

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: SS50/2023

(1)	REPORTABLE: NO <i>Yes</i>
(2)	OF INTEREST TO OTHER JUDGES: NO <i>Yes</i>
(3)	REVISED: NO
4/3/2025	
DATE	SIGNATURE

In the matter between:

THE STATE

and

HABIB, ADAM QASIM LUCAS

ACCUSED

JUDGEMENT ON SENTENCING

Coertse CJ AJ

1. The matter was postponed from Monday 27 January 2025 to Tuesday 4 March 2025 for sentencing purposes.
2. In the well-known case of *Malgas* it was said, *inter alia*, that sentencing is a lonely and onerous task. The imposition of sentence is the prerogative of the trial court. Having said that, the court should seriously take into account what evidence was presented to the court

in respect of mitigating circumstances by the accused and what was presented by the National Prosecuting Authority in respect of aggravating circumstances. In light of the fact that the accused in this instance was found guilty on the main count of human trafficking, section 4 [1] of the PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ACT 7 of 2013 [“the Trafficking Act”] and 7 other charges all of which were committed contravening various sexual offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) [“the SORMA”] it is clear that the main count was subject to a minimum prescribed sentence and he was duly warned about this possibility. The court should also seriously take into account whether there are substantial and compelling circumstances not to impose the minimum sentence.

3. The court stands in the gap between a public, especially the braaivleis-law-chat-groups, that would like to lay their hands on people such as the accused, or to act civilly and to sentence him according to the law. Otherwise, we will be descending into the abyss of lawlessness.
4. I will deal with sentencing as follows: The crimes that he was found guilty of.
 - 4.1. Section 4 (1) of the Trafficking Act
 - 4.2. Section 14 of the Trafficking Act
 - 4.3. Section 13 of the Trafficking Act
 - 4.4. Section 51 of the Criminal Law Amendment Act 105 of 1997 with heading Discretionary minimum sentences for certain serious offences.
 - 4.5. The SORMA crimes: counts 2 – 8.

4.6. *S v Malgas*¹

4.7. *S v Matyityi*²

4.8. Triad of factors: the criminal, the crime and the community

4.9. The sentence.

5. I do not intend to deal with the facts of the matter as it can be accessed in my judgment.

The crimes he was found guilty of:

6. The accused was convicted Monday 27 January 2025 on the following counts:

6.1. Count 1: human trafficking [contravention of section 4 (1) of the Trafficking Act.

6.2. Count 2: facilitating and or assisting the creation and or production of child-pornography in terms of the SORMA.

6.3. Count 3: possession of child pornography in terms of the SORMA.

6.4. Count 4: encourage, enable, instruct, or persuade a child to perform a sexual act [grooming] in terms of the SORMA.

6.5. Count 5: compelled self-sexual assault in terms of the SORMA.

6.6. Count 6: compelling or causing a child to witness sexual offences, sexual acts or self-masturbation in terms of the SORMA.

6.7. Count 7 exposure or display of or causing exposure or display of genital organs and or female breasts to children [flashing] in terms of the SORMA.

¹ *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)

² *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010)

6.8. Count 8: sexual assault in terms of the SORMA.

Section 4 (1) of the Trafficking Act

7. This was "dissected" in great detail in my judgement on the merits and it can be accessed there. For completeness's sake, I quote section 4 (1):

"4 Trafficking in persons

(1) Any person who **delivers, recruits, transports, transfers, harbours, sells, exchanges, leases** or **receives** another person within or across the borders of the Republic, by means of

(a) a threat of harm;

(b) the threat or use of force or other forms of coercion;

(c) the abuse of vulnerability;

(d) fraud;

(e) deception;

(f) abduction;

(g) kidnapping;

(h) the abuse of power;

(i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or

(j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,

aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons."

[the court's emphasis]

Section 14 of the Trafficking Act

8. Section 14 of the Trafficking Act, lists factors to be considered in sentencing [it should be noted that sections 4 (1) and 14 are both to be found in Chapter 2 of the Trafficking Act]:

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

(a) The significance of the role of the convicted person in the trafficking process;

(b) previous convictions relating to the offence of trafficking in persons or related offences;

(c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance;

- (d) the conditions in which the victim was kept;
- (e) whether the victim was held captive for any period;
- (f) whether the victim suffered abuse and the extent thereof;
- (g) the physical and psychological effects the abuse had on the victim;
- (h) whether the offence formed part of organised crime;
- (i) whether the victim was a child;
- (j) the nature of the relationship between the victim and the convicted person;
- (k) the state of the victim's mental health; and
- (l) whether the victim had any physical disability."

