until 2013. I was then appointed a senior magistrate at Seshego. The following year I was appointed as regional court magistrate in the sexual offences court.

Mogoeng: And you've acted as a Judge?

Semenya: Yes I did, Chief Justice.

Mogoeng: How did that prepare you for what you are applying for now?

Semenya: My past experience? Are you referring to my past experience?

Mogoeng: Your past experience as a magistrate, as an acting Judge, how have they capacitated you for what you're now applying for?

Semenya: I think the best court what prepared me was the regional court – the sexual offences court. Because in that court, initially we didn't sentence, we were doing the trials and then transferring the matter to the High Court for sentencing, and when we come back and when we confirmed and sentenced, you feel you've done a good job and also because you don't sleep there – you are in court from 9 o'clock up to 4 and after that you rest for about one or two hours, you'll be writing judgements from then on, so that you don't have many pending matters, pending judgments because if you don't write those judgements during the night, you'll be picking up more and more pending judgements and as a result, you won't cope. So I can say that that court prepared me a lot, because when I started acting in the High Court, it was in 2014, I was given a secretary and when I arrived there I told her that I knew nothing about the High Court and you are going to be assisting me with certain things like where is bathroom, where do I go, the tearoom and so on. The other day when I was leaving, she was assisting me to pack my things so that I could go back home and then she kept on saying ja, ja, ja and I asked why are you doing so and she said to me, are you sure this is your first acting stint, and I said yes this is my first acting stint and she said, and I asked her why, and she said to me, it is for the first time for me to have an Acting Judge who is in her first stint but she goes back home without any pending judgements – I have done all my judgments. And further she said to me that, and when you write your judgments and I take them to the senior Judge, they come back with, all of them come back with only very few mistakes and having spelling mistakes only. So I said to her that yes, this is my first stint acting stint in the High Court but remember that I've been writing judgments for many years so I didn't find it much difficult to -

Judge President Makgoba: Ms Semanya, during your acting stint in Gauteng, you managed to pen, or to produce, two reported judgments – one civil matter and one criminal matter – correct?

Semenya: That is correct.

Makgoba: Now one of the reported matter, the civil matter, had to do with forfeiture of benefits arising from out of marriage of community of property, it was a divorce matter. Now in that matter you declared section nine of the Divorce Act unconstitutional by virtue of the fact it produced a guilt principle of substantial misconduct as an element of forfeiture. Is it correct that matter is now before the Constitutional Court for confirmation or otherwise?

Semenya: Yes we, I was doing it with a senior Judge, and we said we are having a guilt-free divorce system in our country and at the same time we are introducing guilt in terms of section nine, because that section says that one can forfeit marital benefits if he can found to be guilty, so I'm saying, the two doesn't marry – guilt-free divorces and on the other hand you say yes we can punish you if you are guilty, so we are saying that we find it to be unconstitutional or to be - that section must either be amended so that portion must be excluded and, or, it must be done away with in its entirety.

Makgoba: The fact of the matter is that the matter is now before the Constitutional Court for confirmation or otherwise?

Semenya: No, I am not aware because we were saying the parties can invite others, because there were other parties which were to be joined and you can go to the Constitutional Court, but what it did is to provoke a debate as far as this matter is concerned, because I've seen many articles written about it after.

Makgoba: Right, during your acting stint you would recall that we handled a lot of matters, especially when you started acting in Limpopo. We did a lot of appeals together both civil, criminal and even full court appeals, and at all times I insisted that you write judgements and you did write most of the judgments – didn't you feel that you were being overworked in that instances?

Semenya: I think, as I've said, I'm already used to that. I've been writing judgments and I've written many judgments, it doesn't bother me at all, in fact it enhances my work and at times, like I say I'm a magistrate, if those judgments are confirmed elsewhere by the higher court, I become satisfied. I'm not one of those magistrates taking their matters for appeal and so on – it teaches me a lot.

Makgoba: Again. I've noticed that you were in a position to produce judgements within 30 days in almost all of those matters.

Semenya: I did almost all of them unless it's a very involved matter which I must still sit down, research and so forth.

Makgoba: You've also acted in the local division in Thohoyandou. Now this is a semi-rural area where traditional norms are still being applied there. Did you feel accepted when they see a female Judge in that situation, and how's the reception?

