

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

Case No. CC26/23

In the matter between:-

THE STATE

and

T[...] R[...] L[...]

Accused

JUDGMENT ON SENTENCE

BANDS J:

[1] On 17 May 2024, I convicted the accused on two counts of rape (per vaginum) of his stepdaughter in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.¹ The charges arose from two incidents which took place on 30 October 2018 and 30 June 2020 respectively, on which dates the complainant was 15 and 18 years of age.

[2] The circumstances in which the offences were committed are described in detail in the main judgment and accordingly bear no repetition. This judgment concerns the sentence proceedings in respect of the accused.

¹ Act 32 of 2007.

[3] Having been convicted of the rape of a child under the age of 16, and having raped the complainant on more than one occasion, the accused's respective convictions, pursuant to the provisions of section 51(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, attract mandatory minimum sentences of life imprisonment unless the court is satisfied that there are substantial and compelling circumstances which militate against the imposition thereof.

The approach to the minimum sentencing legislation

[4] In approaching the sentencing of the accused, I am to impose sentences that will strike an appropriate balance between the seriousness of the crimes of which he has been convicted; the personal circumstances of the accused; and the legitimate expectations and legal interests of the community. The decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment. It is necessary to have regard to all factors relevant to both aggravation and mitigation, and to assess, upon a consideration of all the circumstances relevant to the matter, whether the prescribed sentences are proportionate to the particular offences.

[5] The court in *S v Malgas*² emphasised the correct approach in establishing whether or not substantial and compelling circumstances exist as follows:

"[7] The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question

² [2001] 3 All SA 220 (A).

conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] *Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence.*

As was observed in Flannery v Halifax Estate Agencies Ltd ⁵ by the Court of Appeal,

“a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based --- than if it is not”. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified

differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets “substantial” and “compelling” cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

[10] To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be “exceptional” in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.”

[6] The Constitutional Court in *S v Dodo*³ approved the approach to sentencing as laid down in *Malgas*. With reference to the aspect of proportionality, the court held that what had to be considered in determining whether the length of a sentence was

³ 2001 (3) SA 382 (CC).

proportionate to the offence, was the offence in its broader context. This, Ackermann J described at paragraph [37] as consisting of “*all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.*” Ackermann J went on further to state at paragraph [38] that even when the legislature has prescribed the sentence ordinarily to be imposed in respect of an offence, the value of human dignity lies at the heart of the requirement that sentences must be proportionate to the offence.

[7] The Supreme Court of Appeal *S v Vilikazi*,⁴ in endorsing the approach set out in *Malgas*, stated that it is only by approaching sentencing under the Act in such manner that it is possible to avoid incongruous and disproportionate sentences. A prescribed minimum sentence cannot be assumed *a priori* to be proportionate in a particular case simply because a crime falls within a particular category. Disproportionate sentences, said Nugent JA, are not to be imposed. Courts are not vehicles for injustice.

[8] Mindful of the aforesaid, I turn to an examination of the case at hand.

The circumstances of the present case

[9] The rape of young girls by their fathers was described by Bosielo JA in *S v Bailey*⁵ as “*scandalous*” and “*morally repugnant*”. It is “*a malignant cancer seriously threatening the well-being and proper growth and development of young girls*” and it qualifies to be described as “*a most serious threat to our social and moral fabric.*”

[10] Cameron JA, in dealing with the rape of a minor by her father stated as follows at paragraph [17] in *S v Abrahams*:⁶

⁴ 2009 (1) SACR 552 (SCA).

⁵ [2012] ZASCA 154 at paragraph [13].

⁶ 2002 (1) SACR 116 (SCA).

“Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in the daughter’s best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter’s body, constitutes deflowering in the most grievous and brutal sense.”

[11] Common sense dictates that these comments are of equal application in circumstances involving rape within the family unit perpetrated by a stepparent,⁷ who, for all intents and purposes, fills the role of a parental figure, such as in the present matter. The rape of a minor child is an abhorrent crime. It is for this reason that the legislature has elected to include this type of rape in the category of crimes which attract a life sentence in the absence of substantial and compelling circumstances.⁸

[12] This notwithstanding, the decisions of our courts, including the Supreme Court of Appeal, frequently depart from imposing life imprisonment because of substantial and compelling circumstances being found to be present. *S v Abrahams* (supra);⁹ *S v Sikhapha*;¹⁰ and *S v Nkomo*¹¹ all involved rapes falling within the ambit of section

⁷ Albeit that the act of rape in such circumstances does not amount to incest.

⁸ *GK v S* 2013 (2) SACR 505 (WCC).