9. It is clear from this section that not all of the aggravating circumstances listed, are applicable on the accused and that this list is not a *numerus clausus*.
10. Section 14 (a): The significance of the role of the convicted person in the trafficking process: this is unknown to the court because the State did not lead any evidence on this factor. As far as this court is concerned, he was the only person cited.
11. Section 14 (b) previous convictions relating to the offence of trafficking in persons or related offences. There were none. The SAPS69 have been rectified to delete any reference to rape. The accused was not charged with rape.
12. Section 14 (c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance. It is not known or disclosed.
13. Section 14 (d) the conditions in which the victim was kept. This is not applicable. The victim was always living with her parents.
14. Section 14 (e) whether the victim was held captive for any period. This is not applicable. The victim was always living with her parents.
15. Section 14 (f) whether the victim suffered abuse and the extent thereof. The victim or in other words, the complainant, suffered significant abuse and the court set it out in great detail in its judgment on the merits.

16. Section 14 (g) the physical and psychological effects the abuse had on the victim. Complainant's mother gave a long list of the physical and psychological effects the abuse had on her daughter. This is covered by the State's victim impact affidavit. The court was informed that the entire family is still struggling to process what happened not only to the complainant, but to her father, mother and brother.
17. Section 14 (h) whether the offence formed part of organised crime. This is not known because the State did not lead any evidence on this factor.
18. Section 14 (i) whether the victim was a child. Complainant is still a child at the passing of the sentence. The complainant was 14 years old at the time of the offences, that is the Trafficking Act and the crimes in respect of the SORMA for the period June 2021, when they first met on Omegle, to September 2022 when the accused was arrested. She was born on 30 April 2007 which means that, at the time of sentencing, the complainant is still a child in terms of the Constitution. She turns 18 on 30 April 2025.
19. Section 14 (j) the nature of the relationship between the victim and the convicted person. The accused claims that it is a "love relationship" between him and the complainant. The mother of the complainant told the court that she is of the opinion that it is a toxic relationship and she also told her daughter this. The court rejects the opinion of the accused and finds that it was an abusive relationship.
20. Section 14 (k) the state of the victim's mental health. The victim's mother told the court that she and her husband were fearing for complainant's life. Complainant, according to the mother, was a changed person.
21. Section 14 (l) whether the victim had any physical disability. The answer is no.

Section 13 of the Trafficking Act

22. Section 13 (1) (a) of the Trafficking Act under the heading: Penalties
 “(1) A person convicted of an offence referred to in — (a) section 4(1) is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.”
23. This is the court’s mandate to impose the mandatory sentence, if, however, the court finds any substantial and compelling circumstances not to impose the minimum sentence then it should note it on the record and then impose that sentence.
24. And Section 13 (2) of the Trafficking Act:
 “A court that has convicted a person of an offence referred to in section 4, 5, 7 or 8(1) or any involvement in these offences as provided for in section 10, where the offence was committed for purposes of sexual exploitation, must, subject to section 50(2)(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), order in the presence of that person that his or her particulars be included in the National Register for Sex Offenders, established in terms of section 42 of that Act, whereafter the provisions of Chapter 6 of that Act apply with the necessary changes required by the context.”
25. At paragraph 17 of the heads of argument, Mr Kruger, on behalf of the accused, stated that the accused does not object to his particulars be entered into the National Register for Sex Offenders.

Section 51 of the Criminal Law Amendment Act 105 of 1997 with the heading “Discretionary minimum sentences for certain serious offences.”

26. The minimum sentencing regime in terms of the Criminal Law Amendment Act 105 of 1997 as amended, Part 1 of Schedule 2 references trafficking in persons for sexual purposes is applicable.

The SORMA crimes counts 2 - 8

27. There is a lively synergy between the SORMA and the Trafficking Act. I venture to say that if a person is charged with contravening the

Trafficking Act, it is inevitable that the SORMA is applicable in some way or another. Having stated this, there is also a synergy between these two statutes and section 51 of the Criminal Law Amendment Act 105 of 1997 as amended.

28. Counts 2 – 8 are all in terms of the SORMA. I have dealt extensively with these counts in the judgment on the merits and I do not intend to restate it herein except where it is really necessary. The accused pleaded guilty to: count 2 [facilitating and or assisting the creation and or production of child-pornography,]; count 3 [possession of child pornography]; count 6 [compelling or causing children to witness sexual offences, sexual acts or self-masturbation]; count 7 [exposure or display of or causing exposure or display of genital organs, anus or female breasts to children flashing] & count 8 [sexual assault]. The remaining counts, he pleaded not guilty to.

