

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION FOR MAKHANDA

CASE NO: CC02/2024

DATE: 20-06-2024

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<p>DELETE WHICHEVER IS NOT APPLICABLE- -(1) REPORTABLE: YES / NO. (2) OF INTEREST TO OTHER JUDGES: YES / NO. (3) REVISED. <u>DATE</u> <u>SIGNATURE</u></p>
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In the matter between

THE STATE

and

SIVUYILE KLAUSHE

Accused

J U D G M E N T

20

NONCEMBU J:

The accused in this matter is facing a charge of rape in contravention of section 3 read with sections 1, 56(1), 57, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

Can I just establish does the accused; I know that throughout the accused in this matter did not have

interpretation services, does he require them now?

ACCUSED: M'Lady, I require that it be interpreted just for some phrases that I might not understand.

COURT: Thank you.

INTERPRETER: M'Lady, tell me, I am so sorry, is there a copy for me?

COURT: Unfortunately, there is not...[speaking simultaneously]

INTERPRETER: No, it is fine. It is fine, M'Lady.

10 COURT: It is alleged that on 24 April 2023 he performed an act of sexual penetration with the complainant, a 10-year-old girl, by inserting his penis in her vagina without her consent.

For purposes of this judgment the complainant shall be referred to as LM in order to protect her identity as provided for in terms of the law due to her young age.

Section 51(1) of the Criminal Law Amendment Act which provides for a discretionary minimum sentence of life imprisonment is applicable in the matter in that the
20 complainant was below the age of 18 years when the offence was committed.

The accused pleaded not guilty to the charge and he elected not to give any plea explanation, however, he made certain admissions in terms of section 220 of the Criminal Procedure Act pertaining to *inter alia* his identity by the

complainant not being taken in issue, as well as the chronology of events of the day before the incident in question.

The state led the evidence of five witnesses in the matter, these being the complainant, her mother and biological father, her aunt, as well as the forensic nurse who examined the complainant. The accused closed his case without leading any evidence.

A photo album depicting the scene of crime was admitted by
10 consent and admitted as EXHIBIT C.

What follows hereunder is a brief exposition of the evidence that was tendered before this Court. The complainant testifying through an intermediary, after being properly admonished by this Court, told the Court that on the day before the incident, which was a Sunday, she was dropped off at church by her mother and the accused whom he called *Bhuti* and regarded as her second father.

The accused was her mother's boyfriend and they lived together in Nahoon, East London, since she was about five
20 or six years old. Her mother was going away on a work-related trip. After church she was picked up by her aunt, who was also in church, to her house in Amalinda from where she was later fetched by the accused and taken home.

The accused left her alone at home for awhile but later

came back. He went to his room and the complainant went to sleep in her bedroom. During the course of the night there was loadshedding but although it was dark it was not so dark that one could not see. In that time the accused came to the complainant's room, removed her pyjama pants and underwear, applied Vaseline in her vagina and inserted his penis in her vagina.

She clarified during cross-examination that she did not know the name of these body parts at the time but she learnt of
10 them after being told by some people after the incident had happened.

Whilst demonstrating with anatomically correct dolls she showed the Court the position as well as the movements made by the accused whilst he was on top of her saying that the accused was kind of swaying side to side whilst on top of her, movements which appeared to be consistent with sexual intercourse. She was kicking and fighting trying to get the accused off of her.

Whilst the accused was still busy making the said
20 movements on top of her, the electricity came back signifying the end of loadshedding. The accused quickly got off her, bid her goodnight and went to sleep in his room. At that stage the complainant sent a message via WhatsApp to her mother informing her what had happened.

Her mother called her biological father by the name of A[...]

and after a short while the mother called her back again telling her that the biological father was waiting outside. She opened the door and went outside where she met her father and told him what had happened. Her father took her to Medicross Hospital in East London. At Medicross they were referred to a hospital in Mdantsane where she was examined by doctors.

Her mother also came and she narrated to her what the accused had done. They went to the detectives' offices
10 where she told the police what had happened.

Her mother called the accused but the accused did not answer the phone. They went to Berea where they found the accused but the accused refused to talk to the complainant's mother. The detectives went inside and arrested the accused.

During cross-examination she explained further that her vagina was sore during the sexual intercourse and that although she did not scream, she was crying at the time. She also stated that it was painful to urinate after the
20 incident. She estimated the ordeal to have lasted for about two to three minutes.

She was also shown the photo album depicting a bedroom which she confirmed to be her bedroom where the incident happened. She pointed the Court to one of the photos in the album depicting a Vaseline tub, which was on the

dressing table next to the bed, stating that it was the one used by the accused to apply in her vagina as it always stayed next to the bed.

Her mother corroborated her evidence with regards to the events of the Sunday before the day of the incident, specifically that she dropped her at church together with the accused person and she was later to be picked up by her cousin. She testified further that after she had left for her business trip, she kept on communicating with the accused
10 as she wanted to make sure that he did not forget to pick up the complainant from her cousin's place as she needed to be in bed on time as the following day was a school day.

At some stage after eight in the evening when she tried to get hold of the accused on the phone, the accused did not answer his phone. After communicating for a while with the complainant she fell asleep.

Around two in the morning she saw a WhatsApp message on her phone from the complainant telling her that she was not okay as the accused had done something to her. She called
20 the complainant and the complainant told her what had happened. She then called the complainant's biological father by the name of A[...], telling him that the complainant was not okay without giving him the full details of what had happened. A[...e went to fetch the complainant from her home.

