

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT)**

Case No: CC 27/2022

In the matter between:

THE STATE

and

A[...] M[...]

Accused 1

N[..] N[...]

Accused 2

SENTENCE

MALUSI J:

[1] It is my onerous task to impose an appropriate sentence after accused 1 has been convicted of rape of a minor child aged thirteen (13) at the time of the commission of the offence and also a count of sexual assault with two (2) incidents involved. Accused 2 has been convicted of the statutory offence of failing to report the commission of a sexual offence against a child.

[2] Due to the nature of the offence in the rape count the provisions of *sec 51(1) of the Criminal Law Amendment Act 105 of 1977 (the Act)* relating to a minimum sentence of life imprisonment are applicable. The discretionary minimum sentence must be imposed unless the court finds that there are substantial and compelling circumstances which justify the imposition of a lesser sentence. The court is required to look at all the traditional mitigating and aggravating factors and consider the cumulative effect thereof in deciding whether substantial and compelling circumstances exist. The court would be entitled to impose a lesser sentence if it concludes that the discretionary minimum sentence is disproportionate to the sentence which is appropriate. The discretionary minimum sentence is however not to be departed from '*lightly and for flimsy reasons*'.¹

[3] Accused 1 is 53 years old. He has nine (9) children of whom five (5) are minors. The minor children are in the primary care of their respective mothers. He was formerly a police officer from 2002 until he was dismissed in 2021 after a disciplinary hearing emanating from the same facts as in this case. He was also a pastor at the *United Presbyterian Church in Mdantsane*. The accused was involved in a five (5) year relationship with the complainant's mother who is accused 2. Though they were formerly married for only for eighteen (18) months in that relationship, in my view it is correct to consider the entire duration of that relationship as having been a marriage due to the fact that they conducted it as if a husband and a wife.

[4] The evidence throughout this trial has clearly indicated that accused 1 was regarded as an upstanding citizen in the community due to his position as a police officer and a pastor. He presented a facade of an ideal citizen who is law

¹ *S v Malgas* 2001 (2) SA1222 (SCA) at para 8; *S v Dodo* 2001 (3) SA 382 (CC) at para 40; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 15.

abiding and morally upstanding as a man of faith. However, the evidence and the submissions from the legal representatives clearly indicate that he was a terror at home. He was physically abusive to his wife and was sexually abusive to his stepdaughter, the complainant in this case. He is currently divorced from accused 2 ostensibly due to the physical abuse he inflicted.

[5] Accused 2 is 35 years old. She was 29 years at the time of the offence. She is a first born daughter of five (5) children. Her mother and her siblings save for one depend on her for financial sustenance. She is currently employed as a Constable in the *South African Police Services (SAPS)* stationed at *Fleet street* police station. She has eight (8) years' experience and earns a nett salary of R12 000.00 with extra financial benefits depending on the work allocated to her. She is divorced from accused 1. She is a mother of two (2) children the complainant in this case and *K[...]* who is currently eleven (11) years old. *K[...]* is currently enrolled in Grade 6. The complainant is in the primary care of her father. The accused is providing financial support to her. It is not disputed that she is a primary caregiver for *[..]* as provided in the *Children's Act* and numerous court precedents. She is currently enrolled for a *Bachelor of Education Degree at Fort Hare University*.

[6] *Dr Fezekile Mgwedli* was called as a witness. He is a physician with a private practice in *East London*. He testified that accused 2 has systematic lupus. She had also contracted *TB* due to her compromised immune system. The *TB* has resulted in lung damage. Her condition is under control with the current medication prescribed for her. She faces a serious risk if she were to be exposed to pulmonary tuberculosis due to the damage in her lungs and the lupus condition.

[7] Rape is ‘*an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family*’.² The rape in this case was particularly odious and abominable as the victim is a stepchild of accused 1 who lived in the same home as him and the rest of their family unit.

[8] Without detracting from the horror of rape, *Majiedt JA* has made the important point that there are categories of the severity of rape. This requires that the court assess each case on its own peculiar facts and circumstances and the need for proportionality must never be overlooked.³

[9] On the aspect of rape within the family unit, *Bosielo JA* writing for a unanimous court stated the following:

*“It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right thinking people, it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously threatening the well-being and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric.”*⁴

The court went on to endorse the views expressed in *Abrahams* about a rape of a child by her father constituting ‘*deflowering in the most grievous and brutal sense*’; it being ‘*peculiarly reprehensible and not subordinate in the scale of abhorrence of any other crime*’.⁵ There can be no doubt in anyone’s mind that the law views this particular kind of rape in a serious light.

² *S v Nchenche* 2005 (2) SACR 386 (W) at 395H.

³ *S v SMM & Others* 2013 (2) SACR 292 (SCA) at para 18.

⁴ *Bailey v The State* [2012] ZASCA 154 (1 October 2012) at para 13.

⁵ *S v Abrahams* 2002 (1) SACR 116 (SCA) at paras 17 and 23.

