



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 22/2022

In the matter between:

THE STATE

And

PHILANI AIDEN BOTHA

ACCUSED

JUDGMENT ON SENTENCE

Govindjee J

Background

[1] Mr Botha was convicted of a charge of rape. He unlawfully and intentionally committed an act of sexual penetration with a seven-year-old female complainant by inserting his penis into her vagina without her consent during 2020.

[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, 1997,¹ attracting a minimum

¹ Act 105 of 1997 ('the Minimum Sentences Act').

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, 1977² 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.³ While the retributive aspect tends to dominate, 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 Ponnar JA held that Parliament:

² Act 51 of 1977 ('the CPA').

³ *S v Rabie* 1975 (4) SA 855 (A).

⁴ *Rabie* 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 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 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.

'...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 raped by Mr Botha, a relative, after she had been sent by her grandmother to him to repair a phone. The rape was painful, causing the complainant to cry. Mr Botha had placed a hand over her mouth and covered her eyes during the incident, and threatened to kill her if she spoke about her ordeal.

[7] It is also important to consider the effect of the crimes on the victim, particularly in cases of gender-based violence.¹¹ The child was extremely young at the time she was raped, and was compelled to experience something completely unfitting for a child her age. Her innocence has been stolen. I accept the argument advanced by the state that it is extremely difficult for anybody, including a presiding judge, to fully comprehend and appreciate the likely effect of the rape on the rest of her life. A clinical psychologist report, accepted into evidence by consent, confirms the significant changes that have been observed in respect of the behaviour of the complainant as a result of her rape. She has become withdrawn and frequently displays a sad mood, expressing feelings of isolation, helplessness, shame and lack of trust. She is now wary of male figures and experiences sleep disturbance and nightmares. She is also absent-minded, mentally drifting off and dwelling on the incident. The clinical psychologist report concludes that the child has suffered significantly from the rape, which has impacted her life negatively. Psychotherapy has been strongly recommended to assist her to come to terms with what happened to her.

¹¹ 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.

[8] It must be noted that the complainant was made to relive her ordeal in court. According to the SCA, this factor should not be overlooked.¹²

Mr Botha's circumstances and interests

[9] *Mr Mgangatho* placed Mr Botha's personal circumstances before court. He would have been approximately 20 years of age at the time of the incident and is a first offender, with no other cases pending. His level of education is grade 11. He is unmarried and was previously employed as a general worker earning R3800 per month. He supported his only child, who was born during August last year and did not reside with him, with R700 per month, and also contributed R600 to the household where he resided. Mr Botha lived with his father, step-mother and two cousins, and was raised by his father once his maternal great-grandmother passed away. He has no relationship with his mother, who lives in Gauteng. A pre-sentence psychological report accepted into the record confirms that Mr Botha does not accept any responsibility for the rape.

The interests of society

[10] 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.¹³ As the court held in *S v Ncheche*:¹⁴

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

¹³ *S v Chapman* 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.'

¹⁴ 2005 (2) SACR 386 (WLD) para 35.

[11] In *S v Vilakazi*,¹⁵ the SCA 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, particularly one as young as seven years of age, is by its nature one of the worst kinds of offences imaginable. The SCA has recently stated that courts cannot ignore the reality that South Africa is facing a pandemic of sexual violence against women and children.¹⁶

[12] 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 Regrettably, that legislation seems to have achieved little in respect of stemming the shocking number of child rape cases that are set down for hearing by this court each year. Society's patience, understandably, is wearing thin, and sentences imposed in child rape cases are rightly scrutinised.

[13] Mr Botha'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 The fact that Mr Botha is a first offender does not, on its own, necessarily warrant a lesser sentence. The question remains whether there are substantial and compelling reasons, on the whole, to justify a lesser sentence than the minimum sentence prescribed.

Analysis

[14] This court is duty bound to consider Mr Botha's personal circumstances, as well as that of the young complainant. 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

¹⁵ 2009 (1) SACR 552 (SCA) at 555h.

¹⁶ *The Director of Public Prosecutions, Grahamstown v T M* 2020 JDR 0652 (SCA) para 15.

¹⁷ *S v September* [2014] ZAECGHC 38 para 8.

¹⁸ *S v PB* 2011 (1) SACR 448 (SCA) para 21; *Matyityi supra* para 23.

prevention, retribution, rehabilitation and deterrence.¹⁹ All the circumstances of the case must be considered to determine whether the imposition of a minimum life sentence is proportionate to the particular offence.²⁰

[15] The aggravating features of the matter are undeniably severe. The rape of vulnerable victims, such as extremely young children, have always been an aggravating feature of rape. As *Ms Van Rooyen* argued, 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.²¹ The effect on the complainant has already been described. 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. This court has previously noted that it will not shirk this responsibility, however agonising it may be to do so.²²

[16] It is important to consider the various circumstances cumulatively, and with specific focus on Mr Botha's clean record and relative youthfulness at the time. 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 has been noted previously that this requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.²⁴

[17] The factors relied upon by Mr Botha as substantial and compelling have been considered in their totality. The main factors in his favour are that he is a youthful first offender. Other factors, including that the rape was carried out seemingly spontaneously and opportunistically on a single occasion, carry less weight when given proper consideration. His level of education, although low, is not unusual and there is no basis for suggesting any remorse. On the whole, however, I consider

¹⁹ *S v Genever and Others* 2008 (2) SACR 117 (C) at 122c-d.

