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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

	Reportable
Case no:	CC03/2021
Date of conviction:	27/01/2023
Date heard:	03/02/2023
Date delivered:	03/02/2023

In the matter between:

THE STATE

and

LOUIS PEPPING

ACCUSED

JUDGMENT: SENTENCING

Notyesi AJ

Introduction

[1] Sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant facts. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the

interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.¹

[2] On 27 January 2023, this Court convicted the accused on a charge of rape in contravention of section 3 read with sections 1, 56(1), 58, 59 and 60 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007. The conviction followed a finding of this Court that the accused is guilty of raping a six year old girl of N[...] A[...] A[...], near M[...], L[...] on 1 September 2019.

[3] At the commencement of the trial proceedings, the State invoked the provisions of sections 51(1) and (2), respectively of the Criminal Law Amendment Act 105 of 1997.² To that end, the State seeks for the imposition of the minimum sentence of life imprisonment.

[4] Prior to leading of evidence and the tendering of the plea by the accused, this Court advised the accused about the minimum sentence legislation and he confirmed that he understood the relevant provisions of the minimum sentence. Similarly, the accused's counsel, *Mr Kekana*, did confirm to have informed the accused about the minimum sentence legislation and that the responses given by the accused to this Court were in accordance with his instructions.

[5] I do point out that the minimum sentence legislation, requires the accused to show the existence of substantial and compelling circumstances, in order for the court to deviate from the provisions of the Act regarding the sentence to be imposed in cases of this nature. In circumstances where the accused is unable to show the existence of the substantial and compelling circumstances, the court will impose the sentence which has been ordained by the statute, unless, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused and the interest of society, it would be disproportionate and unjust to do so.

[6] When the court is imposing a sentence, even when a prescribed minimum sentence applies, it is required to weigh and balance a variety of factors to determine

¹ *Mudau v The State* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 13.

² Hereinafter referred to as 'the Act'.

a measure of the moral, as opposed to legal, blameworthiness of an accused – and thus to determine a sentence that is proportionate. This is achieved by consideration of, and an appropriate balancing of, what the well-known case of *S v Zinn*³ described as a ‘triad consisting of the crime, the offender and the interest of society’.⁴

[7] In circumstances where sentences are prescribed by legislation, courts have been reminded to approach the imposition of sentences conscious that the legislation has ordained the particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances, unless there are and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.⁵

[8] In *S v Malgas*⁶ it was held:

‘What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences that has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed period of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.’

[9] In *S v Vilakazi*⁷ the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Ultimately, in deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only

³ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H (‘Zinn’).

⁴ *S v Boshoff*, unreported judgment of the Eastern Cape High Court, Makhanda, Case No CA&R390/2012 (27 September 2013) para 19.

⁵ *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A) (‘Malgas’).

⁶ *Ibid* para 25.

⁷ *S v Vilakazi* 2009 (1) SACR 552 (SCA) (‘Vilakazi’). See also *S v Pillay*, Case No: CCD48/2017.

some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed.

[10] The task of imposing an appropriate sentence is at the discretion of the court⁸ even where legislation has prescribed sentences, for the reason that the discretion of the court has not been taken away, though, the court must be reminded that the particular offence has been singled out for severe punishment and that the sentence to be imposed should be assessed, paying due regard to the benchmark which the legislature has provided.⁹

[11] In *Opperman v S*¹⁰ it was held:

‘Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interests of society or, with difference nuance, prevention, retribution, reformation and deterrence. Invariably, there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions. This seems to be a case in point.’

[12] In order to determine the existence of substantial and compelling circumstances, the court would have to consider the facts of the case, the mitigating factors, aggravating factors and all such other factors that bear relevance to the imposition of an appropriate sentence. Notwithstanding the mentioned factors to be taken into account by the sentencing court, ‘[t]he specified sentences in the legislation are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degree of participation between co-offenders are to be excluded’.¹¹

⁸ *S v Singh* 2016 (2) SACR 443 para 23.

⁹ *Malgas* fn 5 para 25.

¹⁰ *Opperman v S* [2010] 4 All SA 267 (SCA) at 278 para 30 (*‘Opperman’*).

¹¹ *Malgas* fn 5 para 25.

