

SOUTH AFRICA / JUDGMENT

S v Ayuk and Others (Sentence) (CC46/2019) [2024] ZAWCHC 395 (15 November 2024) [2024] ZAWCHC 395

COURT

Western Cape High Court, Cape Town

BEFORE

A De Wet

CASE / FILE NUMBER

CC46/2019

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FLYNOTES: CRIMINAL – Human trafficking – Sentence – Lured victims under false pretense – Victims held captive by fear and fed drugs – Witnessed and were subjected to vicious and inhumane assaults – Severe and long-lasting detrimental impact to child victims – Prayed on vulnerable children – Best interests of children and society – Complainants were defenceless victims who were subjected to abuse of worst form – Accused 1 is sentenced to life imprisonment for each human trafficking count, with accused 2 and 3 receiving lesser sentences.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: CC46/2019

In the matter between:

THE STATE

and

EDWARD AYUK

Accused 1

LEANDRE WILLIAMS AYUK

Accused 2

YANNICK AYUK

Accused 3

JUDGMENT:

SENTENCING

DE WET, AJ:

- [1] This matter has come to the stage where an appropriate sentence for the crimes of which the accused were found guilty needs to be determined.
- [2] On 24 May 2024 accused 1 was convicted of 28 counts ranging from human trafficking, using the services of a victim of human trafficking, living on the proceeds of prostitution, kidnapping, assault with the intention to do grievous bodily harm and dealing in drugs. Accused 2 was convicted on 3 counts of human trafficking and accused 3 was convicted of 3 counts of human trafficking, 3 counts of using the services of a victim of human trafficking, 3 counts of living on the earnings of prostitution and 3 counts of kidnapping.
- [3] It has often been stated that punishment must fit the criminal, as well as the crime, be fair to society and be blended with a measure of mercy. When sentencing, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in *S v Zinn* 1969 (2) SA 537 (A) which are the personal circumstances of the offender, the nature and seriousness of the offence committed and the interests of society.
- [4] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the “CLAA”) prescribes the minimum sentence applicable on the charges of trafficking in persons for sexual purposes as a sentence of life imprisonment and/or a R100 million fine.[1]
- [5] In terms of the provisions of s 51(2) of the CLAA the applicable sentence on the charges relating to using the services of a victim of trafficking attracts a minimum sentence of 15 years imprisonment and/or a fine, and the conviction on the possession and confiscation of an identification document attracts a minimum sentence of 10 years imprisonment and/or a fine.
- [6] With reference to count 33, s 51 (2)(a) of the CLAA, Part III of Schedule 2, prescribes that the minimum sentence for a first offender is imprisonment for a period not less than 10 years for assault with intent to do grievous bodily harm on a child under the age of 16 years.
- [7] It is trite that unless a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence as regulated in s 51(3) of the CLAA, the minimum prescribed sentence must be imposed.

- [8] Section 51(3) (a) dictates that: "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist 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 may thereupon impose such lesser sentence."
- [9] In *S v Fatyi* 2001 (1) SACR 485 SCA, Melunsky AJA at p 488 para [5] (with reference to the case of *S v Malgas* 2001 (2) SACR 469 (SCA)), considered the criteria pertaining to the determination of what substantial and compelling circumstances are, as follows: "The first is that a court has the duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders (para [9]). It follows, too, that for the circumstances to qualify as substantial and compelling they need not be exceptional in the sense of seldom encountered or rare (para [10]), nor are they limited to those which diminish the moral guilt of the offender (para [24]). Generally, however, the Legislature aimed at ensuring a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response. In other words the prescribed sentences were to be regarded as generally appropriate for the crimes specified and should not be departed from without weighty justification for doing so (para [8] and [18]). Where the court is convinced, on a consideration of all the circumstances, that an injustice will be done if the minimum sentence is imposed, it is entitled to characterise the circumstances as substantial and compelling (para [22])."
- [10] In *S v Matyityi* 2011(1) SACR 40 (SCA) the court cautioned against deviation from the minimum sentences as prescribed by the legislature for flimsy reasons as there is a duty on the Courts, despite any personal doubts about the efficiency of the policy, or aversion to it, to implement those sentences.
- [11] Section 14 of the Prevention of and Combating of Trafficking in Persons Act 7 of 2013 (the "Human Trafficking Act") dictates that if a person is convicted of any offence under Chapter 2, 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."

[12] The objects of the Human Trafficking Act are set out in s 7 as:

"The objects of this Act are to-

- (a) give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements;
- (b) provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties;
- (c) provide for the prevention of trafficking in persons and for the protection of and assistance to victims of trafficking;
- (d) provide services to victims of trafficking;
- (e) provide for effective enforcement measures;
- (f) provide for the co-ordinated implementation, application and administration of this Act, including the development of a draft national policy framework; and
- (g) combat trafficking in persons in a co-ordinated manner."