Her employer made arrangements for her to come back home and she met up with the complainant as she was busy making a statement with the police detectives.

She tried calling the accused person on his phone but the accused did not answer. She tracked the accused through the vehicle tracker and found him in an area between Vincent and Nahoon in East London. She asked to speak to the accused but the accused refused. The accused was thereafter arrested by the police.

10 A[...] confirmed receiving a call from the complainant's mother telling him that the complainant was not okay. He went to their house, waited outside as he normally did when he visited the complainant, called the complainant's mother to inform the complainant that he was waiting downstairs.

As the complainant came out of the house- he noticed that something was not okay as she was not wearing any shoes.

When he asked her where her shoes were the complainant said she was afraid to go back and fetch them. He accompanied her back inside to fetch her shoes. He then

20 took the complainant to Life Beacon Bay Hospital in East London where they were referred to the Thuthuzela Rape Crisis Centre in Cecelia Makiwane Hospital in Mdantsane. The complainant was examined by a nurse, thereafter they went to the police.

Nothing much turned on the evidence of the complainant's

aunt, Nosiphiwo Blokko, who picked up the complainant from the church on the day of the incident, except to state that she was with the complainant in the same room the entire time that the complainant was playing with her girl children at her house after church until she was picked up by the accused a day before the incident.

The forensic nurse who examined the complainant, Ms Nomvuyo Makinana, testified about her observations and findings as recorded in the J88 after examining the
10 complainant on the day of the incident.

Of significance in her findings was that the complainant had redness and bruising on the right side of the labia majora which she stated was indicative of blunt force injury.

She indicated that although the hymen of the complainant was intact that is not indicative of absence of penetration in that because of her tenner stage, which was three, the complainant's hymen was highly elastic and as such no longer sensitive thus making it not easy to sustain injuries. She concluded that the genital findings were consistent with
20 fresh genital penetration.

The accused closed his case without leading any evidence. His version, as was put to the complainant's mother, was that he was very drunk on the day in question and that he does not know what happened.

The issue for determination by this Court is whether or not

the state has proved beyond reasonable doubt that the accused person raped the complainant on the day in question.

Regarding the actual rape the complainant was a single witness in the matter and therefore the cautionary rule is applicable, first by virtue of the fact that she was a single witness, and secondly by virtue of her young age.

It is trite that a Court can convict on the evidence of a single witness provided that such evidence is clear and
10 satisfactory in all material respects. Section 208 of the Criminal Procedure Act is apposite in this regard. With regards to dealing with the evidence of a child witness the following was stated by this division in *S v Dyira* 2010 (1) SACR at page 78, and I quote:

20 “The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the...”

MECHANICAL INTERRUPTION

[09:26]

“Here more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness.”

A proper manner of assessing the evidence of a child witness was set down in *Woji v Santam Insurance Company* 1981 (1) SA 1021 by the Appellate Division where the Court stated the following and I quote:

10 “The question which the trial court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears intelligent enough to observe; whether he has the capacity of recollection

20 will depend again on whether he has sufficient years of discretion to remember what occurs, whilst the capacity of narration or communication raises the question of whether the child has the capacity to understand questions put, and

to frame and express intelligent answers. There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest? Is there a consciousness of the duty to speak the truth? At the same time the danger of believing the child where evidence stands alone must not be underrated."

10 As correctly conceded by counsel for the accused the complainant in this matter ticked all these boxes. For a child of her age her demeanour in the witness box was impeccable.

Her account of events of the day in question was given in a clear chronological and coherent manner and the material aspects of her evidence, not pertaining to the actual rape itself, in particular the chronology of events, were corroborated in material respects by other witnesses, including her mother to whom she reported the incident
20 immediately, her biological father, as well as her aunt. In my view she fared way better than most adult witnesses who appear in our courts.

I therefore welcome the concession that the reliability and trustworthiness of her evidence cannot be questioned.

Having made the above concessions Mr Tshingana, on

behalf of the accused, argued that the matter turns on whether or not penetration has been established by the state. He based this argument on the concession which was made by the forensic nurse who examined the complainant when a proposition was put to her that penetration by any other object, including a finger, could not be excluded. He implored this Court to draw an inference that the injuries sustained by the complainant could have been caused by anything other than penetration by the penis of the accused.

10 This argument, however, presents with a number of shortcomings. Firstly, it is not based on any evidence presented before Court. Granted the concession by the forensic nurse was correctly made because objectively speaking such injuries indeed could be cause by any other blunt object.

However, the subjective evidence of the complainant, which this Court has no basis to reject, is that the accused inserted his penis, which she described as the body part which boys use to “pee”, into her vagina, also appropriately
20 described. This in my view takes away the possibility of her making a mistake with regards to what object penetrated her due to her lack of knowledge of sexual activity consequent upon her young age.

It was held in *S v F* 1990 (1) SACR 238 (A) that in the absence of facts such possibilities (as was suggested by Mr

Tshingana in the present matter) were no more than mere speculation. Furthermore, in terms of the act penetration is described as including any act which causes penetration to any extent whatsoever.

Dealing with this issue of penetration, the Court in *S v Letsibane* 2020 JDR 1087 (GP), the Court held that for a finding of a rape the law did not require that the sexual deed had to be completed. In this regard Bam J stated that penetration to any extent was sufficient to constitute the
10 crime of rape.

