

SOUTH AFRICA / JUDGMENT

S v Hendricks (27/2021) [2022] ZAECHGC 20 (24 February 2022)

[2022] ZAECHGC 20

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Govindjee

CASE / FILE NUMBER

27/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 27/2021

NOT REPORTABLE

In the matter between

THE STATE

and

NICHOLAS HENDRICKS

JUDGMENT

GOVINDJEE, J

Background

- [1] Nicholas Hendricks ('Hendricks') was convicted on 1 February 2022 of the crimes of attempted murder and rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,[1] involving the infliction of grievous bodily harm.

- [2] On the charge of attempted murder, it was found that Hendricks unlawfully and intentionally attempted to kill M.. M... ('the complainant') by unlawfully and intentionally hitting, kicking

and stabbing her with a knife and fork all over her body repeatedly during the period 13 to 17 September 2020 in Alexandria. On the charge of rape, it was found that Hendricks unlawfully and intentionally committed an act of sexual penetration with the complainant, who was 18 years of age at the time, by inserting the handle of a mop into her vagina 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, 1992 in seeking life imprisonment for the rape conviction, on the basis that the rape involved the infliction of grievous bodily harm. 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 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. Attempting to do so remains an unenviable task. 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 Ponnar 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’.

[6] In terms of s 280(1) of the CPA, sentencing courts have the jurisdiction to impose a separate sentence for each conviction, as it would have done if all the offences had been tried separately, before considering the cumulative effect of multiple sentences and the appropriateness thereof.¹³ In practice, a court should:¹⁴

- a. determine the appropriate sentence for each individual offence;¹⁵
- b. determine what an appropriate total punishment would be for the totality of the criminal behaviour; and
- c. take such measure or measures as are required for the sentence determined in (b) above to become the effective sentence.

Nature of the crimes and surrounding circumstances

[7] The facts of this matter, set out in some detail in the judgment, sketch a picture of abhorrent behaviour by Hendricks, including the rape described. In *S v Vilakazi*,¹⁶ the Supreme Court of Appeal confirmed that rape is a repulsive crime. In this case, as in case such as *S v Mofokeng*,¹⁷ the rape was accompanied by an ‘inhumane infliction of pain causing her to suffer...’. Hendricks, on the basis of flimsy rumours of the complainant’s infidelity, repeatedly hit, kicked, tramped, stabbed, cut and pierced her body over the course of a few days, so that a medical practitioner confirmed that she suffered from Crush Syndrome and would have passed away if not taken to hospital. The complainant’s degradation included having the word ‘POES’ carved into her forehead by a person she loved. When Hendricks became concerned that the complainant had informed her landlady about the identity of her assailant, he again hit her and stabbed her in the head with a fork, tied her hands, threatened to rape her and then proceeded to do so with a broken mop handle, by inserting this object into her vagina, taking it out and repeating this twice.

[8] This accepted evidence clearly constitutes rape involving the infliction of grievous bodily harm.¹⁸ The court in *S v Thole*¹⁹ noted that one of the dictionary meanings of the word ‘involved’ is: ‘to include something as a necessary part of an activity, event or situation’. In *S v Rabako*, Musi J equated ‘grievous’ with ‘actually serious’, as follows:²⁰

‘In essence then, if the injury inflicted by the accused on the body of the rape survivor is serious, then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalization or result in permanent loss of bodily or mental faculty; at the other, it may include a wound that heals rapidly. It should not be a trivial or insignificant injury...Whether an injury is serious will depend on the facts and circumstances of every case’.

[9] As such, the rape is of the kind detailed in Part I of Schedule 2 of the Minimum Sentences Act, so 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.²¹

[10] As part of consideration of an appropriate sentence, it is also important to consider the effect of the crimes on the victim. In this case the evidence was that the complainant remained in hospital for approximately two weeks and underwent an operation. She is unable to stand for long periods of time, which affects her ability to work, and also experiences shortness of breath. The scars from her stabbing remain visible, which has affected her emotionally, so that it was a long time before she was comfortable being seen in public. She required the assistance of a psychologist for three to four months,

and took sleep- and stress-related medication. The complainant testified that she no longer has any interest in men or relationships

as a result of her ordeal. She understandably became emotional at times during her testimony, notably when recollecting the word carved on her forehead and the way she was raped.

