

SOUTH AFRICA / JUDGMENT

S v Olifant (41/2022) [2022] ZAECKMKHC 70 (7 October 2022)

[2022] ZAECKMKHC 70

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

41/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: 41/2022

In the matter between:

THE STATE

and

TREVOR VELA OLIFANT

Accused

SENTENCE

Govindjee J

- [1] Mr Olifant was convicted of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[1] On 21 February 2022, he unlawfully and intentionally committed an act of sexual penetration with the complainant, AM, a five-year-old girl, by having sexual intercourse with her per vaginam without her consent and against her will.
- [2] As the victim was under the age of 16, the offence falls within Part I of Schedule 2 of the Criminal Law Amendment Act, 1997,[2] attracting a minimum sentence of life imprisonment unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

- [3] Section 276 of the Criminal Procedure Act, 1977[3] provides for the sentences which courts can impose. A sentencing court's discretion must be exercised judicially and properly, and courts are enjoined to temper the punishment with a measure of mercy.[4]
- [4] 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.[5] 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.[6]
- [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,[7] and these factors must be applied, in accordance with *S v Malgas*,[8] to consider whether substantial and compelling circumstances exist to deviate from any prescribed minimum sentence.[9] In *S v Matyityi*,[10] 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 was only five years old at the time of the rape. It is evident from Mr Olifant's plea explanation that he spontaneously and opportunistically decided to have sexual intercourse with the complainant when he realised that his mother and the complainant's mother had left the home in which he stayed. Despite knowing that she could not consent to this, he engaged with the complainant verbally, locked the front door and undressed the complainant while she lay on the floor. He proceeded to penetrate her vagina with his penis, persisting when he was initially unable to do so.
- [7] The complainant was heard crying by Mr Olifant's mother upon her return. She and the complainant's mother examined the child's private parts and accused Mr Olifant of raping her. He

ran out of the house when the police arrived at the scene after being called. He returned later that night and was arrested the following day. Mr Olifant admitted raping the complainant in his warning statement and has been in custody since that time. While he did not testify in mitigation, he indicates in his plea explanation that he appreciates that his actions were wrongful and unlawful and that he inflicted the injuries described on the J88 Report accepted into evidence. That report reflects that the complainant was bleeding from the area of her anus, suffered a tear located at the perineum and a swollen labia majora and minora, amongst other injuries suffered

in the region of the vagina. These injuries are also reflected in the diagram included as part of the J88 Report.

- [8] A psychological report accepted by consent into the record reflects the impact of the rape on the complainant. The child became distressed and agitated when relating the incident. The clinical psychologist who compiled the report concluded that she had been ‘significantly and negatively affected’ by the incident. Psychotherapy was recommended to assist the complainant to come to terms with her ordeal and the consequent emotional and mental turmoil.

Mr Olifant’s circumstances and interests

- [9] Mr Olifant has previously been convicted of assault and malicious damage to property, arising from the same incident, during March

2020. He received suspended sentences with the option of fines for both these convictions.[11] Ms McCallum placed Mr Olifant’s personal circumstances before the court. He is 25 years old. He was raised by his maternal grandmother and left school at the age of 22 years when in grade 10. His father passed away during 2020. Although unemployed, Mr Olifant became involved with drugs, purchased drugs for other people, and received dagga or pills in return. For two months prior to his arrest he was employed, earning R30 per day and using that money to purchase drugs.

- [10] Ms McCallum argued that Mr Olifant was a substance abuser even at the time of the offence, although he had not taken any drugs on that day. The offence was unplanned and the act was perpetrated without any additional violence. Mr Olifant had admitted his guilt to the police, cooperated and pleaded guilty. This, coupled with his young age, constituted substantial and compelling circumstances for

deviation from the prescribed minimum sentence. Mr Olifant has two children but is not responsible for their care. It was argued that imposing life imprisonment would be disproportionate to the crime.

The interests of society

- [11] As to society’s views, the remarks of the court in *S v Ro and Another*[12] are apposite:

‘The moral reprehensibility of rape and society’s abhorrence of this rampant scourge are unquestioned. The most cursory scrutiny of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalties. This reprehensibility and abhorrence are so much more pronounced in the instances of the rape of very young children, as is the case here. ... the complainant was an innocent, defenceless and vulnerable victim.’

- [12] Society considers rape with revulsion.[13] The rape of a child as young as the complainant in this case is viewed in an extremely serious light, and an offence 'where a proper measure of retribution is called for'.[14] Judges of this division have confirmed that rapes are progressively more serious the younger the victim, if only because the younger the victim the more vulnerable she will be and the greater the chance of serious injury.[15]
- [13] Counsel for the State argued that there were no substantial and compelling circumstances present and that a sentence of life imprisonment should follow. The case against Mr Olifant was overwhelming, he did not need to use force to have his way with the child, and the child's age made the offence particularly serious. In addition, Mr Olifant, as a family member, had a duty to protect the child.

