



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

NOT REPORTABLE

Case no: CC68/2024

In the matter between:

THE STATE

And

HLUMELO YALI

ACCUSED

JUDGMENT ON SENTENCE

Govindjee J

Background

[1] Mr Yali was convicted of a charge of rape. He unlawfully and intentionally committed acts of sexual penetration with a seven-year-old female complainant by inserting his penis into her anus and vagina during October 2022.

[2] As the victim was under the age of 18, the offence falls within Part I of Schedule 2 of the Criminal Law Amendment Act, 1997,¹ attracting a minimum sentence of life imprisonment unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

[3] Section 276 of the Criminal Procedure Act, 1977² provides for the sentences which courts can impose. The imposition of sentence is pre-eminently a matter for the discretion of the trial court, which is free to impose whatever sentence it deems appropriate provided it exercises its discretion judicially and properly. The general purpose of imposing a sentence is fourfold: retributive, preventative, rehabilitative (reformatory) and to act as a general deterrent.³ While the retributive aspect tends to dominate, courts are enjoined to temper the punishment with a measure of mercy.⁴

[4] The sentencing court must attempt to achieve a balance in its sentence, without deliberately striving for either severity or misplaced pity.⁵ The object of sentencing is not to set an example or satisfy public opinion, but to serve the public interest.⁶ In the final analysis, the well-known triad of factors to be considered consists of the crime, the offender and the interests of society,⁷ and these factors must be applied, in accordance with *S v Malgas*,⁸ to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.⁹ In *S v Matyityi*,¹⁰ Ponnann JA held that Parliament:

‘...has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the

¹ Act 105 of 1997 (the Minimum Sentences Act).

² Act 51 of 1977 (the CPA).

³ *S v Rabie* 1975 (4) SA 855 (A) (*Rabie*).

⁴ *Rabie* at 862G-H.

⁵ See *S v Khulu* 1975 (2) SA 518 (N) 521-522.

⁶ *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as *amicus curiae*) 2007 (2) SACR 539 (CC).

⁷ *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H.

⁸ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*).

⁹ See *Radebe v The State* [2019] ZAGPPHC 406 para 12.

¹⁰ *S v Matyityi* 2011 (1) SACR 40 (SCA) (*Matyityi*) para 23. Also see *Malgas* above n 8, in respect of the prescribed period of imprisonment in the Minimum Sentences Act ordinarily being imposed for the commission of the listed crimes in the specified circumstances, in the absence of weighty justification, as quoted in *Otto v S* [2017] ZASCA 114 at para 21.

legislature by resort to vague, ill-defined concepts...and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order'.

Nature of the crime and surrounding circumstances

[5] The complainant was raped by Mr Yali after she had visited the home in which he stayed to play with a friend. The evidence demonstrated that Mr Yali called the complainant to his room by offering her chips, before undressing her and raping her, first while she lay on her stomach and then on her back. He failed to stop when the complainant asked him to do so and the rape was painful, causing her to cry. Medical evidence revealed that the complainant's hymen was broken by the rape. She also experienced minimal dilation and twitching indicative of trauma to the anus. No other physical injuries were discernible, bearing in mind that the complainant was only medically examined some three days after the incident, so that other injuries may have already healed.

[6] It is also important to consider the effect of the crimes on the victim, particularly in cases of gender-based violence.¹¹ The state led the evidence of Ms Stamper, a social work practitioner who examined the complainant on 30 November 2024 and compiled a 'victim impact report'. The uncontested evidence is that the complainant expressed feelings of sadness and emotional hurt. Her behaviour was aggressive, particularly towards her younger sister and she was fearful of male figures and uncomfortable in their presence. The social worker also received a report that the complainant was not taken care of properly by her parents, who allegedly abused alcohol, so much so that psychosocial intervention by the Department of Child Welfare for the complainant and her parents was recommended and arranged by Ms Stamper. Unfortunately, the report reveals that the complainant has no emotional ties with her mother, impacting on her recovery process. It is accordingly

¹¹ See A Spies 'The judicial relevance and impact of victim impact statements in the sentencing of rape offenders' (2018) SACJ 212 at 231 as cited in *S v Dyonase* [2020] ZAWCHC 137 para 21.

