

SOUTH AFRICA / JUDGMENT

S v Botha and Another (1/2023)

[2024] ZAGPJHC 430 (29 April 2024)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

Africa

CASE / FILE NUMBER

1/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 1/2023

1. REPORTABLE: YES / NO
2. OF INTEREST TO OTHER JUDGES: YES / NO
3. REVISED: YES / NO

In the matter between:

THE STATE

and

BOTH A, ROCHELLE

Accused 1

VAN NIEKERK, CORNELIUS

Accused 2

SENTENCE

AFRICA AJ

- [1] Ms. BOTHA, ROCHELLE, (hereinafter referred to as accused 1) an adult female 23 years of age and Mr. VAN NIEKERK, CORNELIUS STEFANUS, (hereinafter referred to as accused 2) an adult male 35 years of age, were found guilty of:

ACCUSED 1

Count 3: RAPE (AID AND ABET)[1]

Count 4: SEXUAL ASSAULT (AID AND ABET)[2]

Count 5: CHILD ABUSE[3]

Count 6: ATTEMPTED MURDER[4]

Count 7: CHILD ABUSE[5]

Count 8: MURDER[6]

ACCUSED 2

Count 3: RAPE[7]

Count 4: SEXUAL ASSAULT[8]

Count 5: CHILD ABUSE[9]

Count 6: ATTEMPTED MURDER[10]

Count 7: CHILD ABUSE[11]

Count 8: MURDER[12]

- [2] “At least three (3) children are murdered, another three (3) survive attempted murder and twenty-one (21) suffer grievous bodily harm. That is the average daily impact of violence against children in South Africa. Children are under attack. Families, friends and communities are left devastated. We cannot look away. We must all come together to tackle this horrific violence that affects the futures of every child across the country”[13]
- [3] As we as a society, go about our daily lives, CR, had hers violently cut short whilst CJR and JR, will be recovering from the physical, mental and psychological impact of long-standing abuse, trauma and suffering endured at the hands of their loved-ones, in the sanctity of their home.
- [4] It is now the unenviable but necessary task of this court to impose an appropriate sentence.

[5]

In deciding on an appropriate sentence, the court must consider the “triad consisting of the crime, the offender and the interest of society”[14] “The elements of the triad contains an equilibrium and tension. The court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of or the exclusion of others. What is necessary is that

the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern”[15]

[6] In S v PB 2013

(2) SACR 533 (SCA) para 19 Bosielo JA stated:

‘. . .it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing’

[7] The statutory mandatory minimum sentencing regime is applicable to certain serious offenses but the trial courts are permitted to depart from the prescribed minimum sentences whenever they find “substantial or compelling circumstance” warranting such departure. This court is mindful that a criminal sentence cannot, in the nature of things, be a matter of precise calculation.[16]

[8] It is however commonly accepted that there are many purposes of sentencing. Firstly, is the desire to punish a person who is the wrongdoer and who has offended against society and caused harm to others. Secondly is the intention to prevent the wrongdoer from committing a similar offence again. Thirdly is to send a message to other would be offenders not to engage in this kind of activity and Lastly is the aspect of rehabilitation.

[9] In S v Matyityi[17] it was stated at para 16:

“An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred... that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity...It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim.[18]

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way, hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the

objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness.

Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim.”

[10] Another factor to be borne in mind is the question of mercy.[19]

[11] The individualization of punishment requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law. [20] Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

MITIGATION OF SENTENCE

[12] In mitigation of sentence, on behalf of Accused 1, the defence submits that this court is not bound by the recommendations made in the Pre-Sentence report.

The defence further submits that the following factors constitutes substantial and compelling circumstances, warranting a departure from the prescribed minimum sentence.

1. The personal circumstances of the accused.
2. She is aged 24, and capable of being rehabilitated.
3. She is a first offender.
4. She has been incarcerated since 1 August 2022.

[13] In respect of section 103 of the Firearms Control Act 60 of 2000, the defence had no address.

[14] In mitigation of sentence, on behalf of Accused 2, the defence submits that in considering the Zinn-triad, accused 2 is 37 years of age. His highest level of education is grade 11 and he held different odd jobs over time, until his arrest. The defence acknowledged that the accused has been convicted of serious offences and in line with the recommendation made; a custodial sentence will be an appropriate sentence. Adv. Dingiswayo submitted that there is an outcry from the community to mete out appropriate sentences under these circumstances; however, punishment should not be approached in a spirit of anger.

