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

CASE NO.: CC64/2024

In the matter between:

THE STATE

and

THOBILE JOKANISI

Accused

JUDGMENT

JOLWANA J:

[1] The accused appeared in this Court on one count of rape in contravention of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In the indictment the State indicated its intention to ask the court to impose a minimum sentence of life imprisonment in the event of the accused being convicted. In doing so the State relied on section 51(1), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act

105 of 1997. The State alleges in the indictment that this is on the basis that the victim was under the age of 18 years at the time the offence was committed.

[2] The accused pleaded guilty to the charge of rape put to him which was that on or about the 19 April 2024, at or near Takalani Township in Ugie in the Joe Gqabi Magisterial District he unlawfully and intentionally anally penetrated L[...] N[...], an 11 year old boy.

[3] The legal representative of the accused handed up to the court a statement provided for in section 112 (2) of the Criminal Procedure Act 51 of 1977 (Act) which is signed by the accused in which the facts on the basis of which he was pleading guilty are set out. Section 112(2) of the Act reads:

“If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such a statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.”

[4] After considering the contents of the statement and the facts contained therein which the accused admitted, the accused was convicted of the rape as charged. In *Hanisi*¹ the Supreme Court of Appeal explained the import of a statement in terms of section 112(2) of the Act as follows:

“A Court considering a statement made in terms of s 112(2) exercises its discretion to determine whether the statement admits all the elements of the offence in question. If it is not satisfied that that is so, it must question the

¹ Director of Public Prosecutions, Gauteng Division, Pretoria v Hanisi 2018 (2) SACR 230 (SCA) para 7.

accused as set out in s112(1)(b) to clarify any matter raised in the written plea. If it determines that the statement is satisfactory and admits all the elements of the offence, it shall convict the accused on the plea of guilty. When the written plea detailing the facts on which the plea is premised is accepted by the prosecution, it constitutes the factual matrix on the strength of which an accused will be convicted and the sentence imposed. The written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by the accused support the plea of guilty tendered.”

[5] The accused having been convicted, the court must now consider an appropriate sentence that must be imposed. In considering an appropriate sentence, a sentencing court is required to have due regard to the triad consisting of the crime, the offender and the interests of society. In *Tsotetsi*² the court restated the basic sentencing principles as follows:

- “(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.
- (b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *S v Zinn*.
- (c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

² S v Tsotetsi 2019 (2) SARC 594 (WCC) at page 604.

(d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from re-offending and the deterrence of would-be offenders.

(e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.”

[6] The accused testified in mitigation of sentence. His evidence included his expression of his acceptance that what he has done in raping the minor child is wrong. He went on to say that he accepted that he has to pay for what he has done and felt that he is a bad person who does not deserve forgiveness. He testified that since his arrest he has been in custody and that if the victim and his family were in court he would apologize directly to them. However, he was prepared to pay for what he has done to the child. He committed the offence in the following circumstances. He had smoked dagga on that day as indicated in his section 112(2) statement which he said was more than he usually smoked. He knew what he was doing when he raped the victim and he appreciated that it was wrong. The dagga emboldened him and made him feel like he can do anything. When he thought of raping the complainant, dagga had the effect of egging him on as it interfered with the functioning of his brain. He understood that he should be punished with a lengthy period of imprisonment, the extent of which should be up to the court.

[7] On being asked some questions by the court he testified that he had opened a knife to instill fear in his victim so as to overcome his victim's resistance although he had no intention of stabbing him. When the complainant cried while he was raping him he did not immediately stop. He stopped when he realized that his cries were becoming too loud and would attract the attention of the people. He already knew the complainant's father although at the time of the incident he did not know that he was raping the child of a person he knew. He had initially denied having committed the offence but when he was at the Police Station he realized that lying about the incident was not right. On the day of his second court appearance, he indicated his intention to plead guilty to his legal representative whom he also requested to convey his apology to the complainant's family. He did not know if his attorney actually conveyed his apology or indicated to the court that he wanted to tender a plea of guilty.