self-evident that not all the complainant's behavioural traits, as observed at the time the report was compiled, are necessarily solely related to the incident. But that does not diminish the reality that the complainant is exhibiting signs of post-traumatic stress and experiences flashbacks of the trauma. The incident affects her sense of trust and has impacted negatively on her family and community. Her childhood has now been scarred by sexual abuse, which undermines her development as a child in various ways, including a sense of powerlessness and low self-esteem. The impact of the ordeal will be long-lasting and multi-fold, extending into adulthood. It is also noted that the complainant was made to relive her ordeal in court. According to the SCA, this factor should not be overlooked.¹²

Mr Yali's circumstances and interests

[7] *Mr Geldenhuys* placed Mr Yali's personal circumstances before court. Although Mr Yali's precise date of birth is uncertain, it was submitted on his behalf that he was 22 years of age at the time of the incident. The psychiatric report accepted into evidence reflects his date of birth as 30 May 2001, suggesting that he might only have been 21 at the time of the incident. He has no previous convictions, with no other cases pending. His level of education is low; he dropped out of school in grade eight. He is unmarried, has no children and is unemployed. At the time of his arrest, he resided with his elder brother and sister, who have acted as his parents since they passed away approximately six years ago. It was argued that these factors cumulatively reflected that the crime had been perpetrated by an immature first offender, so that a lengthy period of imprisonment, rather than life imprisonment, would offer the hope of rehabilitation.

[8] Mr Yali has already been in custody since October 2022, a period in excess of two years. This is explained by a direction issued by the Magistrate: Port Alfred in terms of either ss 77(1) or 78(2) of the CPA to refer Mr Yali for psychiatric observation.¹³ He was admitted to Fort England Hospital on 31 May 2024 and

¹² *MDT v S* [2014] ZASCA 15; 2014 (2) SACR 630 (SCA) para 2.

¹³ Section 77(1): 'If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as

subjected to various clinical interviews and assessments and kept under constant observation by the psychiatric nursing staff. He presented with normal behaviour and speech and no perceptual disturbance, with good insight and judgment during the panel enquiry. The resultant psychiatric report diagnosed only a cannabis use disorder, the panel recommending that the law takes its course based on Mr Yali's capacity to understand court proceedings and to appreciate wrongfulness and act in accordance with that appreciation. While it may be noted that Mr Yali conveyed, via his counsel, that he had used cannabis and tik extensively since 2016, it is speculative to suggest that this affected his conduct at the time the offence was committed. Nonetheless, the court notes that as of 26 June 2024, he continued to suffer from a cannabis use disorder.

The interests of society

[9] Courts have repeatedly reflected on the horrific, repulsive, nature of the offence of rape, given that it constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim.¹⁴ Children's rights are constitutionally protected and rape of a child, particularly one as young as seven, is by its nature one of the worst kinds of offences imaginable. It has therefore been accepted that the crime deserves severe punishment, society's expectation being that this will serve as a deterrent so that the unceasing slew of rape incidents will cease.¹⁵ As the SCA has

to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'

S 78(2): 'If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of s 79.'

¹⁴ See, for example, *S v Vilakazi* 2012 (6) SA 353 (SCA); [2008] 4 All SA 396; [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) (*Vilakazi*) at 555H.

¹⁵ *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B. When imposing a sentence in respect of the offence of rape, an apparent lack of physical injury to the complainant and any relationship between the complainant and accused prior to the offence being committed are not, on their own, considered to be substantial and compelling circumstances justifying the imposition of a lesser sentence: section 51(3)(aA) of the Minimum Sentences Act. *Radebe supra* para 34. In *Vilakazi* above n 14 para 54, Nugent JA noted that 'there comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.'

noted, courts cannot ignore the reality that South Africa is facing a pandemic of sexual violence against women and children.¹⁶

[10] Society's opprobrium has translated into the Minimum Sentences Act, which by way of a prescribed, albeit discretionary minimum sentence regime, has drastically impacted upon the exercise of a court's discretion in imposing a sentence.¹⁷ Regrettably, that legislation seems to have achieved little in respect of stemming the shocking number of child rape cases that are set down for hearing by this court each year. As this court has noted previously, society's patience, understandably, is wearing thin, and sentences imposed in child rape cases are rightly scrutinised.¹⁸

[11] Mr Yali's conduct has been found to fall within the purview of this Act. A court should not for 'flimsy reasons' and 'speculative hypotheses favourable to the offender' deviate from the minimum sentence prescribed, or apply their personal notion of fairness.¹⁹ The fact that Mr Yali is a first offender does not, on its own, necessarily warrant a lesser sentence. The question remains whether there are substantial and compelling reasons, on the whole, to justify a lesser sentence than the minimum sentence prescribed.

