

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: CC 89/2015
DATE HEARD: 7/12/15
DATE DELIVERED: 8/12/15
NOT REPORTABLE**

In the matter between:

THE STATE

and

DL

SENTENCE

PLASKET J

[1] The accused was charged with three counts of rape. The first count related to the common law offence while the second and third related to the statutory offence created by s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which superseded the common law offence. He pleaded guilty to all three counts and I convicted him as charged on the basis of his plea. It is now my task to impose sentence on him in respect of those offences.

[2] The offences were committed over a period of 17 years, the rape of the first complainant, his daughter, having occurred on divers occasions from 1996 to 16

December 2007; the rapes of the complainant in count 3, the accused's adopted daughter, having occurred on divers occasions from 2011 to 2013; and the rape of the complainant in count 2, the accused's niece and foster child, having occurred on divers occasions from January 2013 to August 2013.

[3] In what follows, I shall refer to the complainant in count 1 as 'the accused's daughter', the complainant in count 2 as 'the accused's niece', and the complainant in count 3 as 'the accused's adopted daughter'. I do so, not in order to de-personalize the horrific suffering they were subjected to by the accused, but to refer to them otherwise than by name in order to protect their right to privacy and dignity.

[4] The accused's daughter was born on [.....] 1991. That means that she was five years old when the accused started raping her and 16 years old when he stopped raping her (when she was old enough to resist his advances.) The accused's niece was born on [...] 2004. That means that she was between the ages of eight and nine years of age during the period that the accused was raping her. The accused's adopted daughter was born on [.....] 2005. That means that she was between the ages of six and eight years of age during the period that the accused was raping her.

[5] The Criminal Law Amendment Act 105 of 1997 came into operation on 13 November 1998. It applies in respect of the offences committed by the accused after that date. In other words, it applies to all three counts because it is only in respect of count 1 that some of the rapes committed by the accused pre-date the Act's date of commencement.

[6] Section 51(1), read with Part 1 of Schedule 2, provides that the prescribed sentence for rape when, as in this case, the victim is 'under the age of 16 years' is life imprisonment unless, in terms of s 51(3), substantial and compelling circumstances are found to be present that justify a less severe sentence.

[6] Drawing from *S v Malgas* 2001 (1) SACR 469 (SCA), at paragraph 25 the mechanics of the Act in the sentencing process may be summarized as follows: (a) the sentence prescribed by the legislation for the listed offences are to be regarded

by a sentencing court as ordinarily appropriate; (b) those sentences may not be departed from lightly; (c) all factors traditionally taken into account in imposing sentence remain relevant when sentencing in terms of the Act; (d) those factors are, however, measured against the yardstick of substantial and compelling circumstances; and (e) if, on a consideration of the circumstances of a case, the court is satisfied that the prescribed sentence would be 'disproportionate to the crime, the criminal and the needs of society' it is entitled to impose a less severe sentence, as substantial and compelling circumstances would, by definition, be present.

[7] I now turn to the three sets of circumstances that must be balanced and considered in the determination of sentence. They are the personal circumstances of the accused, the nature and seriousness of his offences and the interests of society.

[8] The accused is a 52 year old man. He has a previous conviction for drunk driving but that is irrelevant for present purposes, and I shall regard him as a first offender. After he pleaded guilty and was convicted he was assessed by a clinical psychologist, Mr Iain Reid, the Principal Clinical Psychologist at Fort England Hospital, Grahamstown. Much of what follows is drawn from Mr Reid's report and evidence.

[9] The accused grew up in a stable home. He is one of four siblings. He left school after failing standard 8. He worked on the railways for two years as a conductor. This was followed by two years of national service in the South African Navy. He was thereafter unemployed for a time but began studying nursing. He worked as a student nurse and then as a nurse from 1984 to 2006. He was fired from St Marks Clinic in that year because he had forged prescriptions for sleeping pills to which he had developed an addiction. He thereafter worked at St Dominics Hospital as a theatre technician until his arrest in 2015. He volunteered as a counsellor for Lifeline in 2003 to 2004.

[10] The accused married (for the second time) in 1990. He is the father of two children, one of whom is the complainant in count 1. She is now 22 years old. His

wife began to suffer from depression after the birth of their daughter and this led to her losing interest in sex, which led to conflict between the accused and her. He engaged in extra-marital affairs in 2004 to 2005 and in 2011 to 2012. They remain married but appear to have parted company in 2013.