²⁰ *Vilakazi supra* para 15.

²¹ Ss 28(1)(d), 12(1)(c) 14 and 10 of the Constitution of the Republic of South Africa, 1996.

²² *S v Zitha* 1999 (2) SACR 404 (WLD) at 418h-l, as quoted in *S v B* [2022] ZAECGHC 12 para 18.

²³ *S v Bull* 2001 (2) SACR 681 (SCA) para 21.

²⁴ *S v Dodo* 2001 (1) SACR 301 (E).

the circumstances to be weighty enough so as to warrant departure from the prescribed minimum. The fact that a prescribed sentence is considered disproportionate is itself a basis to find that there are substantial and compelling circumstances to warrant a departure from a prescribed sentence.²⁵ As Goosen J, as he then was, held in *S v Weideman*:²⁶

'Life imprisonment is the most severe sentence that can be imposed by a court. For this reason it is, generally speaking, reserved for the most serious and egregious criminal acts. It is also reserved for those instances where the criminal poses a clear and present danger to the society and where there is little or no prospect of rehabilitation of the criminal and reintegration of that individual into society. This does not however mean that a court should keep something in reserve on the basis that some more serious manifestation of the crime can be imagined. It means only that the sentence of life imprisonment must be proportionate to the nature of crime for which it is imposed.'

[18] Life sentences are undoubtedly appropriate sentences, in general terms, to impose upon criminals who rape children. The question remains whether it is the appropriate sentence in this instance. It would, in my view, be unjust and disproportionate to impose a life sentence on Mr Botha given his clean record and age, and these circumstances are entered into the record as substantial and compelling on the facts of this case.²⁷

[19] The court is now enjoined to consider an appropriate sentence and must exercise a reasoned discretion in evaluating the various relevant factors highlighted above in order to arrive at a proportionate outcome. It goes without saying that the task is a complex and onerous one, involving various competing considerations. The requirement of proportionality applies equally in relation to cases where sentences have been prescribed by legislation.²⁸ It cannot be ignored that gender-based violence, including child rape, continues to devastate lives and negatively impact upon families and communities. Sadly, many women, including children, live in constant fear of precisely this type of occurrence. The remarks of the court in *S v Ro and Another*²⁹ are apposite:

²⁵ See *S v Weideman* [2014] ZAECPHC 62 para 7.

²⁶ *Ibid* para 14.

²⁷ *Cf TM op cit* fn para 12.

²⁸ *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488f-g.

²⁹ *S v Ro and Another* 2010 (2) SACR 248 (SCA) para 15.

'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. ... [T]he complainant was an innocent, defenceless and vulnerable victim.'

[20] Given the circumstances, a lengthy sentence of direct imprisonment is unquestionably warranted.³⁰ But each situation is different and the nuances of the various considerations must be weighed. In coming to a decision, I have accepted, based on the pre-sentencing psychological assessment report received, that Mr Botha is a normal young man who committed a despicable single act, for which he has expressed no remorse.³¹ He has never previously fallen foul of the law. The offence he committed is by its nature extremely serious and involved gender-based violence. While Mr Botha was a family relative, it cannot be said that he held a position of trust similar to cases that have considered this as an aggravating feature.³² I have also considered that the incident occurred away from the child's home. Leaving aside the physical injuries, the psychological impact is likely to be long-lasting. Regrettably, no imposition of punishment on the offender will restore the childhood that has been stripped from the victim. I have noted that one of the consequences of the rape has been a reported family breakdown. It is to be hoped that the damage to family relations brought about by Mr Botha's criminal conduct may, over time, be repaired.

[21] Balancing the various considerations in the light of all the circumstances, I consider a sentence of 18 years' imprisonment to be appropriate, giving Mr Botha some opportunity to rehabilitate while punishing him heavily for his conduct and the harm he has caused to his victim and to society. Given the nature of the offence, various other consequences emanating from legislation follow. These have been included as part of the order.

³⁰ See *Seedat v S* [2016] ZASCA 153 para 38 *et seq*, on the efficacy of restorative justice as an inappropriate sentencing option in cases involving serious offences.

³¹ See *Weideman op cit* para 13.

³² *M v The State* [2022] ZASCA 3 para 53.

Order

[20] The following sentence is imposed:

1. The accused, Philani Aiden Botha, is sentenced to 18 years' imprisonment in respect of the conviction of rape involving a seven-year-old child.
2. 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.
3. 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.
4. 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:13-16,17 June 2022 and
17-18,21 October 2022 and
April 2023

Delivered:28 April 2023

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