[13] Section 10 of the Human Trafficking Act stipulates that:

"(1) Any person who –

- (a) attempts to commit or performs any act aimed at participating in the commission of;
 - (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or
 - (c) conspires with any other person to commit, an offence under this Chapter is guilty of an offence.
- (2) A person who is found guilty of an offence referred to in subsection

- (1) is liable, on conviction, to the penalties for the offence in question, as provided for in section 13.”
- [14] In terms of s 17 of the Drugs and Drug Trafficking Act 140 of 1992, a person convicted of an offence under that Act shall be liable in the case of an offence referred to in s 13(e), to a fine or imprisonment not exceeding 10 years.
- [15] During the sentencing proceedings the court received pre-sentencing reports in respect of accused 1 and 3 and a pre-sentencing report and additional social worker reports in respect of accused 2. Victim impact reports in respect of [CJ] dated 12 July 2024, [SM] dated 18 March 2022, [MA] dated 22 March 2022, [ND], dated 2 September 2022, [SD] dated 22 July 2022 and [SN] dated 25 September 2024 were also submitted. I do not repeat the contents of the reports herein as it forms part of the record of proceedings as the reports were admitted as exhibits.

Accused 1: personal circumstances

- [16] Accused 1 is a 44-year-old male from Cameroon who came to South Africa in 2006 due to civil unrest in his home country. He married accused 2 on 10 September 2008 in community of property and they are still so married. They have two minor dependent children. They are being cared for at the J[...] Child and Youth Care Centre in terms of 150(1)(a) of the Children's Act 38 of 2005. The children were living with accused 2 in Springbok when accused 1 was arrested in September 2017.
- [17] The accused completed high school and previously worked as a street vendor and also operated tuck shops for income. He also traded in vehicles and helped out at his uncle's[2] night club in Long Street, Cape Town from time to time.
- [18] Accused 2 moved to Springbok during about 2012 after the birth of their second child. He remained in contact with the minor children. His evidence was that he collected them from time to time in Springbok or would arrange for them to come to him with a Taxi. He contributed to their maintenance by buying clothes and sending money from time to time. He stopped contributing to their maintenance when accused 2 received a pay out from the Road Accident Fund.
- [19] Accused 1 is a devout and practising Roman Catholic. He suffers from chronic kidney stones but is otherwise in good health. He does not use drugs and is not affiliated with any gangs. His father passed away from a stroke after his incarceration and his mother is sickly.
- [20] He has no previous convictions.
- [21] He was arrested on 12 September 2017 and has been awaiting trial in custody since. This is a substantial period.[3] He did not apply for bail.

[22] He persists that he is not guilty of any of the charges he was convicted of. He maintains that the police have fabricated the charges against him and have influenced all the witnesses and other police officers to level the false charges against him and the other accused.

Accused 2: personal circumstances

[23] Accused 2 is a 40-year-old female and was arrested on 11 September

2018. She was initially detained at the Upington Correctional Facility. On 3 February 2018 she was transferred to the Pollsmoor Women's Prison. She was released on bail on 20 August 2021. She has been in custody since she was convicted on 24 May 2024.

[24] The accused has 4 children, namely: [CAW] who was born on 25 November 2002 (he is 21 years old), [AA] who was born on 28 March 2008 (he is 16 years old), [JW] who was born on 4 March 2012 (she is 12 years old) and [EW] was born on 24 August 2016 (he is 8 years old).

[25] The accused instituted divorce proceedings through Legal Aid South Africa in March 2017 in the Regional Division of the Magistrate's Court of Springbok. The divorce summons has not been served.

[26] A pre-sentence report compiled by Mr. Leo [Exhibit "CCC"] was admitted into evidence as well as a reports from the Executive Welfare Council of the AFM of SA compiled by Ms. A.E. van der Westhuizen [Exhibits "DDD" and "EEE"] on behalf of accused 2.

[27] Accused 2, her older brother and her oldest son, [CAW] testified in mitigation of sentence. Accused 2 testified that she had witnessed and was exposed to sexual abuse and rape during her formative years and admitted to working as a prostitute and using drugs. She testified, for the first time, that she was also abused and assaulted by accused 1 on several occasions in a similar manner as testified to by the victims. She also reported the abuse suffered at the hands of accused 1 to the social worker, Mr Leo, who recorded same in his report. Her belated statements in this regard were corroborate by her son and one of the victims [SM]. According to Mr Leo, [SM] told him that accused 2 on various occasions came to her assistance and

diverted blows meant for her from accused 1. Her brother denied any knowledge of these assaults, persisted that accused 1 is a good person and stated he had no knowledge that accused 2 worked as a sex worker.