Many other authorities have confirmed that entry into the labia, described as the anterior of the female genital organ, even to the slightest extent was sufficient for the element of penetration resulting in criminal liability for the crime of rape.

Milton in *South African Criminal Law and Procedure* 3rd Edition, Volume 2, also states that what is required is penetration of the labia by the penis albeit to a slight extent.

20 Lastly on this issue, in an article titled, *An Inconvenient Truth on the Absence of Definitive Corroborative Medical Evidence in Child Sexual Abuse Cases* by Professor Susan Kreston a Fullbright scholarship recipient, relying on multiple medical studies that conclude it is completely possible for a child to be sexually abused but for there to be

no discernible physical trace on the child, examines the most common reasons why definitive medical evidence is not forthcoming in the overwhelming majority of child sexual abuse cases.

She states the following in her introduction to the article and I quote:

10 “There is a wrongly yet widely held belief that if a child has been sexually assaulted medical evidence will be able to conclusively corroborate the child’s evidence. This myth is doubly dangerous in that it subjects both the victim’s case and the medical community to unrealistic standards that simply cannot and will not be met in the overwhelming majority of instances of child sexual abuse. The truth is that while medical examination can sometimes confirm that a child has been sexually assaulted, it can never exclude it.”

20 Incidentally similar to the evidence of the forensic nurse who testified in this court one of the reasons she mentions for lack of medical evidence in child sexual, in child victims of sexual assault is elasticity.

She states that similar to the evidence of the nurse who testified in this matter that the hymen’s tissue is elastic and

full penetration by an object, a finger or even a penis, particularly in an older child may cause no visible trauma, e.g., the tearing or e.g., tearing the posterior rim of the hymen.

Another reason she mentions for absence of injuries in such cases is what she refers to as offender/victim typology. In this regard she opines that a careful perpetrator of child abuse, of child sexual abuse, or an experienced one is likely to perform an act which will result in his or her detection.

- 10 She states that in most circumstances this perpetrator is well-known to the child and force is generally not used. This type of child abuse perpetrator is called intimate offender, in that the offender is known to and trusted by the child victim, they tend to cause less physical harm to their victims.

I find the similarities between the offender/victim typology referred to in the above study and that of the accused and the complainant in the present matter to be strikingly uncanny. The closeness between the complainant and the
20 accused in this matter was to the extent that she considered the accused to be her second father.

And significantly in her evidence she stated that the accused rubbed Vaseline on her vagina before penetrating her, a

And as stated by the forensic nurse this could explain why

she did not suffer serious injuries because Vaseline acts as a lubricant making penetration easy.

I take note of the minor discrepancy between the nurse's evidence as recorded in the J88 and that of the complainant in this regard. In my view this is insignificant.

Furthermore, the suggestion by Mr Tshingana that the complainant may have made a mistake in this regard applies equally in respect of the forensic nurse. I dare say even more so in the case of the forensic nurse because her
10 recordal in this regard was based on hearsay, in other words, what she was told by the complainant and therefore room for misunderstanding or miscommunication can never be excluded.

The complainant on the other hand whose evidence could not be faulted was testifying about her own personal experience, and if one views the two versions objectively the complainant's one is more plausible if one considers that the only way she could have come up with a deduction or even a suspicion that Vaseline was used in her vagina
20 was if she knew what purpose the Vaseline would serve, that is that of a lubricant. And from the evidence before Court and given her age this Court can readily; we can readily accept that she could not have had such knowledge.

It is apparent therefore that the accused used Vaseline as a lubricant for easy penetration to ensure that the complainant

sustained as little harm, if any, as possible during the penetration.

One other significant aspect in this regard is the movements that were made by the accused whilst on top of the complainant as she so eloquently demonstrated before this Court. Most victims of sexual abuse when describing the sexual act refer to up and down movements being made by the perpetrator. In this matter and as visibly demonstrated by the complainant the accused was swaying left and right
10 as if trying to be gentle enough so as not to injure the complainant, once more talking to the closeness between the two in as far as the offender/victim typology referred to above.

Given all the authorities that I have referred to above I am therefore satisfied that the state has proved beyond reasonable doubt that the complainant was penetrated by the accused on the day in question.

Regarding the purported version by the accused that he was so drunk on the day in question that he does not know what
20 happened, the following is apposite. Firstly, he has no version before this Court to consider because no evidence was tendered on his behalf. What was put to the complainant's mother regarding his state of sobriety was just a proposition which bore no evidential value as it was never tendered under oath, this Court therefore need not

even consider it.

I also find it quite telling that this version was not put to the complainant, the one person who was with and who saw the accused first-hand at the time of the incident. Furthermore, the chronology of event as narrated by the complainant on the night in question does not correspond with the conduct of someone who was acting in a stupor due to a high level of intoxication.

The evidence of the complainant demonstrated the conduct
10 of someone who had very carefully planned and calculated how he was going to execute his plan. He went into the complainant's room when it was loadshedding and therefore dark and when the electricity came back, he quickly got off the complainant.

According to the complainant the rape lasted for only about three minutes because he was disturbed by the lights coming back. He used Vaseline as a lubricant to ensure smooth penetration so that no visible injuries caused by friction were sustained by the complainant thus to make
20 detection difficult. All this points to someone who knew exactly what he was doing thus making his version that he was so drunk that he does not know what he was doing highly improbable. I therefore reject it as false.