[10] Though less serious, sexual assault is not a minor offence as it has deleterious effects on the complainant. The protection of society and the deterrence of others are important determinants of the interests of society. The Constitutional court took judicial notice of the fact that generally levels of crime are enormously and unacceptably high throughout the Republic especially those crimes in the scheduled categories. [see: *Centre for Child Law v Minister of Justice and Constitutional Development & Others* 2009 (11) BCLR 1105 (CC) at para 59]. That court was of the view that public disquiet and anger about the state of affairs was warranted.

[11] The interest of society require that the weak and infirm amongst us must be protected. *Plasket J (as he then was)* has aptly stated:

*“It goes without saying that society considers rape, and particularly the rape of a child as young as the complainant in this case to be a very serious matter indeed and one in respect of which a measure retribution is called for.”*⁶

[12] It has been held that a just and an enlightened penal policy considers the victim amongst the range of other factors. It gives the victim a prominent role in the sentencing process.⁷ The consequences of the offences in the present matter have been devastating on the victim and the N[...] family. *Ms Nomonde Stamper* has prepared a victim-impact report and she also testified in aggravation of sentence. That evidence has catalogued a slew of severe after effects of the rape the most serious being petulant behaviour, high state of tension, self-isolation, a propensity to outbursts of anger, suicide ideation or self-harm, misplaced feelings of guilt and shame, persistent fear of leaving her

⁶ *S v Nkawu* 2009 (2) SACR 402 (ECG) at para 9. Similar sentiments were expressed in *S v GK* 2013 (2) SACR 505 (WCC) at para 20.

⁷ *S v Matyityi* 2011 (1) SACR 40 (SCA) at par 16.

home, anxiety leading to spates of dizziness and panic attacks, ongoing fear of males.

[13] *Ms Stamper* reported that the child was so overcome with anger that she misguidedly attempted to harm accused 1 by spraying his bed pillow with excessive amounts of perfume in an apparent attempt to cause suffocation due to accused 1 being a chronic sufferer of a sinus condition. On another occasion she crushed a high number of pills into a powder with the intention of mixing this with the food prepared for accused 1. The complainant has relocated from her mother and the *N[...]* family and now permanently resides with her father, stepmother and other members of that family. Based on the evidence it is clear that it has not been a smooth resettlement for her particularly with regard to a difficult relationship with her stepmother and half siblings.

[14] It is clear that the sexual offences have had a serious psychological and emotional impact on the complainant. It is further clear from the evidence by *Mrs Stamper* that the complainant is devastated by the betrayal by his mother in failing to report the commission of the sexual offences by accused 1. This failure and the subsequent misguided blame of the complainant by members of the *N[...]* family has psychologically damaged the complainant.

[15] The court must acknowledge the fact that accused 2 was herself a victim of physical abuse by accused 1. It also appears that the *N[...]* family was heavily dependent on accused 2 for financial sustenance. However, none of the two aforementioned considerations can justify blame being imputed on the child. The complainant suffered injury on her vaginal area. Bad as the injuries were noted in the *J88*, it appears they are within the range and scope expected of a victim of a rape. *Mrs Stamper* persuasively testified about the need for therapy for the complainant and her family.

[16] *Ms B[...]* *N[...]* had testified about tensions within her family as a result of the offences in this case and the failure of accused 2 to report the offences to the police. The relations within the family were reported to be strained by *Busiswa*. The judgment on conviction had alluded to the profound emotional distress suffered by *Mrs N[...]*. She has continued to support accused 2, a daughter she clearly loves dearly and the complainant her granddaughter for whom it appears she has the same feelings. She has been seating prominently in the public gallery for most of the trial. On numerous occasions she has been crying silently. It is not hard to imagine the depth of the heartache and pain members of the *N[...]* family have endured as a result of these offences.

[17] *Mr Skade*, who appeared on behalf of accused 1, submitted that substantial and compelling circumstances exists to depart from the discretionary minimum sentence. He submitted that the personal circumstances of accused 1 and the other mitigating factors cumulatively amount to substantial and compelling circumstances. He relied in particular on a submission that the December 2018 and 25 August 2021 sexual assaults offences were both opportunistic crimes. These sexual assault offences and the rape did not result in any permanent physical injuries of the complainant. He further submitted that the psychological impact of all the offences is within the range ordinarily expected on a victim.

[18] *Mr Nokhwali*, who appeared on behalf of accused 2, submitted that a consideration of all the factors relevant in sentencing her indicate that she is a candidate for rehabilitation. He argued that any kind of direct imprisonment will affect not only the complainant but her last born child, *K[...]* for whom she is a primary caregiver. He pointed to the fact that *Mrs Stamper* had highlighted that it is in the best interest of the complainant that the relationship with accused

2 be mended and improved. He argued that a non-custodial sentence would also be favourable to the complainant. He correctly conceded that she had been convicted of a serious offence though a non-custodial sentence was the appropriate sentence. He highlighted the risk of serious illness presented if accused 2 were to be incarcerated in light of her lungs already been damaged according to *Dr Mgwedli*.