[28] She testified that the reason why she spoke loudly at times during the court proceedings, was due to her having partially lost her hearing as a result of an assault on her by accused 1. She also had a metal pin in her ankle resulting from an assault by accused 1 on her.

[29] Accused 2 left home at a young age and looked after herself. She realised that by using her sexuality and looks, she could live from favours bestowed upon her by men. Eventually she earned a living as a sex worker. Apparently, she did not at first realise that sex work was frowned upon.

- [30] After accused 2 left accused 1 to live with her children in Springbok, accused 1 contributed to the children's maintenance but he stopped when she received a payout from the Road Accident Fund. Accused 2 used these funds to buy a property in Springbok in her children's name. She sold alcohol and operated a brothel from her garage to earn an income. This property is currently being rented out.
- [31] Whilst awaiting the finalisation of the trial and even though she was out on bail, accused 2 could not manage to find sustainable income and reverted to doing sex work.
- [32] Accused 2 testified that she was traumatised by hearing the abuse suffered by the Springbok victims as she suffered the same abuse and had the same fear of accused 1. She stated during cross-examination that accused 1 treated them like animals by controlling and dominating them.
- [33] She admitted that she was responsible for introducing the victims to accused 1 and apologized in court for her role in the trafficking although she still denied that she was aware of the business operated from the premises in Brooklyn. She acknowledged that had it not been for her they would not have known accused 1.
- [34] Accused 2 has seen her minor children only once during the 4 years she was out on bail. Her explanation for the minimal contact is that they are living at a facility in the Northern Cape, which is very far away.
- [35] [CAW] testified that accused 2 was a good mother who always wanted the best for her children. According to him she sent him to live with his father when he was only 3 years old, as she wanted to protect him from the abusive conduct of accused 1. Accused 2 testified in the trial that she sent him away as she was so in love with accused 1. According to the evidence of [CAW], accused 2 always gave him money and nice clothing when he saw her. After she moved to Springbok in 2012 he started living with her again.
- [36] He expressed the view that he believed that his mother could turn her life around. He testified that he did not know that accused 1 was selling alcohol from their garage in Springbok or that she was a sex worker. He stated that if she had done so it was for her children.
- [37] He left school after his mother was arrested. He appealed to the Court to give accused 2 a second chance.
- [38] Accused 2 has two previous convictions. One for assault in 2004 and she also pleaded guilty to contravention of s 11 read with sections 1, 2, 50, 59, 60 and 61 of the Criminal Law (Sexual Offence and Related Matters) Act 32 of 2017 ("SORMAA") during 2018 and was convicted on 21 May 2019. She was sentenced to 3 years imprisonment wholly suspended for 5 years on condition that she not be convicted of any offence under SORMAA during the period of suspension.

Accused 3: personal circumstances

- [39] Accused 3 is a 33-year-old male from Cameroon who came to South Africa in May 2017. At first, he resided with and worked for his uncle in Parow Valley, and also assisted his uncle at his night club in Long Street, Cape Town and also worked at a construction company for a week or two. He completed high school and attained a certificate in building and construction. He completed a three-year apprenticeship in Cameroon.
- [40] He is married with one minor dependent child. The mother and child live in Cameroon.
- [41] Accused 3 is also a devout and practising Roman Catholic, does not use drugs and is not affiliated with any gang.
- [42] He has no previous convictions.
- [43] Accused 3 arrived in South Africa in May 2017 and had lived with accused 1 for at least a month or longer before his arrest in September 2017. Before moving in, he also regularly spent time at the house of accused 1. He remained in the rental premises of accused 1 in Brooklyn until he was arrested during November 2017.
- [44] Accused 3 was arrested in November 2017 and has been awaiting trial in custody since. This is a substantial period. He at some stage applied for bail but abandoned the application.

Mitigation:

Personal circumstances and rehabilitation:

- [45] In mitigation it was argued on behalf of accused 1 and 3 that the following factors constitute substantial and compelling circumstances to deviate from imposing the prescribed sentences: their personal circumstances, the period that they have been incarcerated in conjunction with the conditions in prison, and the relative ease with which they would be able to rehabilitate and reintegrate into society.
- [46] The personal circumstances of accused 1 do not in my view constitute substantial and compelling circumstances to deviate from the prescribed sentences.
- [47] In respect of accused 2 I take note that he was relatively young when he came to South Africa, and first lived with his uncle, worked to earn income initially and did not live and assist accused 1 with his trafficking business for an extended period of time. He also has a small child which he has not had contact with since his incarceration in 2017.
- [48] It was submitted on behalf of the accused that they could be rehabilitated even though they have not admitted to their crimes. This is difficult to understand, as rehabilitation is not possible without a person accepting responsibility.
- [49] I agree that accused 1 and 2 would be able to reintegrate into society with relative ease due to their religious affiliation and the fact that they do not abuse substances and would probably be able to find employment.

