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

Not Reportable
Case no: 50/2021

In the matter between:

THE STATE

and

LM

ACCUSED

SENTENCE

Govindjee, J

[1] L B is an intelligent young girl who expresses her feelings in a diary. Full of life and motivation, she hoped to become a lawyer. She was 11 years of age when she was raped by the accused. He was the husband of her foster mother and the child treated him as the grandfather of the household. She had tried to resist him. He was found to have forcibly held her hands before thrusting himself into her. L B had felt pain and cried out, but he had continued. The accused was convicted of the crime of rape.¹

¹ The accused was charged with rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was found to be guilty of this crime in that he unlawfully and intentionally committed an act of sexual penetration of the complainant on 8 February 2020.

[2] A psychological assessment report about the complainant, compiled by a suitably qualified social worker in private practice, Ms Stamper, was handed in by consent. That report reveals that the rape experience has left the child with poor self-esteem and feelings of shame, anxiety, panic, fear, helplessness, and other signs of psychological distress, including outbursts of anger. Ms Stamper concludes that the rape ordeal 'stole her childhood', 'killed her personality' and will influence her sexual identity.

[3] Mr M is 53 years of age, married and educated up to grade 10 level. He has three children from a previous marriage, two of whom are minors living with his unemployed sister, and dependent on a child support grant. Their mother has passed away and Mr M is the only surviving parent. He was employed in East London, earning R5600 per month and maintaining his children. This is his first offence.

[4] As counsel for the state argued, Mr M was in a position of trust over the complainant and abused this in the most egregious way. He has not demonstrated any remorse or insight regarding his crime, electing not to testify in mitigation of sentence.² Despite compelling evidence implicating him, he maintained that somebody else might have been the perpetrator. Yet it was Mr M that committed the act of rape of an 11-year-old child. It is L B that will have to live with those consequences. To add insult to injury, she was made to relive her ordeal in court. The SCA has held that this is a factor that should not be overlooked, resulting in a child having to relive a nightmarish experience.³

[5] As to society's views, the remarks of the court in *S v Ro and Another*⁴ 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

² See *K v S* [2014] ZASCA 136 para 29.

³ *MDT v S* [2014] ZASCA 15; 2014 (2) SACR 630 (SCA) para 2.

⁴ *S v Ro and Another* 2010 (2) SACR 248 (SCA) para 15.

children, as is the case here. ... the complainant was an innocent, defenceless and vulnerable victim.'

[6] Sentencing courts are obliged to consider all these factors, known as the 'sentencing triad'.⁵ Punishment must be proportional to the criminal and the crime and be fair to society. It should not be imposed out of a spirit of anger or retribution and should also, where circumstances permit, be blended with a measure of mercy.⁶

[7] Minimum sentences have been introduced for various reasons. The Director of Public Prosecutions relied on the provisions of section 51(1), read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 in seeking life imprisonment for the rape conviction. The legislature has determined that it is this sanction, the gravest of all punishments, that should ordinarily, and in the absence of weighty justification, be imposed for the rape of young children.⁷ Every child is meant to benefit from 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.⁸ Society expects that courts will respond decisively to such crimes.⁹

⁵ *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H. On the functions to be served by sentence, see *S v Matyaleni* [2021] ZAECHGHC para 13. In this context, these factors must be applied to consider whether substantial and compelling circumstances exist to deviate from a prescribed minimum sentence: *Malgas v S* 2001 (1) SACR 469 (SCA) para 18.

⁶ *S v Rabie* 1975 (4) SA 855 (A) at 862G-H. Hastiness, the striving after severity and misplaced pity are out of place in the sentencing exercise, as are so-called exemplary sentences designed to use the crime to set an example for others in society: *S v Khulu* 1975 (2) SA 518 (N) at 521-522. The object of sentencing is not to satisfy public opinion, but to serve the public interest: *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189.

⁷ See *S v Bull* 2001 (2) SACR 681 (SCA) para 21. A meticulous weighing of all factors is required before such a punishment can be justifiably imposed: *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 61, quoted with approval in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC) para 8. Also see *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23 and *Malgas v S* op cit fn 5 as quoted in *Otto v S* [2017] ZASCA 114 para 21.

⁸ Ss 28(1)(d), 12(1)(c), 14 and 10 of the Constitution of the Republic of South Africa, 1996.

⁹ See, for example, *S v Jansen* 1999 (2) SACR 368 (C) at 378h-379a, cited with approval in *K v S* para 25. Also see the recent judgment of Laing J in *Cook v S* [2022] ZAECHGHC 13 para 21. 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.'

[8] While all considerations should be carefully weighed, prescribed minimum sentences are not to be departed from lightly and for flimsy reasons.¹⁰ Several cases have provided non-binding guidance to courts as to when it would be appropriate to make a finding confirming that the ‘composite yardstick’ (substantial and compelling circumstances) has been met.¹¹

[9] Aversion to imprisoning a first offender is not, on its own, a factor intended to qualify as a ‘substantial and compelling’ circumstance warranting deviation from the prescribed minimum sentence.¹² Sadly, given the nature of the conviction, Mr M’s minor children who depend upon him financially are destined to grow up without his presence, irrespective of whether a life sentence is imposed. The cumulative effect of the personal circumstances of Mr M, including his age, that he is a first offender and does not appear to be a hardened criminal, and his financial support to his own minor children, are far outweighed by the seriousness of the offence and its traumatic impact on the complainant.¹³ The ordinary mitigating factors he has submitted pale when balanced against the other factors to be considered.¹⁴ Child rape has rightly been held to be a scourge that shames the nation.¹⁵ It has been said that:¹⁶

‘A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.’

This was a specific form of domestic violence, stemming from a foster care arrangement and a relationship between the complainant’s foster mother and Mr M. Her trust in him, as a father figure, has been destroyed and she was raped in the sanctity of her home.

[10] In this case, substantial and compelling circumstances, individually or cumulatively, are not present to justify a departure from the prescribed minimum

¹⁰ *S v PB* 2011 (1) SACR 448 (SCA) para 21; *S v Matyityi* op cit fn 7 para 23.

¹¹ See, for example, *D v S* [2016] ZASCA 123 para 11.

¹² *The Director of Public Prosecutions, Grahamstown v T M* 2020 JDR 0652 (SCA) para 11.

¹³ *D v S* op cit fn 10 para 12.

¹⁴ See *T M* op cit fn 12 para 11.

¹⁵ *MDT v S* op cit fn 3 para 7.

¹⁶ *S v C* 1996 (2) SACR 181 (C) at 186e-f.

sentence. Life imprisonment is not disproportionate to the crime, the criminal and the needs of society and I find that sentence to be just in the circumstances.

Order

[11] The following sentence is imposed:

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

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 07 February 2022

Delivered: 07 March 2022

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Appearances:

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