



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

Case No.: CC07/2025

Reportable	Yes/No
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In the matter between:

THE STATE

versus

M[...] S[...]

ACCUSED

JUDGMENT ON SENTENCE

Cengani-Mbakaza AJ

Introduction

[1] In his book, CR Snyman notes at page 10,¹ that sentencing constitutes a profound infringement on the accused's fundamental human rights, including

¹ Criminal Law CR Snyman sixth edition at page 10.

freedom of movement, privacy and dignity. However, in a society that values human rights like ours, this infringement necessitates a robust justification.

[2] As Hogarth² appropriately notes that in the entire criminal process there is no decision more complex and challenging than that faced by a sentencing judge. Despite the intricate and daunting challenges we face during sentencing stage, we must not succumb to despair. Our courts have clearly established guidelines on how to approach the sentencing of offenders.

[3] To begin with, it is significant to acknowledge the purpose of punishment. The retribution theory which is distinct from revenge posits that the severity of punishment should be proportionate with the severity of the harm caused. This approach seeks to balance the scales of justice by holding the offender accountable to the same degree as the harm inflicted on the victim. By so doing, retribution expresses solidarity to both the victim, while also upholding the principles of justice.³

[4] The prevention theory of punishment enables the court to proactively prevent crime, especially to serious offences such as the one currently under consideration. Additionally, the concept of deterrence plays a crucial role, comprising both individual and general deterrence. The society expects the courts to discourage offenders from committing similar crimes, thereby preventing the normalisation of criminal behaviour. Furthermore, the rehabilitation of the offender is one of the key elements which aims at reforming the offender to become a normal law-abiding member of the community once again.⁴

[5] As early as 1969, the Appellate Division⁵ expounded what is commonly known as a triad approach, a foundational principle that remains relevant even today. This approach consists of the nature of crime, the personal circumstances of the offender as well as the interest of the society. With the advent of our constitutional democracy the law has evolved to place the victims at the centre of criminal justice system in particular during the sentencing process. This development

² Hogarth, *Sentencing as a Human Process* (1971) in regard to sentencing in Canada.

³ Ibid 1, page 12-13.

⁴ Ibid 1, page 17.

⁵ S v Zinn 1969 (2) SA 537 (A).

resonates with the notion that everyone is equal before the law and equal protection of the law.⁶ The Supreme Court of Appeal (SCA) in *S v Matyityi*⁷ strengthened this proposition.

[6] In the present matter, I am mandated to sentence the accused following a conviction of rape which is in contravention of s 3 of the Criminal Law Sexual Offences And Related Matters Amendment Act 32 of 2007 (SORMA). As evident from the findings in the main judgment, the accused perpetrated multiple instances of anal sexual intercourse upon an 11-year-old girl child. Pursuant to Section 51(1), Part 1, Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA), the prescribed sentence for this offence is imprisonment for life. However as required by the law, the court may only deviate if the accused shows the existence of substantial and compelling circumstances.

[7] The substantial and compelling circumstances are not defined, however, the SCA in *S v Malgas*⁸ held:

‘[25] E. The legislature has however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean all other considerations are to be ignored. F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in sentencing process . G The ultimate impact of all circumstances relevant to sentencing must be measured against the composite yardstick(“substantial and compelling” and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained...’

[8] The SCA in *Malgas*⁹ extensively analysed the concept of substantial and compelling circumstances. At paragraph 25D, the court emphasised that deviation

⁶ Section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁷ 2011 (1) SACR 40 (SCA) para 16-17.

⁸ [2001] ZASCA 30.

from the prescribed sentences should not be based on frivolous or flimsy reasons . In this regard, the SCA's stance is that speculative hypothesis favourable to the offender, sympathy, aversion to imprisoning first-time offenders and personal doubts about the efficiency of the sentencing policy are all irrelevant considerations.

[9] I now proceed to deal with all the surrounding circumstances of this case.

(a) The nature and seriousness of the offence

[10] The list of aggravating circumstances presented by Ms Van Rooyen, counsel for the state is not overstated. A child born on 14 June 2013 was subjected to sexual abuse by her paternal uncle, who breached the trust and authority placed in him as a father figure. The accused was entrusted by the family, including the complainant's mother, who would often leave her minor children in his care.

[11] Notably, the accused's position as a pillar of strength in the family, due to the complainant's mother's physical disability, enabled him to conceal the crime. The trauma and the pain inflicted on the child, which is exacerbated by the circumstances, including emotional distress caused to the mother upon learning of the abuse, can hardly be over-emphasised.

[12] According to the report compiled by Ms Stamper, a clinical psychologist (Exhibit "F"), following the traumatic incidents of rape, the complainant has demonstrated significant behavioural changes. Specifically, the report notes that the complainant now experiences intense anger towards her mother and frequently engages in physical altercations with friends, behaviours that were previously uncharacteristic of her.

[13] The complainant expresses feelings of guilt and self-blame for the traumatic experience stating that she should have prevented the repeated instances of sexual abuse. Furthermore, after disclosing the incidents , she became frustrated with having to repeatedly recount the events, which added to her distress.

⁹ Fn 8 above.

[14] According to Ms Stamper's assessment, the child struggles significantly with trust issues and feeling of unsafety. There is a high risk of her developing rebellious behaviour, running away from home and experiencing increased violence and anxiety. Furthermore Ms Stamper notes that the child is vulnerable to developing depression, suicide and other long-term consequences.