[15] The defence further submits that accused 2 played open cards when he admitted that he was on drugs but stated that he cannot remember some of the things. He however takes responsibility for the death of CR and is remorseful. The accused pleads with this court for a second chance, notwithstanding the fact that he must go to prison. He

undertakes to participate in various courses inside prison and has been clean from drug-use for the past 18 months.

The defence argued that the court must take into consideration that the abuse of drugs played a role and that accused 1 was a partner, who neglected her own children. The defence submits that the actions of accused 2 cannot be condoned, as it was both barbaric and inexplicable.

However, in as much as it was the personal choice of accused 2 to use drugs, the loss of his mother and a father who only provided for him, financially, nonetheless affected him. The defence requests this court to find the aforementioned, cumulatively, warrants substantial and compelling circumstances.

AGGREVATION OF SENTENCE

- [16] In aggravation of sentence, the state handed in their written Heads of Argument, marked Exhibit “FF” and called Mr Luke Lamprecht (“Mr Lamprecht”) as an Expert witness. The Pre-Sentence Report as compiled by Mr Lamprecht, marked Exhibit “CC” ‘seeks to break down into a number of elements that which will form the tapestry of his opinion’[21]but more significantly, the impact of this crime on the victims.
- [17] This court do not intend to deal with every detail of the Report as it forms part of the record and for the sake of brevity and to avoid unnecessary prolix. Some apposite aspects however warrants reprise, as follows:
- a) It is common sense and instinctual that a parent has two primary duties in terms of rights of their children. Firstly is a negative duty, not to harm their children and secondly, a positive duty to actively protect their children.[22]
 - b) In order to develop optimally, children need their survival needs met (food, shelter etc.) and then they need to be safe. If these two are not met, children’s development is severely compromised due to a concept known as toxic stress. Overlaid on those are life stage needs, referring to what children need at various stages (ages) of development. In these first phases of development of the child, their brain is very “fragile” and susceptible to abuse and neglect that has long-term consequences.[23]
 - c) According to Mr Lamprecht, what appears clear from the behaviour of the parent and caregiver in this case, is that they did not discharge their duty of care and did not protect their children and in addition actively harmed their children in a way, that if these children were adult prisoners of war, their captors would be charged with war crimes. These attacks were continuous and sustained and it is clear that both caregivers knew what they were doing was wrong as they hid the children from other caregivers and authorities.[24]
 - d) It is clear that the mother chose her sexual partner over her children and what is also clear is that both chose one thing over everything else, drugs. She also took no steps to protect her children when she knew of the abuse and had been offered multiple levels of support.[25]

- e) Once they were caught for the murder of the youngest child, the mother attempted to evade justice by claiming domestic abuse by her partner. When the men in domestic violence cases start harming the children that is when the mothers tend to seek help and leave the relationship. She did neither and actually assisted in hiding the abuse from other family members and authorities and admitted that she too beat the middle child. With this profile in mind, her chances of rehabilitation is very poor as she has no ability to take the perspective of her children and as a result, her ability to protect them has been shown to be absent.[26]
- f) In terms of the adult male caregiver, he, very simply put, tormented these children. He takes absolutely no responsibility for the neglect, abuse and death of the child. He mentions needing drugs or else he becomes aggressive and even more distressingly, at some point appears to be jealous of the three year old child (CR) and how she is in some bizarre way a threat to his relationship with her mother. From what is presented, he has no ability to take the perspective of the children; it is all about his needs. Further, he seems to want to harm the children as a way of getting to the mother and does not see them as individuals in their own right, deserving of care.[27]
- g) It appears that he has no remorse at all but rather regrets being caught.[28]
- h) The youngest (CR) had 49 individual injuries on the body, external and internal head injuries, black eyes and burned lips. Delaying care, they knew that anyone who took one look at this tortured little body would know she had been severely abused, as no possible history could explain the multiple marks of abuse.[29]
- i) The adult male caregiver clearly behaved in sadistic sociopathic ways and all we are left with is the lost innocence of the deceased child, barely recognisable from the sustained assaults but resembling the image of the Joker.[30]
- j) For the middle child (JR), the tragedy is also unimaginable. Again, the adult male caregiver makes up various versions to explain the injuries rather than taking responsibility. There were upward of 16 individual visible injuries to his small body, inflicted over a period of time. This man systematically and sadistically tortured this little boy, it seems either for no reason, to get back at the mother and/or because he enjoyed hitting this little boy. Added to this was the exposure to substance abuse and forcing the child to take drugs as well.[31]
- k) Research has clearly shown that the impact causes disability on a continuum in these children and an enormous amount of intervention is needed to mitigate this attack on childhood.[32]
- l) For the eldest child (CJR), who often are expected to take on parenting roles, there are two elements to consider, in addition to the toxic stresses mentioned