Analysis

- [14] Sentencing courts are obliged to consider the 'sentencing triad' in order to arrive at a just outcome.[16] Punishment must be proportional to the criminal and the crime and be fair to society. As indicated, it should not be imposed out of a spirit of anger or retribution and should also, where circumstances permit, be blended with a measure of mercy.[17]
- [15] Minimum sentences have been introduced for various reasons. The Director of Public Prosecutions relied on the provisions of section 51(1), read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 in seeking life imprisonment for the rape conviction. The legislature has determined that it is this sanction, the gravest of all punishments, that should ordinarily, and in the absence of weighty justification, be imposed for the rape of young children.[18] Every child is meant to benefit from 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.[19] Society expects that courts will respond decisively to such crimes.[20]
- [16] While all considerations should be carefully weighed, prescribed minimum sentences are not to be departed from lightly and for flimsy
- reasons.[21] Several cases have provided non-binding guidance to courts as to when it would be appropriate to make a finding confirming that the 'composite yardstick' (substantial and compelling circumstances) has been met.[22] It must also be appreciated that life imprisonment is the heaviest sentence that a person can legally be obliged to serve.[23] The court must consider the traditional mitigating and aggravating factors cumulatively and as part of determining whether the minimum prescribed sentence is so disproportionate to the sentence that would be appropriate, to the extent that an injustice would be done by imposing that sentence.[24]

[17] If, after considering all the factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or, put differently, that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to impose a lesser sentence than the prescribed minimum.[25] As Rogers J put it in *S v GK*: [26]

‘I thus must not approach the present appeal with a mind that a life sentence is a priori a just punishment ... Instead, I must

examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence, but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs

of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case ... If the just sentence, approached in this manner, falls materially below the prescribed sentence, there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas*, substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be ‘disturbingly’ inappropriate or ‘induce a sense of shock’. In other words, a discrepancy falling short of the latter test ... may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.’

[18] Aversion to imprisoning an offender, even for a first offence of rape, is not, on its own, a factor intended to qualify as a ‘substantial and compelling’ circumstance warranting deviation from the prescribed minimum sentence.[27] Child rape has rightly been held to be a scourge that shames the nation.[28] It has been said that:[29]

‘A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.’

[19] This was, in addition, a specific form of domestic violence. The complainant was well known to Mr Olifant, and would, with her mother, occasionally sleep over at the home he shared with his mother. The background to the psychological report suggests that Mr Olifant’s mother is the complainant’s maternal aunt. The rape occurred during the short time when Mr Olifant’s mother and the complainant’s mother had visited nearby shops, and the complainant had been left alone with him. The complainant was raped by a person well-known to her in the sanctity of a place where she had slept and occasionally stayed.

[20] Balanced against these features of the offence are the personal circumstances of Mr Olifant and other aspects of the nature of the offence, which I have carefully considered. Mr Olifant is an adult with limited formal education who has developed an affinity for drugs. He had managed to secure a basic form of employment for a brief period immediately prior to his

arrest, earning minimal income. He has only previously been convicted for acts perpetrated between 16 June and 29 July 2019, for which he received lenient sentences, and does not appear to be a hardened criminal. There is nothing on record to suggest that those offences involved gender-based violence or were directed towards children. He returned home on the same night after his conduct had been discovered and reported to the police by his mother and the mother of the complainant. He must have realised that he would face arrest and prosecution and subsequently cooperated with the authorities and tendered a guilty plea, although no expression of remorse was forthcoming.[30] As Plasket J noted in *S v Mendile*, [31] this is indicative of an acceptance of some responsibility for Mr Olifant's actions and saved the complainant from the trauma of having to testify and relive the ordeal. While the rape of a child as young as five constitutes a despicable act, it was not accompanied by extraneous violence or threats.[32] The rape was also opportunistic rather than planned, a factor that has previously also counted in favour of an accused in the circumstances of Mr Olifant.[33] In *Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi, Dambuza JA* (Lewis JA and Rogers AJA concurring) considered the age of a first offender, who had been two years younger than Mr Olifant, together with a guilty plea as factors favouring the supposition that the accused person was a good candidate for rehabilitation. These various considerations cumulatively convince me that imposition of a sentence of life imprisonment would be disproportionate to the crime, the criminal and the interests of society and be unjust.[34]

- [21] I therefore conclude that substantial and compelling circumstances are present to justify a departure from the prescribed minimum sentence. Given the facts of the matter, it is, however, clear, that a lengthy period of imprisonment is warranted, as accepted by both counsel who appeared in the matter. I need not reiterate the various dimensions of the offence, which has been perpetrated on a young child in what should have been a safe space, its physical and mental impact on the complainant and society's condemnation of such conduct, to justify this. These realities far outweigh the various mitigating factors when considering an appropriate period of direct imprisonment. I have considered the months already spent in custody in concluding that a period of imprisonment of 23 years is warranted.

