



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: CC65/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

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29/04/21
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DATE

THE STATE

and

AUGUSTINE OMINI OBONO

ACCUSED

JUDGMENT ON SENTENCE

MOGALE AJ

INTRODUCTION

[1] The accused was found guilty on Count 1 being the contravention of section 4(1) of the Prevention and Combating of Trafficking in Persons Act¹ read with section 51(1) of the Criminal Law Amendment Act,² which is trafficking in persons. Count 2 is the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act, which is the rape of a 12-year-old child. Count 3 being the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, which is the rape by a common purpose of a 12-year-old girl. Count 4 being the contravention of section 17(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is benefiting from the sexual exploitation of a child. Count 5 being the contravention of section 17(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is the exploitation of a child. Count 6, Kidnapping and Count 7 being the contravention of the provisions of section 2 of the Sexual Offences Act³ and further read with the Criminal Procedure Act⁴ which is keeping a Brothel.

[2] For purposes of the sentence, this Court has considered the accused's personal circumstances, the seriousness of the offences, and the interests of the community. The Court has borne in mind the primary purposes of the sentence: deterrence, retribution, reformation, and prevention.

[3] Triad, as explained in the case of *S v Zinn*⁵ consists of the crime, the offender, and the interest of the society. It is a well-known phenomenon that rape is the most degrading type of offence, as it robs its victim of the right to privacy and human dignity.

¹ 7 of 2013.

² 105 of 1997.

³ 23 of 1957.

⁴ 51 of 1977.

⁵ 1969 (2) SA 537 (A).

[4] I will deal with the various counts and the number of these offences and the penalties provided for them, have found expression in the Prevention and Combatting of Trafficking in Persons Act, which I will refer to as the Trafficking Act and which came into operation on 9 August 2015. Human trafficking, despite the international culture of human rights, is increasing worldwide. It violates fundamental human rights and is the cause of immeasurable trauma to victims, their families, and the communities in which they live. This is the greatest human rights challenge of our generation.

[5] In this regard, it is essential to note that human trafficking does not take place in a vacuum. Professor Cornelius Roelofse quoted in the article titled "Human Trafficking as an organized crime in South Africa pre, during and post soccer world cup 2010" as it was published in *Criminology*⁶. He described this challenge of human trafficking by mentioning that: "It is a product of an increasing sex-obsessed world with billions of dollars being earned from pornographic magazines, television channels, and prostitution all because of slumping morality. It is a very lucrative business, whereas drugs and other narcotic substances can be used, and a girl used as a sex slave can be sold over and over. This is the tragedy of this cruel exploitation of the vulnerable in our societies".

[6] This is tragically illustrated in this matter before me. It has been said that human trafficking has to be understood as a criminal process rather than a criminal action. In other words, the elements of mobilization are the act, the means used, and the exploitation. Together, they result from a criminal strategy implemented by the perpetrator.

[7] The complainant in this case was a vulnerable 12-year child at the beginning of her teenage years. She was trafficked and raped repeatedly. She prostituted for the accused's financial benefit. Sadly, the person who took advantage of this young girl's vulnerability at the initial stage at Derdepoort was a woman who was supposed to protect a young child. Still, instead, she saw the opportunity of making money out of her situation.

⁶ 24 (3) 2011 Southern African Journal of Criminology.

[8] During cross-examination by the prosecution, the accused gave a long-winded and evasive answer to questions. He showed aggressiveness when refusing to provide information to the police or to comply with the investigating officer's request to assist him in tracing his witnesses. In general, the accused was an unimpressive, dishonest witness who did not even show remorse. The accused did not testify in mitigation of sentence nor call witnesses; his counsel had to make submissions from the bar.

[9] Section 13 of the Trafficking Act provides for penalties to be imposed for contravention of the Act. In contrast, Section 14 of The Trafficking Act provides for factors to be considered in sentencing that is aggravating. The aggravating factors that the Court must take into account at the sentencing stage are a quote from section 14, which provides as follows:

“Factors to be considered in sentencing —

If a person is convicted of any offence under this Chapter, the court that imposes the sentence must consider but is not limited to the following aggravating factors:

- (a) The significance of the role of the convicted person in the trafficking process. In this regard, the accused was not a kingpin. The complainant was lured by an unknown coloured girl, who delivered the complainant to the accused of being used as an enslaved person in the accused business of trafficking and human trafficking.
- (b) Previous convictions relating to the offense of trafficking persons or related crimes. That does not apply to you as you are a first offender as far as these charges are concerned.
- (c) Whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance. This has become very clear in the course of the trial. The accused forced the victims to become dependent on the drug mixture of “rock and cocaine.” The complainant had to deal with the withdrawal symptoms after the escape
- (d) The conditions in which the victim was kept – the State did not provide evidence depicting the premises where the complainant was kept. But from the evidence of the complainant's uncle, relating to the state in which the complainant was when she arrived at his place, one can conclude that she was coming or used to stay in an unhealthy and unclean environment.

