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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: SS26/2023
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
15.09.23

In the matter between:

THE STATE

and

NCUBE MICHAEL

ACCUSED

SENTENCE

DOSIO J:

Introduction

[1] The accused was found guilty on the following counts:

(a) five counts of contravening section 4(1) read with sections 1, 2, 3, 11, 13(a), 14, 29, 30 and 48 of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 ('Act 7 of 2013')

and read with sections 94, 256, 257, 261A(1) and (2) and 270 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') and read with the provisions of section 51(1) of schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') as amended, these are counts 1, 8, 15, 18 and 21. Section 13(a) of Act 7 of 2013 states that s4(1) of this Act is subject to s51 of Act 105 of 1997 and it states that a person convicted of such an offence is liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life.

(b) Five counts of rape as contemplated in section 3 read with sections 1, 55, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Act 32 of 2007') read with sections 92, 94, 256, 257, 261 and 281 of Act 51 of 1977 and further read with section 51 (1) of Act 105 of 1997 on counts 5, 9, 11, 19 and 22. Section 51 of Act 105 of 1997 states that a High Court shall sentence a person to life imprisonment.

(c) Six counts of sexual assault as contemplated in section 5(1) read with sections 1, 55, 58, 59 and 60 and 94 of Act 32 of 2007 read with sections 92, 94, 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977 on counts 2, 3, 7, 16, 25 and 27;

(d) One count of assault with the intent to cause grievous bodily harm in count 12;

(e) One count of assault on count 23;

(f) One count of kidnapping on count 13;

(g) Four counts of contravening s68(1) read with the provisions of sections 1, 5(2) and 29 of the South African Police Services Act No 68 of 1995 in respect to impersonating a member of the South African Police service on counts 4, 14, 17 and 20.

[2] For purposes of sentence, this Court has taken into consideration the personal circumstances of the accused, the seriousness of the offences for which he has been found guilty and the interests of the community.

The personal circumstances of the accused

[3] The accused is 38 years old and has two children aged 16 and 20 years old respectively. The accused was the breadwinner at home in that he was transporting school children earning R2600 per month and also transported adults earning R9000 per month. He is a first offender.

The seriousness of the offences

[4] As regards the human trafficking counts, it is clear that the accused deliberately targeted these young boys who he believed he could easily exploit. The accused abused their

vulnerability. Children believe a police man is there to protect them, not to sexually exploit them. He took advantage of the vulnerabilities of these boys due to their young age, social circumstances or economic circumstances.

[5] The accused mobilized these young boys by moving them away from their homes and familiar environment into an unfamiliar environment thereby increasing their vulnerability. This mobilisation included the act of recruitment for sexual exploitation. In certain of the instances, in order to secure their vulnerability, the accused through the abuse of power induced further fear into these boys by pointing a firearm at them. O.2 was afraid to open up a case against the accused as he was afraid the accused would come with his police friends to threaten him.

[6] It is clear that traffickers, like in this instance, target boys which have few economic opportunities, food or money. The accused in the matter *in casu* offered them financial and hardship relief.

[7] Research indicates that poverty or the lack of income is a significant push factor in internal child trafficking in South Africa. Often victims of trafficking are not even aware that they have been trafficked and that they have the right to be seen and treated as victims. The high sentences imposed for trafficking is indicative that the trafficking of children in South Africa is rife and that the legislature has identified the necessity to create high sentences for this type of crime.

[8] O.1 S, T.1 M, B B, S N, O.2 C and T.2 M were recruited, transported and harboured by the accused for the sole purpose of sexual exploitation. They did not realise that they were victims of trafficking. These children were all very young. Apart from recruiting boys himself, the accused also used S to recruit boys and threatened him that if he did not do as he was told he would kill his only living relative, namely his grandfather. The accused instructed S to recruit B by means of deception.

[9] Almost half of identified cases of child trafficking begin with some family member involvement. The role of people who were considered friends by the victim is also important in the initial phases of trafficking of children. During the trafficking process, as in the matter *in casu*, the children reported they were coerced through psychological abuse. What makes this case serious is that the accused trafficked these children for his own sexual pleasure.

[10] Victim impact reports were handed in for O.1 S(counts 1-7) (exhibit 'BB'), T.1 M (counts 8-14) (exhibit 'CC'), B B (counts 15-17) (exhibit 'DD'), S N (counts 18-20) (exhibit 'EE'), O.2 C (counts 21-23) (exhibit 'FF'), T.2 M (count 25) (exhibit 'GG'), and K M (count 27) (exhibit 'HH').

[11] As regards O.1 S he stated in the victim impact report that during all the oppression he felt like he was losing himself, he was embarrassed of being a boy who was forced to sleep and have sex with another man. He developed anger towards other men and cut out all his male friends as he was upset with the male human species. He is still experiencing difficulties to talk about this to anyone close to him and has not completely healed from this experience. He blames the accused for a lot of changes in his life including his hatred for other men.

[12] As regards T.1 M he stated in the victim impact report that during this ordeal he was always afraid to open up a case against the accused as he was a policeman. These incidents started to damage his thoughts and ability to think which led to him not returning to school. He requested that the accused pay for the damages he did to his body.

