



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – EAST LONDON CIRCUIT COURT)**

Case No: CC59/2024

In the matter between:

THE STATE

and

SISONKE GWAVU

Accused

JUDGMENT ON SENTENCE

Metu AJ

INTRODUCTION

1. On 21 January 2025, the Accused was convicted of rape on diverse occasions in that he had sexual intercourse with a nine (9) year old girl *per anum* and *per vaginam* without her consent and against her will.
2. The Accused was seventeen (17) years of age when the first incident of sexual intercourse *per anum* took place.

3. Consequently, Mrs Mthini applied to have a probationer's/pre-sentence report by a Social Worker, which application was granted.
4. The matter was postponed and scheduled for sentence proceedings from 1 to 4 April 2025.
5. When the matter resumed according to the schedule referred to above, two (2) reports were presented, one being the Complainant's Psychological Report and the other the Accused Pre-Sentence Report. These were accepted and marked as exhibits "E" and "F" respectively.
6. By agreement between Counsel for the State and for Defence, the authors of the reports were not to be called to testify on them, as they accepted their contents.
7. It bears mention that the State in the indictment, invoked provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("CLAA") because the victim is a girl under the age of eighteen (18) and was raped more than once.

PREVIOUS CONVICTIONS

8. The State submitted a report from the South African Police Service Criminal Record System ("SAP 69") showing that the Accused has no record of previous convictions. This record was accepted as Exhibit "D" in the bundle of documents.

DISCUSSION

9. Mrs Mthini submitted that the Court should consider the Accused's youthfulness and lack of maturity. At the time of the first incident the Accused was seventeen (17) years of age.
10. She conceded that on the second occasion, the Accused had attained majority, as he had turned eighteen (18).
11. Mrs Mthini contended that the Accused left school because he had to look after his mother, whose health was deteriorating. According to Mrs Mthini, the

Accused was responsible for looking after his bedridden mother and his young niece (the Complainant) before he even turned seventeen (17).

12. The accused is a first offender. Mrs Mthini further highlighted that the Accused has been in custody for approximately a year as of his sentencing.
13. She averred that the Accused is a 19-year-old boy who was arrested before he went to initiation school, pursuant to the customs and practices of amaXhosa. After serving his sentence, he will still have to attend to initiation even at a ripe age.
14. Mrs Mthini stated that the evidence from the nurse (Ms Pumla Tande) was that the wide hymenal orifice was suggestive of grooming. Mrs Mthini was of the view that this observation and analysis by the nurse meant there was no vaginal penetration.
15. Mr Bartman stated that the heinous crime of rape is prevalent, and this was perpetrated against a young and innocent girl who could not defend herself.
16. He further submitted that the Accused, being an uncle to the Complainant instead of being a protector, was the perpetrator of the crime.
17. Mr Bartman countered by saying the Court must consider the age of the child victim, who was nine (9) years of age and that she was raped more than once.
18. The Accused showed no remorse.
19. According to Mr Bartman the legal requirement of penetration was met.
20. Mr Bartman advanced the proportionality principle established and entrenched in numerous Constitutional Court decisions, arguing that the Accused's sentence must be proportionate to the gravity of the offending behaviour.
21. The report by Social Work Practitioner, Ms Nomonde Precious Stamper ("Ms Stamper") depicts the Accused as a youngster who did not display any behavioural problems before these incidents took place. The Accused left school while in grade 7 to look after his sickly mother and niece (the Complainant).

22. In her report, Ms Stamper evaluated various sentence options. She recommended direct imprisonment, considering that the Accused is in denial. According to Ms Stamper, the Accused can benefit from the various Rehabilitation and Victim/Offender Dialogue Programmes offered at the Correctional Centres.
23. The report by Ms Pumza Sakasa ("Ms Sakasa"), a Clinical Psychologist, records that the Complainant reached her developmental milestones at expected times as a child. She has age-appropriate friends and can assist with certain household tasks at home.
24. Ms Sakasa further records that the Complainant after the rape incidents often displays a sad and depressed mood mainly when the subject of rape incidents is brought up. She becomes tearful or cries without much provocation.
25. Other significant changes regarding the Complainant's behaviour that were observed after the rape incidents are:
 - 25.1. she easily gets startled and frightened, such that she does not like people talking to her in a loud voice;
 - 25.2. initially, the Complainant had a poor appetite, which resulted in weight loss. Recently, she has been eating too much, as if she is not fully aware of the act and is just absent-mindedly engaging with the process.
 - 25.3. she has developed trust issues and gets flustered when approached by male figures, though she eventually is able to contain herself.
26. It cannot be controverted that rape, especially of a minor child is a serious offence. In this matter, there is evidence that on both occasions, there was an axe that the Accused put next to the bed where the Complainant was raped. However, there is no evidence that this was used in any manner that further traumatised the Complainant.
27. The clinical report ("J 88"), does not give much assistance in depicting any serious injuries. It must be borne in mind that the Complainant was taken to

the medical facility after a relatively long period after the occurrence of rape on the second occasion.