Semenya: I never encountered any, any negativity. I worked well with them. I do not remember any once, I don't think anyone ever came to me to complain that I am not helping them well because I always say and I've taught myself because of my past, I've taught myself to say here are the parties, to me there are no senior counsel, there are parties before me, they are equal, I must treat them equally. All I'm interested in in them is to hear what they want to bring before me and to apply the law to what they are bringing before me, and if it favours a junior counsel let it be, if

the judgment must favour senior counsel, let it be, but before me I regard all of them as equal and I am only interested in what they have to bring before me.

Makgoba: Yes. If you were appointed, you'll be the second female Judge in Limpopo in a Bench of, say nine Judges. We only have one female, my Deputy. Now, what would you do to encourage other women to follow suit so that we can transform our Bench to comply with the gender imperatives?

Semenya: I remember JP that we are actually the first females to become magistrates and so forth in the 80s, we were very few. I was the second magistrate in Limpopo, and I always say to them if you want to go and act, feel free to do so, but what I encounter from most of them is that they tell me they are still raising their children and that they are scared, and I said you must take it from us, we are the first, we paved the way for you people because we started during those years where they will say she's a woman, what do you think, what do you want here and what was happening, I always discuss it with my other female colleagues when I started as a magistrate, the attitude was that of constructive dismissal, because they will overwork us, but we are saying to them we are here and we are here to stay, you better make peace with it yourself, so I always encourage them to say people, it is work, you have been properly trained for it to, you appear in court, you defend matters, you prosecute matters, don't think of yourselves as women, think of yourselves, yes you are women but you are legally qualified, you have attended the same classes with them so what makes it, what makes you think that only men can do it and females can't do it. We've been there, I've been there for 30 years and I'm still there.

MEC Skoati: Mrs, Ms Semenya, having practiced in Limpopo and lived in Limpopo for such a long time, obviously you are aware that Limpopo is predominately rural but as well there are several impediments that might not help our people to access justice system, and what is it that you think you'll be able to do to ensure we enhance access of those majority of people who are in the rural areas for them to be able to access the justice system? Obviously we know that you have been able to do, to undertake awareness in several areas to do community work, and therefore you will have that kind of understanding of what are the challenges of people in those rural areas, and what you are bringing to the fore to make sure you are able to enhance that access?

Semenya: You know we, we always encountered those kind of challenges like you, I will talk about my experience because I believe that work together in the same way in the High Court as in the lower courts for instance, you have parties who come from remote areas in the area where there will only be one transport that leaves that area at 6 o'clock in the morning to transport people to town, and it will leave town at 14 hours which means if that party leaves, if you haven't heard that party earlier, she's going to miss that transport back home, so what we are doing is that, when we, when I go to court in the morning, I normally go to court at about 10 minutes to 9

o'clock to do caseload before we can start with the court, what happens is we look at the cases that we are having, if some of them comes from the remote areas in Limpopo, so we hear those people first and thereafter we can deal with those who come from closer to home to make sure that those others are now back home and they didn't miss their transport, so I think the same thing will happen in the High Court as far as members of the community are concerned, because Limpopo High Court as well, it's a vast area and as we say, it's a vast area which comprises of rural areas, so you look at your roll, you help first those who come from far so that they don't have to miss their transport back home, otherwise you have to accommodate them somewhere so that they can sleep and go home the next morning, as well as women with children. Like when I was a regional, district court magistrate as I was saying, we were treated in such a way that it would appear as if they wanted to do away with us. We will go to court at 9 o'clock and in the criminal court you'll preside there until teatime – when you break for tea, you'd find a queue of people waiting for you, members from the community, be it for maintenance, for estates, and if you don't help those people, if you leave them for that tea break and say I'm going back to court because I'm in the criminal court and cannot assist you with maintenances and estates, there are other magistrates who can do that, that means that the possibility is you'll find them again when you come back at lunch, when you adjourn for lunch, you'll find the waiting there. And remember, it's rural people, it will be widows in black and as I say, she might be coming from the most remote area. So if you don't help her, sisi in black and she misses her taxi back home, who's going to accommodate her in a house, so you prioritise them according to where they come from, you help them, they go away, you remain with local people. And I think as far as awareness is concerned, we done enough even though it will not be more than enough - they know they can report domestic violence, they know they can come and claim maintenance and if they go that route they'll be assisted.

