

SOUTH AFRICA / JUDGMENT

S v B (61/2021) [2022] ZAECGHC 12 (25 February 2022)

[2022] ZAECGHC 12**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Govindjee

CASE / FILE NUMBER

61/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no:61/2021

Date heard: 16 February 2022

Date delivered: 25 February 2022

NOT REPORTABLE

In the matter between

THE STATE

and

[.....] B

ACCUSED

SENTENCE

GOVINDJEE, J

Background

- [1] B was convicted of rape in contravention of section 3, read with various sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[1]

- [2] B was found to have unlawfully and intentionally committed an act of sexual penetration with the complainant, who was five years old at the time, by having sexual intercourse with her per vaginam without her consent and against her will. The Director of Public Prosecutions relied on s 51(1), read with Part I of Schedule 2 of the Criminal Law Amendment Act, 1997[2] in seeking life imprisonment for the rape conviction, on the basis that the rape involved a victim under the age of 16. A court that is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence than that prescribed by the Minimum Sentences Act must impose a lesser sentence, entering the relevant circumstances on the record of proceedings.[3]
- [3] Section 276 of the Criminal Procedure Act, 1977[4] 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.[5] While the retributive aspect tends to dominate, courts are enjoined to temper the punishment with a measure of mercy.[6]
- [4] In this regard, the sentencing court must attempt to achieve a balance in its sentence, and not approach its task in a spirit of anger, but in one of equity. Hastiness, the striving after severity and misplaced pity are out of place, as are so-called exemplary sentences designed to use the crime to set an example for others in society.[7] Still, more serious cases clearly require severity, with a certain moderation of generosity, for the appropriate balance to be struck. The object of sentencing is not to satisfy public opinion, but to serve the public interest.[8]
- [5] In the final analysis, the well-known triad of factors to be considered consists of the crime, the offender and the interests of society,[9] and these factors must be applied, in accordance with *S v Malgas*,[10] to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.[11] In *S v Matyityi*,[12] 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 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

- [6] The complainant and a three-year-old friend decided to visit the accused's house. He knew them well and would join them in their play, being a distant relative of the complainant's friend. At some point he experienced sexual urges, which he decided to act upon. He removed the complainant's trousers and panty, placed her on his bed and raped her painfully.
- [7] As the victim was under the age of 16 years, the rape is of the kind detailed in Part I of Schedule 2 of the Minimum Sentences Act. The legislature has prescribed that a minimum sentence of life imprisonment is applicable unless the court is satisfied that there are substantial and compelling circumstances for a lesser sentence.[13]
- [8] As part of consideration of an appropriate sentence, it is also important to consider the effect of the crimes on the victim, particularly in cases of gender-based violence.[14] The medico-legal report submitted into evidence confirms that the complainant cried during her examination and suffered from pain.

While there were no general physical injuries observed, there were tears on the labia minora and the vaginal opening and redness caused by the forceful penetration. The complainant's mother indicated that the incident has also been difficult for her to deal with.[15]

B's circumstances and interests

- [9] B chose not to testify in mitigation of sentence. His counsel explained that he was 43 years of age and single, residing at Scenery Park, East London. He had completed grade nine at school but had then been forced to drop out in 2003 because of his socio-economic circumstances and pressure to work to earn an income. He had since been self-employed, repairing shoes and earning up to R150 per day. This money had been used to support himself and his mother, prior to her passing. He had no previous convictions or pending matters and had been in custody since 16 December 2020.

- [10] Counsel highlighted that B had assisted the court by shortening proceedings during his defence. It was argued that B's circumstances,

viewed cumulatively, warranted a deviation from the prescribed minimum sentence.

The interests of society

- [11] Courts have repeatedly reflected on the horrific 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. As such, it has been accepted that the crime deserves severe punishment.[16] As the court held in *S v Ncheche*: [17]

'A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large,

correctly expects of our courts to punish rapists severely.'

[12] In *S v Vilakazi*, [18] the Supreme Court of Appeal confirmed that rape is a repulsive crime. Society expects that the scourge of gender-based violence must be addressed and must cease. In addition, children's rights are constitutionally protected, and rape of a child, particularly one as young as five years of age, is by its nature one of the worst kinds of offences imaginable.

[13] 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. [19] Blom'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. [20] The question remains whether there are substantial and compelling reasons to justify a lesser sentence than the minimum sentence

prescribed.

