



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

NOT REPORTABLE

Case no: 42/2021

In the matter between:

THE STATE

And

XOLANI NKEWU

ACCUSED

SENTENCE

Govindjee J

Background

[1] Mr Nkewu was convicted of a charge of rape. He unlawfully and intentionally committed an act of sexual penetration with a nine-year-old female complainant by inserting his penis into her genital organs without consent.

[2] As the victim was under the age of 16, the offence falls within Part I of Schedule 2 of the Criminal Law Amendment Act, 1997,¹ attracting a minimum sentence of life imprisonment unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

[3] Section 276 of the Criminal Procedure Act, 1977² 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. The general purpose of imposing a sentence is fourfold: retributive, preventative, rehabilitative (reformatory) and to act as a general deterrent.³ While the retributive aspect tends to dominate, courts are enjoined to temper the punishment with a measure of mercy.⁴

[4] 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.⁵ Still, more serious cases clearly require severity, with a certain moderation of generosity, for the appropriate balance to be struck. The object of sentencing is not to satisfy public opinion, but to serve the public interest.⁶

[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,⁷ and these factors must be applied, in accordance with *S v Malgas*,⁸ to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.⁹ In *S v Matyityi*,¹⁰ Ponnann JA held that Parliament:

¹ Act 105 of 1997 ('the Minimum Sentences Act').

² Act 51 of 1977 ('the CPA').

³ *S v Rabie* 1975 (4) SA 855 (A).

⁴ *Rabie* at 862G-H.

⁵ See *S v Khulu* 1975 (2) SA 518 (N) 521-522.

⁶ *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).

⁷ *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H.

⁸ 2001 (1) SACR 469 (SCA).

⁹ See *Radebe v The State* [2019] ZAGPPHC 406 at para 12.

¹⁰ 2011 (1) SACR 40 (SCA) at para 23. Also see *Malgas supra*, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed

‘...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’.

Nature of the crime and surrounding circumstances

[6] The complainant suffered pain in the area of her genital organs when Mr Nkewu pulled her on top of him. His penis caused a small cut or tear on the posterior fourchette and bruises that were sensitive to the touch on parts of the genital organs, as he forcibly moved her up and down. When she was examined a few hours after the rape, the cut was not bleeding. The complainant’s hymen was intact and her vaginal opening had not been penetrated.

[7] It is also important to consider the effect of the crimes on the victim, particularly in cases of gender-based violence.¹¹ A social worker report, accepted into evidence by consent, confirms the aspects of severe trauma suffered by the complainant as a result of her rape. This encompasses traumatic sexualisation, powerlessness, betrayal and stigmatization. The complainant now requires long-term psychological support to address the various expected negative consequences, such as feelings of guilt and inability to trust. In addition, she was made to relive her ordeal in court. According to the SCA, this factor should not be overlooked.¹²

Mr Nkewu’s circumstances and interests

[8] Ms L Ngwendu, the older sister of Mr Nkewu, testified that he was a loving person who had played a major role in her life after the siblings had lost their father.

crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 at para 21.

¹¹ See A Spies ‘The judicial relevance and impact of victim impact statements in the sentencing of rape offenders’ (2018) SACJ 212 at 231 as cited in *S v Dyonase* [2020] ZAWCHC 137 para 21.

¹² *MDT v S* [2014] ZASCA 15; 2014 (2) SACR 630 (SCA) para 2.

Mr Nkewu is non-violent and a pleasure to be with, also playing a positive role in the life of his nephews. The family had suffered anguish as a result of Mr Nkewu's conviction and found it difficult to believe that he could have performed such an act. It was accepted, however, that his actions would have caused tremendous hurt to the complainant and her family.

[9] *Mr Minnie*, counsel for Mr Nkewu, placed his personal circumstances before court. He is unemployed, unmarried and is treated as a first offender. He has two daughters, aged 11 and 17, who live with their respective mothers. He maintains his eldest daughter by renting his property and contributing R1000 to the child's mother as maintenance. Those obligations will now be performed by his sister.

[10] Mr Nkewu has completed schooling and is 40 years of age. Prior to the incident, he had a good relationship with the complainant. He would cook with her and brought her gifts on occasion, having been in a relationship with the child's mother. It was accepted that Mr Nkewu was drunk at the time he committed the rape. The accepted context was that he had fallen asleep on the couch and, at some point, woken and gone to the room that the complainant's mother typically slept in. The rape had then occurred. Although *Mr Minnie* suggested that this may have been a case of mistaken identity, there was no factual basis laid for this when evidence was led.

The interests of society

[11] 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. As such, it has been accepted that the crime deserves severe punishment.¹³ As the court held in *S v Ncheche*:¹⁴

¹³ *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B. When imposing a sentence in respect of the offence of rape, an apparent lack of physical injury to the complainant and any relationship between the complainant and accused prior to the offence being committed are not, on their own, considered to be substantial and compelling circumstances justifying the imposition of a lesser sentence: section 51(3)(aA) of the Minimum Sentences Act. *Radebe supra* 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.'

¹⁴ 2005 (2) SACR 386 (WLD) para 35.

‘A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expects of our courts to punish rapists severely.’