[11] The accused has a history of depression but according to Mr Reid there is no nexus between that and the commission of the offences. He told Mr Reid, however, that he believed that his 'guilt around his on-going abuse of his daughter was contributing to his depression in 2007' and since then, according to Mr Reid, he 'reports some residual depressive symptoms but he has been well enough to function effectively at work'. Although he was addicted to sleeping pills and abused alcohol at one stage, he has overcome both problems.

[12] Mr Reid reported that the accused was estranged from his now deceased father. The reason for this was that he discovered that his father was also sexually abusing the accused's daughter. Mr Reid said that it appeared to him that the accused got angry with his father because he thought that his father had no right to sexually abuse his daughter. From this, the implication appears to be that he thought he had the exclusive right to do so. This ties in with Mr Reid's evidence that the pattern of the accused's conduct over the years was consistent with him regarding his victims as chattels.

[13] Mr Reid said the following in his report concerning the accused's response to the charges brought against him:

'Mr L has confessed to the charges and as such takes a degree of responsibility for his actions. While he displays remorse, this appears to be more in response to his arrest than to genuine empathy with the victims. He remains surprised that his daughter has filed charges against him as he said they had discussed the abuse, that he had apologised and that she had since forgiven him. He thinks that his daughter may have been influenced by others to lay charges against him. Mr L showed limited appreciation for the possible harmful consequences of the sexual abuse for the victims. Mr L is adamant that he is not sexually attracted to children per se but states that he chose his victims only because they were convenient and available to him as a source of sex. The reason he gives for abusing the children is that his wife refused to have sex with him and that his actions were as a result of

sexual need. No additional evidence was provided to suggest an exclusive sexual preoccupation with children.'

[14] As far as an assessment of the risk posed by the accused to others, Mr Reid stated:

'Mr L admits to being a serial rapist of under-age girls. While Mr L did not go out of his way to lure strangers as potential victims, he repeatedly chose victims entrusted to his care. The fact that his victims are under-age, that he offended repeatedly over a period of 17 years and he shows limited insight into the consequences of his actions on his victims are all factors that may be associated with risk of repeat offending. While the fact that he has been formally charged with the offences may offer some deterrent, he is likely to remain at high risk for sexual offending.'

[15] He concluded by stating that while the accused admitted to raping the three young victims over a period of 17 years, and while he accepts 'some responsibility', there is, in Mr Reid's opinion, 'little convincing evidence for genuine remorse' because of the repeated rapes over a protracted period and the fact that he 'appears to have limited insight into the consequences of the abuse of the victims'. The nature of his offence, viewed holistically, 'increases his risk profile for further offending'.

[16] I turn now to the nature and seriousness of the offences. In *S v Abrahams* 2002 (1) SACR 116 (SCA) at paragraph 17, Cameron JA spoke of the seriousness of the offence of rape when it concerns a father raping his daughter. He stated:

'Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter.'

[17] Later in the judgment (at paragraph 23) he dealt with, and rejected as 'untenable', the notion that 'rape within the family is less reprehensible than rape outside it', stating:

‘(a) First and obviously, a family member is also a member of the wider public and equally obviously as deserving as the rest of the public of protection against rapists, including those within the home. Indeed, where a rapist's victim is within his family, she constitutes the part of the public closest to, and therefore most evidently at risk of, the rapist.

(b) Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. The present case illustrates them with acute force. The rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused did) he can exercise a proprietary entitlement. Though not the case here, a family victim may moreover for reasons of loyalty or necessity feel she must conceal the crime. A woman or young girl may further internalise the guilt or blame associated with the crime, with lingeringly injurious effects. This is particularly so when the victim is the rapist's own daughter, and the more so when the daughter is of tender years.

(c) Third and lastly, the fact that family rape generally also involves incest (I exclude foster and step-parents, and rapists further removed in family lineage from their victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture.’

Cameron JA made the point that these features ‘required particular attention in regard to deterrence and retribution in the sentencing process’.

[18] These passages highlight the objective gravity of the offences committed by the accused and, as will be seen, certain of the ‘lingering injurious effects’ that Cameron JA identified are present in all three of the accused’s victims. When the period over which the abuse of each victim occurred is added to the mix – 11 years, eight months and two to three years – it becomes clear that the accused’s crimes are at the top-end of the scale as far as their seriousness is concerned.