Analysis

[14] This court is duty bound to consider B's personal circumstances, as well as that of the young complainant. The nature of the crime must also be considered, together with the interests of society, seasoned with a measure of mercy and bearing in mind the various purposes of punishment, including prevention, retribution, rehabilitation and deterrence. [21] All the circumstances of the case must be considered to determine whether the imposition of a minimum sentence is proportionate to the particular offence. [22]

[15] The factors relied upon by B as substantial and compelling have been considered in their totality. The main factor in his favour is that he is a first offender. The other factors cited carry less weight when given proper consideration. While his socio-economic

background

and low income are unfortunate, this remains a reality for millions of South Africans and provides no excuse for his conduct in violating the trust of his young friend. He admitted to some aspects of his conduct during his testimony at the trial, but stopped short of pleading guilty or demonstrating any remorse whatsoever for the plight of the raped complainant, or indeed her younger friend who was in the vicinity at the time of the rape and observed his conduct.

[16] It is important to consider the various circumstances cumulatively, and with specific focus on B's clean record, time spent in custody and socio-economic background. The legislature has directed that, when imposing a sentence in respect of rape, an apparent lack of physical injury to the complainant and the relationship between B and the complainant prior to the offence being committed cannot constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. [23] I am 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.[24] It requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.[25]

[17] The aggravating features of the matter are undeniably severe. Attacks on 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.[26] This overtakes the various mitigating considerations, including B's lack of previous convictions.[27] The pre-sentence period has also been considered but does not, on its own, constitute a substantial and compelling circumstance.[28] The complainant was a young child who visited somebody she considered to be a friend. She entered his home assuming it would be a safe space for her and her friend. In return she was violated despicably and suffered pain as a result. The rape was brazen, being perpetrated in front of the complainant's younger friend, a three-year-old, by a person who knew that such conduct was unconscionable. The complainant has since had to be questioned by a clinical psychologist for purposes of ascertaining her ability to testify, given her tender age, and was then required to do so.

[18] In the final analysis, I am obliged to impose the minimum sentence prescribed by the legislature unless there are truly convincing

reasons for departure.[29] In *S v Zitha*, Goldstein J commented on the need to punish perpetrators of child rape as heavily and severely as the law allowed in the absence of substantial and compelling circumstances dictating otherwise. Courts will not shirk this responsibility, however agonising it may be to do so.[30] In all the circumstances, I must conclude that there is an absence of substantial and compelling reasons or weighty justification for a departure from the prescribed minimum. The result is that a sentence of life imprisonment is proportionate and justified, and I consider this to be the only appropriate sentence for this crime. Given the nature of the offence, various other consequences emanating from legislation follow. These have been included as part of the order to follow.

Order

[19] The following sentence is imposed:

- a. The accused, B, is sentenced to life imprisonment in respect of the conviction of rape involving a five-year-old child.
- b. 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.

- c. 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.
- d. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: Adv S. Mgenge

Director of Public Prosecutions

Makhanda

046 602 3000

Attorney for the Accused: Mr H. Charles

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[1] Act 32 of 2007 ('the Act').

[2] Act 105 of 1997 ('the Minimum Sentences Act').

[3] S 51(3)(a) of the Minimum Sentences Act.

[4] Act 51 of 1977 ('the CPA').

[5] S v Rabie 1975 (4) SA 855 (A).

[6] Rabie at 862G-H.

[7] See S v Khulu 1975 (2) SA 518 (N) 521-522.

[8] 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).

[9] S v Zinn

[1969] 3 All SA 57 (A) at 540G-H.

[10] 2001 (1) SACR 469 (SCA).

[11] See *Radebe v The State*

[2019] ZAGPPHC 406 at para 12.

[12] 2011 (1) SACR 40 (SCA) at para 23. Also see *Malgas supra*, 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.

[13] S 51(1) of the Minimum Sentences Act read with section 51(3)(a).

[14] 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.

[15] On the deleterious effect of rape on victims' relations, see *Dyonase supra* para 32.

[16] *S v Chapman*

[1997] ZASCA 45; 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 *S v Vilakazi* [2008] ZASCA 87 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.'

[17]

[2005] ZAGPHC 21; 2005 (2) SACR 386 (WLD) para 35.

[18] 2009 (1) SACR 552 (SCA) at 555h.

[19] *S v September*

[2014] ZAECGHC 38 para 8.

[20] *S v PB 2011*

(1) SACR 448 (SCA) para 21; *Matyityi supra* para 23.

[21] *S v Genever and Others*

[2008] ZAWCHC 7; 2008 (2) SACR 117 (C) at 122c-d.

[22] *Vilakazi supra* para 15.

[23] S 51(3)(a A)(ii) and (iv) of the Minimum Sentences Act..

[24] S v Bull 2001 (2) SACR 681 (SCA) para 21.

[25] S v Dodo 2001 (1) SACR 301 (E).

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

[27] See Vilakazi supra para 58. Also see S v Zitha and Others 1999 (2) SACR 404 (WLD): the absence of previous convictions is not 'substantial and compelling' for purposes of s 51(3)(a).

[28] Mthimkhulu v S

[2021] ZAGPPHC 573 para 49.

[29] Matyityi supra para 23.

[30] Zitha supra at 418h-i.

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