above, as well as seeing the cumulative effect of the two dynamics. The first is the impact of being a witness to violence and the second is the dynamics specific to incestuous sexual abuse. When both are taken together, we talk about the concept of Adverse Childhood Experiences (ACE's).

When the home is abusive, we get a phenomenon known as “sympathetic overdrive” where children cannot fight (too small) nor flight (are dependent on parents). Our nervous system is designed to cope with short bouts of survival threats, not long term, and specifically not in the home with those who are meant to care for you.[33]

- m) It must be remembered that toxic home stress also has long-term effects where children who witness violence at home by caregivers are at increased risk for developing mental health problems, experiencing abusive relationships and engaging in risky behaviours as adults.[34]
- n) In addition, there are additional complex dynamics if that trauma is sexual and incestuous by the male caregiver and the mother figure knows about the abuse but does not protect the child.[35]
- o) There is nothing to suggest these adults are remorseful nor take any responsibility for these childhoods devastated and destroyed. As a result, their poor prognosis for any form of rehabilitation and reintegration into a civilised society is extremely poor and

therefore need long term structural containment.[36]

[18] Adv. Williams on behalf of the state argued that accused 1 was part of a large and loving family whose support she rejected. There were various injuries at different stages of healing which was clearly visible at the time the Post Mortem was conducted. The state argued that despite being under the influence of drugs, as the loving and caring mother accused 1 proclaims to be, why she nor accused 2 never observed these injuries. Even whilst living in the confined space of a container-home, what is the chances that accused 1, likewise never observed any injuries to her children. The state argued that accused 1 had to have been aware of the abuse and her version of “not knowing” is simply improbable.

[19] The state further argued that accused 1 relied and abused both C[...] and R[...] R[...], when it came to the wellbeing of her children. Even during that last month, she made sure that she collected nappies and clothing for CR but prevented them access to CR, evidently to hide the abuse. Accused 1 only during cross examination admitted to a large extent, to the injuries sustained by her children; even being aware of the fact that

accused 1 would smack CR on the mouth, until it was bleeding, but never sought medical attention.

[20] The state argued that the court should be mindful of the chasm between remorse and regret, thus whether the accused is sincerely

remorseful, and not the regret of being caught-out.

[21] Concerning accused 2, the state argued that he attempts to lay blame at the feet of his father who only supported him financially, yet he could not hold down employment, due to his drug abuse. He has a previous conviction but has learnt nothing about bettering himself. Accused 2 takes selective responsibility but not to that which was proven in court.

[22] The state argued, referring to the case of Kekana[37] where it was held:

“Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and severely punished. Oliver JA held in S v P 2000 (2) SA 656 (SCA) at 660D-E: “The right of children are all too frequently trampled over in our society. Abuse of children is sadly an all-too-common phenomenon. Those guilty of violating the innocence of children must face the wrath of the courts”.

[23] The state correctly submits that CR was removed from a loving environment, where she was thriving, to an environment where she had no bed to sleep on, slept on dirty linen, was fed soft porridge due to the extent of her injuries and was denied medical attention when the clinic was just down the road. The state contended that CR was absolutely denied every right she had as a child.

[24] It is noteworthy that in a last attempt to sway this court, accused 1, tries to create this picture of a loving doting mother as can be glean from paragraph 6 and 7 of the Probation Officers Report (“Exhibit BB”)

She wants this court to believe that:

“... she would notice that accused 2 would get impatient with her son and he would at time assault her children, but she was scared to say anything. She was scared of accused 2 as she was dependant on him financially and he would assault her sometimes if she gets angry. She tried to report all the abuse, but never got any help as the police refused to attend to her. She felt helpless as accused 2 used to threaten her and she was afraid for her life. She reported that accused 2 would also assault her whenever she tried intervening, when he assaults her children. She was under the influence of substances most of the time which might be the reason why she never saw most of the alleged abuse.”