Commissioner Singh MP: Just two issues that I would like to raise. I'm sure you've had a look at the comments that have been sent in and letters of support etcetera. There's one that comes from the Black Lawyers Association and one is surprised to read, they say you were appointed as a prosecutor, the Black Lawyers Association have a view that acting for a longer period would benefit her and at this stage, the Black Lawyers Association don't support the appointment – how would you react?

Semenya: I saw it and I read it and reread it but I failed to find reasons why they are saying so. It would have helped me if they said she needs further acting on this aspect, so that I know where to improve but as it is, I just read it, I just read it again and I don't know why they are saying so, because I have been presiding for over 25 years now in both the district court and the regional court, and I also acted in the High Court with our JP, JP of Limpopo, and even in my first acting stint, I had two reported judgments, both criminal and civil, so as to what area they are talking about, I do not know.

Singh: You haven't had an opportunity to engage with them on this?

Semenya: No I didn't, I didn't Commissioner – maybe I should have done that maybe then it would have shed a light on what they are talking about there.

Singh: I'll leave it for now. There's another document we've been handed earlier on which refers to a conviction where you were presiding over somebody convicted of attempted murder and violent rape, where the sentence was R2 000 fine and a five years fully suspended sentence for a violent rape. Now reading this, to us, would seem suspended sentence for violent rape is not an appropriate sentence, however we do not have the benefit of the facts of the case etcetera. Can you just talk to use about this?

Semenya: I do not know whether I should go into details about the matter because -

Singh: The CJ can advise.

Semenya: Yes the CJ can advise but -

Mogoeng: Well, you want me to advise now before you -

Semenya: Can I say something before you -

Mogoeng: Okay.

Semenya: Alright, all I can say is, unless the CJ says I must say more, all I say is that, remember I, I had the benefit of hearing the evidence, of seeing all those who had testified before me, I, I applied my mind and I did what I thought was the correct thing to do under the circumstances taking into consideration demeanour, what they were saying as well as the pre-sentence report however, I respect the comments made by the Judge and I, I appreciate what he has said because I realise that I might have erred but it is still going on appeal. I might have erred yes, and that is how we magistrates - we send our matters for review or they take us on appeal. The comments made by the Judges in our cases, be it good or bad, helps us to improve. There will be cases where you'll be commended on what you have done, there will be cases where they say no, you have misdirected yourself, you have erred, but that doesn't mean it makes you a bad magistrate, it doesn't make you a very good magistrate. We learn from the comments they are making, but for that case yes, I applied my mind to it after I heard about five witnesses, I had the opportunity to observe them, and I was of the view that the only way of doing this is by imposing this type of a sentence. Those comments were made in 2014. It is an unprecedented sentence as you can see, and I expected the state to appeal immediately, but it didn't so I guess they were also of the view that was the best thing to be done under the circumstances.

Singh: CJ I'll leave it to you if there's anything else on that matter.

Commissioner Malema MP: But CJ, just to check on a procedural point that since she said this matter, since she said this matter is going on appeal, those languages

of yours, is it not, what, *sub judice*? Because we might be tempted, we must be guided by you CJ that if it's still a matter that is pending, we must shy away from it because we might be tempted to go into the merits of the case and I don't know, we'll hear your advice. Because the matter is still pending.

Mogoeng: Well, it's a tricky situation and I'll tell you why – it was a publicised matter, it was in the Legalbrief and other publications, some of us know the facts. Now the question is, she hasn't mentioned it in her questionnaire and others haven't read about it - is it best to afford her the opportunity to say something before this Commission, so that nobody gains the impression that she lacks judgment or Judges act prejudicially, or is it best to be overly technical and say no, no, no, an appeal has since been launched, let's say nothing and then people will remember what they read in the media and say, wholly suspended sentence for attempted murder where a stone was used on the head of a woman and tore her ear, two incidents of rape on the same day, even if you the former boyfriend, is it right to suspend a sentence wholly? Do you afford her the opportunity to respond, or do you say no, no, no don't touch it but remember, people know what happened and when they vote what happens? So that's the choice that she has to make. Minister.

Minister Masutha: In fact I was going to add, I think you've stolen the words but a Judge can't steal. I wholly agree with you Chief Justice that unless we are given the opportunity, in our minds subconsciously even if we try to ignore this, it will linger so I think it's better that she, if she, unless she objects. Can I just check though in that vein, you've been a regional court magistrate since when?