[19] But matters get even worse when the impact of the accused’s conduct on his victims is considered. Ms Phia Van Tonder, a clinical psychologist at Fort England Hospital interviewed all three victims.

[20] She stated that the accused’s daughter has suffered long-standing impacts of having been sexually abused by both her father and grandfather. She is now married but experiences intimacy problems. When she was being abused, she

reported this to her mother but was told that she was lying. As a result, nothing was done and she suffered the abuse in silence until she was old enough to resist the accused's advances. The effect of this on her was to disempower her and engender in her a lack of trust for others: after all, her mother and father, who were supposed to take care of her, had betrayed her trust in most fundamental ways. Ms Van Tonder describes her as a very timid person without a good sense of self.

[21] What must have made the years of abuse all the more terrifying was that she had no means of escaping from her torment, especially after her mother disbelieved her. She got married at a young age and this enabled her to leave her family home. She has never had therapy which, Ms Van Tonder said, would help her to cope with the trauma she has endured, even at this late stage.

[22] The accused's niece displayed, according to Ms Van Tonder, various symptoms arising from the sexual abuse she endured. This included sleeping problems, nightmares regarding the abuse, enuresis, tearfulness, mood swings, aggressive behaviour towards other children, feelings of guilt and sadness, a lack of trust in others with resultant poor relationships with peers, concentration difficulties at school, attention seeking behaviour and impulsive behaviour. Her conclusion was that the child was 'displaying a wide range of psychological, behavioural and cognitive' symptoms 'typically associated with child sexual abuse' and that she needs to consult urgently with a psychologist 'in order to try and lessen the potential future impact' of these symptoms on her life.

[23] The accused's adopted daughter displayed a number of similar symptoms related to the sexual abuse she endured. Ms Van Tonder describes these as sleeping problems, frequent nightmares, tearfulness, lack of appetite and weight loss, aggressive and defiant behaviour, mood swings, feelings of guilt and sadness, concentration problems at school, feelings of anger and shame, attention seeking behaviour, irritability and self-injurious behaviour. As a result of this wide range of psychological, behavioural and cognitive symptoms associated with child sexual abuse, Ms Van Tonder recommended that this child 'urgently consult with a psychologist in order to try and lessen the potential future impact' of these symptoms on her life.

[24] Not much needs to be said about the interests of society, not because this is not important but because what has to be said is so obvious. Society has a clear and legitimate interest in seeing that a person such as the accused is effectively sentenced – a person who has over a long period serially sexually abused children who he was meant to protect; who has done so because he was in a position of power over them and they were vulnerable; and who at present represents a risk for other children, should be sentenced appropriately so that others may be protected from the accused's predations.

[25] It was argued that substantial and compelling circumstances are present to justify a departure from the prescribed sentences. These are that the accused is a first offender, that he is remorseful and that he is capable of rehabilitation.

[26] I am doubtful of the genuineness of whatever remorse the accused has expressed for the reasons given by Mr Reid. I also agree with Mr Reid that, judging from the accused's course of conduct over a 17 year period and his attitude to his victims, he is a risk to other children. Given his limited insight into what he has done, I am of the view that his prospects of rehabilitation are not good. For these reasons, I do not regard the factors put forward to constitute substantial and compelling circumstances.

[27] But even if I was wrong as to the questions of remorse and rehabilitation, these are factors that have to be viewed within the broader context of all of the circumstances of the offences. When their inherent seriousness, their sustained duration and devastating impacts are taken into account, any expression of remorse and any prospects of rehabilitation tend to pale into insignificance. In other words, even if these factors were present, when viewed against the nature and seriousness of the offences, they are not sufficiently weighty to qualify as substantial and compelling circumstances.

[28] I am, in any event, satisfied that in the circumstances, the prescribed sentences are appropriate to the crimes, the personal circumstances of the accused and the legitimate interests of society.

[29] I therefore impose the following sentences:

- (a) Count 1 (Rape) – Life imprisonment;
- (b) Count 2 (Rape) – Life imprisonment;
- (c) Count 3 (Rape) – Life imprisonment.

C PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES:

For the State: Adv N Turner, instructed by National Director of Public Prosecutions, Grahamstown

For the Defence: Adv D Geldenhuys, instructed by Grahamstown Justice Centre, Grahamstown.



