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

CASE NO: CC16/2022

In the matter of:

STATE

v

S N

Accused

JUDGMENT

Date : 20 April 2022

NORMAN J :

- 1 The Director of Public Prosecutions for the Eastern Cape Division, prosecuting for and in the name of the State preferred a rape charge against Mr S N (who shall be referred to hereinafter as the accused) , a 46 year old male person. The charge is premised on the 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 , read with section 94 of the Criminal Procedure Act, 51 of 1977 (the “CPA”) .
- 2 The State alleged in the indictment that on divers occasions between 11 and 13 October 2021 and at or near No. [4.....], Stutterheim , the accused did unlawfully and intentionally commit acts of sexual penetration with AM, a ten year old girl, by having repeated sexual intercourse with her *per vaginam* without her consent and against her will. The Director of

Public Prosecutions further requested that in the event of a conviction she will rely on the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (as amended) read with Part 1 of Schedule 2 relating to a discretionary minimum sentence of life imprisonment in that the victim was a person under the age of 16 years and was raped more than once by the accused. Attached to the indictment was a summary of substantial facts upon which the State relied which was furnished in terms of section 144(3) of the CPA. It is common cause that the minor girl child was born on 20 November 2011.

- 3 Before me, Ms Hendricks appeared for the State and Mr Sojada appeared for the accused. After the charge was put to the accused, he pleaded guilty and a statement in terms of section 112(2) of the CPA signed by the accused was read into the record.

- 3.1 The State accepted the following facts which were stated by the accused in his statement filed in support of the guilty plea. They are :

"I hereby plead guilty to the following charge:

- 4.1 ***Rape:*** *In that on the 11 and 13 October 2021 and at House No [4.....], Stutterheim, in the District of Stutterheim, I did unlawfully and intentionally commit acts of sexual penetration with **AM**, a 10 years old girl, by repeatedly having sexual intercourse with her per vaginam without her consent and against her will. I am therefore guilty of contravening Section 3 of Act 32 of 2007, read with section 51(1) of Act 105 of 1997, in that I raped the complainant, who is under the age of 16 years without her consent and against her will. I understand that a discretionary minimum sentence of life imprisonment is applicable.*

The facts on which I plead guilty are as follows:

- 5.1 *On 11 and 13 October 2021 I was staying at house No. [45.....], Stutterheim. I slept at house No. [447....] Location, which house is next door to house No.[450....] and sometimes spent the day at house No. [476...] where the incidents happened.*
- 5.2 *The complainant, AM, who was 10 years old when the incidents occurred, is my brother's child and lives at house No. [450... ..] with her paternal grandmother , Mrs [NN....]*
- 5.3 *The complainant and her younger brother used to visit me at house No. [447....] where they played.*
- 5.4 *On the 11th day of October 2021 I was at house No. [447..] as usual. I asked the complainant to fetch water for me after school came out that day. She put the water in the cupboard. I then undressed her panties and engaged in sexual intercourse with her. I knew very well that she was 10 years old and did not have capacity to consent to sexual intercourse.*
- 5.5 *I did not promise the complainant anything other than using my position of power and trust to get her to submit to my demand to have sexual intercourse with her.*
- 5.6 *On the 13th day of October 2021 the complainant again came to my house, No. [447...], after school came out to fetch water for her grandmother. I called her over and asked her to fold my clothes. I then undressed her panties and had sexual intercourse with her.*
- 5.7 *After I had sexual intercourse with the complainant, BH, an 18 year old girl who kept her clothing at house No. [447...], entered the shack where I was with the complainant.*
- 5.8 *I covered the complainant with a blanket so that BH could not see her on the bed with me.*
- 5.9 *I realised that BH was suspicious as she enquired why I was still covered by blankets during the day.*
- 5.10 *I told her that I was resting and she left.*
- 5.11 *I immediately asked the complainant to go to her grandmother's house.*
- 5.12 *I later learnt that BH saw the complainant leaving my shack and reported the matter.*
- 5.13 *The father of the complainant, who is my brother, approached me after he learnt of the incidents. He asked me what I had done to his child. We were in the presence of our sister S N N.*
- 5.14 *I told him that I was overwhelmed by sexual urges and raped his child as a result.*
- 5.15 *My brother drew a knife and stabbed me. The community also assaulted me thereafter.*
- 5.16 *I was taken to hospital where I was admitted for 14 days (from 22 October to 4 November 2021).*
- 5.17 *The Investigating Officer, Warrant Officer Mhlambiso, arrested me in hospital on 24 October 2021.*