Semenya: Since 2004.

Masutha: So I would imagine that over a decade later, your experience, at that level, should be of some significance in terms of dealing, especially, with criminal matters given the fact that the matter in question was a criminal matter?

Semenya: I agree with you, Minister.

Masutha: Now, it so happens that this is one controversy before us, but are you concerned that you may, along the way in your practice as a magistrate, in your career as a magistrate, have perhaps been able to acquire sufficient judgement skills to be able to execute your function as a judicial official, officer, as sufficiently as you could given it's a controversial matter of this nature?

Semenya: I cannot say that because as I say, I have been in a sexual offences court for, or rather since 2004 and I have dealt with many, many, over a thousand of sexual offences involving very young children, teenagers, adults, elderly people of hundred years and if I may, I don't know whether you'll allow me to say so 'cause - on Thursday when I was leaving the office to come and prepare to come here, the stenographer, we use stenographers as clerks of the court as well, my stenographer brought me my appeal register and she said to me madam, is it possible for you to

take this register with you as an exhibit and the reason why she was saying this is because, since 2004 up to today, and remember in the past, cases were sent to the High Court for sentence, and thereafter we were given jurisdiction to sentence, since that time when I checked that register, I think I have only two cases which were set aside - most of them were confirmed and those who were tampered with were those of, only the sentences were interfered with, and in most cases it would be sentences of life imprisonment – most of them were altered to between 20 and 25 years. So as far as experience is concerned, I don't see myself as being not experienced enough hence I say, this was a unique case, if I may label it that way. It was a unique case, its circumstances, I hope you have, I believed you have read the case. I tried to go this way, I thought about a heavy sentence but the conclusion kept on driving me to the sentence that I have imposed. I can say that when the complainant was testifying, giving her evidence in chief, all I could see was life imprisonment while she was still testifying - I could see nothing, nothing but life imprisonment until she was cross-examined, until other witnesses testified, until a pre-sentence report was brought before me and I just, like the Chief Justice says, maybe I must shed more light on it -

Masutha: But you nonetheless did arrive at a conviction?

Semenya: Yes, conviction yes, there was no way I could have acquitted – the facts were glaring in that direction.

Masutha: That you must secure a conviction?

Semenya: I beg your pardon?

Masutha: The facts were such that you had no choice but to arrive at a conviction?

Semenya: No as far as conviction was concerned there was no other way.

Masutha: Of having reached that point?

Semenya: Yes.

Masutha: The kind of sentence you think of that would be fairest in the circumstances was as described?

Semenya: Yes Minister because, if I may elaborate on that?

Masutha: Yes.

Semenya: The complainant, I'm not trying to rewrite my sentence because I respect the honourable acting Judge, but the facts were that were how I understood them. The facts there were that the complainant and the accused were each married to different people. They had a love relationship, they were working together at Sun City, at some stage the accused decided to leave Sun City to go to Legend and the complainant followed him to Legend. The complainant testified that she was very

close to the accused wife, she, the accused wife was confiding in her regarding her marital problems until she realised she is confiding in a wrong person, she became depressed, it is there in the victim impact report, she became very much depressed. She got divorced from the husband and the children were left in the care of the husband and grandmother, she even went to the extent that, these children love me, they call me mama, I was looking after them, I was taking care of them, I was cooking for them, I was doing their washing so I - and the evidence is such that their relationship was characterised by violence coming from both sides – the accused as well as the complainant and it led, and the complainant was also attacking her colleagues who were, whom she regarded as being close to the accused. One of their colleagues even laid criminal charges against her. Three days before the commission of the offence, the accused obtained a domestic violence order against the complainant and now I said, I looked at it this way that both them involved themselves in that kind of a violent relationship, but that relationship led to a situation where the children did not enjoy the motherly love because of depression, and again it led to a situation where I had to, I had to think about them in that state it was very, very difficult, because I said if she is telling me that she become a mother to those children and now that the situation is as it was at that stage, what it means is that she will no longer go back to them and take care of them, that relationship was over I think, that's how I looked at it. Now, if I sent the accused to jail, what will happen of those children? There are situations where you say no, no, no, I hear you in mitigation, I hear you, you are saying you are having very young children but I will give you an example from other cases, you want me to look at your with mercy because of the young children but you are the author of your own misfortune, and I don't even think your children, your own children are safe with you but in this case it was, it was, I just thought that - they were I think between six and 17 years of age – accused will go to jail, their mother is a depressed somebody, they don't even want to be with her, they are staying with their, they remain behind with their 75 year old, sickly grandmother. Now, I likened that with primary care giving and I said, when I was asking what kind of sentence do you impose, I said the decisions of the Constitutional Court and the Supreme Court of Appeal with regard to primary care giving deals much more with a person who is with those children on a daily basis, who baths them, prepares their lunchboxes, come back to them after school, prepare food for them and so forth and in this case, their father is a breadwinner, he is not a primary care giver but now the object or the interest that we think of protecting is the interests of the children, and they are the same whether you are breadwinner or whether you are a primary care giver and again, I cannot, and I will give an example by myself, I go home -