(b) The personal circumstances of the accused

[15] Mr Solani, counsel for the defence presented the accused's personal circumstances as follows: The accused was born on 05 April 1987. He is currently 37 years of age, residing at Tambo Village in Komani. He is unemployed residing with his mother, aged 67. His father died when he was of tender age. He failed grade 12 and struggled to find a job. The accused is a first offender in that no previous convictions were proved against him.

(c) The interest of the society

[16] Counsel for the state reminded the court to take cognisance of the Preamble of SORMA. This preamble emphasises the importance of protecting the rights of victims, particularly women, children and people with mental disabilities. The preamble highlights the need to recognise the rights to equality¹⁰, privacy, dignity¹¹, freedom of and security of persons, which includes the right to be free from all forms of abuse.¹²

[17] As highlighted above, it is the expectation of the society that offenders be punished for their criminal conduct. Notwithstanding this, it is imperative to note that punishment that is excessive serves neither the interest of justice nor the society.¹³ By considering the interest of the society the court aims to balance the need for punishment with the broader social implications of the sentence.

¹⁰ Section 9 of the Constitution.

¹¹ Section 10 of the Constitution.

¹² Section 12(1) of the Constitution.

¹³ S v Scott-Crossley 2008(1) SACR 223 (SCA) at para 35.

[18] Sentencing is one of the measures in maintaining law and order, upholding societal norms and promoting accountability. Appropriate sentences reinforces public trust in the criminal justice system. Therefore, the courts are duty-bound to demonstrate that the criminal justice system is fair and effective to upholding the rule of law. In *S v Banda*¹⁴ Friedman J, held:

‘The court fulfils an important function in applying the law in the community. It has the duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no space in life it does not include. The court must also by its decisions, and imposition of sentence, promotes respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender. The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquillity in the land needs to be taken into account.’

[19] Children are vulnerable members of the society, and as upper guardians, courts bear the responsibility to safeguard their best interests. In *De Reuck v DPP WLD*¹⁵ Epstein AJ held:

‘The fact that the Constitution regards a child’s best interests as of paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children.’

Discussion

¹⁴ 1991 (2) SA 325 (BG).

¹⁵ 2003 (1) SACR 448 (WLD) @ 457b-d.

[20] Mr Solani argued that unlike in *Mahomotsa*¹⁶ where a knife and a firearm were used in the perpetration of the crime of rape, no weapon was used in this matter. The accused has been in custody for approximately five months awaiting his trial. The complainant suffered no physical injuries. All these factors, so he submitted, combined with the accused personal circumstances as reflected above, constitute substantial and compelling circumstances.

[21] In contrast, Ms Van Rooyen argued that considering the seriousness of the rape charge combined with all the aggravating features, there are no substantial and compelling circumstances that would cause the court to deviate from the sentence prescribed.

[22] There is no doubt that rape is a very serious offence. In *S v Abrahams*¹⁷ Cameron JA made a very powerful statement regarding a rape charge committed by a family member. The court held:

‘Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter’s body constitutes a deflowering in the most grievous and brutal sense and it constituted an egregious and aggravating feature of the accused’s attack upon his daughter.^{124/5} Family member is also a member of the wider public and equally deserving as the rest of the public of protection against rapists. Rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel he can exercise a proprietary entitlement. The family victim may for reasons of loyalty or necessity feel that she must conceal the crime and may internalize the guilt or blame associated with the crime, with lingeringly injurious effects. In particular so when the victim is the rapist’s own daughter and more so when she is of tender

¹⁶ *S v Mahomotsa* 2002 (2) SACR p 435-436 para-C-E.

¹⁷ 2002 (1) SACR 116 (SCA) at para 123.

years. Incestuous – deep social and religious inhibitions and stigma – effects may linger longer than with an extra familial rape.’

[23] The above statement encapsulates some of the consequential features of this rape charge as highlighted by the clinical psychologist. In my view, the accused’s position of trust and authority was a potent weapon that enabled him to exploit the child. We have reached a stage where we need to recognise that rape is a heinous crime that cannot be measured on a scale of brutality. Every instance is devastating and its impact should not be diminished by comparisons. In my opinion, the argument that this rape charge is less serious because there was no physical weapon used is devoid of merit.

[24] Moreover, given the gravity of the offence and its detrimental effect on society, the four- month period that the accused spent in custody is insignificant. Pursuant to the provisions of s 51(3)(Aa)(ii) of the CLAA, the absence of injuries in a rape case does not constitute substantial and compelling circumstances. In any event, in this matter the complainant suffered excruciating pains and dilatation of her anal orifice. In terms of the clinical psychologist’s report, she battles with controlling bowel movements and managing incontinence, as a result of the ordeal.

[25] Upon consideration, I conclude that the circumstances presented by the accused before this court are flimsy reasons that, as indicated by the SCA in *Malgas*¹⁸, cannot constitute substantial and compelling circumstances.

Order

[26] Having considered all the factors of this case, the following sentence is imposed:

1. In terms of sections 51(1) Part 1 of Schedule 2, of the Criminal Law Amendment Act 105 of 1997, the accused is sentenced to imprisonment for life.

¹⁸ Fn 8 infra.

2. 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 unsuitable to work with children. It is directed that his particulars be entered in Part B of the National Child Protection Register.
3. 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 must be included in the National Register for Sex Offenders.
4. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the accused remains unfit to possess a firearm.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the state : Adv Van Rooyen
DPP, Makhanda

For the accused : Mr Solani
Legal Aid-SA, Makhanda

Date Heard : 27 March 2025

Date Delivered : 28 March 2025