I wish to make the following admissions in terms of Section 220 of Act 51 of 1977

- 6.1 *I admit that my actions were unlawful, intentional and punishable in terms of the law.*
- 6.2 *I admit the content of the birth certificate of the complainant, AM, to the effect that she was born on the 20th November 2011 and was 10 years old at the time of the commission of the offence.*
- 6.3 *I further admit that the complainant lacked capacity to consent to sexual intercourse at the date of the commission of the offences.*
- 6.4 *I admit and understand that my conduct on the days in question was rape.*
- 6.5 *I admit that I used my position of power and trust against the complainant to get her to submit to my demands for sexual intercourse.*
- 6.6 *I admit the contents and correctness of the medical report (J88) compiled by Dr. P P. Conjwa."*

4 Thereafter I put certain questions to the accused in order to satisfy myself whether he confirmed, understood and appreciated the nature and import of the statement including the facts contained therein , which he confirmed. The State accepted the plea and the facts upon which it was premised. Upon being satisfied that the accused intended to plead guilty, I accordingly found him guilty as charged.

5 The State proved certain previous convictions against the accused which related to , *inter alia*, theft and assault with intent to do grievous bodily harm. It was conceded by the State that for the purposes of sentencing herein those previous convictions are not relevant.

Evidence in mitigation

6 The accused testified under oath in mitigation of sentence. He was born on 3 June 1975. He is 46 years of age. He left school at Standard 5. He is unemployed and has been unemployed for many years. He is not married

and does not have children of his own. He resided at house no. [450..] with his grandmother Mrs N N. He apologised for his actions to his grandmother, his family, the victim and to the members of his community. He spent approximately five months in prison awaiting trial. He suffers from high blood pressure which is under control. He confirmed that the complainant is his niece and acknowledged that he was supposed to protect the complainant and not be the person who hurt her. He took responsibility for his actions.

7 He further testified that on 20 October 2020 he was stabbed by his brother below the left shoulder after he confronted him about the rape incidents. He was further assaulted by the community on 22 October 2020 which resulted in him sustaining fractures to his jaws . At the hospital they put in jaw wiring that was taken off on 15 December 2021. He was hospitalised for a period of fourteen (14) days. He asked for forgiveness and mercy from the court. He asked for a sentence of twenty years instead of life imprisonment .

8 Under cross-examination by Ms Hendricks it transpired that he was staying in a shack at house 4476 where the offences took place because he had been asked to look after the house. He was not paying any rental for it. He stated that he did not have an opportunity to apologise to his brother and to the child because his brother simply fought and stabbed him. The reason he committed the offence was that he had sexual urges.

At the time of the commission of the offence he did not have a girlfriend. He knew that the child was young and he also knew that the child looked up to him as her uncle for protection. He acknowledged that what he did was wrong because he concealed his actions from people. He undertook not to commit the offence again. He denied that he threatened the child as reported in the social worker's report to which I shall refer later. He felt sorry that the child was experiencing nightmares. He understood the consequences of his actions. It was put to him that the complainant's father and his sister do not accept his apology. He confirmed that he had laid a charge against his brother for stabbing him and that case is pending before the district court in Stutterheim. He confirmed that the five year suspended sentence in relation to the assault with intent to do grievous bodily harm charge had not lapsed when he committed the offence of rape. He accepted that according to his statement there was a day in between the rape incidents. The defence closed its case in mitigation of sentence.

Evidence in aggravation of sentence

- 9 The State called the evidence of Dr Pilela Patience Conjwa who examined the child at the Stutterheim Hospital where she has been employed since 2020. She testified that this was her first paediatric rape case. She qualified from the University of the Free State and has a MBCHB degree. She is registered with the Health Professions Council and is currently

employed at the Stutterheim District Hospital. At university , she dealt with anatomy as part of her degree courses. She examined the minor child on 20 October 2021 and completed a medical report. She recorded that the complainant weighed 22,5 kg and her general body build was normal for her age but she was petite. Her breasts were still developing. The minor child did not know what a condom was. She did not observe any injuries or abrasions on her skin . She noted a white thick discharge coming from the child's vagina but she did not investigate it. She observed slight redness in the para- urethral folds. In conclusion she stated the following:

“Presents with history of sexual assault by uncle. Uncle raped her, penetrating vagina only. Incident occurred Monday 11 October 2021. Again she was raped on Tuesday 12 October 2021 and again Wednesday 13 October 2021 by same uncle.”