Masutha: Chief Justice if I may, the impression that I'm getting, I get a sense of - but I am not convinced that it's really assisting us in justice to doing a proper assessment of whether there was reasonable ground to believe that you may not have misdirected yourself in your sense of judgment, given all the circumstances that you've just outlined, I mean for example there are systems in place in terms of our

social welfare system such as foster care placement and other alternatives at state cost to intervene in circumstances of similar nature, unless there is something completely exceptional that explains your thought process there. Speaking for myself, I am still not finding any direction that says there could have been a unique exception in this situation, in this instance but I leave it to other colleagues to do their own assessment.

Semenya: If I may, that is what I said when I started, I considered that after those comments and when I rethink the matter, I now believed that I have, I have erred, I have misguided myself. I said I considered from the beginning -

Masutha: The last point I wanted to check with you relates to civil exposure – you've been in the regional court as long as described earlier. The regional court has only acquired civil jurisdiction very recently, so it is not conceivable that perhaps until your acting stint, and perhaps for the short duration that civil jurisdiction had recently been introduced to the regional court, that you would have had much civil exposure. Now, to what extent is that likely to be a factor in limiting your ability to be an all-round Judge if you were to be appointed on a full time basis to the Bench, and having to be confronted with a variety of civil work?

Semenya: In the district court we were doing civil matters as well, and also when I was in a senior magistrate's position I did mostly civil work, and then when in the High Court I was also given civil matters to attend to, and I even discussed this with the, with my JP and I said to him that I, that was in January, I said to him that I've been doing criminal matters a lot, I worked with many different parties on criminal cases, and I think acting will benefit me if I am given a civil stint so he indeed agreed with me that with criminal matters he did not have a problem, and he extended my acting stint and gave me another term which was only civil with few appeals, criminal appeals that I did with another Judge. I wrote several judgements during that period and I am satisfied that -

Commissioner Motshekga MP: Mrs Semanya, you know you said you started practicing at '85 and know that was a time when there was a state of emergency declared, which lasted until about 1989 and that was a very difficult period. During that period I knew senior magistrates, they used to come to me asking for advice wanting to quit the system, because it was very difficult. I'm just amazed how a young woman like yourself managed to live through that period, and that even today accept this incident. There is nothing that one can think of that you did not discharge your duties well, that we are not equal to the task. You know as lawyers, we have what we call errors of judgement, errors of law and that's why you have in place system of appeals, but what I pick up about you makes me wonder why lawyers are forced to take behavioural sciences because it comes across that -

Mogoeng: Doctor, in view of what I said and what we agreed to, just put the question to her please.

Motshekga: Thank you for the intervention. The question I was coming to is, were you influenced by the human face that the law should have and the fact that the best interests of the children should be put first in the circumstances?

Semenya: Both of them played a role because I had to attend to those two aspects as well, the interests of the children, where do they go and also as you have adjusted, if you can, because of what you said, I believe that you have read the report.

Motshekga: I just want to say that you come through to me as a honest person because you disclosed the matter, you accept that, in hindsight, you made a mistake so honesty is a very important point, and thank you for making yourself available.

Commissioner Modise: I see you were born in Springs, and that in fact you would come from my generation which means that you would have been one of those young woman who were, one, not very socialised to stay at home, you went to university, you studied the law and therefore you'd be up to date with issues of gender and issues of women specifically.