(e) Whether the victim was held captive for any period. The evidence is clear. The complainant was kept for three months in captivity.

(f) Whether the victim suffered abuse the extent thereof. The complainant suffered – she was abused, both physically, emotionally, psychologically, and mentally. The accused drugged, assaulted, and intimidated the complainant by instilling fear in her so that she could comply with his instruction. What made it more serious is that he made her have sex with other men after drugging her. He failed to care for her, which was confirmed by the evidence of the uncle that when she came home, she was dirty and in a state of a mess.

(g) The physical and psychological effect the abuse had on the victim – it is evident that the complainant was traumatized by the incident and had various symptoms including, difficulty in sleeping, fear and anxiety, her academic performance decline, crying, flashbacks, distress, avoidance to talk about the traumatic incident that happened to her, fear of being alone or travel alone. The Court should also mention that the complainant got pregnant, as a result, she had to go through a termination of pregnancy process at the age of 12

(h) Whether the offense formed part of organized. While there was no direct evidence of the participation of other individuals in the human trafficking, what did come out during the trial was that one Tchibuza delivered the complainant to the accused's flat. Like Marcelo, the accused friend had some girls also who worked for him as prostitute, namely Lerato and Refiloe. The complainant's uncle brought out other evidence. He testified that when they were at the accused's flat with the police to arrest the accused, they found some young girls who were drugged. But unfortunately, the State did not make a follow-up about that evidence nor add more charges to the accused relating to those girls.

(i) Whether the victim was a child. The complainant was a 12-year-old child when she was trafficked and abused.

(j) The nature of the relationship between the victim and the convicted person. There is no relationship between the accused and the complainant; they were, in fact, strangers to each other.

(k) The state of the victim's mental health. There are reports submitted by the State proving that the victim was subjected to both physical, mental, psychological and has suffered severe trauma.

(l) Whether the victim had any physical disability, that aspect does not apply in this case.

[10] When dealing with counts 1-3, the provisions of Section 51 are applicable. Section 51(1) of the Criminal Law Amendment Act provides:

'Notwithstanding any other law but subject to subsection (3) and (6) a regional court or a high court shall sentence a person it has convicted of an offense, referred to in part 1 of schedule 2, to imprisonment for life.

Part 1 of schedule 2 in rape cases refers to:

1. Rape when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
2. Where the victim is a girl under the age of 16.'

[11] Section 51(3) (a) of Criminal Law Amendment Act compels a court to deviate from imposing the prescribed sentence when substantial and compelling circumstances exist justifying the imposition of a lesser sentence. For a court to come to that conclusion, it must consider the totality of the evidence before it, together with other relevant factors traditionally taken into account in respect of sentencing, together with the principles or purpose of sentencing. In this regard, it shall enter those circumstances on the record of the proceedings and thereupon impose such a lesser sentence.

[12] The Constitutional Court in *S v Dodo*,⁷ per Ackerman J, approved the step-by-step procedure to be followed in applying the test to the actual sentencing situation set out in *S v Malgas*.⁸ This approval is also evident in several other cases.

[13] In *S v Malgas (supra)* at 482 d- e Marais JA said:

"...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 crime, and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

At 482 c-d Marais JA further said:

⁷ 2001(1) SACR 594 (CC) at 602-603.

⁸ 2001 (1) SACR 469 (SCA).

“All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not the diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling). It must be such as cumulatively justify a departure from the standardized response that the Legislature has ordained.”

[14] Courts are required to approach the imposition of sentence consciously that the Legislature had ordained life imprisonment or a particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specific circumstances. In *Rammoko v Director of Public Prosecutions*,⁹ the Court held that since the complainant was under the age of 16 years, a sentence of life imprisonment had to be imposed on the appellant unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

[15] I have considered the submissions of mitigation of sentence and found nothing in your personal circumstances or any other substantial and compelling circumstances to impose a lesser sentence than that prescribed.

