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

CASE NO: CC13/2023

In the matter between:

THE STATE

and

NDITHINI MPENI

Accused

JUDGMENT: SENTENCE

SMITH J:

1. Rape is a horrendous crime. It involves conceivably the most violent invasion of the victim's right to privacy and bodily integrity and often leaves him or her both physically and emotionally scarred for life. And as the facts of this case demonstrate, when the victim is a young child and the rape occurred in a familial context, the ramifications are even more far-reaching and extensive. Apart from the psychological trauma suffered by the young and impressionable victim, other members of the family are also profoundly affected in ways that are often overlooked by the dispassionate observer. For, when that odious pebble is cast into the placid waters of family life, the resultant concentric waves of consequences often move quickly and inexorably to engulf also the mother, siblings and other family members.

2. The child, wrecked by conflicting feelings of guilt and anger, is invariably alert to the harsh financial consequences resulting from his or her decision to report the rape. In addition to the incongruous but nevertheless heart-rending sense of loss caused by the perpetrator's incarceration, the child also has to struggle with the mistaken, though compelling illusion that he or she is to blame. Then of course there is the possibility of social denunciation by peers and siblings, who invariably do not know how to relate to the victim. And in a deprived socio-economic context, where the perpetrator is often also the family's only provider, the victim's mother is agonisingly torn between her maternal instinct to nurture and protect her offspring and the financial hardship that will be caused by the prosecution of the perpetrator.

3. Sadly, those considerations were the furthest away from the accused's venal mind when he decided to rape his ten year old step-daughter on 7 October 2022, at M[...] V[...] in S[...]. He has explained the harrowing circumstances of that fateful day in his statement in terms of section 112(2) of the Criminal Procedure Act as follows.

4. At about 17h30 on that day, after having spent some time at a tavern consuming alcohol, he returned to the house where he lives with his girlfriend, who is the complainant's mother. There he found his girlfriend, their two year old child and the complainant. After some time his girlfriend left the house, leaving him alone with the two year-old and the complainant. At some point the complainant went outside to urinate. He then also went outside and called the complainant back to the house. As soon as she had entered the house he grabbed her by the hand, undressed her and then threw her onto the bed. He then raped her vaginally. According to the accused the complainant pleaded with him to stop crying out: 'stop father, stop father'. He, however, did not stop and continued to rape her until he ejaculated.

5. His girlfriend returned and found him still on top of the complainant. He admitted that he had ejaculated into the complainant's vagina, did not wear a condom and had known that he was HIV positive at the time. He confessed to the rape immediately upon his arrest.

6. The discretionary minimum sentence of life imprisonment is applicable in this case for two reasons: first, because the victim was under the age of 16 years and second, because the accused had unprotected sexual intercourse with the victim while knowing that he was HIV positive. (Section 51 (1) of the Criminal Law Amendment Act, 105 of 1997, read with Part 1 of Schedule 2).

7. That sentence must be the point of departure and I can only deviate from it if I find that there are substantial and compelling circumstances which justify the imposition of a lesser sentence than that of life imprisonment. In the enquiry as to whether such circumstances exist, I must have regard to the traditional triad of factors that usually play a role in sentencing, namely the accused's personal circumstances, the nature and severity of the crime and the interests of society. I am only at liberty to depart from the prescribed sentence if, having had regard to the abovementioned factors, I am of the view that the imposition of the sentence will be so disproportionate that it will amount to an injustice. However, the prescribed sentence cannot be departed from lightly or for frivolous reasons. (*Sv Malgas* 2001 (1) SACR 469 (SCA)).

8. It is with the aforementioned legal principles in mind that I now turn to consider the accused's personal circumstances.

9. The accused is 52 years old, a first offender, and at the time of his arrest, on 7 October 2022, he was employed by the local municipality, where he earned approximately R11 900 per month. He left school after completing Standard 5. He was in a relationship with the complainant's mother and at the time of his arrest they were living together with their two year old child, the complainant and her elder sister. He also has two children from his previous marriage, a 22 year daughter and a 16 year old boy. His daughter is studying towards a university degree and her sibling is still at school. They are both living with their maternal grandmother. He was the sole provider for both families.

10. Mr *Sojada*, who appeared for the accused, has urged me to give due consideration to the fact that he did not only plead guilty in court, but has also made a full confession soon after his arrest. He submitted that this is proof that the

accused is genuinely remorseful, and despite the fact that he was under the influence of liquor when he committed the crime, he accepted full responsibility for his deed. His honesty has meant that it was not necessary for the complainant to go through the trauma of having to recount her experience in the hostile environment of a court of law. Mr *Sojada* also submitted that it is evident from the Victim Impact Assessment Report that the complainant has regarded the accused as a good father and that it was only on the few occasions when he was under the influence of alcohol that he has behaved violently. He is therefore a good candidate for rehabilitation. He submitted that these factors, when considered together with the accused's personal circumstances, constitute substantial and compelling circumstances. He nevertheless conceded that the seriousness of the crime calls for long-term imprisonment and submitted that, having regard to the fact that the accused had been in custody since his arrest, a sentence of 20 years' imprisonment will be fair and just in the circumstances.

11. Those mitigating factors must, however, be weighed against the aggravating features which are evident from the Victim Impact Assessment Report prepared by Ms Nomonde Stamper, a social worker in private practice. Unsurprisingly the report paints a disturbing picture of a traumatized young girl who struggles to come to grips with her horrific experience. Ms Stamper testified that the complainant has clearly suffered long term psychological harm as a result of her experience. She has become distant, suffers from hallucinations and has developed a fear of male persons. She is also being socially rejected by her peers, who refuse to play with her.

