

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: CC77/2023

DATE: 08-03-2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE : 10/05/2024

In the matter between

THE STATE

and

A[...] L[...]

Accused

SENTENCE

MOSOPA, J: On 27 February 2024, I convicted the accused of the following charges which were levelled against him:

1. Rape of an 11-month-old child;
2. Attempted murder read with provisions of section 51(1), as well as Part 1 of Schedule 2 of Act 105 of 1997; and
3. Defeating the administration of justice. In these sentencing proceedings, the accused is still represented by Adv Kgokane

from Legal Aid, South Africa and the State is still represented by Adv Khosa from the Director of Public Prosecutions, Pretoria.

The accused in this matter refused to testify in mitigation of sentence but instructed his counsel, Adv Kgokane, to present his personal circumstances from the bar which were recorded as follows:

1. The accused is 32 years of age and has two minor children aged 12 years and one year and 10 months old respectively. The 12-year-old is a boy child and the one-year-old is a girl child who is the victim in this matter.
2. The mother of the 12-year-old child is deceased and the child is currently residing with his maternal grandmother but was residing with the accused before his arrest and his subsequent detention.
3. The accused's father passed away in 2023 and he is originally from Bochum in Limpopo Province and the accused's mother is still alive and residing in Matatiele.
4. The accused is the owner of immovable property where he was residing with the mother of the victim and the victim.
5. Before his arrest he was working at Ravats Pageant Carpets where he was employed as a carpet repairer earning a monthly salary of over R5 000 per month.
6. He is a first offender.
7. He has two siblings who are currently staying with their mother and they are all dependant on the accused for maintenance.
8. The accused's mother is unemployed.
9. He was also responsible for the maintenance of the two children of the mother of the victim and he was the sole provider; and

10. The accused has been in custody since his arrest in May 2023 as bail was denied.

The Court when dealing what needs to be considered in the sentencing of the accused person in the matter of *S v SMM* 2013 (2) SACR 292 (SCA) at page 13 stated that:

"It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence.

Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in *S v Rabie*:

'A judicial officer should not approach punishment in a spirit of anger D because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'

Further at paragraph 14 it was stated that:

"Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. In *S v RO*, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much-quoted *Zinn* dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives."

The health status of the accused is clearly outlined in the

medico-legal examination report which was admitted as EXHIBIT "A2". No evidence was presented to me as to whether the accused is on treatment or not for such condition.

The accused has been in custody since his arrest and nothing was presented to me as to whether or not the accused is receiving medical treatment from the facility that he is kept, and if he is on treatment.

I strongly believe that if it was the situation, Mr Kgokane on behalf of the accused would have brought it to the attention of this Court.

The accused before the commission of the offences was employed and was a sole provider to his family, his mother and siblings and also to other two children of the mother of the victim whose ages are not provided.

The accused is also responsible for the maintenance of his 12-year-old child whose mother has passed away. The child was in his care before his arrest and detention, and he is currently in the care of the accused's mother.

The accused was not earning a good salary but made it a point that he provides to all people who depended on him. The mother of the victim was also not employed.

He has an unblemished criminal record. Despite being a sole provider for his family, the accused cannot be classified as the primary caregiver of either his children from other relationships or the primary caregiver of the victim in this matter.

The Constitutional Court in the matter of *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 at 557 defined a primary caregiver as follows:

"A primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under s 28(1)(b)."

The accused's other child from another relationship after the death of his mother proceeded to stay with the accused. We also know that the accused was also staying also with the mother of the victim in this matter who was unemployed.

There is no evidence before me which indicates that the mother of the victim neglected her parental duties in relation to the child and the child of the accused. As a result, it can be inferred that she was the primary caregiver as it is defined in the matter of *S v M supra* whereas the accused was the sole provider of the family.

The accused sexually penetrated his own child who was 11 months at the time without using protection whilst knowing his HIV status. Such conduct put the child's health at risk with the possibility of the child contracting the virus. I make mention of this as the victim's mother saw sperms coming out of the vagina of the victim after she undressed her. She immediately informed Z[...] of the existence of the sperms, but Z[...] could not see such as the accused bathed the child on her vagina.

The rape of young children by their family members is in the

increase in this country.

The J88 indicates that the child is HIV negative at the time of the examination and it can be accepted that the child was tested to come to that conclusion.

What is aggravating in this matter is that the accused raped the most vulnerable young child who cannot speak for herself.

The doctor who examined the victim noticed injuries on the vagina of the child. The accused also mentioned that the child was feeling uncomfortable when he penetrated her with the thumb, which version was rejected as false by this Court. The doctor noticed healed lacerations at 3 o'clock on the vagina of the child, reddishness on the outside and inside of the child's vagina. On the clefts the doctor recorded that there were 3 o'clock larger. There was no swelling at that stage because the doctor only saw the healed scars.