I am thus satisfied that the state has proved the guilt of the accused beyond reasonable doubt. He is therefore

accordingly found guilty of rape as charged in the matter.

.....

NONCEMBU J

JUDGE OF THE HIGH COURT

10 **DATE:**

20

MR TSHINGANA: As the Court pleases, M'Lady.

ACCUSED'S PREVIOUS CONVICTIONS ARE PUT TO HIM:

As the Court pleases, M'Lady. The state proves one previous conviction and it reads as follows. On 7 February 2019 in Mdantsane the accused person was convicted of contravening section 65(2)(e) of Act 93 of 1996 which is driving a vehicle on a public road while the concentration of alcohol in blood is not less than 0,05 grams per 100 millilitres and he was sentenced to a fine of R3 000 or 6-months' imprisonment and was suspended for a period of 5 years. In terms of section 35(3) of Act 93 of 1996 the
10 Court orders that the suspension of the accused's licence shall not take effect.

COURT: Please rise, Mr Klaushe. Do you admit the previous conviction that was read out to you?

ACCUSED: Yes, M'Lady.

ACCUSED ADMITS HIS PREVIOUS CONVICTION

COURT: Please sign the SAP69 form. The SAP69 is admitted and marked as EXHIBIT E.

MR TSHINGANA: Court pleases, M'Lady.

MR SOGA: The Court pleases, M'Lady. Lastly, M'Lady, the
20 state applies to hand in the victim impact report of the complainant that had been compiled by a social practitioner, [indistinct]. My learned colleague was furnished with a copy of the report.

COURT: Can you just read the findings of the report into the record?

MR SOGA: Thank you, M'Lady.

COURT: Or the evaluation.

MR SOGA: As the Court pleases, M'Lady. Starting with paragraph 8, psychological emotional trauma suffered.

10 “The minor child expressed her feelings of disappointment against the accused. Trust had been broken as she regarded him as the father. According to the minor child the accused violated her at the time she was starting to have a strong bond with him. To her she was the father and she played that role of being a father to her. According to L[...][?] the accused created a very worse situation and I quote as said by the complainant, “I will become uncomfortable with the person who did this”, she expressed herself; at this moment she is disassociating herself from the accused. She experienced nightmares which she
20 regarded as triggering dreams of the trauma. To her these nightmares bring back all the memories of the trauma. She further explained how the dreams or rather nightmares showed her what she could have done during the trauma incident. This

shows that the minor child is blaming herself for what happened to her at the time of the trauma. She felt scared and sickly. L[...] also reported that she lost her aunt she was confiding to as she passed on. She expressed her feelings of grief explaining how her aunt was able to make her feel when she is going through the most. It seems that the minor complainant had lost three significant people in her life. 10 The father figure, that is the accused, her aunt through death and her maternal family though her mother allows her to speak with her maternal aunt. The family is now ripped apart. A sense of betrayal, guilt, loss, grief, powerlessness is being felt by the minor child. Ms [indistinct], that is now the complainant's mother, reported the impact of the offence to her daughter as follows. 20 The offence has created a breakdown within the family. She lost her family and finding herself alone with her mother. The only support received is from fellow colleagues. L[...] now locks the bathroom when she is taking a shower or a

bath. She does everything in a locked bedroom. Before the incident they were taking a bath and do everything together as a mother she is now finding herself reminding L[...] that they are both females and there is no male in the house, she does not need to lock herself up as there are no strangers in the house. Both the minor complainant and the mother are residing in a secured estate where there is no access to uninvited guests from the access-controlled gate, but this does not make L[...] feel safe at home. Safety and protection were not available at the time of need. The minor child now hates the darkness. She does not sleep in the dark and there must be light all the time or lights always switched on at night. She refuses and does not want to sleep alone. She discards the pyjamas called "*onesie*"; she hates it. She does not want to wear skirts and dresses anymore (feeling of shame). At school she chooses to wear a skort[?]. Her academics remained the same. She is progressing well at school. The minor child

is always carrying her teddy bear called,
DT, wherever she goes.”

And the evaluation, M’Lady, on paragraph 12 reads as follows:

10 “L[...] M[...] is 11 years old. She was 10
years old at the time of the rape ordeal.
She is currently in Grade 6 in George where
she resides with her mother. She is
operating according to her range of
cognitive development which is formal
operational phase, this is a stage of
development where children are starting to
reason. Children at this stage become
aware of the consequences of their
disclosure. This is the reason in cases of
intrafamilial sexual abuse [indistinct] and
delayed disclosure is heightened. Children
at this stage of development continue to be
egocentric and believe that everything that
20 happens to them they are to be blamed.
Feelings of guilt are starting to surface to
the minor child as she narrates the details
of her nightmares. The nightmares or
dreams are showing her what she did not
do during the traumatic event. Her

thoughts are telling her that there were things she was supposed to have done, escape the offence. Feelings of blame and guilt are kicking in. She verbalised feelings of disappointment for what the accused did. She is now disassociating herself with him as she is unable to address him in anyway. Feelings of shame were identified by her mother as the child is not comfortable reacting with her mother or in front of her.