- [50] I was also referred to the matter *S v Young* 1977 (1) SA 602 (A) at 610 E-H where it was stated that: “[w]here multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.”
- [51] I agree that the offenses committed by the accused, which involved multiple counts, in respect of various individuals, to some extent all relate to human trafficking.
- [52] Even though each crime committed against each victim carries a serious and prescribed sentence in respect of some counts, cumulative sentences in respect of each complainant would in my view be excessively harsh.
- [53] On behalf of accused 2 it was submitted, in summary, that she was also a victim, that she is the primary caregiver of minor children and that her role in the trafficking activities were minimal.

Period of incarceration and prison conditions:

- [54] It was submitted on behalf of accused 1 and 3 that the period they had been incarcerated and the prison conditions at Pollsmoor constitutes substantial and compelling circumstances to deviate from the minimum sentences prescribed.
- [55] To this end accused 1 and 3 testified that Pollsmoor is overcrowded with prisoners not receiving sufficient nutritious food and/or medical attention which infringes on their basic human rights. I accept, and have considered, that there are challenges, and that human rights infringements may occur. These sentencing proceedings are, however, not the forum wherein the non-performance of the State can be addressed and there are various platforms where any alleged human rights violations in Pollsmoor or other prisons in South Africa can and should be raised.
- [56] According to accused 1 he contracted chickenpox and has had skin rashes whilst incarcerated. Accused 3 reported that he suffers from stress. Neither of them testified that they personally suffered any human rights violations whilst incarcerated. They both also appeared to be in good health on the many days they appeared in Court, which was over a lengthy period.
- [57] I agree that the substantial time spent awaiting trial is a factor which the Court should consider in deciding whether substantial and compelling circumstances exist to deviate from the prescribed life sentences the accused face.[4]

Aggravation:

- [58] In considering the aggravating factors set out in s 14 of the Human Trafficking Act, the evidence showed that accused 1 was the “kingpin” of the human trafficking business conducted from his rental home in Brooklyn, Western Cape. He, with the assistance of accused 2 in respect of the victims from Springbok, lured the victims to come to Cape Town to work for him with promises of being cared for and looked after. He was also the person who introduced and caused most of the victims to become addicted to the drug “rocks”.
- [59] The victims were held captive by fear. They not only witnessed, but was subjected to, vicious and inhumane assaults by accused 1. Detailed accounts of the physical, emotional and psychological abuse suffered by the victims at the hands of accused 1 has been set out in the judgment of 24 May 2024 and is not repeated herein.
- [60] [SN] was merely 15-years old, a child when she was trafficked and assaulted by accused 1.
- [61] I am mindful thereof that accused 1 is a first offender, that the conditions where the victims were held were reasonable in that there were beds and that they were given food and basic toiletries. It was not established that the business of accused 1 formed part of organised crime, though the same names and role players were repeatedly mentioned in the trial as either living or regularly being at the house in Brooklyn.
- [62] As to the nature of the relationship between the victims and accused 1, the testimonies of the victims from Springbok were that they trusted him because he was the husband of accused 2. The other victims all testified that he was initially very nice to them and cared for them and that they therefore trusted him. It was established that most of them had already found themselves in vulnerable positions.
- [63] The state of the victims’ mental health was dealt with in the victim impact and other reports submitted by the state. These reports highlight the severe and long-lasting detrimental impact the crimes committed against them have had on them. During their testimonies most of the victims broke down whilst relating to the Court how they were trafficked and abused by accused 1. Their hatred, resentment and fear of accused 1 was visible.
- [64] It appears from all these reports that accused 1 made false promises to the victims that he would protect them, but instead, they were held hostage, fed drugs and assaulted when they tried to break free from the cycle of abuse. Regarding the impact of the offences committed against [CJ] and [SM], Mr Leo reported, as quoted verbatim below, as follows:

“C[...] J[...] is ‘n slagoffer in hierdie saak. Sy is ‘n volwasse vrou. Sy vind dit uiters moeilik om oor die gebeure tydens haar aanhouding by die oortreders te kommunikeer. Sy wil graag die gebeure agter haar sit en aanbeweeg met haar lewe. Wat sy wel gedurende onderhoudvoering met die proefbeampte bespreek het kan as volg beskryf word: Die oortreder (Mnr Ayuk) het haar gevange gehou vir maande. Sy het verskeie pogings aangewend om te ontsnap maar was sy elke keer aangekeer deur die oortreder en sy trawante. Die slagoffer was dan met elektrisiese koorde en besemstokke aangerand. Sy beskryf dat die oortreder haar vorseer het om ‘n swaar emmer met warm water bo haar kop te balanseer terwyl so op haar hurke sit. Sy het vrees ervaar dat sy haarself sal brand indien sy nie die water emmer reg balanseer nie. Sy onthou hoe sy die oortreder gesmeek het om die gru daad te staak maar het sy te vergeefs

gesmeek. Sy erken dat sy tydens die aanhouding en daarna depressie ervaar het. Sy het erge vrees vir die oortreder (Mnr. Ayuk) ervaar. Sy verbaliseer 'n verlange na haar familie ten tye van die aanhouding by die woning. Sy moes seks met vreemde mans het teen haar sin. Die oortreder sou soms teenwoordig wees ten tye van die seksuele omgang tussen haar en dese vreemdelinge.

S[...] M[...] is 'n slagoffer in hierdie saak. Sy is volwasse en huidiglik in Matjieskloof woonagtig. Die slagoffer ervaar steeds trauma wanneer sy aan die dade wat sy moes deurstaan dink. Sy vermy enige kommunikasie oor die tydperk aan huis by oortreder (Mnr. Ayuk). Sy het egter in onderhoudvoering met die proefbeampte die volgende ervaring gedeel: Sy herroep dat sy pogings aangewend het om uit die kloue van die oortreder (Mnr. Ayuk) te ontsnap. Sy was egter onsuksesvol. Sy herroep oomblikke wanneer sy vir haar lewe gevrees het en dat die oortreder haar ontelbare kere met elektriese koorde en besemstokke aangerand het. Sy onthou hoe die oortreder (Mnr. Ayuk) haar kop onder water gedompel het en sy na asem gesnak het gedurende hierdie gru daad en geveg het vir haar lewe. Sy word steeds met vrees gevul wanneer sy aan die grudade dink. Sy onthou dat die oortreder (Me. Williams-Ayuk) telke kere tot haar redding gekom het deur die houe van die oortreder (Mnr. Ayuk) af te weer. Die slagoffer verbaliseer dat die aanrandings minder intens gevoel het wanneer sy onder die invloed van tik was en dat sy haar vergryp het aan die misbruik van die dwelm ten einde die tyranny van die oortreder te ontsnap.” [5]

[65] Turning to accused 2. When considering the aggravating factors set out in s 14 of the Human Trafficking Act, it appears that the role of accused 2 was to recruit victims in Springbok to work in the human trafficking business operated by accused 1 in Brooklyn. She was aware that the victims had poor family support, could easily be influenced and that at least two of the Springbok victims were already using drugs. She testified that the victims looked up to her as she had previously worked as a sex worker in Cape Town. She was also older than them and they trusted her. Given her evidence during the sentencing proceedings, she knew exactly what accused 1 was subjecting the victims to and that he used physical and emotional abuse to hold them captive. She was aware, given his conduct towards her, that he would treat them the same way. She also testified that she knew accused 1 was selling drugs, that he introduced her to smoking “rocks” and that they extended his business when

she moved in as she knew prostitution. According to her their businesses went “hand-in-hand”. She also stated that she worked for accused 1 as a prostitute and that he controlled everything about her life, had no freedom and lived in fear of his assaults.

[66] As with accused 1 there was no evidence that the trafficking business formed part of organised crime.

[67] When considering the factors listed in s 14 of the Human Trafficking Act in respect of accused 3, it appears from the evidence that his role was that of the enforcer. He assisted accused 1 with the transportation of the victims, sold drugs to them and cooked for them. If accused 1 was not there he took care of the business operations. There was no evidence that he caused any of the victims to become addicted to “rocks” or that they suffered any assaults

at his hands. He was however aware and present when they were assaulted and did nothing whilst living with accused 1 on the proceeds of prostitution. It does not appear that he had any particular relationship with the victims which is understandable, given his role in the business operated from the home of accused 1.

[68] Accused 3 persisted that he was innocent, knew nothing about the crimes he was convicted of and that the charges against him were fabricated by the police and that the witnesses were influenced by the police to make false accusations against him.

[69] The physical and psychological effects on the victims due to being held captive is contained in the victim impact reports.

Best interests of the minor children:

[70] It was submitted on behalf of accused 2 that I should deviate from the minimum sentences applicable to her based on the best interests of her children. This argument was premised on s 28 of the Constitution of the Republic of South Africa, 1996, which provides that a 'child's best interests are of paramount importance in every matter concerning the child'.

[71] In *S v M* 2009 (2) SACR 477 (CC) Sachs J explained this enquiry as follows:

“When considering whether to impose imprisonment on the primary caregiver of young children, did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?” In the majority judgment the duties of a court when sentencing a primary caregiver of minor children is set out and a primary caregiver is defined as 'a person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and attends school regularly’.