[8] In addition to the evidence of the accused, his legal representative, Ms McCullum made submissions in which she started by acknowledging the seriousness of the offence which she said the society obviously abhorred as children should ordinarily be able play safely and be able to go home freely without fear. She placed the following circumstances which she contended, were substantial and compelling and on the basis thereof, urged the court to depart from imposing the prescribed minimum sentence of life imprisonment. The accused pleaded guilty to the offence and in his section 112 (2) statement he played open cards with the court. He did not downplay the incident and he took full responsibility for what he has done. He accepted that he must be punished and he acknowledged the complainant's pain so much that in his evidence he initially said that the extent of his sentence would not be up to him, the court would have to decide on it. It was when he was pressed by counsel for the State that he indicated that the sentence should be fifteen years imprisonment.

[9] He was very frank with the court about what happened and gave details of what he did to the complainant in his guilty statement. The commission of the offence was not premeditated but was committed impulsively when he saw the complainant walking alone. At that stage he had smoked dagga which had an effect on him even though it

was not the first time that he smoked dagga as he had been smoking dagga since 2022. It was submitted that the accused acknowledged the wrongfulness of his actions. All of these combined and considered cumulatively were indicative of his remorse and were indicative of the accused's prospects of rehabilitation.

[10] The accused's personal circumstances which were placed on record were that he was born on 6 December 2001. He was therefore 22 years old when he committed the offence. Before his arrest he lived with his mother and his younger sister as well as four children of his two elder sisters. Those two elder sisters live in Ugie but their children live with his mother. He is one of 9 siblings and all his elder siblings do not live at home. His mother is a domestic worker in a farm and also stays there. She comes home for one week every month. He is mostly the only adult at home. His younger sister usually makes food and when she cannot cook, the accused cooks for his family.

[11] He has never been formally employed. He does odd jobs like cleaning other people's yards. Even on the day of the incident he was cleaning his neighbour's yard for which he was paid R50 which he used to buy electricity for his home. At home they depend on his mother's wages as a domestic worker together with the child support grant of his two elder sisters' young children who live with them. He went to Sibabane High School where passed grade 8. Thereafter he did not go back to school as his mother could not afford paying school necessities for all of them. His main responsibilities at home are to clean the yard and to cook for the children when his younger sister is at school. His father died when he was 13 years old. During his life time he worked in the same farm in which his mother works. He is a first offender who may not have committed the offence if he had not come across the complainant as the offence was not planned.

[12] With reference to *Malgas*³ it was argued that the imposition of the prescribed minimum sentence could itself be an injustice taking into account all of the

³ S v Malgas [2001] 3 All SA 220 (A) para 22.

circumstances of the offence and the accused which it was submitted, were substantial and compelling so as to justify a departure from the prescribed minimum sentence.

[13] In *Malgas* the Supreme Court of Appeal gave the following guidance on the very difficult task of considering an appropriate sentence without perpetrating an injustice. The court said.

“ ... 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 a 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 the society. If that is the result of a consideration of the circumstances the court is entitled to characterize them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

[14] The State called a clinical psychologist who testified in aggravation of sentence bringing to the attention of the court the changes that have been observed in the behavioral patterns of the young complainant since the incident occurred earlier this year. She testified that the complainant was brought to her by his mother at the instance of the Director of Public Prosecutions for a psychological assessment to determine the impact of the rape incident on the complainant. The complainant asked that his mother should be present when she interacted with him. Some of those negative changes which the victim's mother observed include the following. The complainant has become irritable, hostile and has become an angry child. He has become very disrespectful which manifests itself by speaking out of turn, sometimes hurling insults even to adults and is unapologetic about his unruly behavior. When he does not get his way he becomes aggressive, verbally abusive and throws tantrums and would sometimes cry hysterically.

[15] He has become withdrawn with mood swings whereas before the incident he was a hard worker who initiated certain household chores without being requested. He refuses to go out to play with other children and displays uncontained behavior. He uses very aggressive messages on his Facebook page and gets defensive when confronted for this behavior. He has become wary of male figures, becomes anxious, agitated and suspicious when he meets male persons in the streets. In one instance he was walking with his mother when they came across a male person. On that occasion he started trembling and behaving erratically. He struggles to fall asleep and sometimes he would moan and talk in his sleep. He experiences fecal retention. He has suicidal thoughts and ideation which he sometimes expresses. This has resulted in his mother having to keep guard on him constantly out of fear that he might act impulsively on his suicidal thoughts. His mother has found dealing with the complainant quite overwhelming as his father is often absent. Even when he is at home he ignores the child and does not assist in correcting some of his behavioral patterns.