Analysis

[12] All the circumstances of the case must be considered to determine whether the imposition of a minimum life sentence is proportionate to the particular offence.²⁰ This includes Mr Yali's personal circumstances, as well as the undeniable impact of the crime on the young complainant. The nature of the crime must also be considered, together with the interests of society, seasoned with a measure of mercy where appropriate, and bearing in mind the various purposes of punishment. Life sentences are undoubtedly appropriate sentences, in general terms, to impose upon criminals who rape children. Courts will not shy away from imposing prescribed

¹⁶ *The Director of Public Prosecutions, Grahamstown v TM* 2020 JDR 0652 (SCA) (TM) para 15.

¹⁷ *S v September* [2014] ZAECHC 38 para 8.

¹⁸ See *S v Botha* [2023] ZAECHC 52 para 12.

¹⁹ *S v PB* 2011 (1) SACR 448 (SCA) para 21; *Matyityi* above n 10 para 23.

²⁰ *Vilakazi* above n 14 para 15.

minimum sentences whenever this is warranted.²¹ The court is also cognisant that a finding of an absence of substantial and compelling circumstances will result in the gravest of sentences being passed and that the consequences of this are profound, effectively removing an individual from society.²² It has been noted previously that this requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.²³

[13] The aggravating features of the matter are undeniably severe. The rape of vulnerable victims, such as extremely young children, have always been an aggravating feature of rape. Every child is meant to enjoy the constitutional rights to be protected from maltreatment, abuse and degradation, to freedom and security, which includes the right to be free from all forms of violence and to have their privacy and dignity respected and protected.²⁴ Even though the physical effects of the rape were relatively minimal, the significant psychological effect on the complainant, past present and future, has already been described. It is also relevant that although Mr Yali has been convicted of one count of rape, the evidence revealed that he penetrated the complainant twice, *per anum* and *per vaginam*. The complainant and another child witness were forced to relive the incident given Mr Yali's failure to accept responsibility for his conduct.

[14] The factors relied upon by Mr Yali as substantial and compelling have been considered in their totality. The main factors in his favour are that he is a first offender who was 21 or 22 years of age at the time of the incident. Other factors, including that the rape was carried out seemingly spontaneously and opportunistically on a single occasion, carry less weight when given proper consideration. While Mr Yali's very low level of education is not unusual, it combines with his lack of employment and independence, as well as his drug problem, so that he presents as an unsophisticated individual. Applying the test in *S v Matyityi*, but unlike the facts in that matter, the available evidence justifies the conclusion that his level of immaturity at the time was such that this constitutes a genuine mitigating

²¹ *S v Zitha* 1999 (2) SACR 404 (WLD) at 418*h-l*, as quoted in *S v B* [2022] ZAECHGHC 12 para 18.

²² *S v Bull* 2001 (2) SACR 681 (SCA) para 21.

²³ *S v Dodo* 2001 (1) SACR 301 (E).

²⁴ Ss 28(1)(d), 12(1)(c) 14 and 10 of the Constitution of the Republic of South Africa, 1996.

factor in the present circumstances.²⁵ There is no basis for suggesting any remorse or appreciation of the trauma he has caused the complainant, or the fact that this will be long-lasting. It is so that there is no evidence of any threat towards the complainant, or indeed the other child witness who testified, or any indication of gratuitous violence during the commission of the offence. I have also considered the lengthy period of time already spent in custody and the reason for this.

[15] The fact that a prescribed sentence is considered disproportionate is itself a basis to find that there are substantial and compelling circumstances to warrant a departure from a prescribed sentence.²⁶ As Goosen J held in *S v Weideman*:²⁷

‘Life imprisonment is the most severe sentence that can be imposed by a court. For this reason it is, generally speaking, reserved for the most serious and egregious criminal acts. It is also reserved for those instances where the criminal poses a clear and present danger to the society and where there is little or no prospect of rehabilitation of the criminal and reintegration of that individual into society. This does not however mean that a court should keep something in reserve on the basis that some more serious manifestation of the crime can be imagined. It means only that the sentence of life imprisonment must be proportionate to the nature of crime for which it is imposed.’

