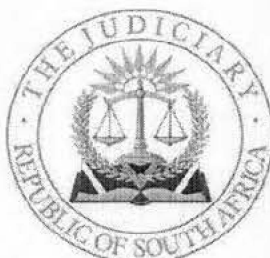


REPUBLIC OF SOUTH AFRICA



**HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG (PALMRIDGE)**

Case No: SS027/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
<u>28/03/2025</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

THE STATE

and

GERHARD CHRISTIAN VAN DEVENTER

Accused

SENTENCE

STRYDOM, J

- [1] Mr. Gerhard Christian Van Deventer (hereinafter referred to as 'the accused') was convicted on a count of rape as contemplated in Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act).

- [2] His victim is a minor female child, TM, who was between 4 and 6 years old when the accused penetrated her vagina with his fingers.
- [3] The accused was staying with the family of TM in a room adjacent to a workshop where the family lived. TM and her siblings got close to the accused, who at that stage was about 65 years old. He formed a trust relationship with TM and her older brother DM. This relationship he abused by penetration the vagina of TM who was an innocent young child at that stage.
- [4] The accused is currently 68 years old.
- [5] It is now the difficult task of this Court to sentence the accused.
- [6] It is trite that a Court, when considering appropriate sentences must consider and balance three competing factors, i.e. the personal circumstances of the accused, the seriousness of the crimes and the interests of society.
- [7] The Court should strive to accomplish and arrive at a judicious counterbalance between these elements to ensure that one factor is not unduly accentuated at the expense of, and to the exclusion of, the others.
- [8] The Court is also required to have regard to the aims of punishment when it considers an appropriate sentence, namely prevention, deterrence, rehabilitation and retribution. The sentence must be balanced, and the Court will consider the concept of mercy in appropriate circumstances.¹
- [9] The accused in this matter was found guilty on one count of rape read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). I pause to mention that the evidence in this matter focused on one occasion when the accused penetrated the vagina of TM with his fingers. She, however, added that this happened on more than one occasion. She did not provide any specific evidence pertaining to these other occasions. The Court

convicted the accused on one count of rape as charged but the indictment, with reference to this count, alleged "*acts of sexual penetration*" upon or about the dates that is unknown to the state. The Court accepted the evidence of TM. Accordingly, the Court accepted that the rape happened on more than one occasion.

- [10] In terms of section 51(1), but subject to subsections (3) and (6) of the Minimum Sentences Act, the court shall sentence a person it convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life. Part 1 of Schedule 2 (as amended) refers to rape as contemplated in section 3 of the Sexual Offence Act where the victim is a person under the age of 18. In this case the victim was between 4 to 6 years old when she was raped.
- [11] Section 51(3)(a) of the Minimum Sentences Act provides the court with a discretion to deviate from the prescribed sentence of imprisonment for life if the court is "*satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed.*"
- [12] The Court will bear in mind that there is no onus placed on the accused to prove the presence of substantial and compelling circumstances, or on the state to prove the absence of such substantial and compelling circumstances. However, there rests a clear duty on the accused to produce evidence to convince the Court that circumstances exist, which justify the imposition of a lesser sentence. It stands to reason that such substantial and compelling circumstances may also be inferred to be present in the state's case or in evidence presented by the state witnesses or by the prosecution itself. If no factual basis is laid for a finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it follows that the Court will be obliged under the statutory provisions to impose the prescribed sentence.²

[13] What would constitute substantial and compelling circumstances has been the subject matter of decisions in many matters.

[14] In *S v Malgas*³ the following was stated in relation to this question of whether substantial and compelling circumstances existed or not:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[15] Our courts have held on numerous occasions that the seriousness of this kind of offence and the prevalence thereof outweighs an accused's personal circumstances and found lengthy periods of imprisonment to be appropriate.⁴

[16] The personal circumstances of an accused can, however, constitute substantial and compelling circumstances that justified the imposition of a lesser sentence when considered with all the circumstances of the offence which the accused was convicted of. This would, obviously, further depend on the nature of such personal circumstances, viewed together with the nature of the crime and the needs of society.

[17] In the matter of *Director of Public Prosecutions Limpopo v Motloutsi*⁵ the SCA questioned the decision of the trial court to have found that the personal circumstances of the respondent amounted to substantial and compelling circumstances that justified the imposition of a lesser sentence. The court referred to the matter of *S v Matyityi*⁶ where Ponnann JA found as follows:

"Malgas, which has since been followed in a long line of cases, set out how the

³ 2001 (1) SACR 469 (SCA) at [25]

⁴ *S v Cornick and Another* 2007 (2) SACR 115 (SCA) and *S v M 21007* (2) SACR 60 (W).

minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from Malgas: the fact that Parliament had enacted the minimum sentence legislation was an indication that it is no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present."

- [18] In *S v Vilakazi*⁷ the following was said in relation to a finding whether substantial and compelling circumstance exist in a particular case:

"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."