THE MALGAS-case

29. I am reminded of the well-known case of *Malgas* that gives clear and serious guidelines to trial courts and its approach to section 51 of the Criminal Law Amendment Act 105 of 1997 with the heading **Discretionary minimum sentences for certain serious offences**. There is indeed a built-in discretion in section 51 and I find it in the words that if there are "... substantial and compelling circumstances which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence ..."
30. In the court's mind substantial and compelling circumstances are the markers or the indicators for the court to follow to extend mercy to the accused. In religious language, mercy is equated to grace. Grace

is something extended to a person who does not deserve anything but the severest action. I am confronted between maudlin sympathy and a harsh execution of the minimum sentencing regime.

31. What are substantial and compelling circumstances? The court in the *Malgas*-case indicated what it is not. At page 15: "... 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. ... 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. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure."
32. At para 10 "... a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers."
33. It is trite that the court is confronted with a discretionary minimum sentence in this respect but, fortunately it is tempered with mercy. I find mercy in the words that if there are substantial and compelling circumstances, I should note those on the record and promptly proceed to sentence accordingly.
34. I will list the substantial and compelling circumstances that I found that do exist in this case.

THE *Matyityi*-case

35. In the *State v Matyityi*³ it was said “Had more relevant evidence been placed before the court as to: the prevalence of these types of offences; the public desire for protection from the kind of wanton criminality encountered here; the public interest in suitably fair, just and balanced punishment; and the harm suffered by Ms KD and those who survive Mr MF, the traditional triad of the crime, the criminal and the interests of society would have been better served.”
36. At para 13 it was said in *Matyityi*-case that: “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. ... 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.”
37. In *Matyityi* at para 14 the SCA discusses the age of an accused. It is trite between the State and the defence that the accused is an adult male with vast sexual experience – that he admitted to pertinent questions by the State Advocate during her cross-examination. The complainant was a girl child of 14, 15 years whom never even had a boyfriend and not even attending her school friend’s parties. The two factors are also in the scales to consider an appropriate sentence. His chronological age belies his vast sexual experience.
38. I will now turn to the factors that were presented to the court in respect of the criminal, the crimes and the community. These factors were encapsulated in the sworn statements by the accused in respect

³ (695/09) [2010] ZASCA 127 (30 September 2010)

of extenuating circumstances and in the sworn statement presented by the NPA in respect of aggravating circumstances.

The triad of factors: the criminal, the crime and the community

39. The court received copies of various documents for the defence in respect of sentencing:

39.1. An affidavit executed by the accused at the Johannesburg Correctional Facility on 6 February 2025.

39.2. An affidavit executed by his six siblings before Paramjit Kaur Deol Solicitor & Notary Public and Commissioner for Oaths at West Midlands, UK and

39.3. Accused's parents also executed an affidavit before the same person mentioned above.

40. The court read these affidavits. It is clear that the accused presents a complete turnaround from the hardnosed stance he presented during the trial and more so during the strenuous cross-examination by the State Advocate. It is however, regrettable that when he had the golden opportunity since day one in the court which is early 2024, to make a clean breast of it, he failed to do it. He had one long continuous opportunity during cross-examination to once again, come clean. Did he do so? No, not at all. He justified his actions with all sorts of excuses. He even threatened complainant's parents and he was scathing about complainant's grandmother who was terminally ill.

41. I am of the view that now that accused expressed his remorse and his say so that he wants to make amends, it should be taken into account. His remorse flies in the face of his parents affidavit and

especially in the face of his six siblings who is still blaming the complainant. The very first day I saw accused in court, I saw a human being in front of me. He is not a statistic.

42. His siblings kept on blaming complainant, as was the accused, for their brother's circumstances. They pretended to know better what the relationship was between complainant and her family; they are at loggerheads with complainant's mother who gave very graphic evidence about the dramatic changes in complainant since the day she, complainant, met the accused.
43. His parents' affidavit is exactly how parents will react in these circumstances: emotionally charged. The court is of the view that this affidavit, read with the affidavit by his siblings, are the ultimate expression of maudlin sympathy: it is overly emotional and somewhat insincere or maybe somewhat manipulative. It seems to the court as if his siblings are trying to impress the court how they cared for the complainant. They have not even seen her in the flesh.
44. Before I move onto the next aspect, I want to address the affidavits that were executed in the UK and the copies that were presented to the court in Johannesburg. I don't know where the originals are. What happened here is exactly what Rule 63 of the Uniform Rules of Court is all about. The title of Rule 63 reads: "Authentication of Documents Executed Outside the Republic for Use Within the Republic." In essence these rules require that documents, such as affidavits that were executed outside the RSA, be authenticated in a prescribed way. These affidavits submitted on behalf of the accused do not comply with Rule 63 (3). It lacks the required seal of office of certain prescribed officers and their signatures. Is it fatal for the validity of these two affidavits? I do not think so. Rule 63 (4) states as follows: "Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting

to have signed such document." I am therefore satisfied that these two sets of affidavits are duly authorised and authenticated and these are accepted as such.