Hendricks’ circumstances and interests

[11] Hendricks testified in mitigation of sentence. He is 27 years of age, married with two boys aged four and six. His highest education level is grade 11. He was living with his wife and one of his sons prior to his arrest (on 17 September 2020) and was the owner of a hair salon, earning approximately R3500 per month.

[12] Hendricks’ parents passed away in traumatic circumstances when he was two years of age: his father shot his mother, aunt and then himself, while he was in his mother’s arms and he had never received counselling for this. He had no previous convictions or pending matters and had pleaded guilty to the attempted murder charge, also conveying an apology to the complainant via his counsel during her cross-examination. He maintained his innocence in respect of his rape conviction. When asked how he felt about what had occurred, he indicated that he was ‘heartbroken’ without elaborating or demonstrating real remorse. Mr Charles argued, on Hendricks’ behalf, that consideration should be given to the medical assistance he had provided to the complainant, and that the cumulative effect of his circumstances justified the imposition of a

lesser sentence than the prescribed minimum.

The interests of society

- [13] 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.²² As the court held in *S v Ncheche*:²³ ‘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.’
- [14] Society expects that the scourge of gender-based violence must be addressed and must cease. This applies also in cases of domestic relationship.²⁴ The Domestic Violence Act, 1998, for example, recognises that domestic violence is a serious social evil, that there is a high incidence of domestic violence within South African society and that victims of domestic violence are among the most vulnerable members of society.²⁵
- [15] 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 sentence.²⁶ Hendricks’ 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.²⁷ The question remains whether there are substantial and compelling reasons to justify a lesser sentence than the minimum sentence prescribed.

Analysis

- [16] This court is duty bound to consider Hendricks’ personal circumstances, as well as that of the complainant, who was 18 years of age at the time of the incident. The nature of the crimes 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.²⁸ It behoves a court to consider all the circumstances of the case to determine whether the imposition of a minimum sentence is proportionate to the particular offence.²⁹
- [17] The factors relied upon by Hendricks as substantial and compelling have been considered in their totality. The main factors in his favour are that he is a first offender and has young children. The other factors cited carry less weight when given proper consideration. He has, for example, suffered the trauma of coming to know of the circumstances surrounding the passing of his parents and aunt, but this was some 25 years ago and he could have taken steps to obtain help if this still weighed heavily upon him. There is no suggestion that he did so.
- [18] Hendricks has been in custody since his arrest in 2020. While he pleaded guilty to attempted murder, this was in the face of overwhelming evidence of his guilt, and his testimony offered a watered-down version of events. It has correctly been held that a guilty plea in these circumstances is a neutral factor in the final analysis.³⁰

[19] Hendricks' approach during the time of the sustained attack was to utilise his relationship with the complainant to cover his own back. He had ample opportunity to come forward at that time and to express remorse about his conduct and inability to control his rage. Instead, his violent behaviour continued, demonstrating a complete

disregard for the complainant, with whom he was involved in a love relationship. This prolonged infliction of pain diminishes, in my view, Hendricks' limited attempts to assist the complainant with medical care following his attacks. Rather than focus on her well-being, his focus was on perpetuating the tale about the robbery and limiting her interaction with people who might discover the truth. It is for this reason that he offered to take her to hospital himself, instead of allowing her to travel by ambulance, and instructed her to advise hospital staff that she did not require their attention. The evidence demonstrates that his small acts of kindness occurred mainly in the presence of his friend or the friend's mother. In fact, his rage was simmering without dissipation and culminated in the grotesque events of 16 and 17 September 2020.

[20] While conveying an apology to the complainant during her testimony, this apology can only be described as half-baked, as he continues to deny the rape. Despite being educated up to grade 11, a business owner and able to express himself clearly, Hendricks could only offer the single suggestion of being 'heartbroken' when pressed

as to how he felt about what had occurred. This, in my view, is something well short of genuine remorse. As Ponnann JA held in *S v Matyityi*:³¹

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.'