10 The sexual offence took away the trust she had with the people in general and she does not feel safe even at home. She was sexually violated at a place she called home by the trusted figure she regarded as a father who was meant to protect her during her mother's absence. The offence now had brought up a distorted value systems in the child's mind. The minor

20 child now feels that the world is not safe even around people who can be trusted. It brought about confusion between wrong and right. The word[?] model of trust and possession did not work at the time of need. Sexual abuse of children has got a

long-lasting effect on the child. It does not go away but the child will learn to cope with the aftermath of her ordeal as long as she lives. It does not affect the child as a victim alone but impacts the family and the society as a whole. The fact that she is an introvert cannot be misunderstood by the fact she is coping well. The effects of the trauma continue to exist and can also show in adulthood. If unattended it could lead to rebellious behaviour in the future, substance abuse, self-harm, suicide, lots of mental issues.”

The conclusion and recommendation in paragraph 11:

“It is therefore recommended that both the minor child and the mother be referred for psychotherapy to assist to cope better with the aftermath of the ordeal. The offices of the Department of Social Development are available in all areas. They will be in a position to assist the family in this regard.”

That is all, M’Lady. May I hand it in, M’Lady?

COURT: Mr Tshingana, was the report explained to the accused?

MR TSHINGANA: No, M’Lady, it has not been but it has

just been given by my learned colleague just before the court started.

COURT: Can you summarise the report for the benefit of

INTERPRETER: Thank you, M'Lady.

COURT: Thank you. The report is admitted and marked as EXHIBIT F.

MR TSHINGANA: Court pleases, M'Lady.

MR SOGA: The Court pleases, M'Lady.

COURT: Mr Soga, was the complainant referred to the
10 recommended psychotherapy?

MR SOGA: That is correct, M'Lady, I did interview the mother of the complainant, there are sessions that he attended and she is busy with those sessions, M'Lady.

COURT: Thank you. Mr Tshingana.

MR TSHINGANA: Thank you, M'Lady. May I approach my learned colleague for the state quickly, M'Lady?

COURT: Yes.

MR TSHINGANA: May I approach the accused quickly, M'Lady?

20 COURT: Yes, you may.

MR TSHINGANA ADDRESSES COURT: Thank you, M'Lady. M'Lady, the defence is aware that in respect of the charges that have been proven against the accused that there is a prescribed minimum sentence of life imprisonment, however, the law states it clear, M'Lady, that if there are compelling

and substantial circumstances to deviate, then the Court may so do.

The personal circumstances of the accused, M'Lady, are as follows, he is a 36-year-old male, was unemployed at the time of his arrest, however, he is a professional who had been working with the Department of Public Works. He has two dependants aged 10 and six respectively, a boy and a girl, M'Lady. Indeed, as per SAP69 he has a previous conviction, the sentence of which has now been completed,
10 M'Lady. He was a movable property, that is a vehicle, has no immovable property.

M'Lady, the Court needs to take into cognisance that the accused, as it was testified, had great relations with the mother of the complainant, as well as the complainant. Yes, M'Lady, voluntary taking alcohol while one is fully aware of its consequences is not an excuse exonerating that particular person in the event of committing a crime, however, it is a factor to be considered, M'Lady, considering the said relationship between the parties.

20 M'Lady, one may find that defending this case on the part of the accused was not showing remorse or was trying to delay the finalisation of the matter, or was to waste the state resources. We submit, M'Lady, that is not the case.

There were medical questions, M'Lady, that needed clarity in order to determine if in the event of a guilty verdict rape

was the appropriate charge to have been proven by the state.

M'Lady, from a layman's point of view when a hymen is intact, as was reflected in the J88, it simply means that there was no penetration. That is how laypersons understand with no medical experience.

While in medical terms we have come to learn before this Honourable Court, M'Lady, that it simply means that there was no damage or injuries to the hymen but not necessarily
10 that there was no penetration. That was but one of the reasons why the matter was defended.

Further, M'Lady, clarity was sought as to how there were no injuries, tearing [indistinct], considering that it was a 10-year-old that was raped by a 36-year-old man. Also, that, M'Lady, was based on the fact that we understood from a laypersons point of view that there ought to have been visible and terrible injuries.

All these clarities, M'Lady, were needed in order to assist this Court to decide on whether or not there was actual
20 penetration.

M'Lady, it is our submission that the accused is capable of being rehabilitated as he has learnt from the consequences of excessive consumption of alcohol. He was confirmed by the mother of the child as a heavy drinker, something that he will learn from and try not to repeat in future.

M'Lady, accused did not lie or mislead this Honourable Court and he simply stated that he could not remember, M'Lady, and therefore he could not admit or deny but in the event that he was to be found guilty considering the fact that there was only one version before the Court and that of the complainant, what would then have been the appropriate charge for his conviction?

A person in trouble, M'Lady, has a choice always either to tell the truth or to lie to cover his actions, but the accused
10 elected to tell his truth without wasting the Court's time and his truth was that he could not remember.

M'Lady, it must also be considered that the circumstances surrounding this event depict that there was no violence that was used by the accused except for the actual penetration, M'Lady. There were no threats that were directed at the complainant.

M'Lady, there is plethora of authorities to support the deviation from the prescribed minimum sentence. I will not waste this Honourable Court's time with many of those but I
20 will just cite one, that is *S v Letsoalo*, (Case number 108/2022) [2023] ZAGPJHC 452, a judgment that was delivered on 10 May 2023. I am not going to quote from the case, M'Lady, but at paragraph 12 it just states the circumstances in which a Court may deviate. However, at paragraph 12, M'Lady, it says:

“Where a court is convinced that after consideration of all the factors, an injustice will occur if the minimum sentence is imposed then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.”