[72] I was also referred to and have considered the matter of *S v S* (Centre for Child Law as Amicus Curiae) 2011 (2) SACR 88 CC where it was held by Cameron J in the majority judgement that:

“62. S v M has revolutionized sentencing in cases where the person convicted is the primary caregiver of young children. It has reasserted the central role of the interests of the children as independent consideration in the sentencing process. Yet it would be wrong to apply S v M in cases that lie beyond its ambit. The mother in S v M was a single parent and was almost exclusively burdened with the care of her children. There was no other parent who could without disruption step in during her absence to nurture the children and provide the care they need and to which they are constitutionally entitled..” and at “63. That is not the case here ... A non- custodial sentence is therefore not necessary to ensure their nurturing. And a custodial sentence will not inappropriately compromise the children’s best interests.”

[73] In the matter of *S v Piater* 2013 (2) SACR 254 (GNP), it was held by Makgoka J, with regard to the best interests of minor children, that:

“[21] In S v M (Centre for Child Law as Amicus Curiae), (footnotes omitted), the majority of the Constitutional Court set out the duties of a court sentencing a primary caregiver of minor children. In para 28 the court defined a primary caregiver as 'the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly'. The court held that focused and informed attention needed to be given to the interests of the children at appropriate moments in the sentencing process. What is expected of the sentencing court is to give sufficient independent and informed attention, as required by s 28(2) and s 28(1)(b) of the Constitution (footnote omitted), to the impact on the children of sending their primary caregiver to prison. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk.”

[74] He summarised in para [23] that s 28(2), read with s 28(1)(b) of the Constitution, imposes four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue, namely to establish whether there will be an impact on the child; to consider independently the child's best interests; to attach appropriate weight to the child's best interests; and, to ensure that the child will be taken care of if the primary caregiver is sent to prison.

[73] It was disputed by the State that accused 2 was the children's primary caregiver of her minor children. I disagree. It was not disputed that the children lived with accused 2 after 2012 when she moved to Springbok until she was arrested in

2018. It was as a result of her arrest that the children were placed at a Child Care Facility where they still live.

[74] However, from the reports submitted to court it appears that the children are doing well, are properly cared for and are not at risk should accused 2 be further incarcerated. I share the view of Ms Van der Westhuizen that the two younger children will benefit from having contact with accused 2 whilst being in a secure and safe environment and that she should be placed in a facility close to the children in order to maintain contact. Her recommendations were that regular telephonic contact between the children and accused 2 take place at this stage; that their current placement at Jogébed Foster Home remains unchanged for a further period while the possible movement of the children closer to accused 2 is investigated; that accused 2 uses the opportunity to obtain a stable and safe environment and income and that accused 2 must work with the responsible social workers in order to ensure

re-unification with the children in future.

[75] Accused 2 has shown some degree of remorse for her deeds during the sentencing proceedings and had over the years, in her way, cared for and loved her children whilst living a troubled and at times a horrific life since her early years. It is not uncommon for victims of abuse to become perpetrators of the very same abuses they have suffered, and it appears that accused 2 had unfortunately not only for her own benefit, but also for the benefit of accused 1, trafficked and abused vulnerable women known to her.

The interests of society:

- [76] Our society is currently experiencing high levels of violent crime, especially violent crimes against women and children. In *S v Reay* 1987(1) SA 873(A) at 877C it was stated in this regard that: “The interests of society demand that offenders of serious crime be deterrently punished, hence the deterrent objective of sentencing as an element which seriously need to be considered in the interest of society. If offenders are punished too lightly for serious offences, the respect which society has for law and order, would be undermined”. Similarly and in *S v Du Toit* 1979(3) SA 846 (A) it was emphasised that serious crimes require that the objectives of retribution and deterrence should weigh more than the objective of rehabilitation of the offender.
- [77] The gravity of the offences of which the accused has been convicted of cannot be overemphasised. I agree with the submission by the State that in cases like these society demands that the Court must protect and enforce stringent sentences and that the interest of society and the seriousness of the offences must weigh heavier than the interest of the accused.
- [78] It was recognised in *S v Schwartz* 2004 (2) SACR 370 SCA at 378 c-d that serious crimes “Induce a sense of outrage in society and will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a relatively smaller role.”
- [79] I was also referred to the matter of *S v Msimanga and Another* 2005 (1) SACR 377 (OPD)[6] where it was held that: “The reason for the existence of the criminal justice system is to serve the interests of the public and sentencing, as an integral part of that system, has the same *raison d’être*. Violent conduct in any form can no longer be tolerated, and courts, by imposing heavier sentences, convey the message, on the one hand, to the prospective criminals that such conduct is unacceptable and, on the other hand, to the public that the courts take seriously the restoration and maintenance of safe living conditions. Deterrence is the over-arching and general purpose of punishment.” and “Since no civilized community should have to tolerate barbaric conduct, in cases of crime in particular the deterrence and retribution aims of punishment are to be preferred over those of prevention and rehabilitation which in such cases play a subordinate role.” I agree.