[13] For this case, in order to determine an appropriate sentence in respect of the offence of rape of a six year old, the starting point is that the legislature has prescribed life imprisonment as a sentence to be imposed, however, this Court is obliged to consider the 'triad' principles of sentencing, for the reasons that the right balance of all factors must be achieved. On a proper construction of the 'triad' of *Zinn*, sentencing must involve an element of mercy, though, interest of society and the nature of the crime, must be accentuated in considering a departure from the minimum sentence and determining proportionality of the sentence. The reason is that the legislature has expressed its attitude and preferences regarding sentences to be imposed in respect of certain crimes, that was in response to the ever escalating rate of crimes involving violence, especially against women and children in society at large.

The personal circumstances of the accused

[14] The accused is a 58-year-old, which suggests that he is at an advanced stage of his life. He is educated. He is a first offender. This offence was committed when he was 56 years old. He held a senior position in the D[...] o[...] E[...] where he was a s[...] a[...]. Prior to being a s[...] a[...], he was an assistant teacher and later worked for the S[...], R[...], A[...] and C[...]. He testified that he has four children of which one of them is from his estranged wife. He could not remember the mothers of the two of his alleged children, neither could he remember the names of those two children. He testified that all the children are not his dependents. He used to support the youngest child who is now 14 years old, though he does not know his name. He stopped supporting this child after he was dismissed by the D[...] o[...] E[...]. His testimony was that he has since been dismissed by the D[...] o[...] E[...]. Therefore, he is unemployed.

[15] I have no doubt in my mind that he has achieved measurable career progression in his life. He was an assistant teacher and thereafter employed by Arts and Culture and ultimately, a s[...] a[...]. It is easy for this Court to infer that, as an advisor in the D[...] o[...] E[...], he has immensely contributed to the development and transformation of the educational system. He was useful to the society and enjoyed a position of trust until the offence was committed.

[16] He complained that he is on chronic medication. He had some psychological sickness. He had a fractured knee. He confirmed that he does not have medical records relating to the fractured knee. He also had no psychological report for the confirmation of any psychological sickness. He did not disclose the details of the chronic illness for which he is allegedly taking medication.

[17] I was not impressed by the evidence of the accused in his mitigation. I cannot imagine a parent who does not know the names of his children nor their mothers. A child is the biggest moment in a person's life. In respect of the alleged fourteen year old, of which he claims to have been paying maintenance, at least, the Court expected production of the salary advice or bank statement since, according to him, deductions were made from his salary. He did not even know the name of this fourteen year old. This Court does not accept the evidence about children. In any event, the accused testified that they are not dependent on him. The evidence about medical sickness is also rejected on the basis that there were no medical records in this regard.

The offence

[18] Rape is a serious offence for reasons that it offends against the victim's rights to personal freedoms, dignity, privacy and humanity. It is a disgusting, horrible and despicable crime as it does not only undermine the person of the victim, but does take away the dignity and self-esteem as well of the victim. The crime of rape is undoubtedly and indubitably serious. In our case law, the act of rape has been described as obnoxious, despicable and disgraceful. There is an abundance of case law condemning this type of offence. The offence becomes more aggravated when it is committed against defenceless and innocent young children and women, as is the case here.

[19] In *Director of Public Prosecutions v Thabethe*,¹² it was held:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is

¹² *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) at 577G-I.

founded on protection and promotion of the values of human dignity, equality and the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, of the kind of which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

[20] In *Mudau v State*¹³ the effect of rape was described by Majiedt J as follows: 'It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi*, Nugent JA referred to the study done by Rachel Jewkes and Neema Abrahams on the epidemiology of rape which concluded on the available evidence that 'women's right to give or withhold to consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa.' (Footnotes omitted.)

[21] The offence of rape in this case was committed against a six year old child. The accused promised the complainant food and money when committing the crime. This is the hallmark of arrogance and a show of power over an innocent and defenceless child. In my view, that conduct of the accused had rendered this offence more serious.