[16] The accused's personal circumstances are as follows — Advocate Mohlahlo stated that the accused is presently 40 years of age and was 36 years when the offence was committed. He has no previous conviction, and he has already spent 4 years 9 months in prison. He is a Nigerian citizen who arrived in South Africa in 2013. He is unmarried with one kid, a boy aged five, and he is not staying with the child's mother. He was self-employed, recruiting clients for hair at various salons and earning between R700-R1000 per month. With the agreement with the mother of his child, maintenance varied, between R700- R1000 when the need arose.

⁹ 2003 (1) SACR 200 (SCA).

Mitigating Factors — Advocate Mohlahlo submitted that the above factors are compelling and substantial factors for this Court to deviate from imposing the prescribed sentence. He requested the Court to exercise the element of mercy and referred the Court to various case laws like *S v Sparks*, *S v Rabie* in support of his application. He also argued that in *S v Sikipa*,¹⁰ the Court found that the 13 years old rape victim did not sustain serious injuries according to the medical report. As a result, this Court must also consider that the complainant, according to the medical report, it was concluded that she did not sustain serious injuries. It was submitted further that the accused could be rehabilitated. This Court should give him that opportunity to be reformed by imposing a lesser sentence for the accused to interact with society. On behalf of the State, Advocate Roos contended that there were no compelling and circumstantial circumstances warranting deviation from the minimum sentence prescribed presented by the accused. That personal circumstances advanced is out-weighed by aggravating circumstances. The time of incarceration is not a match; it is outweighed by aggravating circumstances. The victim was a 12 years old girl, a virgin who was forced to sleep with five to six-men daily and became pregnant. At some stage during the proceedings, the complainant couldn't cope and relapsed; assessments had to be done for her to continue with evidence. Advocate Roos requested the Court to impose life imprisonment for count 1 to 3 and that the Court should exercise its discretion when imposing sentence for counts 4 to 7.

[17] The seriousness of the crime — Rape according to *S v Chapman*¹¹ has been categorized as a very serious offence constituting as it does a humiliating, degrading, and brutal invasion of the privacy, dignity, and the person of the victim. Reference was also made to the case in *S v Swartz and Another*,¹² where the Court described rape as cancer.

[18] The interest of the Community — Gender-based violence in this country is a pandemic. A day hardly goes by without reading in the newspapers or the television about women and children being raped and killed. Unfortunately, the complainant in

¹⁰ 2006(2) SACR 18 (SCA).

¹¹ 1997(2) SACR 3 (SCA).

¹² 1992(2) SACR 380 CPD.

this matter is a statistic. The annual statistics show that gender-based violence is on the rise. In its endeavour to curb such a rise, the government is conducting several campaigns to educate the communities about the seriousness and impact of gender-based violence on families and the victims.

[19] A lot of money has been allocated by the government to support organizations such as SAWLA, and there are different campaigns conducted within the country to promote awareness. Still, it appears that such efforts fall on deaf ears. In a year, two months are put aside to conscientize the communities about gender-based violence. In the light of this pandemic that has hit our country, society is putting its hope in the judicial system.

In the matter of *S v Mhlakaza and Another*,¹³ Harms JA stated that:

'The objective of sentencing is not to satisfy public opinion but to serve the public interest; a sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. The Court's duty remains to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'

[20] The community of Mamelodi must have been worried or concerned about the fact that the complainant went missing. After the disappearance of the complainant, the uncle went to the police station to open the missing person's file. Dipuo also testified that posters were showing that the complainant was missing at her school.

[21] It is a trite that the offender's interest plays a lesser role where the offence committed is not only serious but prevalent. In *S v Mhlakaza*,¹⁴ it was held that "given the current levels of violence and serious crimes in the country, it seems proper that in sentencing especially such crimes, the emphasis should be on retribution and deterrence...."

[22] Section 4, sub-section 1 of the Trafficking Act creates the offence of "trafficking in persons." The sentence prescribed for a contravention of section 4 is a maximum fine of R100 million or life imprisonment, or both. You were found guilty of one count of trafficking in persons.

¹³ 1997 (1) SACR 505 (SCA) at 518E.

¹⁴ *Supra* at 519 d-e.

[23] Count 2-3 are in respect of contravention of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), which is rape of a 12-year-old child. The minimum sentence of life imprisonment is prescribed by section 51(1) of the Criminal Law Amendment Act 105 of 1977 and you failed to prove to this court the existence of compelling and substantial circumstances for deviation

[23] Counts 4 and 5 are in respect of the sexual exploitation of a child for financial reward. Section 17(2) of the Criminal Law Sexual Offences and Related Matters Amendment Act provides that:

"A person ('A') who unlawfully and intentionally offers the services of a child complainant ('B') to a third person ('C'), with or without the consent of B, for financial or other rewards, favor or compensation to A, B or another person ('D')- (a) for purposes of the commission of a sexual act with B by C; (b) by inviting, persuading or inducing B to allow C to commit a sexual act with B; (c) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with B by C; (d) by making available, offering or engaging B purposes of the commission of a sexual act with B by C; or (e) by detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by C, is guilty of an offense of being involved in the sexual exploitation of a child."