⁹ The court set aside a sentence of 7 years’ imprisonment imposed on a father for raping his 14-year-old daughter and increased it on appeal to a sentence of 12 years.

It was found that the accused’s age (53) was not itself a mitigating factor, but that he had reached his middle years without a criminal conviction was. The court further took into account that the accused’s son’s suicide less than two years prior to the rape, adversely influenced his conduct within the family and led to a diminution in the judgement that he brought to bear as a father. It was further found that the rape in question was not one of the worst cases of rape. These factors are distinguishable from the facts of the present matter. Moreover, the court in considering sentence was faced with a single act of rape. Whilst there was evidence as to the psychological impact of the rape on the victim, which was not insignificant, the features of complete and utter hopelessness which emerged in the facts of the present case, surpass those in *Abrahams*.

¹⁰ 2006 (2) SACR 439 (SCA).

The court set aside a sentence of life imprisonment where the appellant had raped a 13-year-old girl and replaced it with a term of 20 years imprisonment. It regarded as substantial and compelling circumstances, the fact that the appellant was a first offender; that he had a wife and children dependent upon him; that he has a trade (he is a bricklayer) and makes a living from his work; that he was 31 years old at the time of the trial, and that he is capable of rehabilitation. However, distinguishable from the facts of the present matter, the court was faced with a single act of rape and had no evidence before it as to the psychological impact on the victim.

¹¹ 2007 (2) SACR 198 (SCA).

51(1) of the Act. The respective courts, after having considered the relevant facts, departed from the prescribed minimum sentence on the basis that life imprisonment was disturbingly disproportionate to the point where it could be described as unjust. Such decisions, of course, remain guidelines, and do not constitute a benchmark or a precedent binding on other courts.

[13] I now turn to the question of whether substantial and compelling circumstances are present in this case.

[14] In mitigation of sentence, it was advanced on behalf of the accused that he is currently 40 years old. He was 34 and 36 years old at the time of the commission of the respective offences and has no prior convictions. He has known the complainant since she was three years of age, at which time he entered into a romantic relationship with her mother, which later led to their marriage in 2010. He supported the family unit financially and was described by the complainant as having played his role as a father “*very well*” prior to the date of the first incident. That the accused was the victim’s father figure since the age of three and breached the trust relationship between them is an aggravating factor. The accused and the complainant’s mother are currently still married, albeit that they have been separated since 2022.¹² He is the father of two children. A daughter born from the marriage between him and the complainant’s mother, who is currently 12 years of age and in grade 8; and a 19-year-old son who is unemployed. The accused was gainfully employed as a merchandiser earning between R4,800 and R5,200 per month. But for a period of two weeks during his initial incarceration, he maintained his employment up until the time of his conviction, fulfilling his maintenance obligations in respect of his daughter by the payment of all school related expenses. He was, accordingly, a contributing member of society, which is a mitigating factor. Notwithstanding that he failed to impress as a witness, for the reasons set out in the judgment on conviction, he came

The court set aside a sentence of life imprisonment and replaced it with a term of 16 years imprisonment in circumstances in which the appellant’s victim was kidnapped and raped several times in one night. Distinguishable from the facts of the present matter, the victim was not a minor; the appellant was not a father figure to the victim; and no evidence was led as to the psychological trauma suffered by the victim.

¹² It being common cause that there is an existing domestic violence interdict in operation against the accused.

across as a well-spoken, intelligent individual – these too are mitigating factors in favour of the accused.

[15] On the other hand, the complainant was 15 and 18 years of age at the time of the incidents. From the age of three years old up until the first incident, she viewed the accused as her father figure. The rapes were perpetrated on her during her grade 10 and grade 12 years of schooling, during which years she failed to meet the minimum requirements to successfully complete the respective academic years. From the content of The Victim Impact Report, which was handed in by consent, it is apparent that she has suffered grave and ongoing emotional and psychological suffering. She describes herself prior to the incidents as having been a happy, emotionally stable young girl, who loved reading. She excelled academically. Describing how the incidents have changed her life, the complainant stated that:

“My heart is very sore. I cry every day when I think about this thing. My life has drastically changed. My future is finished. My dreams are destroyed.”

[16] She: (i) suffers from anger issues; (ii) isolates herself; (iii) has turned to alcohol abuse as a coping mechanism; (iv) suffers from depression; (v) cries daily; and (vi) experiences flashbacks. The complainant describes her life as being in “a mess”. The impact of the offences on the complainant was further confirmed through an impact statement admitted into evidence on behalf of the complainant’s mother, which included a detailed statement on the impact that the incidents have had on the complainant¹³ as well as the impact that the incidents have had on her as the complainant’s biological mother; as the biological mother of the child born from the marriage between her and the accused; and as the wife of the accused.¹⁴

[17] Whilst no evidence was placed before me, through a social worker or psychologist, as to the complainant’s long-term prognosis, that the impact on her is devastating and far-reaching is manifest. This is an aggravating factor.