At paragraph 13, M’Lady, it reads:

10 “Further, it is trite that particular factors whether aggravating or mitigating should not be considered individually and or in isolation to determine whether substantial and compelling circumstances exist. Alternately in deciding whether substantial and compelling circumstances exist one must look at the traditional mitigating and aggravating factors and consider the cumulative effect thereof.”

20 M’Lady, the defence is aware of the fact that accused elected to exercise his right to remain silent and did not take the witness stand, it is therefore – it was therefore not easy for the Court to establish his remorse, however, the fact that he did not take it, M’Lady, was solely based on the fact that he felt that he had no version and then did not

want to delay this Court any further. However, it is not a fact that should be taken as him having shown no remorse.

Under the circumstances, M'Lady, the defence submits that it has satisfied this Honourable Court that there exist compelling and substantial circumstances to deviate from the prescribed minimum sentence and further, M'Lady, the defence has no objection to the accused being declared unfit to hold a firearm license.

If there is anything that the Court wants me to address on, 10 M'Lady, that will be all.

COURT: Okay.

MR TSHINGANA: As the Court pleases.

COURT: Mr Soga.

MR SOGA ADDRESSES COURT: As the Court pleases, M'Lady. The state submits, M'Lady, that the Honourable Court has [indistinct] serious offence and he is liable to be in possession of a life sentence in that sense of substantial and compelling circumstances.

And as correctly pointed out by the Honourable Court when 20 delivering judgment the complainant's evidence in this matter revealed that the accused actions before this Honourable Court, before and after the event, demonstrated that he was fully aware of his actions and also the fact that his conduct involved an element of planning in that he was consciously aware of what he was doing when he raped the

complainant hence he applied Vaseline on the genital organs of the complainant before he raped her.

And the complainant in this matter was 10 years old at the time of the incident thus substantially under the age of 18 years and I submit, M'Lady, that due to her age she was particularly vulnerable and in addition to that her mother was absent when the offence was perpetrated by the accused person.

10 The accused person I submit, M'Lady, that he took advantage of the absence of the complainant's mother and abused the complainant. He knew that the complainant's mother was going to be away for three days. This is a factor that is ordinary present, I submit before this Court, on rapes committed within families or by those who are close to them. They wait for the right opportunities and strike.

And I submit, M'Lady, that it is an aggravating factor that this heinous act by the accused person was not committed by a stranger but it was committed by a person who was considered by the child to be a father.

20 And then now I submit, M'Lady, that the accused person violated a breach of trust between himself, the complainant, as well as the mother of the complainant and the offence took place at the place where the complainant regarded it as her home and the complainant throughout her testimony, he referred to the accused person as *Bhuti*, he kept of saying

Bhuti, so that indicates, M'Lady, I submit the trust that he had on the accused person. And also, as evident from the testimony of the mother of the complainant that shows that they maintained good relations, good relations with each other. He used to assist the complainant with school work and also, he used to drop the complainant at school.

Now, it is not known now as to where this carnal desire from the accused person came from because he perpetrated this offence on the same day that his girlfriend, that is now the
10 mother of the complainant, left to Maclear for her work duties. So that means, M'Lady, that his behaviour was goal directed to satisfy his carnal desires on the young helpless child who was left now in his care by her mother.

I mean he had time, M'Lady, I submit to reflect on his actions because the child was sleeping alone in her own bedroom and the accused person went there, open the bedroom, went to the child's bed, took off her pyjama and underwear and committed this heinous act. I mean that shows barbaric conduct on the person of the; the accused
20 person on the helpless child.

Now instead of restoring his father figure to the complainant now he abused this position of trust and by preying on her, instead of setting an example to the child and also take into account, M'Lady, that it was for the first time that he was left; I mean according to the mother that was the first time

that he left the complainant with him; I mean when he was going to be away, so the accused person, I mean now waited, waited like an opportunistic predator for the young defenceless child to be left with him so that he can pounce on her that night. I submit, M'Lady, that those are aggravating factors in this matter.

Also, the evidence of the victim impact report; I mean the victim impact report establishes that the complainant suffered greatly after the incident, even her mother suffered
10 greatly as correctly pointed, M'Lady, in paragraph 8 and in paragraph 10 of the report. The social practitioner listed a long list of symptoms that the complainant is suffering, is suffering from and that she continues to suffer.

I therefore submit, M'Lady, that the incident would have long devastating effects on the complainant and her mother. And the accused person I submit, M'Lady, that he infringed the right to dignity and the right to bodily and psychological integrity of the complainant which any democratic society respects those rights.

20 And I also wish to refer this Honourable Court to what was stated in the case of *S v Jansen* 1999 (2) SACR 368 (C) at 378g to 379b. The Court stated as follows insofar as rape involving young children are concerned:

“Rape of a child is an appalling and
perverse abuse of male power. It strikes a

blow at the very core of our claim to be a civilised society. The Community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely, in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.”

10

And I submit, M’Lady, that the accused person in this matter did not testify under oath which leaves the Court now guessing as to what has been on his mind now when he committed the offence.

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So, in the light of that, M’Lady, I submit that it is difficult to find any true remorse on the person of the; of the accused person because if he was remorseful, I submit, M’Lady, he

was expected to take the Court into confidence and testify under oath and tell the Honourable Court as to what motivated him to commit this offence.