- 10 In describing her observations on the hymen she wrote *“mostly intact micro perforated”*. She did not observe any tears or swelling. She explained that a hymen itself does have one perforation which will allow a blood to come out when a child reaches the stage when she menstruates. She found that the small holes that were on the hymen were normal because the hymen differs from person to person. She was not able to admit any fingers into the victim's vagina because the victim was in pain and was uncomfortable. There was no bleeding or bruising observed. There were no signs of injury noted on anal examination. Under- cross

examination she testified that because the hymen was not torn that does not mean that there was no penetration. She stated that because the child was very young the healing process in the vaginal area took place very quickly.

- 11 She explained the reason why the hymen would remain intact although there was penetration. She stated that during penetration the victim could experience what she referred to as thickening of the hymen itself, that the hymen can stretch with certain activities and if the patient is sweet-talked there would be less damage during penetration. The other reason is that if the victim was more relaxed and the pelvic muscles were relaxed then the victim would not experience brutal tearing. She indicated there was no evidence that any force was used due to the quick healing process that happened. She testified that penetration does not necessarily mean that the hymen should be torn because that depends on how deep one penetrated the child.
- 12 Although this was her first paediatric rape case, she did perform examinations on adult rape victims. She did not concede that this was not a brutal rape case because of the healing process that had intervened prior to the child approaching the hospital. She stated that the healing process during trauma is quite rapid it takes between four to seven days. She only examined the child using her naked eye. The medical report had been accepted by the accused and the evidence of Dr Conjwa was not

seriously challenged. I accept her evidence as it reflected her findings at the time of examination. I am satisfied that the child sustained injuries consistent with having been sexually assaulted by the accused. Dr Conjwa did not exaggerate or speculate on the gravity of the injuries and was consistent in her responses in relation to her observations and findings.

- 13 The next witness called was Captain Jiya. Captain Eunice Jiya is registered with the South African Council for Social Service Professions. She qualified at the University of Fort Hare with a Bachelor of Social Work and a Masters degree in social work in forensic practice completed at the University of North West. She has a certificate in advanced forensic training (managing difficult and complex cases in child sexual abuse investigations). She was appointed as a social worker by the Department of Social Development in Port St Johns from 23 February 2009 up to 31 March 2017. She was also appointed by the High Court , Mthatha , as an intermediary in some child sexual abuse cases and was appointed as a principal social worker by the South African Police Services and is based in King William's Town . Her duties entailed conducting special forensic social work related investigations in cases of child sexual abuse and to compile scientific based reports and testify as an expert witness in court.
- 14 In respect of this case the child was referred to her by Sgt Thomson to assist with the impact of the offence on the child . She assessed the child on two occasions being 2 March 2022 and 4 April 2022. The sessions

were conducted at the King William's Town FCS Unit and at the Stutterheim Detective Unit. She assessed, *inter alia*, the developmental capabilities, cognitive language and memory development of the child . She found that the child was in the third cognitive developmental stage known as concrete operational stage which applies to children between the ages of 7 and 12. She relied in her report on various authors . She testified that :

14.1 She found that the complainant was able to differentiate between the truth and a lie and verbalised that it is not good to lie. She could identify different colours. She understood that she was a girl and knew the difference between a girl and a boy. She was able to communicate in isiXhosa in a manner that was understandable by adult listeners. Her vocabulary and conversation skills were assessed. She freely narrated the alleged rape incidents during the assessment. The competency assessment that was done showed that the minor child was able to recall and relay the information about the rape incidents.

14.2 The minor child was greatly affected by the rapes. She had been deprived of her childhood and she was not performing well at school. She was not able to state whether the child would ever recover from the emotional trauma . She recommended that the child should receive ongoing therapy to cope with the trauma and

to deal with the anger that she was exhibiting when she was playing with other children as she was beating them .