45. On page 8 of the heads of argument for the accused, the attorney puts forward this argument: "He did not, it seems, form the intent to truly harm anyone else or to satisfy a pattern of sexuality. He truly did not want to, through criminal actions, harm "complainant" His actions simply took over, affecting, in my opinion his moral blameworthiness." This is fallacious reasoning for the following reasons:

- 45.1. The big bundle of WhatsApp messages militates against it,
- 45.2. He falsely created Exhibit L: it is the document that the complainant disputed the authenticity of;
- 45.3. All the other documentation that was handed in by the State and
- 45.4. his own evidence under oath and his replies to the strenuous cross-examination by the State Advocate
- 45.5. linked to his signed statement in mitigation of sentence.

All of the above militate undisputedly to his criminal intent.

46. The trial court was clear about these matters; the State proved his guilt beyond reasonable doubt. Exhibit L was hotly contested by able argument by both the defence and the State, and much time was spent on it during the trial just to be told by Mr Kruger that his instructions are not to proceed with the application. A similar situation arose in the Supreme Court of Appeal in the matter of *Minister of Home Affairs v Ali*⁴: "Although the retrospectivity argument was not pursued before us, in view of the fact that it was raised in the heads of argument and debated at length before the high court I think it is necessary to say something about the argument briefly." The way I read that judgment of the SCA is that the SCA was of the view that since it was in the heads of argument, and since it was argued at length, the court [SCA] must now pronounce on it. When I was sitting as the trial court, I pronounced upon it and now, in light of this argument, I must pronounce again on it: this argument is rejected in its totality.

⁴ (1289/17) [2018] ZASCA 169 (30 November 2018) Al paragraph [21].

47. On page 16 ad paragraph 9 of the Accused's heads of argument the relationship between accused and complainant is presented as a "true love story." If this is love, the court will eat his hat as the proverb is saying. It was abusive to the extreme as was set out in great length during the judgment on the merits and I need not state it again. A true lover does not threaten to kill the other lover's parents; a true lover does not teach a child to practice self-sexual assault; a true lover does not make light of the other lover's grandmother who was terminally ill. The worst that happened to the complainant, physically that is, is the touching of her breast – that was the argument presented to the court on behalf of the accused. If it stopped there, that might have been correct; it did not stop there: the court dealt with the entire scenario of the so-called "love relationship" that complainant's mother said it was a toxic relationship.
48. At para 9.4 of the defence's heads of argument it is stated boldly that: "No violence was committed; no loss of life or permanent long-term results have followed." The only factual point in this paragraph that is correct is that no loss of life followed. It is clear from the victim impact affidavit of complainant's mother that the long-term impact is still felt in the household and her family. To state that no violence was committed beggars' belief – the entire ordeal is not only psychological but also physical. Need I to repeat what the physical consequences where in the complainant's life? Who was the perpetrator? The accused was the criminal doing it.
49. The triad of factors relevant to sentencing, with due regard to the minimum sentencing regime are the criminal, the community and the crime.
50. The factors in respect of the criminal. There is an age difference of 10 years between the accused being born on 21 October 1997, and the complainant born on 30 April 2007. He had, by his own admission under cross-examination by the State Advocate, stated that he is an adult male of 24 years when he met complainant and had, at that stage already, had vast sexual experience. Complainant, in contradistinction,

and according to her mother, had at 14 years never even attended school parties, she was an innocent young girl who was enjoying life.