ANALYSIS

28. In **S v Zinn**¹ the following triad was developed:
 - 28.1. the crime;
 - 28.2. the offender; and
 - 28.3. the interests of society.
29. There is a prevalence of rape of children. In as much as the age gap between the Accused and the Complainant is about nine (9) years, the Accused, on his version, was looking after his sickly mother, who was bedridden and also the Complainant. The Accused is a maternal uncle to the Complainant
30. The repeated conduct by the Accused in violating the minor child victim is an aggravating factor, more so that the second incident occurred when the Accused had attained majority. In **S v Matyityi**², the appeal Court increased a sentence of twenty-five (25) years to life imprisonment on the basis, *inter alia*, that the Respondents conducted themselves with flagrant disregard for the sanctity of human life or individual physical integrity. The Court found that the respondents acted in a manner that was despicable in any civilised society, particularly relating to the protection of the rights of all persons, including women. In this matter, I extend this expression to include children.
31. In **Matyityi** it was held that sentences that are imposed should reflect that the law takes the victims' trauma into account.
32. Lewis JA as a scribe in **Nkomo v The State** had this to say³:

¹ 1969 (2) SA 537 @ 540 G: where Rumpff JA aptly stated: 'What has to be considered is the triad consisting of the crime, the offender and the interest of society.'

² 2011 (1) SACR 40 (SCA).

³ *Nkomo v The State* 2007 (2) SACR 198 (SCA) @ para 1.

“...In Rape, when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice, attracts a minimum sentence of life imprisonment unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.”

33. The learned Judge considering the dicta in **Malgas** in paragraph 3 aptly stated⁴:

“...In Malgas, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused’s moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course, these must be weighed together with aggravating factors. But none of these need be exceptional.”

34. In paragraphs 15 to 16 of **Nkomo**, Lewis JA makes a substantive analysis of how the test should be applied to determine whether substantial and compelling circumstances were present. He writes:

“In S v Mahomotsa, this court pointed out that even in the case of a serious and multiple rape, a sentence of life imprisonment need not necessarily be imposed. If there are compelling and substantial circumstances ...

It perhaps requires to be stressed that what emerges clearly from the decisions in Malgas and Dodo is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other

⁴ Loc cit @ para 3.

uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognizance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past.

....

Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and, therefore, that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."

[my underlining].

35. That being said, the rapes concerned here, though very serious, cannot be classified as falling within the worst category of rape. Having regard to the evidence in totality, and considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence, I find that there are substantial and compelling circumstances warranting deviation from the prescribed minimum sentence
36. In deciding on an appropriate sentence, I have to consider certain mitigating and aggravating factors in conjunction with the *Zinn* triad to establish whether

certain factors, such as the prospects of rehabilitation, can be viewed as “substantial and compelling” during the sentencing process.

37. Concerning the evidence presented before this Court, I evaluated it cumulatively to establish whether there were or were not substantial and compelling circumstances as envisaged in Section 51(3) of the CLAA to deviate from the minimum sentence for this type of crime. I find that there are substantial and compelling circumstances that the permit application of Section 51(3) of the CLAA in that the prescribed minimum sentence not be applied.
38. Section 28(2) of the Constitution of the Republic of South Africa Act, 108 of 1996, enjoins the Courts to consider children's interests paramount in any matter involving them.

SENTENCE

39. As a result, I make the following order:
 - 39.1. The Accused is sentenced to eighteen (18) years imprisonment.
 - 39.2. The Accused's personal details will be included in the National Register for Sexual Offenders established under section 42(1) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

B METU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

for the State: *Adv. Bartman*
instructed by: Director of Public Prosecutions
Mkhanda

for the Defence: *Adv. Mthini*
instructed by: Legal Aid Board SA
Qonce

Date of hearing: 02 April 2025.

Date of Delivery: 04 April 2025.