[25] It is however, an objective fact according to Dr. Apathu, that the majority of the injuries to the body of the deceased were visible,

likewise the photographs depicting the visible injuries to the body of little JR. It is further an objective fact that the photographs did not depict a home but rather a place of squalor. In a world where mothers are often celebrated as the epitome of love, accused 1 far falls short, instead she presents as a manipulative and compulsive liar, who was willing to sacrifice her own children for her benefit.

[26] The evidence shows that it was never the intention of accused 1 to expose accused 2. She used every conceivable opportunity to concoct stories, to lie and mask the behaviour of accused 2 even describing him as ‘a caring and loving father, who does not even raise his voice at the children’. What a devastating lie these words turned out to be. Mr Lamprecht described accused 1 as a mother who chose her sexual partner over her children...and chose one thing over everything else; drugs. This court could not agree more.

[27] Accused 1 presents as a self-absorbed individual, who took no real steps and made no effort to stop the abuse or to protect her children when she clearly knew of the abuse. She was offered support from various avenues, including her own family, whom she brushed off as them “constantly stirring”. Accused 1 is the kind of self-absorbed mother who has the capacity to wedge out the screams of her child, by tending to her nails, whilst basking in the sun.

[28] The court find that the photographs[38] explicitly depicted an environment where the children were deprived of the necessities that would enable them to thrive as children. The court also find that the photographs depicted a clear failure on the part of the accused to provide these children with adequate food, clothing, abode and medical assistance. Accused 1 and 2 miserably failed to discharge their duty of care and did nothing to protect the children.

[29] The outrages lies as told by accused 1 and having defended accused 2 by hiding her abused children, despite the multiple interventions

offered, is indicative of the extend she was willing to go to in being complicit by not disassociating herself from the conduct and actions of accused 2. The court finds itself in agreement with the opinion as expressed by Mr Lamprecht that ‘there is nothing to suggest that accused 1 are remorseful nor take responsibility for these childhoods devastated and destroyed.’

[30] Mr Lamprecht described accused 2 as someone who tormented these children. He beat, sexually assaulted, burned and bludgeoned the

youngest to death, over a period of time. The behaviour of accused 2 as with the mother, is described as ‘deeply self-serving and he has no ability to take the perspective of the children, it is all about his needs. Accused 2 chose over 49 times to harm the little body of CR, which begs the question whether this was not a jealous display of his contempt or resentment he harboured for little CR, because he saw her as a threat to his relationship with her mother?’

[31] Mr Lamprecht opined that accused 2 seemed to want to harm the children as a way of getting to the mother and did not see them as

individuals in their own right, deserving of care. I agree, in this instance that ‘the Secrecy was the power of abuse’.

Accused 2 often undermined and criticised accused 1 for not being able to discipline her own children. Accused 2 who established

himself as the father figure treated these children as less important, less valued and things to be used or abused, at will. Accused 2, as the authoritative-figure, wanted to exercise control over these children in all forms, violating their bodies and minds, whilst

accused 1 stood by, allowing for this 'take-over', to occur. Accused 1 was complicit in this conspiracy of silence, in hiding her children away, not stopping or reporting accused 2 to the relevant authorities and thereby aiding and abetting his atrocious actions. Mr Lamprecht describes accused 2 as someone having no remorse at all but rather regrets being caught and therefore, like accused 1, need long term structural containment.

[32] Regards the seriousness of the offences, the court is mindful that with reference to the case of *Mudau v The State*[39] where it was stated that:

"... Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of the fundamental rights such as equality, human dignity and bodily integrity"

[33] Startling new evidence shows that violence against children is increasing throughout Africa. [40] In the words of Graça Machel: "Of all the unspeakable damages suffered by our children, violence is surely the worst, simply because it is entirely avoidable, yet leaves lasting scars."

In *S v Gardener & another* 2011

(1) SACR 570 (SCA) para 68 Heher JA explained as follows:

'True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence, and why a court, in loco parentis for society, is responsible for working out the answer.

[34] This court is mindful of the case of *S v Makudu*[41] where it was stated that the behavior of an accused during trial may be indicative of a lack of repentance or intended future defiance of laws by which society lives and therefore be a relevant factor in considering sentence"

[35] The time has come to send a clear message that anyone who perpetrates these crimes against the most vulnerable in our society does so at their peril and the community correctly expect our courts to punish perpetrators severely. Communities are outraged and if we fail to take account of that outrage, we risk encouraging the breakdown of law and order and communities taking the law into their own hands.