¹³ Inclusive of suicidal ideation.

¹⁴ Including the fears that she lives with.

[18] I must mention that the accused, in the face of the evidence at trial regarding the complainant's state of mind and change in behaviour following the first incident, including her depression; continuous crying; isolation and failure to pass grade 10, which he acknowledged, attempted, opportunistically, to lay blame on other aspects of the complainant's life for such phenomena.¹⁵ Perhaps more importantly, the accused being undeterred by the visible impact that the first incident had on the complainant, again proceeded to rape her in June 2020.

[19] In argument before me, Mr Van der Spuy who appeared on behalf of the accused, implored upon me to find that the facts as set out in paragraph [14] of this judgment, taken cumulatively, amount to substantial and compelling circumstances, justifying a lesser sentence than life imprisonment.

[20] He further argued, whilst acknowledging the severity of the offences, that life imprisonment would be disproportionate in the circumstances of this case. He cited the fact that the accused, at the conclusion of his cross-examination at trial, became visibly, yet quietly emotional, as noted by me in the judgment on conviction. He further argued that this factor, together with the factors to which I have set out above, all point to good prospects of rehabilitation. Having no insight as to the cause of the accused's display of emotion, this factor cannot be elevated to be anything other than what it was, nor can I infer remorse therefrom.¹⁶ Whilst the accused is of a relatively young age and was gainfully employed, that he showed no remorse and again elected to rape the complainant, having noted the devastating effect that the

¹⁵ Such as usual teenage behaviour.

¹⁶ The accused showed no signs of remorse, nor was it contended by Mr Van der Spuy in argument, that any such remorse was present.

As stated in paragraph [14] of 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

fist incident had on her emotional and psychological wellbeing, to my mind, militates against rehabilitation and is an aggravating factor.

[21] Ms Grootboom, who appeared on behalf of the State, submitted that the facts placed before the court by the accused did not amount to substantial and compelling circumstances, justifying the imposition of a lesser sentence. On the aspect of proportionality, and in responding to questions posed as to whether or not life imprisonment in this case was not disharmonious with the lesser sentences imposed in the cases referred to, Ms Grootboom stressed that the facts of this matter, given the serious psychological and emotional impact that the offences have had on the complainant (coupled with the two acts of rape), distinguished it from such cases and called for the minimum sentence as prescribed by the legislature. The argument so advanced was not far removed from that advanced in *S v Bailey*, in which the Supreme Court of Appeal, in an appeal against a sentence of life imprisonment imposed on a father for the rape of his 12-year-old daughter was dismissed, with heavy reliance being placed on the dramatic effect which the rape had on the victim as evidenced in the Victim Impact Report.

[22] Ms Grootboom also highlighted, as an aggravating factor, the threats made to the complainant by the accused, which emerged at trial. Not only did he threaten to kill her should she tell anyone about what had happened, but he further stated that in any event, no one would believe her should she report the incident – not even her mother. This latter aspect was illustrated at trial with reference to a deeply regrettable exchange between mother and daughter when the complainant first attempted to approach her mother regarding the incidents and their impact on her. This led to a delay in reporting and accordingly a lack of medical evidence, which was a neutral factor.

[23] She further argued that the accused, being the complainant's father figure, abused his position of trust, and continued to profess his innocence throughout the proceedings. This is so. The abuse of trust by the accused, in circumstances where he was the complainant's father figure since a tender age is an aggravating feature of the matter.

[24] In considering what sentence to impose, I have given due consideration to the approach to sentencing as set out above. I have further had regard to all factors relevant to both aggravation and mitigation, and considered whether the prescribed sentence is proportionate to the offences. Having done so, I am not persuaded that the accused's circumstances given the facts of this case meet the threshold of substantial and compelling circumstances. The sentences are appropriate and proportionate to the particular offences in the circumstances at hand.

[25] In the result, the accused is sentenced as follows:

1. **Count one (rape):** Life imprisonment.
2. **Count two (rape):** Life imprisonment.

It is ordered that the sentences imposed on each of the counts are to run concurrently.

I BANDS
JUDGE OF THE HIGH COURT

Coram: Bands J

Date heard: 24 June 2024

Date of judgment: 28 June 2024

Appearances:

For the state: Adv Grootboom, NDPP

For the accused: Adv Van der Spuy, Legal Aid South Africa