Seriousness of the offences:

- [80] The crimes committed by the accused were horrendous and the enormity of it can hardly be over emphasized.
- [81] Trafficking in Persons or Human Trafficking as it is commonly known is a heinous crime to its very core. It strips the victim(s) of their dignity as they are treated like a commodity, a slave. The Palermo Protocol stipulates that state parties must adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons especially women and children. South Africa is a signatory to the Palermo Protocol.

[82] In an effort to curb trafficking in persons, some provinces such as the Western Cape have formed provincial human trafficking task teams and a Rapid Response Team comprising of representatives from different provincial departments inter alia: Social Development, Education, Health, the SAPS, Justice and civil society stakeholders in the province. Such forums coordinate prevention, prosecution, and protection and partnership interventions through an inter-sectoral provincial action plan, to ensure outreach and awareness to instances of trafficking, and support for trafficked victims.

[83] In addition to imposing stringent penalties, the courts also pointed out other factors, such as gross human rights violations which underpins the seriousness and nature of this crime. In the matter of *S v Obi* (case number CC 40/2018 GP at para 8), Ranchod J held:

‘It (human trafficking) violates basic human rights and is the cause of immeasurable trauma to victims, their families and the communities in which they live.’

[84] The seriousness of the offence of trafficking in persons for sexual exploitation has been affirmed in many cases.[7]

Evaluation and conclusion:

[85] The complainants were defenseless victims who were subjected to abuse of the worst form. They were treated like objects and stripped of their dignity as human beings. They were treated like commodities by the accused to feed their greed for money and power.

[86] Having regard to all the facts placed before this Court in respect of accused 1, I can find no substantiating or compelling reasons to deviate from the prescribed sentences. By ordering his sentences to run concurrently, the period for which he has been awaiting trial, is recognized and taken into account.

[87] On the conviction in respect of dealing in drugs I point out that after recruiting the victims by deceptive means, one of the first things accused 1 did, was to get them to smoke rocks and make them dependent on it. This was part and parcel of his tactics to manipulate, coerce and intimidate them to do his bidding. The effect the rocks had on the victims were attested to by them and commonly

referred to as “wake-up”. I reject the testimony of accused 1 in respect of the reason why he allegedly sold the drugs in respect of count 40.

[88] In respect of accused 2, I find that substantial and compelling circumstances exist given her personal circumstances and her future relationship with her minor children, two of them still being relatively young. Long term imprisonment of which a portion is suspended will in my view be in accordance with the Zinn triad.

[89] In respect of accused 3, I also find that substantial and compelling circumstances exist given his personal circumstances, the substantial period spent as an awaiting trial prisoner and his role in the trafficking operations. The victims, contrary to their reactions to and fear of accused 1, did not display the same sentiments towards accused 3. Long term imprisonment of which a period is suspended will therefore in my view be proportionate and in accordance with the Zinn triad.

[90] Having considered all the factors, the following sentences are imposed:

In respect of accused 1:

1. On counts 1, 7, 8, 15, 28 and 34 [Human Trafficking] life imprisonment on each of these counts.
2. On counts 3,10,17,30 and 36 [Using the services of a victim of human trafficking] 15 years imprisonment on each of these counts.
3. On counts 4, 11, 18, 31 and 37 [Living off the earning of prostitution] 5 years of imprisonment on each of these counts.
4. On counts 5, 12, 19, 21 and 38 [Kidnapping] 10 years imprisonment on each of these counts.
5. On counts 6, 13, 20, and 39 [Assault with the intention to grievous bodily harm] 7 years imprisonment on each of these counts.
6. On count 33 [Assault with the intention to grievous bodily harm of a minor] 10 years imprisonment.
7. On count 14 [Possession, Destruction, Confiscation, Concealment of or tampering with documents] 10 years imprisonment.
8. On count 40 [Dealing in drugs] 5 years imprisonment.
9. All the above sentences shall run concurrently in terms of section 280(2) of the CPA with counts 1, 7, 8, 15, 28 and 34.

In respect of accused 2:

10. On counts 1, 7 and 8 [Human Trafficking] 20 years imprisonment on each count of which 5 years is suspended on condition that accused 2 does not contravene the Human Trafficking Act or any section of SORMAA during the period of suspension.
11. The above sentences shall run concurrently in terms of section 280(2) of the CPA.

