



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

**Not Reportable**

Case no: 63/2021

In the matter between:

**THE STATE**

**and**

**AYANDA NDLOVU**

**ACCUSED**

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**SENTENCE**

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**Govindjee J**

[1] Mr Ndlovu was convicted of rape in contravention of section 3, read with various sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.<sup>1</sup>

[2] Mr Ndlovu was found to have unlawfully and intentionally committed three acts of sexual penetration of the complainant, who was eight years old at the time, by

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<sup>1</sup> Act 32 of 2007 ('the Act').

having sexual intercourse with her *per vaginam* without her consent and against her will. The Director of Public Prosecutions relied on s 51(1), read with Part I of Schedule 2 of the Criminal Law Amendment Act, 1997<sup>2</sup> ('the Minimum Sentences Act') in seeking life imprisonment for the rape conviction, on the basis that the rape involved a victim under the age of 16. A court that is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence than that prescribed by the Minimum Sentences Act must impose a lesser sentence, entering the relevant circumstances on the record of proceedings.<sup>3</sup>

[3] Section 276 of the Criminal Procedure Act, 1977<sup>4</sup> ('the CPA') provides for the sentences which courts can impose. The imposition of sentence is pre-eminently a matter for the discretion of the trial court, which is free to impose whatever sentence it deems appropriate provided it exercises its discretion judicially and properly.<sup>5</sup> While the retributive aspect of sentencing tends to dominate, courts are enjoined to temper the punishment with a measure of mercy.<sup>6</sup>

[4] It has previously been said that the sentencing court must attempt to achieve a balance in its sentence, and not approach its task in a spirit of anger, but in one of equity. Hastiness, the striving after severity and misplaced pity are out of place, as are so-called exemplary sentences designed to use the crime to set an example for others in society.<sup>7</sup> The appropriate balance must be struck. To this end, more serious cases clearly require severity, with a certain moderation of generosity. The object of sentencing is not to satisfy public opinion, but to serve the public interest.<sup>8</sup>

[5] In the final analysis, the well-known triad of factors to be considered consists of the crime, the offender and the interests of society,<sup>9</sup> and these factors must be

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<sup>2</sup> Act 105 of 1997.

<sup>3</sup> S 51(3)(a) of the Minimum Sentences Act.

<sup>4</sup> Act 51 of 1977.

<sup>5</sup> The general purpose of imposing a sentence is fourfold: retributive, preventative, rehabilitative (reformatory) and to act as a general deterrent. *S v Rabie* 1975 (4) SA 855 (A).

<sup>6</sup> *Rabie* at 862G-H.

<sup>7</sup> See *S v Khulu* 1975 (2) SA 518 (N) at 521-522.

<sup>8</sup> *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as *amicus curiae*) 2007 (2) SACR 539 (CC).

<sup>9</sup> *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H.

applied, in accordance with *Malgas v S*,<sup>10</sup> to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.<sup>11</sup>

In *S v Matyityi*,<sup>12</sup> Ponnann JA held that Parliament:

‘...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...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, [are] foundational to the rule of law which lies at the heart of our constitutional order’.

[6] Mr Ndlovu used his access to the complainant and position of authority over her as a family member to rape her on three occasions during 2020. He threatened her in order to ensure her silence, also giving her small amounts of money to keep her quiet.

[7] A suitably qualified registered social work practitioner, Ms Stamper, conducted a psychological assessment report of the complainant, focusing on the impact of the rape on her. Her testimony confirmed the contents of her report dated 13 March 2021.<sup>13</sup> That report reveals that the complainant suffered anxieties and nightmares, blaming herself and feeling guilty about what had occurred. She was forgetful, and had become angry. The threats she had received have had a psychological effect on her. She lives with fear and had to learn to accommodate the sexual abuse ordeal perpetrated by her stepfather. Her own development as a child has been irreparably compromised and it is likely that she will be unable to reach her full potential in future. She will also suffer from issues of trust and sexual identity.

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<sup>10</sup> *Malgas v S* 2001 (1) SACR 469 (SCA).

<sup>11</sup> See *Radebe v The State* [2019] ZAGPPHC 406 para 12.

<sup>12</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23. Also see *Malgas* op cit fn 10, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 para 21.

<sup>13</sup> Stamper’s report was based on the referral received from the Director of Public Prosecutions, a copy of the indictment, including a summary of substantial facts, medico-legal examination report and her consultations with the complainant and the complainant’s biological father.

[8] Mr Ndlovu chose not to testify in mitigation of sentence. His counsel explained that he was 46 years of age and unmarried. He was the father of 7 children. Only two of these children were majors. The other 5 children were aged between a few months and fifteen years. He had not attended school but had attended adult classes up to grade 3 level. He had worked as a bricklayer and supported his minor children before his arrest. He had no previous convictions.