[36] Indeed ordinary law-abiding citizens in this country are at their wits end about these ongoing and senseless crimes involving violence

against children and sight should not be lost of the fact that society view these crimes as heinous and abhorrent. Within this

context, is there an injunction upon courts, to fiercely protect children from these crimes.

[37] In R v Karg[42] it was stated that serious crimes would usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role. Society's sense of outrage and the deterrence of the offender

and other potential offenders deserve considerable weight, in cases of this nature.

[38] In an effort to curb the wave of violent crimes, which threatens to destroy our society, the legislature enacted section 51 of the Criminal Law Amendment Act 105 of 1997. Courts are reminded in Malgas[43] that when considering what sentence to impose, emphasis was to be shifted to the objective gravity of the type of crime and public's need for effective sanctions against it.

[39] The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.[44] Traditional mitigating factors alone cannot be considered substantial and compelling circumstances.[45]

[40] This court is also mindful in assessing the proportionality of the prescribed sentence in a particular case; the sentencing court must determine what a 'proportionate' sentence would be, considering all the circumstances traditionally relevant to

sentencing. The proportionality of a sentence cannot be determined in the abstract.

[41] In S v Ganga[46] it was stated that, a court must still seek to differentiate between sentences in accordance with the dictates of justice. Seeking

guidance in Malgas, it was stated that the greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its

anxiety will be that it may be perpetuating an injustice. That can only be because it is satisfied that the circumstances of the

particular case render the prescribed sentence unjust or, disproportionate to the crime, the criminal and the legitimate needs

of society.

[42] In S v Vilakazi[47] Nugent JA said the following:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas said should be avoided."

[43] This court had regard to the following considerations:

- a) degree and extent of the violence used in the commission of these heinous offences;
- b) the nature and type of weapon/s used including the fact that JR and CR specifically was forced to smoke drugs from a drug-pipe;
- c) the brutality and cruelty of the assaults;
- d) the fact that the accused' cruel intentions are cemented by them hiding the children as they were aware of the onslaught and extent of the injuries and abuse;
- e) the fact that the abuse was deliberately not reported to the authorities, when help was readily available;
- f) the manipulative, cruel and callous nature of the accused;
- g) the fact that these children were innocent, fragile, vulnerable and defenseless;
- h) the fact that no medical attention was sought, when the hospital was just down the road;
- i) the fact that these offences were also perpetrated in the sanctity of the home by people in a position of trust and authority;
- j) the fact that these offences were perpetrated by either and/or both accused over a period of time;
- k) the fact that the victims were exposed to drugs abuse and violence over a period of time;
- l) the fact that accused 1 had the knowledge, reasonable belief or suspicion that a sexual offence/s has been committed against CJR, a vulnerable person and was obliged to report such knowledge, reasonable belief or suspicion immediately to a police official, but did not.
- m) the fact that the attacks were continues and sustained over a period of time as a direct consequence of accused 1 doing nothing to stop it;
- n) the fact that these children were not afforded the most basic of human rights such as adequate food, clothing or medical care.
- o) the deeply ingrained psychological, emotional and physical trauma suffered at the hands of the accused daily, as parent and caregiver respectively;
- p) the devastation wreaked on the development of the victims;
- q) the increased risk of the victims developing mental health problems, experiencing abusive relationships and engaging in risky behaviours as adults;
- r) the emotional hurt suffered by the extended family members of the victims who offered support and vainly begged to see the children;

- s) the lowered perception of these children as individuals or human beings deserving of human dignity, by the accused;
- t) the fact that courts must fiercely guard against such perceptions by imposing sentences which sends the message that the lives of children are not less worthy of protection, than that of any other human being;
- u) the utter lack of remorse displayed by the accused, as genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error.

[44] Further, this court had regard to the Objective of the Act[48] which are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

[45] Davis J, in *S v Jansen*[49] encapsulated the horrific nature of rape perpetrated on children as follows:

“Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilized

society...the community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that

punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets

in any safety; where children are unable to grow up in the kind of climate, which they should be able to demand in any decent society,

namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any

society, which aspires to be an open and democratic one based on freedom, dignity and equality; the very touchstones of our constitution”

[46] After taking into account all aggravating and mitigating factors, this court is of the considered view that in respect of Counts 3 and 4, the state proved that accused 1 aided and abetted in the commission of those offences. In respect of Counts 6 and 8, the state proved that accused 1 had the necessary intention in the form of *dolus eventualis*. This court is of the view that such a finding persuaded this court to conclude that this would qualify as a substantial and compelling circumstance, which would warrant the deviation from the prescribed minimum sentence.