[21] While it may have been conveyed that Hendricks had been upset by his suspicions of the complainant's infidelity, there is no explanation of what has provoked his supposed change of heart or sense that he possesses a true appreciation of the consequences of his actions. These are matters peculiarly within his knowledge.

[22] It is important to consider the various circumstances cumulatively, and with specific focus on Hendricks' clean record and young family. 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 Hendricks and the complainant prior to the offence being committed cannot constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.³² 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.³³ It requires a meticulous

weighing of all relevant factors before a decision to impose it can be justified.³⁴

[23] The aggravating features of the matter are undeniably severe and overtake the various mitigating considerations, including his lack of previous convictions.³⁵ The complainant was made to suffer and was sadistically hit and stabbed in the head, where she had already suffered several injuries, immediately prior to being raped with the mop handle. The effect of this on the complainant, who was only 18 years of age at the time, has already been described.

[24] The remarks of the Supreme Court of Appeal in *S v Kaywood*, where the complainant had suffered a dozen stab wounds, amongst other injuries, appear to be apposite:³⁶

‘The appellant’s personal circumstances pale against the abhorrent nature and level of cruelty with which he committed the crimes under consideration. Any lesser sentence would not be justified. I have already set out the injuries sustained by the appellant and the impact thereof on her. The offences committed by the appellant were particularly abhorrent. First, he inflicted untold pain on the complainant, and then when she must have been writing in pain, soiled with dirt and blood, he performed one of the most degrading acts on her. As a result of his exceedingly cruel conduct, the complainant was left permanently, physically and emotionally scarred...a departure from the minimum prescribed sentence would be nothing short of maudlin sympathy.’

[25] In this instance, that degrading act was performed by way of the repeated insertion of a broken mop handle into her vagina. In the final analysis, I am obliged to impose the minimum sentence prescribed by the legislature unless there truly convincing reasons for departure.³⁷ In all the circumstances, I must conclude that there is an absence of substantial and compelling reasons, justifying a sentence of life imprisonment on count two, and that this sentence is proportionate to the crime. A sentence of twenty years’ imprisonment is imposed for the count of attempted murder, considering the severity of the circumstances surrounding the prolonged attack, and excluding any consideration of the rape as an aggravating factor. In terms of s 39(2)(a)(i) of the Correctional Services Act, 1998,³⁸ this sentence must run concurrently with the life sentence.³⁹

Order

[26] The following sentence is imposed:

- a. The accused, Nicholas Hendricks, is sentenced to life imprisonment in respect of the conviction of rape involving the infliction of grievous bodily harm and twenty years’ imprisonment in respect of the conviction of attempted murder.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

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] ZACC 18; 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 280(1) provides, in part, that 'When a person is at any trial convicted of two or more offences...the court may

sentence him to such several punishments for such offences...' 14 SS Terblanche A guide to sentencing in South Africa (3rd Ed) (LexisNexis) (2016) 199. 15 In doing so, the established principles in respect of multiple crimes sharing aggravating features, and the avoidance of a double

consideration of aggravation, must be considered: Terblanche supra 204-205. 16 2009 (1) SACR 552 (SCA) at 555h. 17 2016 JDR 1591 (FB). 18 See the factors considered by the majority of the court to establish serious injury in S v Rabako 2010 (1) SACR 310 paras 10 and

14. These include the actual injuries sustained, the instrument or object used, the number of the wounds – if any – inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. As Molemela AJA held in Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) para 15, the question is '...whether, as a matter of fact, the victim... sustained grievous bodily harm'. 19 2012 (2) SACR 306 (FB). 20 Supra para 7. 21 Cf Thole supra para 9, where the only evidence before the court indicated that the appellant had stabbed the deceased after he had raped her, and that the rape had already been concluded by the time that he stabbed her, so that it was held that the infliction of grievous bodily harm was not involved in the rape of the deceased. In S v Tuswa 2013 (2) SACR 269 (KZP) para 22, Stretch AJ (as she then was) considered it unnecessary to establish intention to conclude that the rape involved the infliction of grievous bodily harm. In Vilakazi supra para 13, Nugent JA noted the absence of any gradation between imposition of ten years' imprisonment for rape and life imprisonment in instances where the Minimum Sentences Act found application. 22 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 Vilakazi supra 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.’ 23

[2005] ZAGPHC 21; 2005 (2) SACR 386 (WLD) para 35. 24 The Domestic Violence Act, 1998 (Act 116 of 1998) defines a ‘domestic relationship’ to include a relationship between people engaged in an intimate or sexual relationship of any duration, and who share or recently shared the same residence: s 1.