- [19] In the matter of *S v De Beer*⁸ it was found that before a life sentence is imposed a court will have to give proper consideration to the question of whether a life sentence was proportionate to the crime, the appellant and the legitimate needs of society. The court found as follows:

"[21] The court a quo does not seem to me to have given proper consideration to the question whether a life sentence was proportionate to the crime, the appellant and the legitimate needs of society. It seems to me to have focused too much on the fact that life imprisonment was the prescribed minimum sentence."

[20] Thus, the enquiry will focus, *inter alia*, on the seriousness of the crime. Rape without a doubt is one of the most serious crimes which is prevalent in this country.

[21] There are, however, degrees of seriousness. Even in cases of child rape. In this regard the Court can refer to the matter of *S v Mahomotsa*⁹. In this case, the Supreme Court of Appeal held that certain rape matters are more serious than others. At paragraph 17 it was held as follows:

"[17] The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia no subsequently visible injuries were inflicted on them. According to the probation officer – she interviewed both complainants – they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence."

[22] In *S v SMM*¹⁰ Madjiedt JA found as follows with reference to degrees of seriousness of rapes:

"The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in S v Abrahams that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence

is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing."

- [23] In *De Beer*¹¹ the court also considered that there are various degrees of seriousness when it comes to rape. It was held in paragraph [20] of this judgment as follows:

"[20] S v GK 2013 (2) SACR 505 (WCC) is an insightful discussion by Rogers J, with whom Gamble J concurred, of the approach to the proportionality of life sentences in rape cases. He referred to cases such as Malgas, S v Abrahams 2002 (1) SACR 116 (SCA), S v Mahomotsa 2002 (2) SACR 435 (SCA), S v Vilakazi 2009 (1) SACR 552 (SCA) and S v SMM 2013 (2) SACR 292 (SCA), all of which support his approach. He also referred to crimes which would previously have constituted indecent assault and would probably have attracted a few years' imprisonment, but now fall within the minimum sentencing regime. The present case falls into this category. See in this regard the analysis in S v Coetzee 2010 (1) SACR 176 (SCA), at paras 18 to 25, of sentences imposed in cases of indecent assault. The sentences included terms of imprisonment ranging between eighteen months and five years, with portions thereof suspended, and in some cases correctional supervision in terms of s 276(1) of the CPA."

- [24] In my view, the case of the accused falls into a category of the less serious rape matters. Before the Sexual Offences Act was legislated the accused, for inserting his fingers in the vagina of TM, would have been convicted of indecent assault and not rape. The Court must emphasize that the penetration by a finger of the vagina of a female person is now legislated to be rape and remains a very serious crime. Moreso, when the victim is a young child.

- [25] On behalf of the state, Ms. Williams, argued that the accused failed to show the existence of substantial and compelling circumstances and that the Court should impose the prescribed minimum sentence of life imprisonment.

- [26] Considering the accused's personal circumstances, more particularly his age, as he is currently 68 years old, together with the fact that he has no previous convictions and the nature of this rape case the Court is of the view that substantial and compelling circumstances exist to deviate from the prescribed minimum sentence. For 68 years the accused had no brushes with the law. He maintained a stable employment record over many years. Add to this, the accused remained in custody pending finalisation of his trial for a period of approximately 2 years and 4 months.
- [27] Having regard to this, a sentence of life imprisonment would be unjust, and it would be disproportionate to the crime, the criminal and the needs of society. An injustice would be done by imposing that sentence. Consequently, the Court would be entitled to impose a lesser sentence.
- [28] The Court will now consider what this sentence should be again with reference to the personal circumstances of the accused, the seriousness and nature of the offence and the interest of society.
- [29] The Court was provided with a report compiled by a probation officer, Ms. Mulalo Nemutandani. The Court is indebted to her for compiling this report.
- [30] In this report the family background of the accused has been set out. The accused had a reasonable stable upbringing and apart from the fact that his own father died when he was still young there is nothing reported which might have had the impact on why he committed this offence. He never got married and had no children. It was also noted that the accused became close to his victim and that there existed a close relationship between them. It was further noted in the report that the accused persists in his innocence and, accordingly, have shown no remorse for his actions. It was recommended that considering the seriousness of the crime on which the accused was convicted, direct imprisonment would be

the most appropriate sentence given the mandatory sentencing guidelines for offences such as rape, particularly considering that the victim is a minor.

[31] The Court agrees with the recommendation made by the probation officer that direct imprisonment would be the only appropriate sentence.

[32] As stated hereinabove it was argued on behalf of the state that the Court should sentence the accused to life imprisonment. As part of this argument the Court was referred to many cases which emphasized the seriousness of the crime of rape. That rape is a serious crime, is indeed so. See in this regard the matters of *S v Ncheche*¹², *S v C*¹³, *Holtzhauzen v Roodt*¹⁴, *S v Vilakazi*¹⁵ and *S Chapman*¹⁶ in which matters the seriousness of the crime of rape was emphasized.