- 14.3 The child informed her that she was angry with the accused and wanted to beat him when she saw him. The child also informed her that the accused told her not to tell anyone about what happened and if she did he would kill her. She was experiencing stomach aches after the incidents.
- 14.4 She also interviewed the child's mother , grandmother and cousin. The mother reported that after she had taken the child to hospital the child was vomiting and not eating. Her cousin SN observed that the child was not doing well at school. She had to repeat herself when talking to the child. She was always beating other children when playing with them. The grandmother of the minor child reported that the child had nightmares.
- 14.5 Captain Jiya testified that it became evident to her that the child was very angry and she needed therapy to manage that anger. Captain Jiya relying on several authorities in her findings, found relying on one *Lewis (1999)*, that sexual abuse does not only result in the loss of childhood but also gives rise to the more serious symptoms of a complex post-traumatic disorder. She defined this disorder as a prolonged, repeated trauma where there is often a relationship between the victim and the perpetrator.

14.6 Since young children are egocentric by nature they mistakenly accept responsibility for other people's action towards them. This could be exacerbated by what the alleged perpetrator said to the victim during the abuse. In this case, the minor child blamed herself that her uncle was arrested because she does not have the mental capacity to understand that he was arrested because of what he did to her. Relying on the work of *Finkelhor v Brown* (1995) quoted by Holly and Miller 2009 developed a systematic model that conceptualises the impact of sexual abuse which can be used in both further research and for the purposes of treatment. They refer to this model as Traumagenics. Traumagenics suggest that the experience of sexual abuse can be defined in terms of four Traumagenic dynamics. The traumagenic dynamics alter a child victim's cognitive and emotional orientation to the world. These distortions often result in behavioural problems that are commonly noted in victims of sexual abuse.

14.7 She further dealt with the issue of betrayal and relied in this regard on certain literature. She observed that the child realized that someone she loved or whose affection was important to her treated her with total disregard. A complainant whose feelings of betrayal are intense often show signs of grief and depression over the loss of a trusted person. The minor child voiced that she was hurt by what her uncle did. Relying on literature she found that

complainants tend to show aggressive behaviour in response to anger stemming from feelings of betrayal. This aggressive behaviour is argued to be a primitive way of trying to protect oneself against future betrayals and can develop into more serious antisocial behaviour and delinquency if untreated. She found that the child was experiencing fear and had reported that she felt that she felt hurt after her uncle threatened to kill her if she told anyone about the incidents.

15. Captain Jiya recommended that the child should attend therapy sessions. Under - cross examination it was put to her by defence counsel that she was biased because she had indicated that the child might not heal from the trauma. The State objected to the suggestion of bias. I found that the suggestion was unwarranted and I accordingly disallowed it.

16. I found Captain Jiya to have carefully analysed the circumstances of the minor child and her reliance on literature was not made in general but referred to specific matters pertaining to the child. She is adequately qualified to report on matters contained in her report. I find that she was objective in her assessment. I am satisfied with her evidence and I accept it.

17. Mr Sojada for the accused made the following submissions: That :

- (a) The accused took the court into his confidence, pleaded guilty and displayed genuine remorse. That the rapes do not fall into the category of the rapes that are regarded as worse.
- (b) There is no DNA and the accused chose to plead guilty and not to subject the minor child to secondary victimisation where she would be exposed to cross- examination and he admitted that he used his position of power.
- (c) The accused is a suitable candidate for rehabilitation and relied on **S v Chowe (2010) (1) SACR 141 North Gauteng High Court , Pretoria**. He is willing to attend certain programs in prison to deal with his sexual urges. He is not a repeat offender. He submitted that a sentence of 20 years imprisonment will be adequate. In sentencing the offender the court should not serve the public opinion over the interests of justice.
- (d) He submitted that there is a difference between regret and remorse. In this regard he referred the court to **S v Matyityi 2011 (1) SACR 40 SCA**. In addressing the issue of remorse he submitted that the accused chose to come clean, he made his own decision. He submitted that in this matter there was no eye witness. The only direct witness is the complainant who is a minor. He submitted that the evidence of the medical doctor does not corroborate the evidence of the victim.

(e) He submitted that rape is a serious offence and in this case the victim is a minor. He relied in this regard on the case of **S v Malgas 2001 (1) SACR 469 SCA** for the submission that this court has a discretion to decide whether there are substantial and compelling circumstances. He further submitted that the differences in the nature of the rape should receive recognition when considering a proper sentence. In this regard he relied on **Rammoko v DPP 2003 (1) SACR 200 SCA**. He submitted further that as in **S v Abrahams 2002 (1) SACR 116 SCA** the emphasis is that the court must look at the degree of the seriousness that needs to be attached to each case based on its own merits.