In respect of accused 3:

12. On counts 15, 28 and 34 [Human Trafficking] 20 years imprisonment on each count of which 5 years is suspended on condition that accused 3 does not contravene the Human Trafficking Act or any section of SORMAA.

13. On counts 17, 30 and 36 [Using the services of a victim of human trafficking] 15 years imprisonment on each count.
14. On counts 18, 31 and 37 [Living on the earnings of prostitution] 5 years imprisonment on each count.
15. On counts 19, 32 and 38 [Kidnapping] 10 years imprisonment on each count.
16. All the sentences shall run concurrently in terms of s 280 (2) of the CPA with counts 15, 28 and 34.
17. All the accused are declared unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000.

A De Wet

Acting Judge of the High Court

Dates of Hearing:

5, 6, 25, 26 and 27 September 2024

11 October 2024

Date of Judgment:

15 November 2024

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- [1] Section 13(1) of the Human Trafficking Act stipulates that the penalty for a person convicted of an offence referred to in section 4(1) is, subject to s 51 of the CLAA, a fine not exceeding R 100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.

- [2] Mr Charles Ayuk is also referred to as the cousin brother of accused 1 and 3.
- [3] The cases against the accused in Springbok and Maitland were consolidated and transferred from the Regional Court to the High Court. The trial only commenced in November 2021 in the High Court and the record of proceedings reflects the various challenges encountered to finalize the matter. These included but were not limited to the use of more than one interpreter, the transportation and availability of witnesses from different provinces, the personal circumstances of the victims and witnesses, the systemic issues pertaining to criminal trials in the Western Cape High Court, the Covid 19 pandemic and various other issues. These delays cannot be ascribed

to the accused.

- [4] In the matter of GG Moleme v The State (unreported judgment under case number CA 15/2022, North West Division, Mahikeng) Petersen ADJP with reference to Radebe and Another v S 726/12)[2013] ZASCA 31; 2013 (2) SACR 165 (SCA)(27 March 2023), reiterated that the period of detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified as such approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period in detention. In para 19 he confirmed that: “It is clear from Radebe that the period in detention is one of the factors that should be considered in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed.”

- [5] My translation: [CJ] is a victim in this matter. She is a major woman. She found it difficult to communicate about the incidents

which occurred during her detention by the perpetrators. She wants to put the events behind her. What she did discuss with the

probation officer can be described as follows: The perpetrator (Mr Ayuk / accused 1) held her prisoner for months. Shy made several

attempts to escape but was found and brought back by the perpetrator and his helpers. The victim was then assaulted with electrical cords and broomsticks. She described that the perpetrator would force her to balance a bucket of water on her head whilst sitting on her haunches. She feared that she would burn herself if she did not balance the bucket correctly. She remembers how she begged the perpetrator to stop with his gruesome deeds, but it was in vain. She admitted that she suffered from depression during and after her detention. She experienced severe fear of the perpetrator (Mr Ayuk). She verbalised that she longed for her family whilst being detained at the home of the perpetrator. She had to have sex with strange men against her will. The perpetrator would sometimes be present whilst she had sexual intercourse with these strangers. [SM] is a victim in this case. She is a major and currently living in Matjieskloof. The victim still suffers trauma when she must think about the deeds she had to withstand. Sy avoids any communication about the period she lived in the house of the perpetrator (Mr Ayuk). She

shared during the interview with the probation officer the following: She recalls that she attempted to escape the claws of the perpetrator (Mr Ayuk). Her attempts were unsuccessful. She recalls moments that she feared for her life and that the perpetrator had assaulted her with electrical cords and broomsticks on innumerable occasions. She remembers that the perpetrator (Mr Ayuk) held her head under water and how she gasped for air during these gruesome deeds and had she fight for her life. She still becomes fearful when she thinks about these gruesome deeds. She remembers that the perpetrator (Ms. Willimas-Ayuk/accused

2) came to her rescue on many occasions by diverting the strokes of the perpetrator (Mr Ayuk). The victim verbalised that the assaults felt less intense when she was under the influence of tik and that she used drugs in an attempt to escape the tyranny of the perpetrator.

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- [6] In *S v Msimanga* en ‘n ander 2005(1) SACR 377 (O) at paras [9] and
- [10] the original Afrikaans text is set out and has been correctly translated.
- [7] See *S v Dos Santos* 2018 (1) SACR 20 GP where the accused was sentenced to life; *S v Mabuza* 2018 (2) SACR 54 GP; *S v Jezile* 2016 (2) SACR 62 WCC; *S v Obono* 2022 JDR 1015 (GP); *S v Okekeke and Another* 2023 ZAGPPHC 110 dated 23 February 2023 and *S v ZB2023* (1) SACR 298 (WCC).

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