[13] As regards B B he stated in the victim impact report that the day this incident happened to him he feared everyone who came close to him and it felt as if it was the end of the world. His relationship with his friends came to an end as he felt embarrassed by what had happened to him. He stated that as a result of his penis being slapped by the accused, he developed pain in his testicles.

[14] As regards S he stated in the victim impact report that after the incidents he felt as if he was useless as he had not protected his body from this sexual abuse. The incidents have affected him in that he has sleepless nights always thinking about what happened to him. He fears that the accused is always in the room where he is sleeping and that he will do it again. When he is with his friends he feels embarrassed as he feels they may know what happened to him. He stated that the pain he feels inside is unbearable.

[15] In respect to O.2 C he stated in the victim impact report that after these sexual incidents occurred he felt embarrassed as his friends at school would look at him as if they knew something was wrong and this affected him immensely. He as a result has no more friends. The behaviour of the accused shocked him as he thought the accused was a police officer who should be there to love and help his community, not to do what he did.

[16] In respect to T.2 M he stated in the victim impact report that he felt embarrassed and ashamed as his friends started to spread stories about him that he had been raped which was not the case. As a result, he started staying indoors and avoided his friends.

[17] The offence of rape of young boys is extremely serious in that it emasculates them leaving serious physical and psychological scars. These boys will experience difficulties in their future sexual relationships. Sexual assault equally will have an impact on these boys. Their age is crucial in that they were all very young when these sexual acts were committed to them and because they were at their initial stages of development into adults, naturally the inability to consent to natural sexual acts, as in the matter *in casu*, will affect them as adults.

[18] The offence of falsely representing to people that one is a police officer is equally serious. A contravention of s68(1) of the South African Police Services Act 68 of 1995 states that in instances where false representations are made that one is a police officer such a person will be liable to imprisonment not exceeding two years imprisonment.

Interests of the community

[19] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expect that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed, it may deter others from committing these crimes.

[20] Section 51(1) of Act 105 of 1997 dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2 he shall be sentenced to life imprisonment.

[21] Section 51(3) of Act 105 of 1997 states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[22] As stated in the case of *S v Malgas*,¹ the Supreme Court of Appeal held that:

‘if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’²

[23] The accused has not shown any remorse in this matter. He decided to plead not guilty, which although it is his constitutional right, he had the choice to come to the witness bench and plead mercy knowing that he had been found guilty of destroying the lives of these young boys, yet he persists with his belief that he is innocent. Due to the lack of remorse, this Court is unable to determine what the triggers were that made this accused prey on young boys. As a result, he is a danger to the community and he must be removed from the community. The defence counsel has asked that this court find that the following are compelling and substantial circumstances to depart from the minimum prescribed sentence, namely:

- (a) that the accused is a first offender;
- (b) that he is 38 years old and has two children aged 16 and 20 years respectively;
- (c) that he was the breadwinner.

[24] This Court does not find the above mentioned factors and compelling or substantial to depart from the minimum prescribed sentence of life imprisonment on 5, 9, 11, 19 and 22. This Court is aware of the hardship that a sentence of imprisonment will have on the accused’s son, however, he will be looked after by the child’s aunt. The fact that the accused’s son will be deprived of the breadwinner, namely the accused, is not a reason to give the accused a non-custodial sentence.

[25] The accused has been in custody since April 2022, but as stated in the matter of *DPP v Gcwala*,³ the Supreme Court of Appeal held that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just

¹ *S v Malgas* 2001 (1) SACR 469 SCA.

² *Ibid* para i.

³ *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014).

one. This Court finds the sentence of life imprisonment in respect to the rape counts is a just sentence in the circumstances of this case.

Findings

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

Count 1 ten years imprisonment
 Count 2 five years imprisonment
 Count 3 five years imprisonment
 Count 4 two years imprisonment
 Count 5 life imprisonment
 Count 7 five years imprisonment
 Count 8 ten years imprisonment
 Count 9 life imprisonment
 Count 11 life imprisonment
 Count 12 two years imprisonment
 Count 13 two years imprisonment
 Count 14 two years imprisonment
 Count 15 ten years imprisonment
 Count 16 five years imprisonment
 Count 17 two years imprisonment
 Count 18 ten years imprisonment
 Count 19 life imprisonment
 Count 20 two years imprisonment
 Count 21 ten years imprisonment
 Count 22 life imprisonment
 Count 23 two years imprisonment
 Count 25 five years imprisonment
 Count 27 five years imprisonment

The court orders that the sentences imposed on counts 1, 2, 3, 4, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 27 will run concurrently with the sentence of life imprisonment imposed on count 5. In terms of s50 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 the accused's name is to be entered into the register of sexual offenders. In terms of s103(1)(g) of the Firearms Control Act 60 of 2000 the accused is declared unfit to possess a firearm.

**D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date Heard: 15 September 2023

Judgment handed down: 15 September 2023

Appearances:

On behalf of the State: Adv C. Ryan

On behalf of the Accused: Adv L. Mqongozi