However, as far as accused 2 is concerned, no substantially compelling circumstances exist to cause this court to deviate from the imposition of a lesser sentence other than the prescribed minimum sentence.

[47] In the case of *S v BP*[50], where Van den Heever stated:

“Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think that they can get away with it, and all too often do...” The time has come that a clear and unambiguous message be sent to offenders who are found defiant.

[48] On a balanced consideration of the totality of the evidence, this court finds the sentence to be imposed, proportionate to the crime, the criminal and the legitimate needs of society.

[49] ACCUSED 1

Count 3: RAPE

(AID AND ABET)[51] : Twenty five

(25) years direct imprisonment.

Count 4: SEXUAL ASSAULT

(AID AND ABET)[52] : Five (5) years direct imprisonment.

Count 5: CHILD ABUSE[53] : Ten

(10) years direct imprisonment.

Count 6: ATTEMPTED MURDER[54] : Ten

(10) years direct imprisonment.

Count 7: CHILD ABUSE[55] : Ten

(10) years direct imprisonment.

Count 8: MURDER[56] : Twenty five

(25) years direct imprisonment.

[50] ACCUSED 2

Count 3: RAPE[57] : Life imprisonment.

Count 4: SEXUAL ASSAULT[58] : Ten

(10) years imprisonment.

Count 5: CHILD ABUSE[59] : Ten

(10) years imprisonment.

Count 6: ATTEMPTED MURDER[60] : Fifteen

(15) years imprisonment.

Count 7: CHILD ABUSE[61] : Ten

(10) years imprisonment.

Count 8: MURDER[62] : Life imprisonment.

[51] In respect of accused 1; in terms of section 280 (2) of the CPA 51 of 1977, it is ordered that sentences imposed on counts 4,5,6 and 7, will run concurrently with the sentences imposed on counts 3 and 8. Accused 1 is effectively sentenced to Twenty five (25) years imprisonment.

[52] In respect of accused 2; considering that the prescribed minimum sentence in respect of counts 3 and 8 is life imprisonment, the sentences so imposed in respect of counts 4,5,6 and 7 will in terms of section 39(2)(a)(i) of the Correctional Services Act[63]run concurrently with the sentences of life imprisonment. Accused 2 is effectively sentenced to life imprisonment.

[53] In terms of section 103 (1) of the Firearms Control Act 60 of 2000, the accused will remain ex lege UNFIT to possess a firearm.

In terms of Section 103(4) of Act 60 of 2000, the court issues a search and seizure order for competency certificates, licenses, authorizations and permits, firearms and ammunition.

The Assistant Registrar is ordered to inform the Registrar: Central Firearms Control Register in writing of this order.

[54] In terms of Section 299A of the CPA 51 of 1977, the immediate and extended family of the deceased, CJR and JR, be informed that they have the right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

[55] The particulars of the accused as completed on Form 5 (J736) together with a set of fingerprints be forwarded to the Registrar of the National Register for Sex Offenders, to be registered in terms of Section 50 (2)(a) of the Criminal Law Amendment Act 32 of 2007.

[56] The particulars of the accused as completed on Form 25 together with a set of fingerprints be forwarded to the Director General,

Department of Social Development, Pretoria to be included in Part A of the National Child Protection Register (Regulation 39) in terms of Section 114 of the Children's Act 38 of 2005.

AFRICA A

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES:

Counsel for the State: Adv. Williams

Instructed by: The Director of Public Prosecutions, Johannesburg.

Counsel for accused 1: Adv. Lerm

Counsel for accused 2: Adv. Dingiswayo

Both instructed by: Legal Aid South Africa

Johannesburg

DATE OF HEARING: 12 March 2024

DATE OF JUDGMENT: 29 April 2024

[1] Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further, read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section 120 of the CA 38 of 2005.

[2] Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256, 261 and 270 of CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.

[3] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005. Further read with sections 92, 257 and 270 of the CPA 51 of 1977.

[4] Read with section 51(2) of the CLAA 105 of 1997 and further read with section 257 of the CPA 51 of 1977. (Proven form of intention: Dolus eventualis).

[5] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005. Further, read with sections 92, 257, and 270 of the CPA 51 of 1977.