Semenya: I agree Commissioner.

Modise: So you would also be aware that the victim in such circumstances always get the blame?

Semenya: Yes, sometimes yes and that is the reason why sexual offences court was created in the first place.

Modise: Thank you ma'am.

Semenya: Just to sensitise people that, when you deal with the sexual offences court, you deal with cases where girls would be raped simply because they were at a tavern at a given time, so what we do in our judgment we say yes, they are, the citizens of this country, they are entitled to be anywhere, anytime so you cannot say that because she was at the wrong place then the accused cannot be found guilty, whether he was drunk or not, the thing is she does not deserve to get raped. Why are boys allowed to be in the tavern at anytime but when it comes to girls they are not supposed to be there?

Mogoeng: There will be follow up if she is not satisfied with your answer.

Modise: Are we women citizens of South Africa being unfair to expect the courts to be more sensitive to exactly the points you are raising?

Semenya: No we are not, we are not at all.

Modise: And in your experience, because being one of the woman citizens of South Africa, I have been having my doubts about the enforcement of the Sexual Offences Act – do you find it easy to enforce?

Semenya: Yes, I find it easy to enforce.

Modise: Easy?

Semenya: Yes. The Sexual Offences Act?

Modise: Yes.

Semenya: You know one would think about the Sexual Offences Act that it covers almost everything like trafficking, it deals with different kinds of - remember in the past, I started in the 80s and rape as it was defined then is not the same as it is defined now, because in the past, men took an advantage that if I penetrate my finger, I won't be found guilty of rape, so as it is it covers almost, it covers everything and it covers the situation both as it was in common law and it took it further.

Modise: Thank you Ms Semenya. The reason I was putting this to you as a practitioner is that most of us women in South Africa have heard stories of how difficult it is to implement this Act. Now, you say you don't have a problem at all. May I just ask you my last question, why do you think you are ready to become a Judge?

Semenya: I went through many stages of a judicial officer -

Modise: I'm aware of that, but what would make you a good Judge?

Semenya: I listen, I listen to the parties, I sit down, I apply my mind, I, most of the time, do not just jump to conclusions. I, when I do judgments, I write and rewrite until I see this can go out as well as the fact, as the JP has said, we need women on the Bench as well, and I am a qualified and experienced person to become one.

Modise: I was impressed, then I became very worried when you said you come home at four, you take an hour and you start writing your, your - you didn't just say notes, then you said drafting your judgment. I was a bit worried whether your cases were similar, and required just an overnight writing period.

Semenya: They are not the same, but remember a few are in the, are in the sexual offences court where you only do sexual offences.

Modise: No, no ma'am, when you were speaking right at the beginning you referred to how busy you have been when you were acting and how, in the regional court, you went to work from nine to four, took a rest of an hour and then started drafting and you did not make a distinction on, of the different matters that you had, then you said you just start writing because you did not want to lag behind.

Semenya: No, I come from an era where we were not recording mechanically, we were taking notes so I still continue to do that. When we are busy with a matter, I just write almost everything that is being said and when I go home, I go home with notes and when I write the judgment, I write the judgement based on the notes that I am

having otherwise if you don't do that you will be overwhelmed because you will have 20 pending judgements to write.

Modise: I am going to leave it there.

Commissioner Nkosi-Thomas: You said that this case came across as a unique one, so in legally, basically what you are telling us is that you found compelling and substantial circumstances that warranted deviation from the prescribed minimum sentence. Is that what you're telling us?

Semenya: Yes.

Nkosi-Thomas: Was that recorded in the judgement?

Semenya: I did not write them like item one is this, item two is this, item three is this -

Nkosi-Thomas: I guess my question is, did you say I convict for this offence and ordinarily this is a sentence which I should impose, all things being equal, but now because this case is unique, in other words, because I have found substantial and compelling circumstances in this specific matter, I am deviating from the minimum prescribed sentence and these are the substantial and compelling circumstances that I have found that on the basis on which I'm deviating – did that come across clearly from your judgment?

Semenya: I do not remember, I don't think I did that, I just wrote a sentence and gave reasons why I am arriving at this conclusion.

Nkosi-Thomas: Is it not expected of a judicial officer to set it out in the manner in which I have suggested?

Semenya: The Act says you must do so, you must state that I, because of these circumstances one, two, three, four but I wrote - of the reasons I gave as substantial and compelling was the interest of the children.