[16] It is clear from the evidence of the clinical psychologist which is also based on the observations she testified she made during the psychological assessment, that all of the things the complainant's mother observed are the life altering effects of the rape incident. The clinical psychologist explained that as a result of this incident, the complainant is in a state of confusion about his sexuality and gender identity due to what happened to him. His refusal or reluctance to go out and play with other children could be due to the publicity the incident received as some of his friends and children of similar age may have become aware of the incident. She testified that rape is essentially about power and its exertion over another person and the fecal retention could be one way the complainant is trying to assert some measure of control post the rape incident. She concluded that the complainant suffered significantly from being raped and the symptoms which manifest themselves in the observations that have been made are all indicative of the negative impact the incident has had on this young boy. While psychotherapy will help him understand and cope better with what was done to him, he will never be the same person again as the rape incident was a significant life altering ordeal whose psychological scars cannot be erased.

[17] In his submissions in aggravation of sentence, counsel for the State, Mr Nohiya pointed out that rape is undeniably a horrible and despicable offence. He submitted that the life of this complainant was clearly damaged very fundamentally to the extent that he is now confused about his sexual identity as a result of what was done to him by the accused. He, however, pointed out that he could not dispute that the rape was not premeditated. The fact that the accused is relatively young was also an undeniable fact, although it was not conclusive on its own. Counsel for the State further submitted that he could not, with any sense of conviction, argue that the imposition of the prescribed minimum sentence of life imprisonment would not, in all the peculiar circumstances of the case, be disproportionate regard being had to all the facts of this case.

[18] The crime of rape has become a menace to our society. It is most commonly perpetrated against the weaker in our society as the victims are generally women, both older women and younger women, girls and even babies who happen to be girls. There are anecdotal indications that rape of young boys is also increasing at an alarming rate, which is indicative of a fundamental shift from a situation in which by definition, the vulnerable members of our society were only women and children. We have not even made a significant dent in reducing the sexual abuse of women and girl children. The unfortunate reality is that we are now fast being confronted with the abuse of young boys who, like women and girls, are also being subjected to sexual abuse because they are also weaker and therefore vulnerable in our society in the sense of not being strong enough to ward-off these evil attacks on their basic humanity and sense of self-worth. Clearly, as Mr Nohiya pointed out, the seriousness of the offence of rape against boys is as bad as the rape of women and young girls for which a clear message must be sent out that the punishment meted out for the rape of young boys and boy children will be taken as seriously as that of young girls. This goes to the point that the clinical psychologist made which must be emphasized, which is that rape is about the exertion of power over another person in a most horrible way.

[19] As Ms McCullum pointed out, the crime itself was clearly not premeditated or planned but was rather opportunistic. Without suggesting that the use of mind altering substances such as dagga are, in themselves a mitigating factor, she submitted that it is not in dispute that the accused had smoked dagga just before the incident. If his evidence is to be believed, while it was not the first time that the accused had smoked dagga, the difference was that he had smoked more dagga than he normally did. The complainant was accosted on his way home by the accused who was also on his way home after smoking dagga. The accused must be given a sentence that sends a clear message to would be offenders that courts will be unflinching in the exercise of their duty to impose appropriate sentences that acknowledge the seriousness of the offence and take it account not only the pain that the complainant such the one in this matter experienced but also the long term after effects of having been put through this horrendous ordeal.

[20] That will only be so if the accused is removed from society for quite some time. Hopefully, considering the fact that while the complainant and the accused live in different localities, they are all from the same geographical area. It could provide a sense of comfort, it is to be hoped, if the victim does not also have to encounter the accused person anywhere as he goes about trying to rebuild his life as a growing young man after this incident. A lengthy sentence of imprisonment will not only give the accused time to go through the rehabilitative processes during his time in prison and thus give him a second chance in life, it will also hopefully enable the complainant to get some form of relief in knowing that there is no chance that he could meet the accused anywhere while he tries to recover and cope with the ordeal.

