

SOUTH AFRICA / JUDGMENT

S v Ntakatsane - Sentence (26/2023) [2023] ZAECMKHC 120 (27 October 2023)

[2023] ZAECMKHC 120

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

26/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: 26/2023

In the matter between

THE STATE

and

SONWABILE NTAKATSANE

ACCUSED

SENTENCE

GOVINDJEE, J

Background

- [1] Mr Ntakatsane was convicted of three counts 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] 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] ('the Minimum Sentences Act') in seeking life imprisonment for the rape convictions in respect of counts 1 and 2, on the basis that both rapes involved victims under the age of 16. As Mr Ntakatsane had no prior convictions at the time, the minimum

prescribed sentence for the count 3 conviction is imprisonment for a period not less than 10 years. 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] This court has often had occasion to remark that a 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] Mr Ntakatsane raped both 'NN' and 'AN', the complainants in counts 1 and 2, aged 14 and 15 at the time respectively, at his dwelling on 25 August 2018. This after they had been threatened with a knife and forced to accompany him to a bridge, where he inserted his fingers into their vaginas, and then to his dwelling.
- [7] Mr Ntakatsane pleaded not guilty to those counts, and guilty to a third count of rape, involving 'ND', an adult woman, for which he was convicted. On the accepted facts contained in his statement in terms of s 112(2) of the Criminal Procedure Act, 1977, Mr Ntakatsane had been drinking with his brother and the complainant at a tavern and at his brother's dwelling on 27 October
2018. The complainant and the brother slept on the bed while he slept on a chair in the room. Mr Ntakatsane awoke and observed that the complainant's dress was pulled up and he observed that she was not wearing a panty. Overcome with sexual desire, he proceeded to rape her, while his brother continued sleeping.
- [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.[13] In the case of the complainant in count 1, a psychological assessment report, dated 7 August 2023 and accepted into evidence, confirms that the complainant endured 'significant emotional effects as well as psychological distress' from her rape, requiring psychiatric and psychological intervention once her mental state has stabilised.
- [9] The complainant in count 2, who is now 20 years of age, underwent psychological assessment on 5 September 2023. The clinical psychologist who examined her confirms that she 'has endured significant emotional duress' from her rape, now presenting with a pattern of symptoms that are consistent with the emotional effects of trauma. That report concludes that she may benefit from a psychological intervention in order to assist her to process the impact of her rape, and to learn adaptive ways of coping.

Mr Ntakatsane's circumstances and interests

- [10] Mr Ntakatsane chose not to testify in mitigation of sentence. His counsel explained that he was 23 years old at the time of the commission of the offences. His highest level of education was grade 9. He had two minor children, aged 8 and 9, and his girlfriend was pregnant. Given that it appears as if he does not have a good relationship with the mother of the children, it may be accepted that he is not a feature of their lives. Mr Ntakatsane survived on contract construction work and he had no permanent employment at the time of the offences. The main points advanced in his favour was that he had no previous convictions at the time of the commission of the offences, and that he had pleaded guilty in respect of count 3.

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.[14] As the court held in *S v Ncheche*: [15]

‘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*, [16] 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 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.[17] Mr Ntakatsane’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.[18]

Analysis

[14] Mr Sojoda emphasised that a sentence of life imprisonment was the ultimate punishment, and referred to two instances from some 20 years ago

where life imprisonment had not been imposed despite convictions for rape. For present purposes it may be noted that those cases are distinguishable for various reasons. To cite one example, in *S v Abrahams* [19] the victim had been the perpetrator’s daughter, and one of the main reasons for a finding of substantial and compelling circumstances was the downward spiral that the perpetrator had experienced following his son’s suicide. The question remains

whether there are substantial and compelling reasons to justify a lesser sentence than the minimum sentence prescribed.

[15] This court is duty bound to consider Mr Ntakatsane’s personal circumstances. 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.[20] The impact of the offences on the lives of the complainants in counts 1 and 2 is a further consideration. They were young and vulnerable

and were subjected to threats with a knife, as well as a prolonged ordeal as they were forced to accompany Mr Ntakatsane first to the bridge and then to his home, where they were raped before managing to escape while he slept. All the circumstances of the case must be considered to determine whether the imposition of a minimum sentence is proportionate to the particular offence.[21]

[16] The factors relied upon by Mr Ntakatsane as substantial and compelling have been considered in their totality. The only real factor in his favour is that he is considered a first offender for purposes of sentencing. The remainder of his personal circumstances carry less weight when given proper consideration. It is not unusual that he was unemployed and a person with a low level of education, or that he had consumed liquor prior to committing the offences. He has shown no remorse whatsoever, but did plead guilty to the offence in count 3, thereby shortening proceedings and avoiding the need for the complainant to testify. AN was required to testify

and NN was unable to do so.