Nkosi-Thomas: Now how long - you have been presiding in the criminal court for how long before, prior to this judgement Ms Semenya? I mean with your experience I guess I must just put it to you, one would have expected slightly more. Am I being fair to you?

Semenya: Yes I agree with you -

Nkosi-Thomas: So if one would suggest to you that it might perhaps be a good idea to give yourself a bit more time, act a little bit more so that you very comfortable with issue such as this – would you say that is an unfair comment?

Semenya: I would say so.

Nkosi-Thomas: Why?

Semenya: Because that will, as I say, it's a - I regarded it as one of those unique, I have done many, many cases, rape cases, and I say I forwarded them to the Judges for appeal, they weren't there for appeal and 99.9 per cent of them were confirmed, and it is just that some of my sentences were reduced from life to 25, it is still a fairly long period, I am comfortable with that, but I did what you are saying, it is expected of a judicial officer. Where there was substantial and compelling circumstances, I would do so. Where I could not find any, I was imposing that sentence that is prescribed, but unfortunately some of them were reduced - there are those where I imposed life which were confirmed -

Mogoeng: Ma'am please, if you could just confine yourself to the question it would help. You have told us that, please.

Semenya: I erred in this matter, I erred by not stating that.

Commissioner Ntsebeza: CJ, it seems to me that we are now getting into concessions made by the honourable magistrate saying she erred.

Commissioner Gcabashe: Thank you Chief Justice. On the same points ma'am, the Constitution, and I just want short answers. You are comfortable that you can deal with the Bill of Rights in any court?

Semenya: Yes.

Gcabashe: You are quite comfortable about that not only in relation to the criminal law but in relation to the civil law as well?

Semenya: Yes I am.

Gcabashe: You are quite comfortable that you understand the role, the duties, the powers of the three branches of government? Do you know exactly or you can read up on, if you have to, what you might have to do should you be faced with circumstances when you taking a decision on such infraction or the other?

Semenya: Yes.

Gcabashe: And you are happy with the Chapter Nine institutions, what they do? I mean we don't know everything, but you are comfortable that you've had sufficient exposure to what those institutions do, where to find the law, how to consult your colleagues on the Bench should you need assistance with anything?

Semenya: Yes I am.

Judge President Mlambo: Me and you were at varsity together.

Semenya: Yes.

Mlambo: We finished together.

Semenya: They are laughing at me 'cause you are a Judge President and I am still a magistrate.

Mogoeng: Please.

Mlambo: I want to confirm I invited you to come and act in the division. You were recommended to me, and I have had no occasion to sit down with you and find fault with anything you've done. But I just want to deal with two aspects that you said – you said working in the regional court and in the district court, prepared you for the High Court?

Semenya: Yes JP.

Mlambo: Do I understand you to be saying you found no difference in terms of conceptual nature, volume, complexity in the work of the High Court and the work you've done?

Semenya: I do not want to lie, there is a difference and you need to adapt. I found that in the High Court, you procrastinate at your own peril because you'll be given cases, files of cases to do and you will think that these are the matters I have been called upon to come and do in the High Court -

Mlambo: So you found, I'm sorry to - I'm actually saving you know, if you were my witness I would have said just answer the question.

Semenya: Yes, I found a lot of difference and you need to adapt somewhere.

Mlambo: You see, and the reason I'm asking, and that's why I'm toning down in terms of inviting magistrates to come and act, because there's a view in the magistracy that says you deal with the same law as Judges and therefore its easy work. Do you come from that school of thought?

Semenya: Not at all, I - you know you, in the magistrates' court, you deal with a case right from the onset – you start with the evidence right from the beginning and you write your judgment based on that, but in the High Court remember that there are appeals – it is decisions made by another person, you must read those decisions and you must be able to put yourself in the boots of the person who was presiding over the trial and make sure that you understand this case from that persons perspective.

Mlambo: Okay, let me ask you a different question, slightly different based on what you saying, you had occasion where you sat in the High Court in Pretoria to sit on appeals in judgements written by regional court magistrates?

Semenya: Yes JP.

Mlambo: You did?

Semenya: Yes JP.

Mlambo: And did you find any areas where they went astray?

Semenya: Most of the, yes, the most part that I have realised was the application of cautionary - most of them.