And now his personal circumstances are before this Honourable Court, the Honourable Court of course will take into account the gravity of the offence as well as the personal circumstances of the accused person, as well as the legitimate interest of the society.

COURT: Mr Soga, can you address me on the existence or
10 otherwise of substantial and compelling circumstances?

MR SOGA: Yes, that is where I am heading to, M'Lady.

COURT: Oh, I see.

MR SOGA: Yes. Yes, M'Lady, his personal circumstances were placed on record by my learned colleague and I understand, M'Lady, that the personal circumstances has not been defined in case law, however, in the light of those that were placed by my learned
colleague before this Honourable Court, I mean viewing them cumulatively or individually I submit, M'Lady, that they
20 do not pass the test, they do not amount, M'Lady, to substantial and compelling circumstances. I understand this Honourable Court will use its discretion of course, however, in the light of the personal circumstances the state finds no compelling and substantial circumstances.

I therefore, M'Lady, apply that he be sentenced to life

imprisonment, unless the Honourable Court finds that there are substantial and compelling circumstances that are present in his case.

That will be all, M'Lady.

COURT: Thank you. A reply, Mr Tshingana?

MR TSHINGANA IN REPLY: Yes, M'Lady. M'Lady, my learned colleague for the state made emphasis on the victim impact report. M'Lady, it is our submission that it is normal for rape victims to react in the manner that the complainant
10 is behaving and we empathise with that, M'Lady, however that is not the only factor that this Honourable Court should take into account. It must be taken cumulatively with all the other factors, M'Lady, and secondly, M'Lady, we concede that planning of an event, be it good or bad, in this event we will refer to the rape in question, can take a moment rather than weeks or months.

COURT: Yes.

MR TSHINGANA: However, M'Lady, it is our submission that he could not have planned to rape the accused, the
20 complainant, simply because, M'Lady, the complainant had been exposed to the accused on many occasions, like taking her to and from school and being with her in the same house while the mother is away.

M'Lady, [indistinct] a submission that on the day the accused just satisfied his selfish desires, rather than to

have planned it, that on realising, M'Lady, the difficulties that may be there because it is a child that is when he applied Vaseline. It was a spur of the moment and then realising that penetration might be difficult he used Vaseline, M'Lady, and that will be all.

COURT: Mr Tshingana, if the Court should find that substantial and compelling circumstances exist in this matter, what in your view would be an appropriate sentence?

10 MR TSHINGANA: M'Lady, considering that the offence is a gruesome one and it is one that is prevalent in our community and then the Court has a duty to preserve the confidence in the justice system then, M'Lady, I will be lying to myself and I will be dishonest if I said any form of imprisonment, any form of sentence that is short of imprisonment is applicable in this particular matter, M'Lady. Yes, it is rape, rape of a minor and a message must be sent, M'Lady, to anybody else out there who still wants to commit such a gruesome act that the law does not tolerate same.

20 Yes, M'Lady, the Court may deviate from imposing life sentence but direct imprisonment, M'Lady, will still be a suitable sentence, M'Lady.

COURT: For how long?

MR TSHINGANA: It is difficult to say, M'Lady, considering the circumstances. The prescribed minimum sentence is

life, the victim is a minor child and; M'Lady, to be honest I would like to leave it ...[intervenes]

COURT: Let me make it easy for you and say Malgas states that where the Court finds such circumstances to exist it must be mindful that the benchmark for the particular offence is life. So, in deviating it must use that...

MR TSHINGANA: That benchmark.

COURT: As the benchmark.

MR TSHINGANA: Yes, M'Lady. In this event, M'Lady, I will
10 say anything between 20 and 22. As the Court pleases.

COURT: Thank you. Mr Soga, on the last aspect?

MR SOGA: As already conceded by my learned colleague for the defence, M'Lady, I also agree that, M'Lady, a sentence in the range of 22 years will do justice, M'Lady, in this matter.

COURT: Thank you.

MR SOGA: Thank you, M'Lady.

COURT: The matter is to stand down until two.

MR TSHINGANA: As the Court pleases, M'Lady.

20 MR SOGA: As the Court pleases, M'Lady.

COURT: Court to take tea adjournment.

COURT ADJOURNS [10:35]

COURT RESUMES [13:36]

REGISTRAR: M'Lady, I am recalling the matter case number CC02/2024. The State versus Klaushe Sivuyile.

COURT: You may be seated for now, sir.

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION FOR MAKHANDA

CASE NO: CC02/2024

DATE: 20-06-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES :YES / NO
(3) REVISED

.....

In the matter between

THE STATE

and

SIVUYILE KLAUSHE

Accused

10

S E N T E N C E

NONCEMBU, J:

Having convicted the accused of rape as charged in this matter I am now faced with the daunting task of having to sentence him.

Both the defence and state addressed this Court in regard to sentence or in respect of sentence and a victim impact report in respect of the complainant was submitted to Court.

20 The state has argued that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment, whilst the defence argued otherwise.

The victim impact report sets out in detail the impact that this offence had on the complainant. It will not be repeated in this judgment as I believe it is still fresh in everybody's mind and

forms part of the court record.

It is trite that in sentencing an offender a Court is enjoined to take into account the Zinn triad which ensures that a balancing of competing interest in maintained. The Court thus has to take into account the seriousness of the offence committed, the personal circumstances of the offender, as well as the interest of society.