The Preamble of this Act reflects that the State is committed to the elimination of domestic violence, which is defined in s 1 to include physical abuse, sexual abuse and any other controlling or abusive behaviour towards a complainant. 25 Preamble to the Domestic Violence Act, 1998. 26 S v September [2014] ZAECGHC 38 para 8. 27 S v PB 2011 (1) SACR 448 (SCA) para 21; Matyityi supra para 23. 28 S v Genever and Others [2008] ZAWCHC 7; 2008 (2) SACR 117 (C) at 122c-d. 29 Vilakazi supra para 15. 30 S v Barnard 2004 (1) SACR 191 (SCA) at 197; Matyityi supra para 13. 31 Supra para 13 (footnotes omitted). 32 S 51(3)(a A)(ii) and (iv) of the Minimum Sentences Act. The gynaecological examination of the complainant, five days after her rape, revealed nothing abnormal: para 28 of the judgment. 33 S v Bull 2001 (2) SACR 681 (SCA) para 21. 34 S v Dodo 2001 (1) SACR 301 (E). 35 See Vilakazi supra para 58. 36 2016 JDR 2203 (SCA) paras 15, 16. 37 Matyityi supra para 23. 38 Act 111 of 1998. 39 See S v Ziqhu 2014 (1) SASV 247 (VB).

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)

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11 See Radebe v The State [2019] ZAGPPHC 406 at para 12.

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consideration of aggravation, must be considered: Terblanche supra 204-205.

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17 2016 JDR 1591 (FB).

18 See the factors considered by the majority of the court to establish serious injury in *S v Rabako* 2010 (1) SACR 310 paras 10 and

14. These include the actual injuries sustained, the instrument or object used, the number of the wounds – if any – inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. As Molemela AJA held in *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* 2017 (2) SACR 384 (SCA) para 15, the question is ‘...whether, as a matter of fact, the victim... sustained grievous bodily harm’.

19 2012 (2) SACR 306 (FB).

20 Supra para 7.

21 Cf Thole supra para 9, where the only evidence before the court indicated that the appellant had stabbed the deceased after he had raped her, and that the rape had already been concluded by the time that he stabbed her, so that it was held that the infliction of grievous bodily harm was not involved in the rape of the deceased. In *S v Tuswa* 2013 (2) SACR 269 (KZP) para 22, Stretch AJ (as she then was) considered it unnecessary to establish intention to conclude that the rape involved the infliction of grievous bodily harm. In *Vilakazi* supra para 13, Nugent JA noted the absence of any gradation between imposition of ten years’ imprisonment for rape and life imprisonment in instances where the Minimum Sentences Act found application.

22 *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 *Vilakazi* supra 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.’

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25 Preamble to the Domestic Violence Act, 1998.

26 S v September [2014] ZAECGHC 38 para 8.

27 S v PB 2011 (1) SACR 448 (SCA) para 21; Matyityi supra para 23.

28 S v Genever and Others [2008] ZAWCHC 7; 2008 (2) SACR 117 (C) at 122c-d.

29 Vilakazi supra para 15.

30 S v Barnard 2004 (1) SACR 191 (SCA) at 197; Matyityi supra para 13.

31 Supra para 13 (footnotes omitted).

32 S 51(3)(a A)(ii) and (iv) of the Minimum Sentences Act. The gynaecological examination of the complainant, five days after her rape, revealed nothing abnormal: para 28 of the judgment.

33 S v Bull 2001 (2) SACR 681 (SCA) para 21.

34 S v Dodo 2001 (1) SACR 301 (E).

35 See Vilakazi supra para 58.

36 2016 JDR 2203 (SCA) paras 15, 16.

37 Matyityi supra para 23.

38 Act 111 of 1998.

39 See S v Ziqhu 2014 (1) SASV 247 (VB).

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