Sight should not be lost of the fact that the child was only medically examined after five days after the incident. The reason for such late examination is attributed to the accused's conduct.

On the day of the incident, he refused to allow T[...] to take the child to the hospital or clinic and he threatened her with a knife. T[...] had to lie to the accused that she was going to go and fetch her other child in Limpopo and that is when the accused gave her money to travel to Limpopo. Whilst at Limpopo she tried to get the assistance from the clinic but she was not successful. When she returned to Gauteng she could not immediately be assisted as she found the hospital at

Laudium closed after she laid criminal charges against the accused as she went to the hospital late. She was only assisted the following day.

No victim impact report or reports were handed by the State in this matter and we do not know how this incident impacted in the life of the child and her mother.

What we know is that when T[...] testified, she mentioned that irrespective of what happened between the child and the accused, she still loves the accused.

After taking the child to I[...]’s place and after the accused admitted to sexual penetrating the child, T[...] cried and then she went to their place of residence.

Here in court when testifying she was emotional and also threatened not to testify further.

Gender-based violence crimes are serious thorn in the flesh of the government. Domestically related incidents are also on the rise. The upshot with these kind of offences is that in most instances are not reported to the police as families will endeavour in some instances to resolve them within the family.

We know that there was a stage when accused leaving the child unattended when he went to go and buy dagga. We also heard that when T[...] was reporting the incident to Z [...], the accused had a glass and was drinking something out of that glass.

What is not clear is what was the sobriety status of the

accused when he committed these offences and most importantly what motivated him to commit such offences.

T[...] testified that the accused did not want to take the child to the clinic or hospital as that will have the effect of drawing the attention of the members of the community.

This clearly illustrates the fact as to how the communities

deem such kinds of offences. In many communities if the commission of offences come to your attention, they do not wait for the police to arrive but handle the matters themselves. They take it upon themselves to deal with the matter which in some instances result in the murder of the perpetrators or serious bodily injuries sustained.

Despite community's disapproval of such actions by perpetrators it is the object of sentencing not to satisfy public opinion but to serve public interest. (See *S v Mhlakaza* 1997 (1) SACR 515 (SCA)).

In the matter of *S v Karg* it was said that it was acceptable for the Court to take account of public feelings. It is true that the communities in view of commission of serious and violent crimes 'are looking at the courts to put a stop to that, but Courts are cautioned not to impose sentences that caters predominantly or exclusively for public opinion as such is inherently flawed.

The accused has been convicted of two counts which fall within the preview of the prescribed minimum sentence, which is life imprisonment. This is because of the age of the victim and also for the fact that the accused sexually penetrated the victim

knowing his HIV status. Section 51(3)(a) of Act 105 of 1997 provides for the exception to the sentences prescribed by the Act provided that such Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed one.

In *S v Nkomo* 2007 (2) SACR 180 (SCA) at 210 paragraph 3 the Court stated that:

"In *Malgas*, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

Mr Kgokane on behalf of the accused contended that the rape in this matter is not one that can be described as a "worst rape case" looking at the injuries sustained by the complainant.

In the matter of *S v Nkomo* on which Mr Kgokane relied on in contention, the Court considered such aspect and treated such as amount to substantial and compelling circumstances and interfered with the sentence of life imprisonment. However, in that

matter the Court emphasized that each case must be considered having regard to each particular facts. Theron AJA as he was then, in a minority judgment in the matter of *Nkosi* state that:

"Courts must not shrink from their duty to impose in appropriate cases the prescribed minimum sentence ordained by the legislature.

Further against the backdrop of unprecedented spade of rapes in this country, Courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect their equality, dignity and freedom of all women."

Section 51(3)(aA) of Act 105 of 1997 is instructive and provides that:

"Apparent lack of physical injuries to the complainant shall not constitute substantial and compelling circumstances justify imposition of a lesser sentence. The same goes to the relationship between the accused and the complainant prior to the commission of the offence."

It is established *in casu* that the accused is the biological father of the victim. No other injuries were noted on the body of the victim except for those indicated by the doctor in his medical examination of the victim. An inference can be drawn that no weapon was used at the time of the commission of the offences even though at a later stage the victim's mother was threatened with a knife when she wanted to take the child to the hospital and prevented by force from doing that.

It is therefore my considered view that the contention by Mr Kgokane has no merit looking more in particular to the age of the child.

I have been called upon to consider the fact that the accused was the sole provider of his family and extended family together with his personal circumstances as constituting in substantial and compelling circumstances.

It is fully appreciated by this Court that the accused did not neglect his parental responsibility and not maintained them as there is nothing to gainsay that.