[9] Mr Ndlovu had been raised by a pastor in Johannesburg. His father had left him at a young age and had not been part of his life until 2011. He had since passed away. Counsel for Mr Ndlovu argued that his circumstances, viewed cumulatively, warranted a deviation from the prescribed minimum sentence and that the Court should depart from the prescribed minimum sentence as a measure of mercy, and so as not to destroy him. I was also urged to note that Mr Ndlovu had not followed through with his threats against the complainant and had not caused her any other harm, outside of the rapes.

[10] The reality is that South Africa has been reported to suffer from five times the global average of violence against women.<sup>14</sup> Courts have repeatedly reflected on the horrific nature of the offence of rape, given that it constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim. There is also increasing evidence that disproportionately high levels of violence against women and children have measurable and far-reaching effects on the health and economy of the nation.<sup>15</sup> As such, it has been accepted that courts cannot deny that the country is facing a pandemic of sexual violence against women and children<sup>16</sup> and that crimes of rape deserve severe punishment.<sup>17</sup> Children's rights are constitutionally protected, and rape of a child is by its nature a shocking crime. Society's shame has translated into the Minimum Sentences Act, which by way of a prescribed, albeit discretionary

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<sup>14</sup> *The Director of Public Prosecutions, Grahamstown v T M* 2020 JDR 0652 (SCA) para 15.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B. *Radebe* op cit fn 11 para 34. In *S v Vilakazi* [2008] ZASCA 87 para 54, Nugent JA noted that 'there comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.' See *S v Ncheche* 2005 (2) SACR 386 (WLD) para 35; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 555h.

minimum sentence regime, has drastically impacted upon the exercise of a court's discretion in imposing a sentence.<sup>18</sup>

[11] In this instance, the conduct amounts to a specific form of repeated domestic violence, impacting negatively upon the child and her mother. Mr Ndlovu abused his position of power and trust in the household to sexually violate the complainant on three occasions in the absence of the complainant's mother, who was at work. Mr Ndlovu's conduct has been found to fall within the purview of the Minimum Sentences Act. A court should not for 'flimsy reasons' and 'speculative hypotheses favourable to the offender' deviate from the minimum sentence prescribed or apply its personal notion of fairness.<sup>19</sup> The question remains whether, when considering all the circumstances, there are substantial and compelling reasons to justify a lesser sentence than the minimum sentence prescribed.

[12] This court is duty bound to consider Mr Ndlovu's personal circumstances, as well as that of the young complainant. The nature of the crime must also be considered, together with the interests of society and bearing in mind the various purposes of punishment.<sup>20</sup> A measure of mercy must also be added to a proper consideration of all the circumstances, to determine whether the imposition of a minimum sentence is proportionate to the offence.<sup>21</sup> I am also cognisant that a finding of an absence of substantial and compelling circumstances will result in the gravest of sentences being passed and that the consequences of this are profound, effectively removing an individual from society.<sup>22</sup> It requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.<sup>23</sup>

[13] The factors relied upon by Mr Ndlovu as substantial and compelling have been considered in their totality. The main factor in his favour is that he is a first offender. It has repeatedly been held that aversion to imprisoning a first offender is not, on its own, a factor intended to qualify as a 'substantial and compelling' circumstance

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<sup>18</sup> *S v September* [2014] ZAECHGHC 38 para 8.

<sup>19</sup> *S v PB* 2011 (1) SACR 448 (SCA) para 21; *Matyityi* op cit fn 12 para 23.

<sup>20</sup> *S v Genever and Others* 2008 (2) SACR 117 (C) at 122c-d.

<sup>21</sup> *S v Vilakazi* [2008] ZASCA 87 para 15.

<sup>22</sup> *S v Bull* 2001 (2) SACR 681 (SCA) para 21.

<sup>23</sup> *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC) para 8.

warranting deviation from the prescribed minimum sentence.<sup>24</sup> It has also been noted that he appears to have had an unfortunate upbringing but has obtained employment and contributes to society in that way. Many other South Africans find themselves faced with similar socio-economic circumstances. He also has five minor children that he supported prior to his arrest. Sadly, given the nature of the conviction, those children are destined to grow up without their father irrespective of whether a life sentence is imposed.