[16] On the whole, following consideration of the nature of the offence, its impact on the complainant, the interests of society and Mr Yali’s personal circumstances, I consider there to be sufficient grounds to warrant departure from the prescribed minimum sentence in this instance. Notwithstanding the various aggravating considerations highlighted, it would, in my view, be unjust and disproportionate to impose a life sentence on Mr Yali, particularly given his clean record and age at the time of the offence, coupled with his personal circumstances, considered

²⁵ *Matyityi* above n 10 para 14.

²⁶ See *S v Weideman* [2014] ZACPEHC 62 (*Weideman*) para 7.

²⁷ *Ibid* para 14.

cumulatively. These circumstances are entered into the record as substantial and compelling on the facts of this case.²⁸

[17] The court is now enjoined to consider an appropriate sentence and must exercise a reasoned discretion in evaluating the various relevant factors highlighted above in order to arrive at a proportionate outcome. It goes without saying that the task is a complex and onerous one, involving various competing considerations. The requirement of proportionality applies equally in relation to cases where sentences have been prescribed by legislation.²⁹ It cannot be ignored that gender-based violence, including child rape, continues to devastate lives and negatively impact upon families and communities. Sadly, many women, including children, live in constant fear of precisely this type of occurrence. The remarks of the court in *S v Ro and Another*³⁰ are apposite:

‘The moral reprehensibility of rape and society’s abhorrence of this rampant scourge are unquestioned. The most cursory scrutiny of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalties. This reprehensibility and abhorrence are so much more pronounced in the instances of the rape of very young children, as is the case here. ... [T]he complainant was an innocent, defenceless and vulnerable victim.’

[18] Given the circumstances, a lengthy sentence of direct imprisonment is unquestionably warranted.³¹ But each situation is different and the nuances of the various considerations must be weighed. In coming to a decision, I have accepted, that Mr Yali is a young man who committed a despicable single act, for which he has expressed no remorse.³² He has never previously fallen foul of the law. The offence he committed is by its nature extremely serious and involved gender-based violence. While Mr Yali was a family relative of the complainant’s friend, it cannot be said that

²⁸ Cf *TM* above n 16 para 12.

²⁹ *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488f-g.

³⁰ *S v Ro and Another* 2010 (2) SACR 248 (SCA) para 15.

³¹ See *Seedat v S* [2016] ZASCA 153 para 38 *et seq*, on the efficacy of restorative justice as an inappropriate sentencing option in cases involving serious offences.

³² See *Weideman* above n 26 para 13.

he held a position of trust similar to cases that have considered this as an aggravating feature.³³ I have also considered that the incident occurred away from the child's home. Leaving aside the physical injuries, the psychological impact is likely to be long-lasting. Regrettably, as has previously been observed, no imposition of punishment on the offender will restore the childhood that has been stripped from the victim.

[19] Balancing the various considerations in the light of all the circumstances, and bearing in mind the period in excess of two years already spent in custody, I consider a sentence of 21 years imprisonment to be appropriate, giving Mr Yali some opportunity to rehabilitate while punishing him heavily for his conduct and the harm he has caused to his victim and to society. Given the nature of the offence, various other consequences emanating from legislation follow. These have been included as part of the order.

Order

[20] The following sentence is imposed:

1. The accused, Hlumelo Yali, is sentenced to 21 years imprisonment in respect of the conviction of rape involving a seven-year-old child.
2. In terms of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the accused, as a convicted sexual offender, must be included in the National Register for Sex Offenders.
3. In terms of section 120(4) of the Children's Act 38 of 2005 and section 41 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the accused is declared to be unsuitable to work with children, and it is directed that his particulars be entered in Part B of the National Child Protection Register.

³³ *M v The State* [2022] ZASCA 3 para 53.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 20 February 2025

Delivered: 21 February 2025

Appearances:

Counsel for the State: Adv Hendricks
Director of Public Prosecutions
Makhanda

Counsel for the Accused: Mr Geldenhuys
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