

SOUTH AFRICA / JUDGMENT

S v Zikhali (Sentence) (CC15/23) [2023] ZAGPPHC 1842 (10 August 2023)

[2023] ZAGPPHC 1842

COURT

North Gauteng High Court, Pretoria

BEFORE

Cox

CASE / FILE NUMBER

CC15/23

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE

NO: CC15/23

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

THE
STATE
and
NTOKOZO
KHULEKANI ZIKHALI

JUDGMENT

SENTENCE

COX, AJ

[1] After his plea of guilty the 31 year old accused was convicted of raping a 9 year old girl.

He showed no remorse for his actions and was linked to the crime by DNA evidence. The plea of guilty thus becomes a neutral factor as it seems that the accused was not left with much of a choice, given the strength of the evidence against him.

- [2] When considering a suitable sentence, the court will refer to the personal circumstances of the accused, the nature, seriousness and the prevalence of the offence that he was convicted of as well as the interests of the community when the court sentences a person.
- [3] The purpose of considering these factors are to give effect to the aims of legal punishment which include retribution for what he has done, rehabilitation of the offender and deterring him and other would be offenders from committing similar offences in future.
- [4] All of these factors must be accorded appropriate weight in accordance with the circumstances of the case. The sentence must also be blended with a measure of mercy.
- [5] The accused is single and has no children.

He completed grade 10 and dropped out due to suffering from headaches when studying for exams.

From 2011 to 2015 he was employed in his father's construction company as a general labourer. Subsequent to his father's retirement the accused has been unemployed. He is therefore dependant on his parents.

- [6] The rape of children has become a pandemic in this country. It is one of the most harrowing and malignant crimes confronting South Africa today.

In Ndlovu [2017] ZACC 19 it was described as follows:

"Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa."

- [7] The South African Constitution contains a Bill of Rights which provides for the right to life, dignity and respect to name a few. The accused person unjustifiably trampled on the constitutional rights of the complainant. He showed her no respect and invaded both her privacy and dignity.
- [8] There is no justification for what he has done to the complainant. He abused the trust which she had in adults in that she adhered to his request to take a picture of him with his cell phone. Thereafter he took her to some trees where he proceeded with raping her.

She did not sustain any physical injuries. She however sustained some gynaecological injuries which included tears of her Labia majora, posterior fourchette and perineum.

[9] The victim impact statement of the complainant's mother describes the impact that the crime had on her and her child. It impacted on the child at school ; she could not concentrate on he schoolwork.

Fortunately it improved but the incident will always remain with the victim and let's hope that it does not manifest in her future relationships with males.

[10] Communities become enraged when crimes are committed, especially against vulnerable, innocent children.

It is often said that it takes a community to raise a child hence children sometimes play in parks and streets unattended in the belief that they will be safe and unharmed. Children are entitled to be their playful selves. They should not have the fear that they maybe attacked and abused by persons like the accused.

[11] It is a fair expectation that an adult man should be able to control his carnal desires and not to take it out on children because if he does he will be met with the full might of the law.

[12] Punishment imposed by the court must fit the crime, be fair to the society whilst also considering the personal circumstances of the accused.

[13] In accordance with section 51(1) of the Criminal Law Amendment Act 105 of 1997[1] (CLAA) the conviction of an accused for raping a child under the age of 16 years attracts a minimum sentence of life imprisonment.

The court is obliged to impose that sentence unless it can find substantial and compelling circumstances to exist, in which event the court may deviate from imposing the prescribed sentence and may impose a lesser sentence.

The intention of the legislature was to ensure severe punishment to those who commit serious crimes referred to in the act.

[14] Relying on various cases the court in *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (2) SACR 477 (CC) held that:

‘ . . . the starting point for a sentencing court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.’

[15] This was endorsed in *Nkabinde* 2017 (2) SACR 431 (SCA) as follows:

‘ . . . the prescribed minimum sentences should not be departed from lightly and for flimsy reasons. The legislature has ruled that these are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes, unless there are truly convincing reasons for a different response.

It being the ultimate penalty that may be imposed in the country, it will not be imposed lightly.

[16] Counsel for the accused submitted that the following factors , when considered cumulatively constitute substantial and compelling circumstances:

- That the accused is a first offender and that he has been in custody awaiting finalisation of the trial from 14 October 2022;
- The fact that he pleaded guilty to the offence;
- That the complainant suffered no other physical injuries than the gynaecological injuries referred to earlier; and that the accused did not threaten the complainant in any way.

[17] The state contended that there are no substantial and compelling circumstances present which warrant a departure from imposing the prescribed minimum sentence.

The state argued that even when considered cumulatively the factors referred to does not equate to substantial and compelling circumstances.

[18] I am in agreement with the state that none of the factors mentioned on its own or cumulatively can be elevated to be substantial and compelling.

[19] Having considered the foregoing I conclude that there are no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment and that the imposition thereof will not be disproportionate in the circumstances, hence the accused is sentenced to life imprisonment.

In terms of section 50(1) Act 32 of 2007 it is ordered that the particulars of the accused be registered in the national register for sexual offenders.

In terms of section 120(4) Act 38 of 2005 the accused is deemed unfit to work with children.

No order is made contrary to the provisions of section 103(1) of the Firearms Act 60 of 2000 and the accused therefor remains unfit to possess any firearm.

Cox AJ

Acting Judge of the High Court of South Africa

North Gauteng Division, Pretoria

Appearances:

For the Accused:

Adv Van Wyk

For the State:

Adv Sihlangu

Date of delivery: 10 August 2023

[1] Section 51(1) provides: “Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

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