Aggravating factors

[22] The accused has preyed upon an innocent and vulnerable six year old to quench his covetousness and selfish needs. The accused has given no explanation for his obnoxious conduct. There is a prevalence of rape of women and children. The complainant sustained injuries as a result of rape and had to be admitted in hospital

¹³ *Mudau v S* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 17.

for a number of days. The J88 reflects a painful experience for the complainant. It is recorded in the J88 that there was a forced penetration that caused her to suffer injuries. She was bleeding at the time when she met the witnesses. The bleedings was also observed during her examination by the nurses. I have no doubt in my mind that this must have been an excruciating pain that the complainant had endured.

[23] The social worker report records that the sexual assault has caused the complainant and her family to live in extreme fear. This Court is unable to speculate how long the trauma will last. The complainant is reported to have stress symptoms, such as sadness and sleep disturbances. She is reported to have lost trust and felt betrayed by the accused. Undeniably, the family and the complainant were extremely hurt and traumatised as a result of the unthinkable conduct by the accused. The accused has not tendered any apology for this monstrous crime. The mother of the complainant, N[...] S[...], also testified regarding the impact of the rape on the family and the complainant.

[24] The fact that the offence was committed against an innocent defenceless six year old girl, is aggravating the offence.

Interest of society

[25] All right thinking members of the society are, with no doubt, sick and tired of the seemingly ever present reality and scourge of rape of women and children. However, a court must not overemphasize one factor, but should strike a balance of all the factors which are the personal circumstances of the accused, the nature of the offence and the interest of the society. In *S v Kruger*¹⁴ it was remarked:

‘Punishing a convicted person should not be likened to taking revenge’.

[26] In *S v Scott-Crossley*¹⁵ it was said:

‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst

¹⁴ *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 11.

¹⁵ *S v Scott-Crossley* [2007] ZASCA 127; 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) para 35.

deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.’

[27] This Court will approach the sentencing of the accused on the basis that it is in the interest of justice that crime should be punished and that such punishment should be proportionate since excessive punishment does not serve the interest of justice nor those of society. The interest of justice or public interest, is not synonymous of public opinions about what a sentence ought to be. Sentence must serve public interest rather than public opinions.

[28] In *S v Pillay*,¹⁶ the court referred to *S v Makwanyane & Another*¹⁷ where it was said:

‘. . . public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. . . “righteous anger should not becloud judgment”.’

[29] The rape of children has been singled out by the legislature as one of the serious offences that warrants a minimum sentence of imprisonment. This demonstrates the extent to which this type of offence is viewed by the society. By now, it must be axiomatic that in the face of such grievous offences, the interest of society should weigh more heavily than the interest of the accused, unless substantial and compelling reasons exist for justification. The community, in general, must be protected against sexual predators such as the accused in this case. The rape of a six year old by a 56 year old educated man, who must be aware of the impact of sexual violence, cannot be imagined or tolerated in a right minded society. As far as this Court can understand, the legislature has enacted legislation that proposes severe sentences, awareness campaigns about gender based violence

¹⁶ *S v Pillay*, unreported judgment of the KwaZulu Natal High Court, Durban, Case No CCD 48/17 (7 May 2018).

¹⁷ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 paras 87-89.

has been launched, notwithstanding those, the gender based violence, rape of children and women, remains prevalent in society.

[30] In these circumstances, the society, justifiably, demands for the imposition of sentences that will have deterrent effect, whilst allowing for the effective rehabilitation of the accused person.

[31] In consideration of an appropriate sentence, I do take into account the fact that the accused is an educated person and he should have known better. It is common knowledge that there are public awareness campaigns regarding gender based violence. The accused ought to know that his conduct was unlawful. The consideration of this fact demands for the court to consider imposing a sentence that will serve as a deterrent, not only to the accused, but also to other would-be offenders.

[32] In *Opperman v S*¹⁸ Majiedt AJA (as he then was) writing the minority judgment, held–

‘The moral reprehensibility of rape and society’s abhorrence of this rampant scourge are unquestioned. The most cursory scrutiny of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalties. This reprehensibility and abhorrence is so much more pronounced in the instances of the rape of very young children as is the case here. The court below correctly took into account the fact that the complainant was an innocent, defenceless and vulnerable victim.’

[33] I agree with the above observation. The statement is more apposite to the present case.