18. He further referred the court to **S v Mahomotsa 2002 (2) SACR 435 SCA** where the accused faced two counts of rape. The second rape offence was committed whilst the accused was out on bail. There was use of a firearm and a knife but the court reduced the sentence to 8 years and 12 years imprisonment on the second count. Further, he argued, that the court cannot turn a blind eye to the fact that the accused did not ask for too lenient a sentence because 20 years is a long-term sentence and he acknowledged that he deserves punishment.

19. He submitted that the evidence of the social worker indicated that she was not sure whether the child will overcome the ordeal , however,

with therapy that will be given to the child as indicated by the court he believes that the child will get better. The accused offered an apology to the child and that would assist the child at a later stage.

20. Ms Hendricks , on the other hand, submitted that this is a very serious offence and it is trite that the court should take into account the triad when considering sentence , namely, an accused person being the offender, the offence, the interests of community which all remain relevant. She highlighted the following as aggravating factors: That :

- a. The child is ten years old. She was raped twice by the accused and that on its own falls foul of the discretionary sentence twice . Even if the court accepts that the accused called the child and raped her there was an element of planning at least. They are related and these family rapes are prevalent and particularly insidious because of the general taboo attached to them. He is the uncle to the complainant and by virtue of that he had easy access to her as a result of the familial link, they lived in the same house.
- b. The accused breached the trust of the complainant and that of his brother. The complainant's vulnerability due to age and family relationships was exploited. He was also in a position of authority relative to the complainant and he abused that position to commit the acts in question.

- c. She urged the court to create consistency by not departing lightly from the minimum sentence that the legislature has promulgated. She submitted that the guilty plea was not a plea of remorse because the accused realised that he faced a strong case.
- d. He blamed his action on sexual urges. She submitted that we are all human beings and that we all learn to control our urges. He simply said he will do his best to make sure that his urges do not get the better of him. That, she submitted, was not good enough reason to depart from the minimum sentences. She submitted that insofar as the medical evidence is concerned, the court must have regard to the fact that although the hymen was still intact when the doctor testified that was because no force was employed during the rape. However, she submitted, that we do not know what injuries were there during the time when the incidents occurred. The psychological *sequelae* will continue for years.
- e. In looking at the injuries one has to consider, she submitted, the quick healing process that the vaginal area especially of a minor child goes through between the period of 4 to 7 days. She relied on the case of **S v PB (2011) (1) SACR 448 SCA** for the submission that the accused has not worked for a long time. He

has not been a productive member of society. Where he was staying he was not paying any rent. She submitted that this is an appropriate case to impose a life sentence.

- f. This court could have regard to the previous convictions only to the extent of establishing the character and the prospects of rehabilitation of the accused. She submitted that whatever mitigating factors are there do not rise to a level where life imprisonment ought not to be imposed.
- g. She relied on the decision in ***S v Booysen 2009 JDR 0273 (ECG)*** for her submission that life imprisonment will be adequate because in that case the complainant was ten years old , a tiny child , slender and was incapable of offering resistance to a sexual assault by an adult.

21. In reply it was submitted on behalf of the accused that when he was confronted by his brother, he admitted that he had committed the offence. After receiving argument the matter was adjourned to 20 April 2022 for judgment on sentence.

Discussion

22. Section 51 of the Criminal Law Amendment Act 105 of 1997 provides:

“51 Discretionary minimum sentences for certain serious offences

- 1 *Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."*

23. Section 51(3)(aA) reads:

"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) the complainant's previous sexual history;*
- (ii) an apparent lack of physical injury to the complainant;*
- (iii) an accused person's cultural or religious beliefs about rape; or*
- (iv) any relationship between the accused person and the complainant prior to the offence being committed."*

24. In ***The Director of Public Prosecutions, Grahamstown v Mantashe***

(131/2019) [2020] ZASCA 05 (12 March 2020) at paragraph 13 the

Supreme Court of Appeal stated:

- "13 *The high court found in the respondent's favour that there was no gratuitous violence although threats were made to the child not to disclose the rapes. Presumably, because there was no physical injury to the child, other than the rapes, this was held to be a mitigating factor. Lack of physical injury as constituting a substantial and compelling circumstance when imposing a sentence on a conviction of rape is specifically excluded in terms of section 51(3)(aA) of the Act. This is precisely because rape itself is an act of violence and has such devastating long-term sequelae."*

25. Section 8 of the Children's Act 38 of 2005 provides that:

"8 Application

- (1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.*
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.*

9 Best interest of child paramount

In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance must be applied."