[14] It is true that Mr Ndlovu did not inflict harm upon the complainant outside of the three rapes, despite threatening to do so. The legislature has directed that, when imposing a sentence in respect of rape, an apparent lack of physical injury to the complainant cannot, on its own, constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.<sup>25</sup> The reason for this appears to be two-fold. Rape is itself an act of overt violence. It is also an act acknowledged to have devastating long-term *sequelae*.<sup>26</sup> The familial relationship between Mr Ndlovu and the complainant is similarly not, on its own, a substantial and compelling circumstance in terms of legislation.<sup>27</sup> Given the similar circumstances of the two cases, the remarks of Nicholls JA in *T M* are apposite:<sup>28</sup>

‘There can be no greater crime, in my view, than to deprive a child of her innocence, especially a vulnerable child such as the complainant here. This heinous act was not perpetrated by a stranger, but by a person who said he considered the child to be his own daughter. For a child to be violated in the sanctity of the only place she can call home is a most egregious breach of trust. Can she ever feel safe again? Unsurprisingly, the psychologist’s report diagnosed the child with post-traumatic stress. Apart from the fears, the nightmares...there will be long term psychological consequences. It is stated that these will have a negative impact on her psychological growth and psychosexual development into adulthood – no amount of counselling can counteract this. In short, this young girl’s life has been irreversibly damaged.’

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<sup>24</sup> *T M* op cit fn 14 para 11.

<sup>25</sup> S 51(3)(a A)(ii) of the Minimum Sentences Act. But see the judgment of Plasket J in *S v Nkawu* 2009 (2) SACR 402 (ECG), cited with approval in *S v SMM* 2013 (2) SACR 292 (SCA) para 26.

<sup>26</sup> *T M* op cit fn 14 para 13.

<sup>27</sup> S 51(3)(a A)(iv) of the Minimum Sentences Act.

<sup>28</sup> *T M* op cit fn 14 para 14.

[15] Mr Ndlovu's personal circumstances cannot be viewed in isolation. The aggravating features of the matter are palpable. Attacks on vulnerable victims such as extremely young children have always been an aggravating feature of rape. Every child is meant to enjoy the constitutional rights to be protected from maltreatment, abuse and degradation, to freedom and security, which includes the right to be free from all forms of violence and to have their privacy and dignity respected and protected.<sup>29</sup> The complainant was sexually violated by an adult who was expected to play the role of a father figure. She lived under the same roof with him, and was raped on three occasions. Her lived experience sadly adds to the plethora of children who have experienced what it means to be raped, in a country grappling with an infestation of gender-based violence.

[16] Ordinary mitigating factors do not necessarily equate to 'substantial and compelling' circumstances.<sup>30</sup> The minimum sentence prescribed by the legislature must be imposed unless there are truly convincing reasons for departure.<sup>31</sup> Higher courts have cautioned that there is no place for over-emotional pity in sentencing offenders against the backdrop of the legislative approach. Flimsy reasons and hypotheses favourable to an accused person would not survive scrutiny and simply do not qualify as substantial and compelling.

[17] In *S v Zitha*, Goldstein J commented on the need to punish perpetrators of child rape as heavily and severely as the law allowed in the absence of substantial and compelling circumstances dictating otherwise. Courts will not shy away from this responsibility, however difficult it may be to do so.<sup>32</sup> In all the circumstances, I must conclude that there is an absence of substantial and compelling reasons or weighty justification for a departure from the prescribed minimum. Mr Ndlovu's conduct overtakes the various ordinary mitigating considerations his counsel has presented, including his lack of previous convictions, even when these are viewed cumulatively.<sup>33</sup> The result is that a sentence of life imprisonment is warranted and I

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<sup>29</sup> Ss 28(1)(d), 12(1)(c), 14 and 10 of the Constitution of the Republic of South Africa, 1996.

<sup>30</sup> *T M* op cit fn 14 para 11.

<sup>31</sup> *Matyityi* op cit fn 12 para 23.

<sup>32</sup> *S v Zitha and Others* 1999 (2) SACR 404 (WLD) at 418*h-i*.

<sup>33</sup> See *S v Vilakazi* [2008] ZASCA 87 para 58. Also see *Zitha* *ibid*: the absence of previous convictions is not 'substantial and compelling' for purposes of s 51(3)(a).

consider this to be a proportionate sentence for the crime. Given the nature of the offence, various other consequences emanating from legislation follow. These have been included as part of the order to follow.

## **Order**

[18] The following sentence is imposed:

- a. The accused, Ayanda Ndlovu, is sentenced to life imprisonment in respect of the conviction of rape involving an eight-year-old child.
- b. In terms of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the accused, as a convicted sexual offender, must be included in the National Register for Sex Offenders.
- c. In terms of section 120(4) of the Children's Act 38 of 2005 and section 41 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the accused is declared to be unsuitable to work with children, and it is directed that his particulars be entered in Part B of the National Child Protection Register.
- d. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

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**A. GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:** 07 February 2022

**Delivered:** 04 March 2022



Appearances:

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