[33] It was submitted that the following aggravating circumstances are present in this matter:

- a. TM was approximately 4-6 years old at the time of the rapes.
- b. TM was raped by the accused on multiple occasions.
- c. TM sustained injuries as a result of the rapes by the accused. These injuries were described as clefts to her hymen.
- d. The accused was in a position of trust which he abused.
- e. The accused knew that TM was vulnerable as he knew that her parents did not properly take care of her and her siblings.

[34] These are aggravating circumstances this Court will consider in arriving at an appropriate sentence.

¹² 2005 (2) SACR 386 (W)

¹³ 1996 (2) SACR 181(C)

¹⁴ 1997 (4) SA 700 (AA)

[35] The Court will also consider the interest of society which expects from this Court to deal appropriately with an accused convicted on account of rape, albeit, that penetration only took place with fingers, especially where a young child was the victim. This Court and society are alive to the scourge of abuse of children. The Court operates in society and has a duty through its sentencing discretion to promote respect for the law.

[36] In *S v D*¹⁷ it was found:

"Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think that they can get away with it, and all too often do..."

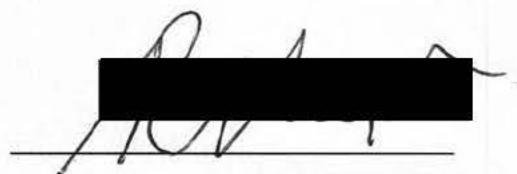
[37] In this matter there was no evidence presented to Court as to what lasting psychological impact and effect this rape had on TM. The reason being that she might have been too young to properly understand what had happened to her. It should be mentioned that the Court could not observe any visible signs of psychological trauma whilst she testified. During her evidence she stated that she no longer liked the accused but apart from this she appeared to be unphased as to what happened to her. As to what the long-term effects would be when she becomes older, the Court can only speculate about. For sentencing purposes, the long term possible, or even probable, psychological impact of the rape on TM was not proven. The Court would, however, be appraised of the psychological effect the rape had on the brother of TM. It took a long time before he could relate to a therapist what had happened to his sister. Even in court he still experienced difficulties relating his evidence to court.

[38] TM suffered no serious injuries during the rape. The only injuries were two clefts to her hymen. In terms of section 51(3)(aA)(ii) of the Minimum Sentences Act, when imposing a sentence in respect of the offence of rape an apparent lack of

physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. This, however, does not mean that this Court cannot consider this fact when an appropriate sentence is considered. In *S v SMM*¹⁸ the court concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, which, along with other relevant factors, would be considered to arrive at a just and proportionate sentence.

- [39] The accused has showed no signs of being remorseful. He persisted in his innocence as he is rightfully entitled to do. For purposes of sentence, however, the Court will take into consideration that he is not remorseful for what he has done.
- [40] The Court considered sentences imposed in other reported cases to serve as a guide as to what an appropriate sentence would be in this matter. The Court will briefly deal with some of these matters, the facts of which have some similarity with the facts of this case. The Court, however, is acutely aware that rarely other matters would be on all fours with the matter at hand.
- [41] In *S v De Beer*¹⁹ the appellant was convicted on a count of rape, in that over a period of four months he had on numerous occasions inserted his finger into the private parts of an 8-year-old girl and made her touch his private parts. On a further appeal to the SCA, after the first appeal court increased his sentence to life imprisonment, he was sentenced to 15 years imprisonment of which five years were suspended. This was the original sentence imposed by the Regional Court.

- [42] In *S v SMM*²⁰ the appellant inserted his fingers into the vagina of his 13 years old niece and thereafter continued to insert his penis into her vagina. This lasted for about 5 minutes, but when she started to cry the appellant stopped his actions. On appeal a sentence of life imprisonment was replaced with a sentence of 15 years imprisonment.
- [43] In *Chinjeke v The State*²¹ the full bench of this Division, upheld an appeal against a life sentence for the rape of an 8-year-old child, where the appellant inserted his penis in the vagina of his victim. His victim knew the appellant and she trusted the appellant. He took advantage of this trust relationship. The sentence of 18 years imprisonment was imposed. It should be mentioned that there were more severe injuries to the genitals of this child as is the case with TM. This was caused through forced penetration by the penis and not the fingers of the appellant.
- [44] Having considered the aggravating and mitigating circumstances, including the seriousness of the rape conviction, where the accused on more than one occasion penetrated the vagina of TM, a young child, with his fingers, where the accused is an elderly first offender, who already spent 2 years and 4 months awaiting finalisation of his trial, the Court is of the view that the accused should be sentenced to a relatively long period of imprisonment.
- [45] The accused is sentenced to 15 years imprisonment, 5 years of which is suspended for a period of 5 years, on condition that the accused is not during the suspension period convicted on any contravention contemplated in the Sexual Offenses Act 32 of 2007 for which conviction he is sentenced to direct imprisonment.

A handwritten signature in black ink, appearing to be 'R. Strydom', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

R. STRYDOM

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Date of conviction: 06 February 2025

Date of sentence: 28 March 2025

Appearances

For the State: Adv. Williams

Instructed by: National Prosecuting Authority (Johannesburg)

For the Accused: Adv. Buthelezi

Instructed by: Legal Aid South Africa