51. The accused displayed no remorse whatever during the trial⁵ and especially during the strenuous cross-examination by the State Advocate. He has, however, made an about turn and has displayed remorse.
52. I want to re-iterate that from the very first day I saw the accused in court, I saw a human being. It should be clear by now that I look at the accused not as a statistic. This is my approach in respect of me sentencing him. I cannot disregard the filth that he offered in his own words to be jest, jokes, part and parcel of his dark humour, I do not disregard the litany of profanities, the documentation that were handed in and the effect it had on complainant, her family, the community and on the court to such an extent that Adv Ryan lamented the filth that oozed out of the documentation that were handed in as exhibits. I must also have regard what the effect of the sentences will have on the accused, his immediate family and his community in the UK. This was disclosed in the signed documents of his siblings and his parents.
53. Although he was very explicit and demanding to have the most brutal sex with a child, it did not materialise. It did not materialise, not to his "credit" but to the credit of concerned parents and the quick and effective action of the SAPS. That is in this instance really to the credit of the SAPS and parenting: Can I take this as compelling and substantial circumstances not to impose the minimum sentence of life imprisonment? In light of the numerous instances where these courts, inclusive of the Supreme Court of Appeal and the ConCourt stated clearly and unequivocally that sentencing lies squarely in the domain of the trial court, I will take the opportunity to extend mercy in tangible form to the accused. He is an adult man, only in his late twenties and to remove from him from society for life, seems to me to be extremely harsh.

⁵ State v Matyityi (695/s9) [2010] ZASCA 127 (30 September 2010) at para 9

54. He was rather critical about our country's human trafficking laws. I do not share his sentiments. I will not hold it against him, as I am of the view that he is an unsettled, embittered and displaced human being in search of serious help and assistance.
55. I find the following to be substantial and compelling circumstances not to impose the discretionary minimum sentence in respect of count 1: human trafficking:
- 55.1. The accused and the complainant had only one physical contact and that was tightly controlled. I am aware that this specific instance, was not due to any of his doings or any of his efforts, but solely by the diligence of her parents and yet I take this into account in his favour.
 - 55.2. The complainant was not raped
 - 55.3. She was not abducted
 - 55.4. She was not physically harmed
 - 55.5. She was not introduced to drugs
 - 55.6. She was not harboured as she continued living with her parents.
 - 55.7. What were the physical and psychological effects of the abuse on the victim? That was spelt out in the victim impact affidavit.
 - 55.8. I don't know whether he was part of an international syndicate of human traffickers. I take this into account in his favour and if I err then I err in his favour.
 - 55.9. He is a first offender and apparently also in the UK [this was disclosed by the State Advocate from the Bar].
 - 55.10. With some assistance from psychologists, psychiatrists and life coaches he might be rehabilitated. This is his stated goals as he described so vividly in his signed statement in respect of mitigation of sentence.
56. His time waiting trial is also taken into consideration in respect of the sentences I am about to pass in respect of the crimes in terms of the SORMA. He was arrested on 22 September 2022. It means that he was in custody awaiting trial since then; he was at a rough estimate 2 years and 3 months in custody.

57. I will also order that his particulars be entered into the Sexual register. Section 13 (2) register of sexual offenders Trafficking Act & Section 50 SORMA.

The sentence:

58. Count 1: human trafficking [contravention of section 4 (1) of the Trafficking Act: 10 years imprisonment.

59. Count 2: facilitating and or assisting the creation and or production of child-pornography [the SORMA]: 5 years. In respect of this specific count and the sentence, I order that the accused period awaiting trial prisoner of 2 years and 3 months be taken into consideration as follows:

- 59.1. The effective sentence then is 2 years and 9 months imprisonment.

60. Count 3: possession of child pornography [the SORMA]: 4 years imprisonment.

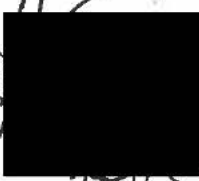
61. Count 4: encourage, enable, instruct, or persuade a child to perform a sexual act [grooming] [the SORMA]: 5 years imprisonment.

62. Count 5: compelled self-sexual assault [the SORMA]: 4 years imprisonment.

63. Count 6: compelling or causing a child to witness sexual offences, sexual acts or self-masturbation [the SORMA]: 5 years imprisonment.

64. Count 7 exposure or display of or causing exposure or display of genital organs and or female breasts to children [flashing] [the SORMA]: 4 years imprisonment.

65. Count 8: sexual assault [the SORMA]: 5 years imprisonment.

[Handwritten signature]

[Handwritten initials]

66. I order that the sentences in respect of counts 2 – 8 run concurrently with the sentence in respect of count 1
67. I order that his full particulars be entered into the National Register for Sex Offenders in terms of Section 13 (2) of the Trafficking Act and in terms of section 50(2)(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007).
68. I order that the accused is unfit to possess a firearm in terms of Section 103 of the Firearms Control Act 60 of 2000.


COERTSE CJ AJ

For the State: Advocate C Ryan NPA

For the Accused: Mr J Kruger instructed
by Botha Du Plessis & Kruger
Attorneys Rosebank