[6] Read with section 51(1) of Part 1 of Schedule 2 of the CLAA 105 of 1997. (Proven form of intention: Dolus eventualis).

[7] Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further, read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section 120 of the CA 38 of 2005.

[8] Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256, 261 and 270 of the CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.

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- [9] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005. Further, read with sections 92, 257, and 270 of the CPA 51 of 1977.
- [10] Read with section 51(2) of the CLAA 105 of 1997 and further read with section 92, 257 and 270 of the CPA 51 of 1977. (Proven form of intention: Dolus directus).
- [11] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005. . Further, read with sections 92, 257, and 270 of the CPA 51 of 1977.
- [12] Read with section 51(1) of in Part 1 of Schedule 2 of the CLAA 105 of 1997. Further, read with the provisions of sections 92, 256, 257 and 258 of the CPA 51 of 1977. (Proven form of intention: Dolus directus).
- [13] Statement by UNICEF South Africa representative, Christine Muhigana 23 November 2022.
- [14] *S v Zinn* 1969 (2) SA 537 (A) at 540g.
- [15] *S v Banda and others* 1991 (2) SA 352 (B) 355.
- [16] *Crime and punishment in South Africa* 1975 page 150.
- [17] 2011 (1) SACR 40 (SCA).
- [18] (See generally Karen Muller & Annette van der Merwe 'Recognising the Victim in the Sentencing Phase:
- [19] *S v Rabie* 1975 (4) SA 855 (AD) at 862:
- [20] *S v Rabie* 1975 (4) SA 855 (A) at 861D; *S v Scheepers* 1977 (2) SA 154 (A) at 158F – G.
- [21] Exhibit CC, page 2, para 2
- [22] Exhibit CC, page 2, para 3
- [23] Exhibit CC, page 2, para 3.
- [24] Exhibit CC, page 3, para 1.
- [25] Exhibit CC, page 3, para 2.
- [26] Exhibit CC, page 4, para 1.
- [27] Exhibit CC, page 4, para 2.
- [28] Exhibit CC, page 5, para 1.
- [29] Exhibit CC, page 5, para 2.
- [30] Exhibit CC, page 6, para 1.
- [31] Exhibit CC, page 6, para 2.
- [32] Exhibit CC, page 7, para 1.

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- [33] Exhibit CC, page 7, para 2.
- [34] Exhibit CC, page 8, para 1.
- [35] Exhibit CC, page 9, para 1.
- [36] Exhibit CC, page 11, para 1.
- [37] (629/2013)[2014] ZASCA 158 (1October 2014).
- [38] Exhibit “M”
- [39] (547/13) [2014] ZASCA 43 (31 March 2014.
- [40] ‘New data shows violence against children is rising across the African continent: 29 July 2021’
- [41] 2003
- (1) SACR 500 (SCA).
- [42] 1961
- (1) SA 231 (A) at 378-379.
- [43] 2001
- (1) SACR 469 (SCA).
- [44] Malgas supra “Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”
- [45] S v Obisi 2005 (2) SACR 350 (W).
- [46] 2016
- (1) 600 (WCC).
- [47] 2009 (1) SACR 552 (SCA) para 58.
- [48] Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007, as amended.
- [49] 1999
- (2) SACR 368 (C) at 378g.
- [50] The court referred to S v D 1995 (1) SACR 259 (A) at 260.

- [51] Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further, read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section 120 of the CA 38 of 2005.
- [52] Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256, 261 and 270 of CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.
- [53] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.
- [54] Read with section 51(2) of the CLAA 105 of 1997 and further read with section 257 of the CPA 51 of 1977. (Proven form of intention: Dolus eventualis)
- [55] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.
- [56] Read with section 51(1) of the CLAA 105 of 1997. (Proven form of intention: Dolus eventualis)
- [57] Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further, read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section 120 of the CA 38 of 2005.
- [58] Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256, 261 and 270 of the CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.
- [59] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.
- [60] Read with section 51(2) of the CLAA 105 of 1997 and further read with section 257 of the CPA 51 of 1977. (Proven form of intention: Dolus directus)
- [61] Contravention of section 305(3) (a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.
- [62] Read with section 51(1) of the CLAA 105 of 1997. Further, read with the provisions of sections 92, 256, 257 and 258 of the CPA 51 of 1977. (Proven form of intention: Dolus directus)
- [63] 111 of 1998.

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