26. Section 28(2) of the Constitution provides that:

"(2) A child's best interests are of paramount importance in every matter concerning the child."

27. If one has regard to the popularly known triad principles applicable when a court sentences an accused person, the interests of minor children do not feature as a separate consideration especially where the children affected are victims of crime or abuse. The triad involves the accused, the crime and the interests of society. Although the courts do take into account the interests of the children (for example, where a breadwinner is to be sentenced to a term of imprisonment *S v M* (CCT 53/06) [2007] ZACC18; 2008(3) SA 232 (CC)) : in criminal matters those interests are not standalone interests but are more often than not lumped together with those of the society. Davis J in *S v Jansen* 1999 (2) SACR 376 (CC) at 378 g-379 stated :

" Rape of a child is appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely, in freedom and without , fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. "

28. In my view, the interests of the children where they are victims of crime or abuse, must be addressed prior to the conclusion of the trial in order to ensure that the well being of an abused child is taken into account by the trial court. That, in my view, will pave the way for those children to grow and become emotionally, mentally and physically strong future members of society. Once sentence is imposed on an accused person that is the end of the trial. If nothing is said about the child victim other than condemning the unlawful act itself, the child will go back home with no support from the justice system. I deal with this issue later in this judgment.

Are there substantial and compelling circumstances ?

29. Before answering the question I wish to seek guidance from the

Rammoko case, above, at page 205 paragraph 13, where Mpati JA stated : “ Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment- which has been prescribed for a very specific reason- simply because such circumstances are, unwarrantedly, held to be present.”

30. At paragraph 22 in the *Malgas case, above, the court stated :*

“ The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of

circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

31. I find that in this case there are substantial and compelling circumstances which warrant deviation from the imposition of life imprisonment. I record them below.

32. I am enjoined by law that if I am to impose sentence that accords with justice I must decide this case on its own merits. I could embark on an exercise of drawing parallels and similarities between the various authorities relied upon by both Counsel but those should simply be used as a guide.

33. The accused in his section 112 (2) statement gave a very detailed account of his actions. Those facts were accepted by the State and that demonstrated that they were truthful or at least reliable otherwise the state would have rejected them and tendered evidence. He pleaded guilty and having regard to the summary of substantial facts that the State relied on and the details given by the accused in his statement, I am satisfied that he gave a frank account of the events. He testified under oath and apologised throughout in his evidence about what he did to the complainant. He apologised to the complainant, to his brother, his family and the community. I observed him and I am satisfied that not only did he verbalise his remorse but he displayed it as he was testifying.

34. He was intent on tendering apologies as aforementioned, and he did. He appeared and demonstrated sincerity as he was apologising to his brother, the victim, his family and the community. I find that he displayed genuine remorse. I am satisfied that and as indicated by Captain Jiya that the fact that he tendered an apology to the victim was good. In many instances victims of rape are confronted by perpetrators who make them feel that they brought the rape upon themselves . I have no doubt that an apology from a perpetrator will positively contribute to the healing journey that the minor child is to embark upon.

35. In the *Booyesen* case, above at paragraph 4 the court stated :

“ I think there is merit in Mr Brisley’s submission that the trial judge may well have gone further than merely rejecting the defence argument. The wording of his judgment suggests that he found by inference that the appellant , knowing that he was alone in the house with the child , could well have planned to rape her if the opportunity arose , and that he had probably done so. If that is so, it was a finding that should not have been made. The inference of premeditation was not the only reasonable inference to be drawn from the facts , and it should not have been held against the appellant for purposes of sentence.”

The submission by the State that I must find that there was some planning at least before the commission of the offence is not supported by the plea and the facts that were accepted by the State. The State is bound by the plea and the explanation accepted by it (*Sv Moorcroft* 1994 (1) SACR 317 (T) at 320.

36. I am alive to the provisions of section 51 (3) (aA) that lack of physical injury shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. In this case the circumstances are different. The medical evidence is that the perforation on the hymen was normal. It also revealed that no force was used and that the hymen remained intact demonstrating that the perpetrator did not penetrate the child deeper and forcefully. *In casu*, it is not lack of physical injury that is a consideration but the gravity of those injuries. The medical doctor did not wish to speculate on the gravity of the injuries due to the intervention of the healing period. I am not at liberty to speculate without medical evidence.