[21] The substantial and compelling circumstances as already indicated are briefly the fact that he is a first offender and has pleaded guilty. On his own version, which has not been gainsaid, he indicated his intention to plead guilty to his lawyers as soon as his second court appearance. This could be highly indicative of rehabilitative prospects. He chose to testify in mitigation of sentence which is not as common as it should be and was subjected to cross-examination. His evidence included his expression of his

willingness to serve whatever sentence the court imposes. He took responsibility for his actions. While it cannot be said with any degree of certainty, it would appear that he was a responsible young man who assisted his family before this incident. He was the main person responsible for looking after his younger sister who attended school and also his older sisters' young children who lived with them at home. The crime itself was not planned but was committed opportunistically possibly spurred by the effect dagga had on him.

[22] The difficulties and thought processes involved in finding the correct equilibrium in the exercise of the sentencing discretion, especially for serious offences such as in this matter were expressed as follows in *Vilakazi*⁴:

“It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the “offence” in that context:

‘consists 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’.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*, which said that the relevant provision in the Act:

⁴ S v Vilikazi 2009 (1) SARS 552 (SCA) at 560 g-h – 561 a-b.

‘vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘justify’ ... it’.”

[23] There is one other matter of concern that I do feel it would be remiss of this Court not to raise it. That is the issue relating to the therapy that the minor child needs after the incident which has been described as an ordeal. The clinical psychologist has recommended psychotherapy to assist the minor child to deal with the ordeal. However, there does not seem to be any actual road map or plan to ensure that this child and his mother do get the required psychotherapy sessions. Perhaps it should be required that one of the witnesses the Director of Public Prosecutions calls in a case involving the abuse of minor children should be the Regional Head or head of office in the Department of Social Development in the area in which the crime was committed as a standard practice. This is to ensure that the court, as the upper guardian of all minor children, is apprised of the plan for ongoing therapy sessions or a plan to start with such sessions if by the time the matter gets to court appropriate counselling sessions had not yet started.

[24] In *S v S*. N⁵ Norman J had this to say:

“...[T]he interests of the children where they are victims of crime or abuse, must be addressed prior to the conclusion of the trial in order to ensure that the well-being of an abused child is taken into account by the trial court. That, in my view, will pave the way for those children to grow and become emotionally, mentally and physically strong future members of society. Once sentence is imposed on an accused person that is the end of the trial. If nothing is said about the child victim other than condemning the unlawful act itself the child will go back home with no support from the justice system.”

⁵ *S v S*. N (CC16/2022) [2022] ZAECKMKHC 122 (20 April 2022) para 28.

[25] We should strive for a victim centred justice system if we are to rebuild our communities subsequent to the crime having been committed. Considering all of the above I do intend to issue an appropriate order to deal with this aspect as it is a dereliction of duty by the Department of Social Development that there does not seem to be systems in place for them to know about all cases of abuse against children so that they can deploy the necessary resources. This is absolutely necessary so that the affected children are given the indispensable support and therapy they need in their difficult journey of recovery from what they went through.

[26] I have already indicated hereinbefore that the substantial and compelling circumstances exist that justify a departure from the minimum prescribed sentence of life imprisonment. What the court must now do is to impose a sentence that suits the crime, the offender and the interests of society, an undeniably difficult balancing act. Before I impose the said sentence I am required to inform you that in terms of section 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, your name will be included in the National Register for Sex Offenders. This is because you have been convicted of a sexual offence against a child who was under the age of 16 years when you raped him, the complainant in this case.

[24] Accordingly you are sentenced as follows:

1. You are to serve a period of 25 years direct imprisonment.
2. The Registrar of the National Register for Sex Offenders is ordered to enter the details of the accused in the Register for Sexual Offenders.
3. The investigating officer is directed to serve a copy of this judgment on the Regional Head or head of office of the Department of Social Development in Queenstown.

4. The Regional Head or head of office of the Department of Social Development in Queenstown is ordered to ensure that psychotherapy counselling sessions are provided to the minor child on a regular basis until they are no longer necessary.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearance:

Counsel for the state : A. Nohiya
Instructed by : NDPP
Grahamstown

Counsel for the accused : H. McCullum
Instructed by : Legal Aid South Africa
Grahamstown

Date heard : 20 November 2024
Date delivered : 22 November 2024