[17] What stands out is that the incident involving counts 1 and 2 was brazen, involving the rape of one child in the presence of another. This was followed a mere eight weeks later with a further instance of rape in arguably even more shameless circumstances, with complete disregard of the possibility of Mr Ntakatsane's brother waking up while he raped the complainant in count 3.

[18] It is important to consider the various circumstances cumulatively, and with specific focus on Mr Ntakatsane's clean record. I have also considered the time he may have spent in custody, although not raised specifically as a feature, and his general socio-economic

background. The legislature has directed that, when imposing a sentence in respect of rape, an apparent lack of physical injury to a complainant cannot constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.[22] 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.[23] It requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.[24]

[19] The aggravating features of the matter are undeniably severe. This includes the very fact that two children were raped, having been forced to accompany Mr Ntakatsane, and eventually to submit to him, under threat of the knife he wielded. 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.[25] The reasons for the high premium placed on the rights of children is apparent from the significant adverse effects experienced by both complainants who were children at the time they were raped. This,

together with the brazenness of the commission of the offences, including that in count 3, overtakes the various mitigating considerations, including Mr Ntakatsane's lack of previous convictions.[26] On its own this cannot constitute a substantial and compelling circumstance in context.[27]

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

reasons for departure.[28] 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, and even though the result will have a tremendous impact on the rest of Mr Ntakatsane's life.[29] 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 in respect of any of the counts. The ultimate result is that sentences of life imprisonment

for the offences in counts 1 and 2 are considered to be proportionate and justified, and, as Ms Van Rooyen argued, the only suitable punishment for what has transpired. I am constrained to agree with that argument in the circumstances. Despite the plea of guilty adding to the factors to be considered in respect of count 3, there is again no justifiable basis for deviating from the prescribed minimum sentence. As a result, a sentence of 10 years imprisonment is imposed in respect of count 3, to run concurrently with the sentences of life imprisonment. Given the nature of the offences, various other consequences emanating from legislation follow. These have been included as part of the order to follow.

Order

[21] The following sentence is imposed:

1. The accused, Sonwabile Ntakatsane, is sentenced to life imprisonment in respect of the convictions of rape in respect of both counts 1 (rape of a 14-year-old girl) and 2 (rape of a 15-year-old girl).
2. The accused is sentenced to 10 (ten) years imprisonment in respect of count 3 (rape of an adult female), to run concurrently with the sentences of life imprisonment imposed in respect of counts 1 and 2.
3. 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.

4. 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.
5. 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

Heard: 23 October 2023 Delivered: 27 October 2023 Appearances: Counsel for the State: Adv M. van Rooyen Director of Public Prosecutions Makhanda 046 602 3000 Attorney for Accused: Mr V. Sojada Legal Aid of South Africa Makhanda 046 622 9350

[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] Ibid 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] S v Malgas 2001

(1) SACR 469 (SCA).

[11] See Radebe v The State

[2019] ZAGPPHC 406 at para 12.

[12] S v Matyityi 2011

(1) SACR 40 (SCA) at para 23. Also see Malgas above n 10, 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] 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.

[14] *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.’

[15] *S v Ncheche* [2005] ZAGPHC 21; 2005

(2) SACR 386 (WLD) para 35.

[16] *S v Vilakazi* 2009

(1) SACR 552 (SCA) at 555h.

[17] *S v September*

[2014] ZAECGHC 38 para 8.

[18] *S v PB* 2011

(1) SACR 448 (SCA) para 21; *S v Matyityi* above n 12 para 23.

[19] *S v Abrahams* 2002 (2) SACR 116 (SCA).

[20] *S v Genever and Others*

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

[21] *S v Vilakazi* above n 16 para 15.

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

[23] *S v Bull* 2001

(2) SACR 681 (SCA) para 21.

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

- [25] Ss 28(1)(d), 12(1)(c) 14 and 10 of the Constitution of the Republic of South Africa, 1996.
- [26] See *S v Vilakazi* above n 16 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).
- [27] *Mthimkhulu v S* [2021] ZAGPPHC 573 para 49.
- [28] *S v Matyityi* above n 12 para 23.
- [29] *S v Zitha* above n 26 at 418h-i.
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