37. The complainant suffered injuries associated with an act of rape. It is so that a 46 year old man who penetrates sexually a girl of ten years would injure her . The gravity of the injuries is not known to me and I can only relate to those that Dr Conjwa testified to. She suffered emotional trauma. The doctor testified that the child was in pain and uncomfortable hence she could not perform digital vaginal examination.

38. The accused was stabbed by his brother when he confronted him about the incident. A few days later the community also assaulted him and he was hospitalised for (14) fourteen days having sustained fractured jaws. I find that the attack on the accused by the community is not and cannot be to advance legitimate needs of society. I cannot disregard this evidence because when people take the law into their own hands that is

breeding ground for anarchy. The accused has been punished by his brother and the community and sustained physical injuries. Such evidence was not challenged .

39. In the cases relied upon by the state I have not come across a case where the community took the law into their hands as in this case. That , in my view, ought to be a factor to be considered as forming compelling and substantial circumstances.

40. The accused does not have previous convictions that related to sexual offences. He should be regarded as a first offender. The State conceded that his previous convictions were not relevant for the purposes of sentence but could be considered when considering his character. It is common cause that in relation to , the assault with intent to do grievous bodily harm conviction , the five year suspended sentence had not lapsed when he committed rape . He was convicted during the years 2001 (theft) , 2002 (theft) , 2003 (theft and house breaking) , 2019 (assault with intent to do grievous bodily harm) 2021 (rape) . There is a period of at least 15 years between 2003 and 2019 and one year between 2019 and 2021 where he committed no offences. This means that the accused is a candidate for rehabilitation. For fifteen years he did not commit any offence. He is 46 years old and I do not have any evidence upon which I could find that he cannot be rehabilitated if given a sentence other than life imprisonment.

41. Although it has been submitted on behalf of the State that he is not a useful member of the community because he has been unemployed for a long time, I am not able to make that assumption based only on the fact that he is unemployed. No evidence was presented about his behaviour within the community. In any event being unemployed does not render a person not useful.
42. The doctor testified that she could not conclude that the thick white discharge observed from the complainant was as a result of an infection. There were no swabs taken to investigate the discharge. She testified that the healing process of between 4 to 7 days is rapid and allows healing during trauma. The medical evidence was that no force was used.
43. The accused apologised to the victim, his brother and his family and displayed genuine remorse. Captain Jiya recognised that the apology was a good thing. That is something that should be considered in his favour when imposing sentence.
44. The fact that these are factors that are substantial and compelling circumstances to deviate from the imposition of life imprisonment does not mean that a lighter sentence should be imposed. The minor child was introduced to the adult world in a harsh manner. She is suffering from psychological trauma. The accused had easy access to her because of familial relations. He breached the trust that this child had in

him. I agree with Ms Hendricks that “*these family rapes are prevalent and particularly insidious because of the general taboo attached to them.*”

45. I had regard to the decision in ***S v Sekiti (2010) (1) SACR 622 ECG 622 at 626*** where the accused person was convicted on his plea for sodomising the complainant. He had sexually assaulted 14 people while he was an inmate at a psychiatric hospital. He had also threatened staff with physical harm. He was declared a dangerous criminal and was sentenced to imprisonment for an indefinite period. He was ordered to be brought before court for reconsideration of sentence on the expiry of five years from the date of sentence. This case does not exhibit the gravity of the offences committed in the *Sekiti* case .

46. In ***Director of Public Prosecutions, Free State v Mashune 2018 JDR 0687 (SCA)*** an effective term of 22 years was imposed on appeal. Where the conviction related to two rape convictions, the court found that there were no substantial and compelling circumstances and imposed 15 years imprisonment in respect of each count with the second 15 year imprisonment to run concurrently with the sentence that was imposed in respect of count 1.