[12] In *S v Vilakazi*,¹⁵ the Supreme Court of Appeal confirmed that rape is a repulsive crime. Society expects that the scourge of gender-based violence must be addressed and must cease. In addition, children’s rights are constitutionally protected, and rape of a child, particularly one as young as nine years of age, is by its nature one of the worst kinds of offences imaginable.

[13] Society’s opprobrium has translated into the Minimum Sentences Act, which by way of a prescribed, albeit discretionary minimum sentence regime, has drastically impacted upon the exercise of a court’s discretion in imposing a sentence.¹⁶ Mr Nkewu’s conduct has been found to fall within the purview of this Act. A court should not for ‘flimsy reasons’ and ‘speculative hypotheses favourable to the offender’ deviate from the minimum sentence prescribed, or apply their personal notion of fairness.¹⁷ The question remains whether there are substantial and compelling reasons to justify a lesser sentence than the minimum sentence prescribed.

Analysis

[14] This court is duty bound to consider Mr Nkewu’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, seasoned with a measure of mercy and bearing in mind the various purposes of punishment, including prevention, retribution, rehabilitation and deterrence.¹⁸ All the circumstances of the case must be considered to determine whether the imposition of a minimum sentence is proportionate to the particular offence.¹⁹

¹⁵ 2009 (1) SACR 552 (SCA) at 555h.

¹⁶ *S v September* [2014] ZAECHC 38 para 8.

¹⁷ *S v PB* 2011 (1) SACR 448 (SCA) para 21; *Matyityi supra* para 23.

¹⁸ *S v Genever and Others* 2008 (2) SACR 117 (C) at 122c-d.

¹⁹ *Vilakazi supra* para 15.

[15] The aggravating features of the matter are undeniably severe. The rape of 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.²⁰ The long-lasting effect on the complainant has already been described. 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 shirk this responsibility, however agonising it may be to do so.²¹

[16] The legislature has directed that, when imposing a sentence in respect of rape, an apparent lack of physical injury to the complainant and the relationship between Mr Nkewu and the complainant prior to the offence being committed cannot constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.²² Still, it is important to consider the various circumstances cumulatively, and with specific focus on Mr Nkewu's clean record and state of intoxication. 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.²³ It requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.²⁴

[17] The factors relied upon by Mr Nkewu as substantial and compelling have been considered in their totality. The main factors in his favour are that he is a first offender and that it may be accepted that he committed a despicable act, out of character, as a result of his state of intoxication. The other factors cited carry less weight when given proper consideration. His level of education is normal and, in the absence of any testimony on his part, there is no real basis for considering that he is truly

²⁰ Ss 28(1)(d), 12(1)(c) 14 and 10 of the Constitution of the Republic of South Africa, 1996.

²¹ *Zitha supra* at 418h-i.

²² S 51(3)(a A)(ii) and (iv) of the Minimum Sentences Act..

²³ *S v Bull* 2001 (2) SACR 681 (SCA) para 21.

²⁴ *S v Dodo* 2001 (1) SACR 301 (E).

remorseful. On the whole, however, I consider the circumstances to be weighty enough so as to warrant departure from the prescribed minimum. It would, in my view, be unjust and disproportionate to impose a life sentence on Mr Nkewu given his clean record and the circumstances in which the rape was perpetrated, including his level of intoxication.

[18] The court is now enjoined to consider an appropriate sentence and must exercise a reasoned discretion in evaluating the various relevant factors highlighted above in order to arrive at a proportionate outcome. Society demands that stern sentences be meted out in cases where a child is raped in the sanctity of her home. Gender-based violence, including child rape, continues to devastate lives and negatively impact upon families and communities. Sadly, many women, including children, live in constant fear of precisely this type of occurrence. The remarks of the court in *S v Ro and Another*²⁵ are apposite:

‘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 are so much more pronounced in the instances of the rape of very young children, as is the case here. ... [T]he complainant was an innocent, defenceless and vulnerable victim.’

[19] Given the circumstances, a lengthy sentence of direct imprisonment is unquestionably warranted.²⁶ The offence is by its nature extremely serious and involved gender-based violence. The physical injuries suffered were less serious than what might have been the case, but the psychological impact is likely to be long-lasting. The consumption of alcohol, and its effect on reducing inhibitions, and impairing good judgment, looms large as a possible explanation for what occurred. To some extent it must be accepted that this has reduced the blameworthiness of Mr Nkewu, who previously had a good relationship with the complainant. In all the circumstances, I consider a sentence of 17 years’ imprisonment to be appropriate, also giving Mr Nkewu the opportunity to rehabilitate. Given the nature of the offence,

²⁵ *S v Ro and Another* 2010 (2) SACR 248 (SCA) para 15.

²⁶ See *Seedat v S* [2016] ZASCA 153 para 38 *et seq*, on the efficacy of restorative justice as an inappropriate sentencing option in cases involving serious offences.

various other consequences emanating from legislation follow. These have been included as part of the order.

Order

[20] The following sentence is imposed:

1. The accused, Xolani Nkewu, is sentenced to 17 years' imprisonment in respect of the conviction of rape involving a nine-year-old child.
2. 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.
3. 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.
4. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 10 August 2022

Delivered: 22 September 2022

Appearances:

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