Mlambo: Okay so you, you see, I just want to make sure I understand you because I don't want to, to support you yet I'm supporting someone who come to the High Court and be a problem, because we have those instances. Your JP can confirm that, he knows.

Semenya: It won't be the same, it can't be the same -

Mlambo: Okay, let's leave it there. Let's come to the case - this case where you sentenced - you see I'm a bit constrained CJ, because when Ms Semanya says she erred, I don't know whether I can ask her that by saying that she's saying she now realises she should have imposed a harsher sentence. I don't know if I can ask that, because this matter is on appeal. You said you concede you erred. Are you saying, looking at this matter now and having thought about it, you should have gone with a harsher sentence?

Malema: On a procedural point CJ, I'm worried, I'm worried because if the matter is on appeal, I don't know anything, I'm not a lawyer and the matter is on appeal and she's going to make certain concessions here. Whoever is appealing that matter can even take this before the court and say I don't what we are still doing her because she already admitted.

Mogoeng: No, it doesn't work that way, it doesn't work that way. Appeals are dealt with purely on the basis of the record and, remember at the beginning I said, it's for her to decide how far she wants us to go with the matter. She can decide and say no, *sub judice* or to say, you know people are beginning to suspect things that are wrong about me, I want to put this matter in a proper perspective, and that does not happen without questions being put to her and by elaborating on her own, in the manner that she did, she therefore allows Commissioners to put clarificatory questions to her, so the JP is well within his rights.

Mlambo: Ms Semanya, you remember the question I asked?

Semenya: I'd rather leave it to the appeal court.

Mlambo: Okay that's fair. One last question – do you, when you, I suppose when you were researching and writing the judgment and the sentence, you must have looked at other cases?

Semenya: Yes, I did.

Mlambo: Did you look at the case called *State vs. Nkomo* from the SCA?

Semenya: No I didn't even cite it in my judgment.

Mlambo: But did you look at it, or you don't remember?

Semenya: I don't remember.

Mlambo: Because if I'm not mistaken, your case, it was more than one rape, isn't it?

Semenya: Yes it was, the evidence presented was that it was more than one rape.

Mlambo: So it was a life sentence case?

Semenya: Yes.

Mlambo: Now, in *State vs. Nkomo*, the facts are not similar, but the SCA reversed a life sentence to 16 years and there was an outcry in the country against that judgment. It was written by Justice Cameron and Lewis, and Justice Theron dissented.

Semenya: Oh ja, I know the case yes.

Mlambo: Did you consult it when you wrote this one?

Semenya: Yes I did, I - Justice Theron dissented in that matter. I didn't find it applicable in the matter before me.

Mlambo: Thank you very much CJ. In fact just before I step off, I confirm that when you acted in the High Court, you acted in a number of difficult work areas like the opposed motion court, the unopposed motion court – you confirm that?

Semenya: I confirm that.

Commissioner Malema MP: Do you know Judge Masipa?

Semenya: There are two Judge Masipas.

Malema: The one who handled Oscar's case?

Semenya: Yes, I know her.

Malema: Do you know she made certain rulings there?

Semenya: Yes.

Malema: And then they were overturned by the Appeals Court?

Semenya: Yes.

Malema: Does the appeals court overturning the judgment makes her of a lesser Judge?

Semenya: No, not all.

Malema: Did you lose any respect for her since the overturning of that judgement?

Semenya: No I didn't. She's a Judge; she applied her mind to the matter.

Malema: So what, what is the purpose of the appeals court?

Semenya: It is to look at the judgment if it needs to be corrected.

Malema: And that's how Judges are held accountable when they've erred?

Semenya: Yes.

Malema: And your case that we refer to, it's not different to many other cases which were there which were appealed and the appeals court ruled against very senior judicial officers?

Semenya: I agree Commissioner.

Malema: But also that you have two reported cases.

Semenya: I do Commissioner.

Malema: And there so many so-called senior Judges without a single reported case? Is that true?

Semenya: I agree Commissioner.

Malema: Thank you very much.

Mogoeng: One last thing, is it fair to assume that as you considered what was in the best interest of the children, you also took into account the interests of the victim?

Semenya: Yes, I did.

Mogoeng: And it's reflected in the Judgment?

Semenya: Yes.

Mogoeng: Thank you, you are excused.