[24] Section 56A provides that if a penalty is not prescribed for that offence in terms of this Act or any other Act, the Court may impose a sentence in terms of section 276 of the Criminal Procedure Act, which I will refer to as the CPA. Section 51 (2) (a) of the Criminal Law Amendment Act as amended, the so-called minimum sentence Act, read with part III of schedule 2 thereof, provides that in the case of a first offender, a sentence of imprisonment for a period of not less than 10 years should be imposed.

[25] Again, as I find no substantial and compelling circumstances to deviate from the prescribed minimum sentence on counts 4.

[26] Count 5 is in respect of living on earnings of sexual exploitation of a child and is an offence in terms of section 17 (5) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. The prescribed sentence is a term of imprisonment of 5 years.

[27] Counts 6 relate to the kidnapping of the complainant. The complainant was held against her will and kept for at least three months. The sentence prescribed is a term of imprisonment of 7 years.

[28] Counts 7 is the charge of keeping a brothel. The term of imprisonment is imprisonment for 3 years.

EVALUATION

[29] I find that the accused is not a candidate to be rehabilitated. In *S v Chapman supra* at para 5, it was held that women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment to go and come to work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. In these instances, the complainant went to Derdepoort to enjoy herself like other children who went there for the same purpose. There is no direct evidence linking the accused to the recruitment of the complainant, but she ended up at the accused place and stayed there for three months. She was kept captive there as a slave. Made to sleep with five to six older men daily, sometimes, the accused inclusive. She was not allowed to walk alone wherever she wanted to go. The accused guarded her all the time, ensuring that she did not escape. The rapes were conducted without using a condom, exposing the complainant to the risk of contracting AIDS. She ended up being pregnant at the age of 12 by the accused, a 36 years old man and ended up terminating the pregnancy at that early age. The accused was not even remorseful, but instead, he told the Court that the 12-year-old child was his girlfriend and that they had consensual sex. The accused did not show any sign of remorse. Instead, he displayed arrogance. Even after medical evidence proved that the complainant's physical development shows a 15 to 16-year-old child, the accused maintained that the complainant looked like she was 19 years old to him. The accused is presently illegal in the country as the Department of Home Affairs denied his Asylum application.

[30] The only thing that counts in favour of the accused is that he is a first offender, and the fact he has been in custody for the past four years and nine months, this Court has considered this factor as a mitigating factor.

[31] After careful consideration of the evidence, the accused personal circumstances, and mitigation presented, it is my view that the accused failed to show this Court the existence of any "substantial and compelling circumstances" justifying the imposition of a lesser sentence. In the absence of the existence of substantial and compelling circumstances.

[32] I consider the following sentence to be appropriate —

- 32.1 Count 1: contravention of section 4(1) of the Prevention and Combating of Trafficking in persons Act 7 of 2013 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, trafficking in person, you are sentenced to Life imprisonment;
- 32.2 Count 2: Contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, rape of a 12 years old child, you are sentenced to Life imprisonment;
- 32.3 Count 3: Contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, rape by a common purpose of a 12-year-old girl, you are sentenced to Life imprisonment;
- 32.4 Count 4: contravention of section 17(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, benefiting from the sexual exploitation of a child – 10 years' imprisonment;
- 32.5 Count 5: contravention of section 17(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is an exploitation of a child - you are sentenced to 5 years' imprisonment;
- 32.6 Count 6: Kidnapping - you are sentenced to 3 years' imprisonment;
- 32.7 Count 7: contravention of the provisions of section 2 of the Sexual Offences Act 23 of 1957, keeping a Brothel, you are sentenced to 3 years' imprisonment;

- 32.8 The sentence in count 2, count 3, count 4, count 5, count 6, and count 7 run concurrently with the sentence in count 1.
- 32.9 In terms of section 50 of the Sexual Offences and Related Matters Act 32 of 2007, the accused particulars are ordered to be included in the Register of Sexual Offenders. The effect of this order is that you cannot be employed in an environment that involves children in the future.

A handwritten signature in black ink, consisting of a series of vertical, slightly wavy lines, with a horizontal line crossing through them near the top. The signature is positioned above a solid horizontal line.

K MOGALE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 April 2021.

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Date of judgment:

29 April 2021