Order

- [22] The following sentence is imposed:

- a. The accused, Trevor Olifant, is sentenced to 23 years' 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, Mr Olifant's particulars, 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, Mr Olifant 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, Mr Olifant is declared unfit to possess a firearm.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:04 October 2022

Delivered:07 October 2022

Appearances:

Counsel for the State: Adv H. Pienaar

Director of Public Prosecutions

Makhanda

046 602 3000

Attorney for the Accused: Ms H. McCallum

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046 622 9350

[1] Act 32 of 2007.

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

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

[4] S v Rabie 1975

(4) SA 855 (A) at 862G-H.

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

[6] 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).

[7] S v Zinn

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

[8] S v Malgas 2001

[1] SACR 469 (SCA).

[9] See *Radebe v The State*

[2019] ZAGPPHC 406 at para 12.

[10] 2011 (1) SACR 40 (SCA) at para 23. Also see *Malgas op cit*, 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.

[11] Mr Olifant has also been convicted of failing to appear after an adjournment or to remain in attendance, and was sentenced to pay a fine of R200 or to undergo two months' imprisonment during 2019.

[12] *S v Ro and Another* 2010

(2) SACR 248 (SCA) para 15.

[13] *S v Dyantyi* 2011

(1) SACR 540 (ECG) para 21.

[14] *S v Nkawu* 2009

(2) SACR 402 (ECG) at 405c-e.

[15] *Ibid* as quoted by a full bench in *S v SQ* (2013) 1 SACR 70 (ECG).

[16] *S v Zinn* [1969] 3 All SA 57 (A) at 540G-H. On the functions to be served by sentence, see *S v Matyaleni*

[2021] ZAECGHC para 13. In this context, these factors must be applied to consider whether substantial and compelling circumstances

exist to deviate from a prescribed minimum sentence: *Malgas op cit* para 18.

[17] *S v Rabie* 1975

(4) SA 855 (A) at 862G-H.

[18] See *S v Bull* 2001

(2) SACR 681 (SCA) para 21. A meticulous weighing of all factors is required before such a punishment can be justifiably imposed: *De Lange v Smuts NO and Others*

[1998] ZACC 6; 1998 (3) SA 785 (CC) para 61, quoted with approval in *S v Dodo*

[2001] ZACC 16; 2001 (3) SA 382 (CC) para 8. Also see *S v Matyityi* 2011

(1) SACR 40 (SCA) para 23 and *Malgas op cit* as quoted in *Otto v S op cit* para 21.

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

[20] See, for example, *S v Jansen* 1999

(2) SACR 368 (C) at 378h-379a, cited with approval in *K v S* para

25. Also see the recent judgment of Laing J in *Cook v S*

[2022] ZAECGHC 13 para 21. 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.’

[21] *S v PB* 2011

(1) SACR 448 (SCA) para 21; *S v Matyityi* op cit para 23.

[22] See, for example, *D v S* [2016] ZASCA 123 para 11.

[23] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

[24] See the judgment of Petse ADJP in *S v Dyantyi* op cit para 14.

[25] *S v GK* 2013

(2) SACR 505 (WCC) para 9.

[26] Ibid para 14. The aspects of the judgment dealing with proportionality of life sentences in rape cases were cited with approval in *S v De Beer* 2018 (1) SACR 229 (SCA) para 20.

[27] The Director of Public Prosecutions, *Grahamstown v T M* 2020 JDR 0652 (SCA) (‘TM’) para 11.

[28] *MDT v S* [2014] ZASCA 15; 2014 (2) SACR 630 (SCA) para 7.

[29] *S v C* 1996

(2) SACR 181 (C) at 186e-f.

[30] It has been held that while it may be argued that every human being is capable of change and transformation if offered opportunity and resources, the prospect of rehabilitation pales in the absence of an expression of contrition and commitment to ‘the path of rectitude’: *S v Dyantyi* op cit para 26.

[31] *S v Mendile* 2016 JDR 2010 (ECG) para 11.

[32] See *S v GK* op cit para 15 where these factors, together with the fact that the duration of the act appears to have been quite brief and the lack of evidence that the accused had ejaculated, were considered as mitigating, albeit in the context of oral rape.

[33] *S v Mendile* op cit para 7.

[34] See, in general, *S v Sekonyela* 2020 JDR 1614 (ECM).

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