A fourth consideration pertains to the interest of the victim as was highlighted in *S v Matyityi* 2011 (1) SACR 40 (SCA) 10 asserting the provisions of the Service Charter for victims indicating that a just penal policy should be victim centred. In addition to this a Court has to take into account the objectives of punishment which are prevention, deterrence, rehabilitation and retribution being mindful, however, that these will not be applied equally in each case as the circumstances of each case will determine which one of these must come to the fore. The Supreme Court of Appeal in *S v Mhlakazi* 1997 (1) SACR 515 at 519(d-e) stated the following and I quote in this regard:

20 “Given the current levels of violence and serious crimes in this country it seems proper that in sentencing, especially such crimes, that emphasis should be on retribution and deterrence and retribution might even be decisive.”

Rape by its nature is a serious offence. It is, however, even

more so when it is committed against a child in a familial environment, the sanctity of her home, the one place where the child is supposed to feel protected; not to mention when such is committed by a person placed in a position of trust, as the accused was, whom the complainant considered to be her second father. The accused abused such trust in a very heinous manner.

Regarding the offence of rape, the Supreme Court of Appeal in *S v MM* 2013 (2) SACR 292 at paragraph 17 stated the following:

“Rape is undeniably a degrading, humiliating and brutal invasion of a person’s most intimate, private space. The very act itself, even absent accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person’s fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane, or degrading way.”

In *S v Day*, Van Den Heever JA stated the following:

“Children are vulnerable to abuse and the younger they are the more vulnerable they are. They are usually abused by those who think they can get away with it and all too often do, even where an offence is brought to

light our adversarial system often results in
the Courts failing the victims.”

The accused took advantage of the complainant’s vulnerability knowing very well that he was trusted, not only by the complainant but by her mother as well who put him in such a high regard that she trusted him even more than she trusted the child’s biological father.

These types of offences are very rife in our communities and seem particularly to be on a spirally rise in this division. I find
10 it quite significant that only today this is the second matter where I have to sentence a rape offender who was in a position of a father figure to the complainant. It seems that the more efforts are being put in place to try and curb this disturbing trend, the more the offences seem to be on the rise depicting an even bleaker future for our children.

Society seems to be at their wits end and now courts seem to be the only hope that they look up to and the only way that courts can ensure that society is afforded some measure of hope is by ensuring that those who are brought before the
20 courts for having committed these atrocious crimes are appropriately dealt with and get the full might of the law as that will send a message not only to the offender before court but also those who are likeminded.

The personal circumstances of the accused were placed on record by his counsel and need not be repeated here, suffice

to say that whilst he has a previous conviction the Court is mindful of the fact that it is for an unrelated matter and as such he will be treated as a first offender for purposes of this offence.

It does appear from the evidence of both the complainant and her mother that the commission of this offence by the accused was out of character for him given the high regard that both placed him to the extent that he was very often left alone with the complainant.

10 One thus cannot overlook the fact that intoxication may have played a role in the commission of the offence, as even the complainant conceded in her evidence that the accused was drunk on the night in question. Hence correctly conceded by his counsel though that is no justification for the offence he committed. It does, however, play a role on the extent of his moral blameworthiness for the offence committed.

In *S v MM* 2013 (2) SACR 292 at paragraph 18 to 19, Majiedt JA, emphasised that the advent of minimum sentence legislation had not changed the centrality of proportionality in
20 sentencing and that since life imprisonment is the most severe sentence which a Court can impose the question whether it is an appropriate sentence requires careful consideration. The Court held that when a minimum sentence prescribed by law which in the circumstances of a particular case would be unjustly disproportionate to the offence, the offender and the

interest of society it would justify the imposition of a lesser sentence.

I take into account the factors referred to above, as well as the manner in which the offence was committed that no serious physical injuries were sustained by the complainant, whilst on the same breath not in any way discounting the emotional scars and impact carried by the complainant as a result of the said offence.

I find, however, that considered cumulatively the above factors
10 constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment, as I am of the view that life imprisonment would not be a just sentence on the circumstances of this matter.

Please rise, Mr Klaushe. I therefore find that an appropriate sentence on the circumstances of this matter would be imprisonment for a period of 20 years and the accused is sentenced accordingly, and the following ancillary orders shall issue:

- a) No otherwise order is made in terms of section 103(1) of
20 the Firearms Control Act 60 of 2000. In other words, the accused remains unfit to possess a firearm.
- b) The accused's name shall be included in the National Register for Sexual Offenders in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

- c) In terms of section 120 of the Children's Act 38 of 2005, the accused is deemed unsuitable to work with children.
- d) In terms of section 299A of the Criminal Procedure Act 51 of 1977 the victim's family or the complainant's family is advised that they are entitled to make representations to the Parole Board or to attend any relevant meeting of the Parole Board where the placement of the accused on parole, day parole or correctional supervision, is considered.

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NONCEMBU, J:

JUDGE OF THE HIGH COURT

DATE:

20 MR SOGA: As the Court pleases, M'Lady.

MR TSHINGANA: The state begs leave of this Honourable Court to hand in the draft orders, M'Lady, as part of the order in terms of section 52(a), as well as in respect of the completion of the victim impact statement.

COURT: Thank you. Court adjourns.

COURT ADJOURNS

[13:58]