Remorse

[34] The accused has shown no remorse for the horrendous rape of the six year old girl. The conduct of the accused was a callous one. The accused did not care

¹⁸ *Opperman* fn 10 at para 15.

that the complainant was 'his child' or he was her possible 'grandfather', as in African culture, where children are parented and raised by the community as a whole, that culture is consistent with the concept of 'UBUNTU'. The accused has betrayed and breached 'UBUNTU'. The rape of a six year old cannot be justified. Even during these proceedings, the accused showed no remorse, he was laughing, smiling and making some gestures, in which he showed the middle finger to this Court. Whatever is the meaning of that gesture, is unknown to this Court. The conduct of the accused, considered in the conspectus of this case, shows a heartless person who has no respect for the rule of law and the rights of others. During the main trial, the evidence was heard that the accused on the day of this incident, had consumed liquor. There is no suggestion that such consumption of liquor had an impact on him. This Court will not consider as a mitigation the fact that the accused had consumed liquor. What is left, is that this Court is still in the dark on the reasons or explanation why the accused committed this heinous crime against an innocent six year old child. In such circumstances, this Court is unable to measure the moral blameworthiness of the accused.

Findings

[35] The personal circumstances of the accused, including the fact that he is at an advanced age, are far outweighed by the seriousness of the offence and the interest of justice. The interest of justice demands that the sentence prescribed by legislation must be imposed. The accused failed dismally to show the existence of substantial and compelling reasons for deviation from the minimum sentence. I take into account the following factors, which aggravates the offence:

- (a) The complainant was only six years old;
- (b) The victim assessment report shows that the complainant was traumatised and that she is still experiencing issues of trust;
- (c) The complainant was admitted for many days at the hospital after the rape;
- (d) The complainant sustained injuries which came about as a result of forced penetration;

- (e) The accused has shown no remorse for the offence;
- (f) The total conspectus of the impact of this rape to the complainant and her family, as clearly set out in the social worker's report, which was unchallenged; and
- (g) That the accused is an educated person who is aware of the society's disgust on crimes of violence against women and children. I do consider the fact that the accused held a position of trust at the time.

[36] I agree with the concession by *Mr Kekana*, counsel for the defence that the personal circumstances of the accused, in this case, did not establish substantial and compelling reasons for deviation from the minimum sentence. My view about the personal circumstances of the accused, as raised by the accused in his evidence and *Mr Kekana* during his argument, is that they must yield to consideration of deterrence. The conduct of the accused was callously brutal and it was appalling. In these circumstances, it is safe to remember the warning expressed in *S v Vilakazi*.¹⁹

'In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it become clear that the crime deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in an employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of flimsy grounds that *Malgas* said should be avoided.'

[37] When I look at the circumstances of this case, the interest of society, the interest of the complainant and the aggravating nature of the offence, I am of the view that the aggravating factors outweigh the mitigating factors. In *S v Malgas*,²⁰ the court held:

¹⁹ *Vilakazi* fn 7 para 58.

²⁰ *Malgas* fn 5 para 25.

‘The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.’

Conclusion

[38] For all the reasons stated above, I conclude that there are no substantial and compelling circumstances justifying this court to deviate from the prescribed sentence of life imprisonment as prescribed by the legislation. This Court will pass a sentence that would give recognition to the justifiable abhorrence invoked by the callousness of rampant crime of rape, especially for innocent, defenceless and vulnerable children. In this Court’s view, the sentence will not destroy the accused, though it will serve as a general deterrence. That would give the accused sufficient time to be rehabilitated for his reintegration into society as a responsible citizen. In *S v Kearns*²¹ the Court stated that rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The physical scare may heal, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical, but the deep sense of some deathless shame... By the very nature of the offence, it is an obnoxious of the highest order.

[39] In the result, the accused is sentenced as follows:

(1) For the crime of rape in contravention of section 3 read with sections 1, 56(1), 58, 59 and 60 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007, the accused is sentenced to undergo life imprisonment.

M NOTYESI
ACTING JUDGE OF THE HIGH COURT

²¹ *S v Kearns* 2009 (2) SACR 684 (GSJ)

Counsel for the State : *Adv Nyendwana*
: *The DPP*
Mthatha

Counsel for the Accused : *Adv Kekana*
Attorneys for the Accused : *Legal Aid*
Mthatha