47. In the *Booyesen* case , *supra* the trial court imposed life imprisonment which was upheld on appeal by the Full Bench . The accused in that matter had raped a ten year old victim. In that case the court had found

that the complainant did not suffer physical injuries other than those which followed upon the act of rape. She was a tiny child, slender and slightly built, and quite incapable of offering resistance to a sexual assault by an adult. The medical report showed virtually no signs of sexual development. Unlike in this case , the child in *Booyesen* was examined by the doctor four days after the rape. The medical evidence tendered reflected that there were still signs of redness to the labia majora, bleeding in the vagina and pre-fresh tears of the hymen. The doctor noted no signs of emotional instability and there was no psychological assessment done of the effects of the rape on the child. The facts of that case differed materially from the facts of this case , especially when it comes to the medical evidence. I have already dealt with the findings by the clinician which differ from the *Booyesen* case. I am satisfied that this is not a case that warrants the ultimate sentence of life imprisonment based on the findings I made, above. The sentence which I intend to impose fits the crime and is fair in the circumstances of this case. Before I do so , I wish to deal with the following:

Therapy Order

48. In contemplation of the order relating to therapy that I intended to make, I recalled Captain Jiya whom I had instructed to investigate and prepare a proper schedule of the therapy for the minor child. Indeed, on 13 April 2022 she returned to court and informed the court that after the

adjournment she made enquiries from King William's Town and had liaised with Ms Thozama George who is the Regional Service Office Manager, of the Department of Social Development in Stutterheim. She spoke to her and then arrangements were made that the child will receive therapy from Ms Nkabi.

49. They also investigated a possibility of such therapy being rendered in Port Elizabeth, however, they discovered that the organisation that used to assist the State was no longer doing so. It was for that reason then that they settled for therapy within the district where the child resides which is in Stutterheim. Ms Hendricks for the State confirmed the arrangements and that they then prepared a draft order which contains the schedule to be undertaken by the child. Mr Sojada did not object to the proposed order.

50. I called S N who is the person who will be responsible for taking the minor child to the therapy sessions. . She is 25 years old. She went up to Grade 10 at school. She is not employed. She confirmed that the complainant is her brother's child and that she is the caregiver. She resides with the child. The child attends [.....] Primary School in Stutterheim and she comes back from school at 13h30. She indicated that the place where the counselling will take place in Stutterheim, although it is within a walking distance , is quite far and that they will need to use a taxi to get to therapy. She agreed to take the child to

therapy on the dates contained in the schedule and undertook to adhere to the order that the court will issue. She indicated that she was not in a position to indicate whether they will always have taxi fare as that was the responsibility of the father of the child.

51. As a result I enquired from Mr L N who confirmed that he is the father of the minor child. He agreed that he will ensure that there were sufficient funds in the amount of R36.00 per month to enable S N to take the minor child to therapy.

Therapy order

52. I accordingly make the following order:

- a. It is ordered that AM should undergo counselling at the Department of Social Development at 34 Marais Street, Stutterheim, for two years from date of this order.
- b. Her first session will commence on Wednesday, 4 May 2022, at 15h00 and will continue on a monthly basis on the same day and time for at least two years the last session being Wednesday 8 May 2024 at 15h00.
- c. It is further ordered that the guardian of the child during the period in question at this stage SNN will ensure that the said AM attend the sessions as arranged.

- d. Ms Nikiwe Nkabi, the social worker tasked with the therapy sessions or any other social worker assigned to the case in due course as may be required by reasonable operational requirements, shall be entitled to exercise her discretion in mandating further sessions as required by the best interests of the child concerned.
- e. The Regional Service Office Manager at office no. 1 at the Department of Social Development in Stutterheim, Ms Thozama George or her successor or successors in the event that Ms George does not remain at the said Department for the duration of the counselling, is and are ordered to arrange and manage AM's sessions with the assigned social worker, Ms Nkabi as required.
- f. Ms Nkabi shall file progress reports with the Court every six months.
- g. A copy of this Order must be served on Ms Thozama George and Ms Nkabi.

SENTENCE

53. Having had regard to the personal circumstances of the accused, the seriousness of the crime, the interests of the community and those of the minor child, the authorities placed before me by both Counsel and the evidence placed before me, I am satisfied that the sentence to be

imposed must send out a strong message to would be offenders that rape of minor children is a serious violation of the child's body , mind and soul.It shall be treated by the courts in a manner that will demonstrate that this unlawful conduct should not be tolerated.

54.The sentence I will impose will be relative to the crime itself. Unfortunately such is not a mathematical calculation hence the Legislature deemed it appropriate to afford the courts a discretion in this regard.

**I accordingly sentence the accused to undergo TWENTY FIVE
(25) YEARS IMPRISONMENT.**

**T V NORMAN
JUDGE OF THE HIGH COURT**