[19] *Mr Mgenge*, who appeared on behalf of the *State*, highlighted that rape was a serious and a prevalent offence in the *Republic*. He argued that a deterrent and a retributive aspect of sentencing has to come to the fore when considering the sexual offences. He submitted that this rape was particularly abhorrent as it involved a stepfather turning predator on her stepdaughter. He pointed out that accused 1 had showed no remorse as he denied liability forcing the complainant to relieve the experience by testifying in court. He particularly emphasised that the rape amounted to a breach of trust and that the complainant was raped in the sanctity of her own home. He stated that the age gap of 39 years between the complainant and accused 1 was an aggravating factor. He argued that accused 1 had carefully planned the offences. He pointed out to the debilitating effects the sexual offences have had on the complainant. He argued that the status of accused 1 as a police officer and a pastor who must have been viewed as a role model in the community was an aggravating factor.

[20] *Mr Mgenge* submitted that accused 2 had betrayed the trust of the complainant as her biological mother. He pointed out that had she acted as required by the law and reported the first sexual assault in December 2018 when later reported to her the complainant would have been spared being a victim of the further sexual offences. As a mother accused 2 had failed to protect the complainant. He argued that this was a prevalent offence where parents and

other relatives fail to report the sexual abuse of children in their care by members of the family. The message needed to be conveyed to the wider community that if a person committed such offences they would be severely punished. He correctly conceded that due to the peculiar circumstances of accused 2 a non-custodial sentence was appropriate.

[21] I have anxiously considered the issue of substantial and compelling circumstances. It is imperative that one disabuses his or her mind of the evidence relating to all the incidents of sexual abuse related by the complainant. One needs to keep in mind that accused 1 has only been convicted of a single instance of rape and two instances of sexual assault. As I stated in the judgment on conviction I had a strong suspicion that accused 1 had committed all the year 2020 sexual acts the complainant related though not proved to the legal standard. However, in sentencing him I must only concentrate on the acts on which he has been found guilty.

[22] I find myself in the circumstances eloquently described by *Marais JA* in *Malgas*:

“the greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration

of circumstances the court is entitled to characterised them as substantial and compelling and such as to justify the imposition of a lesser sentence.”⁸

[23] In my view to impose the discretionary minimum sentence on the rape count will be disproportionate and therefore unjust. I have considered the type of sentence imposed in similar circumstances by other courts before coming to the above decision. However, on the peculiar facts of this case it appears to me it will be unjust to impose the minimum sentence on accused 1. After balancing all the relevant circumstances in this case it appears to me that accused 1 is not deserving of punishment with the harshest sentence on our statute books. I have considered the character of accused 1 albeit that he was abusive at home, the deplorable circumstances of the complainant and her family and the interests of society. It weighed heavily with me that accused 1 has already been severely punished by losing his employment and all the other mitigating and aggravating factors persuade me that it will be unjust to impose the discretionary minimum sentence.

[24] However, rape is such a serious crime that the element of retribution has to come to the fore. The interests of society and the aggravating factors require that a long term of imprisonment be imposed.

[25] Likewise, the sexual assault offences are serious offences. They also require that a term of imprisonment be imposed. The court needs to take into consideration that though accused 2 has been convicted of two (2) instances of sexual assault the way the charge sheet has been framed and his conviction it is clear that they amount to a single count though there are two (2) different and separate instances.

⁸ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 22.

[26] The failure by accused 2 to report the commission of the sexual offences is likewise a serious offence. However, the need of the complainant to rebuild her life by having the relationship with her mother restored weighed heavily in my mind. Another significant factor is that accused 2 is a primary caregiver as defined in our law. She is also a breadwinner for the broader *N[...]* family. If she were to be sent to direct imprisonment without an option of a fine it would have a devastating effect on the complainant and the rest of the *N[...]* family. The issue of accused 2 ill-health is also a substantial factor militating against direct imprisonment. I am alive that illness on its own does not *per se* entitle a convicted person to escape imprisonment.⁹

[27] I am satisfied that the following are just and appropriate sentences.

Accused 1:

27.1 Sexual Assault

The accused is sentenced to undergo five (5) years' imprisonment.

27.2 Rape

The accused is sentenced to undergo twenty-five (25) years' imprisonment.

Accused 2:

27.3 Failing to report a sexual offence committed against a child to the police

⁹ *S v Magida* 2005 (2) SACR 491 (SCA) at para 16.

The accused is sentenced to undergo five (5) years' imprisonment alternatively a fine of five thousand (R5 000.00) rand.

T MALUSI
JUDGE OF THE HIGH COURT

Appearances:

For the State: Advocate Mgenge *instructed by*
Director of Public Prosecutions
MAKHANDA

For the Accused 1: Mr Skade *instructed by*
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PRETORIA

For the Accused 2: Mr Nokhwali *instructed by*
Private instructions
TSOLO

Heard: 13, 14, 15 & 16 February 2023.
15, 16, 17, 18 & 19 May 2023.
12, 13 & 14 June 2023.
18, 19, 20 & 21 September 2023.
26, 27 & 28 February 2024.
04 & 05 April 2024

Delivered: 05 April 2024