12. According to Ms Stamper, the whole family have been affected by the incident. The complainant's mother, concerned about the daunting prospect of the family's breadwinner being incarcerated, has attempted in vain to withdraw the case. She is struggling to come to terms with the fact that her partner, whom she loved, could have done such a terrible thing to her child. And to make matters worse, she has been blamed and rejected by the accused's family.

13. It is evident from the report that the complainant regarded the accused as her father and told Ms Stamper that he always provided for the family and made sure

that he kept some money for rainy days. It was only when he was under the influence of alcohol that he was prone to violence and would threaten her mother. Ms Stamper also testified that the complainant poignantly reported how, during a hallucinatory trance, she heard a mocking voice declaring that her father will never return from prison.

14. Ms Stamper further concluded that:

‘The minor complainant regarded the accused as her father. [She] does not know her own biological father, She described the accused as the breadwinner within the family and the also the daunting (sic) father she ever had. The rape ordeal adversely effected the minor child to greater extent in that it brought distorted beliefs to her as a child. Trust had been broken. The internal working model of trust had been distorted. The child feels the world is not safe also around people she can trust. She is hyper-vigilant and always expecting danger to happen. She is avoiding men in general when approaching them on street. She is starting to exhibit psychological effects of the trauma as she is hearing voices, becoming distant, withdrawal symptoms and feeling frightened when she is called. She is experiencing rejection within the community as her peers are prevented from playing with her.’

15. And regarding the impact on the complainant’s mother Ms Stamper said the following:

‘[N] is struggling to comprehend that her partner that she loves and trust has committed rape to her daughter. She experienced shock, disbelief, sorrow and ambivalent feelings. Her ambivalent feelings were displayed when she wanted to withdraw the rape charges against the accused. She is facing lots of confusion as she is financially dependent upon the accused at the same time she has got a duty to protect her daughter from further traumatic events. [N] is currently in a process of grief. The traumatic event is a double crisis to her. It questions her competence as a mother and make her doubt her own self-concept.’

16. It is thus manifest that the complainant and her entire family have been profoundly affected by her experience. The overwhelmingly aggravating impact of this fact is self-evident. Unsurprisingly, Ms Stamper recommends psychotherapy and counselling for the whole family.

17. The complainant has also suffered physical injuries to her private parts. She suffered superficial abrasions and lacerations to the posterior fourchette, her hymen was open with clefts and bruises and there was clear evidence of forced penetration. What renders the accused's conduct even more reprehensible is the fact that he was aware of his HIV status but nevertheless exposed the complainant to the possibility of infection.

18. I am also mindful of the fact that the accused was in a position of trust vis-à-vis the complainant, who regarded him as a father. He betrayed that trust in the most brutal and tragic manner conceivable by raping her in the sanctity of her own home, a place where she was supposed to feel safe and protected. It is not surprising then that according to Ms Stamper she has become irrationally fearful and distrustful of others.

19. I must also have regard to the fact that offences of this nature come before our courts with alarming frequency. In fact, sexual abuse of young and vulnerable children has become a societal scourge. It is indeed a matter of great concern that despite severe sentences being meted out by courts on a regular basis, the rate of recurrence of these crimes still shows no sign of abating.

20. To my mind the aggravating features of this case are overwhelming and compelling. The fact that the accused has pleaded guilty is a neutral factor. He was caught in the act of raping the complainant and on his own version had ejaculated into her vagina. He accordingly had no choice but to admit guilt. It can therefore not be said that his guilty plea was a show of genuine remorse, and as Ponnau JA explained in *S v Matyityi* 2011 (1) SACR 40 (SCA), at para 13, an indication of 'that gnawing pain of conscience for the plight of others'.

21. And in my view any mitigating impact that his clean record might have had is also attenuated by the serious nature of his crime. His personal circumstances are ordinary and in my view they cannot, either on their own or when considered collectively with other mitigating factors, constitute substantial and compelling circumstances.

22. There can be little doubt that society expects courts to impose sentences that will reflect its abhorrence and outrage at these type of offences, as well as send a clear message to other would-be offenders. The crime thus calls for the 'severe, standardised and consistent response', expounded in *Malgas*, (supra at para 9).

23. I am consequently of the view that there are no substantial and compelling circumstances that can justify a departure from the prescribed minimum sentence.

24. Before I proceed to pass sentence I must express my concern about the fact that there is no indication of any arrangements to ensure that the complainant - and for that matter her mother and elder sibling - receive counselling or psychotherapy. I have considered making the type of prescriptive order which Norman J made in *S v Nongogo* (Case no: CC16/2022), but after having read that judgment, I realized that I do not have sufficient information before me to justify such a detailed and prescriptive order. I therefore intend instead to request the state counsel, Mr *Nohiya*, to investigate the possibility of such an arrangement and to report back to the court within a specified time period. I have noted that Norman J ordered the counselling sessions to take place at the offices of the Department of Social Development in Stutterheim. Since the complainant and her family live in a village close to Stutterheim, such an arrangement may well also be possible in this case. I have little doubt that Mr *Nohiya* will pursue this request with the same vigour and thoroughness with which he presented the state's case in this matter.

25. In the result I make the following order:

1. The accused is sentenced to life imprisonment.
2. The state counsel, Mr *Nohiya*, is requested to investigate the possibility of psychotherapeutic and counselling sessions for the complainant, her mother and

elder sister, and to submit a written report in this regard to the court by 16H00 on Friday, 30 June 2023.

J.E. SMITH
JUDGE OF THE HIGH COURT

Appearing for the State:	Mr. Nohiya
Appearing for the Accused:	Mr. Sojada
Date of sentence:	18 May 2023