In *Malgas* it was also found that traditional factors relating to mitigation of sentence still plays a role in the prescribed minimum sentence regime, The same was also decided in *Nkomo*.

However, in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at paragraph 58 the following was stated:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. in this case the appellant had reached the age of 30 without any serious brushes with the

law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character."

Credit must be given to the accused that at the age of 32 years he has had no serious brushes with the law as he is a first offender especially looking at the ages of between 20- and 30-years being ages in South Africa of most people prone to commit offences.

He has a stable family and work environment. We do not know at this stage what will be the effect of a lengthy prison sentence will have on the accused or whether he is a suitable candidate for rehabilitation and most importantly that he cannot re-offend as there is no expert opinion before me.

The accused violated his own child, and I am not in a position to can predict how will the relationship be between the accused and his child as the child grows. What can be accepted is that trust has been eroded by the actions of the accused.

In *S v Vilakazi supra* at paragraph 1 the following was stated: "Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity' In *S v Chapman* this court called it a 'humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim' and went on to say 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 from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the

insecurity which constantly diminishes the quality and enjoyment of their lives."

The victim in this matter was violated by the person who was supposed to protect her; the person who was supposed to see to it that she is properly nourished and protected against all the ills of crime; the person who was supposed to journey with her in her trip called life.

It is unfortunate that we do not know at this stage the mental status of the child as no assessment was done. I imagine how will the child grow up knowing that she was violated by her biological father at a very tender age in her life. The State did not do enough to bring all those aspects to the fore.

The accused failed through the voice of his counsel to express remorse despite this Court's findings. I am alive to the fact that lack of remorse is not an aggravating factor. But this case is different as it involves two individuals who are related by blood.

All that was said was only about the accused and this to me shows that the accused lacks remorse. The accused does not even regret his action and to me it indicates that the accused is of the view that what he did to the child is correct.

Khampepe J in the matter of *S v Tshabalala* 2020 in a separate but concurring judgment stated that:

"Rape is often mischaracterised as being an act of sexual intercourse absent of consent committed by inhuman monsters. This is a dangerous mischaracterisation of rape. Words matter.

Words give a construction of a certain viewpoint of the world and this viewpoint tends to be gendered. Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another without consent, it must be first that the victim does not experienced rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relate to the biological element of sexual intercourse. For many victims and survivors. of rape they do not experience rape as a sexual encounter but as a life-threatening attack and as a moment of immense powerless integration."

The victim *in casu* is still young to appreciate what sexual intercourse is but was confronted with the frightening and life-threatening attack by the accused. When the child was undressed her nappy and urinated, she cried to show that she was feeling pain after being woken up by the mother. I imagine the pain that the child felt at the time when she was raped. We do not know what time the child was raped as T[...] only realised the following day after returning from the ceremony in her neighbourhood that the child was raped. It appears that when the accused gave T[...] permission to attend the ceremony and promising to take care of the child, he had monstrous intentions regarding the child.

The actions of the accused warrants him to be removed from society for a very long time. T[...] was given R150 by the family member of the accused to withdraw charges against the accused. This shows how little regard this person had this person had on what the victim went through.

The family members of the accused also evicted T[...] and the child from where they were staying together with the accused

saying that she is the one who put the accused in prison. Again, total disregard of what the child went through.

As a result, I see no existence of compelling and substantial circumstances in the case of the accused and the accused ought to be sentenced as ordained by the legislature.

Life imprisonment is the most severe sentence which a Court can impose. It endures for the length of the natural life of the offender although release is nonetheless provided for in the Correction Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of the case, requires careful consideration.

"The minimum sentence prescribed by the law which in the circumstances of a particular case would be unjustly disproportionate to the offence, the offender and the interest of society would justify the imposition of a lesser sentence than the one prescribed by law." (See *S v M M* 2013 (2) SACR 292 (SCA))

This case does not fall under that category. Having said that, the accused will then be sentenced as follows:

Count 1: Rape: You are sentenced to life imprisonment.

Count 2: Attempted murder read with the provisions of section 51(1) of Act 105 of 1997: sentenced to life, imprisonment.

Count 3: Defeating the administration of justice: You are sentenced to two years imprisonment.

It is ordered that in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of

2007 the name and all particulars of the accused, A[...] T[...] L[...], be included in the National Register for Sex Offenders.

The effect of this is that the accused will be prohibited to be employed in the following categories:

- (a) Be employed to work with a child in any circumstances,
- (b) Hold any position which relates to supervision or care of a child.
- (c) Granted license to operate entity relating to the care of a child.
- (d) Became a foster parent.

That will be the sentence

MOSOPA, J
JUDGE OF THE HIGH COURT

DATE: 10/05/2024