IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Case number: 33/2016

In the matter between:

THE STATE

and

PETER FREDERIKSEN Accused

HEARD ON: 13 MARCH 2018

SENTENCE BY: DAFFUE, J

DELIVERED ON: 15 MARCH 2018

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[1] Mr Frederiksen, it is now time to sentence you. In order to achieve a balanced sentence I shall consider firstly you as a person and your personal circumstances, secondly the nature and severity of the crimes and thirdly, the interests of the community. The objects

of punishment, to wit retribution, prevention, deterrence and rehabilitation will also be kept in mind.

Your personal circumstances

[2] You are 66 years old. You and your first wife, Vivian, have been living together since 1977. You married her in 1987, but got divorced the next year for tax purposes. However, you were still staying together until you left Denmark for South Africa in 2004. You remarried in 2004, but were again divorced in 2015. One daughter and two sons were born from your first marriage. They are 40, 28 and 26 years old respectively. They, like your ex-wife, Vivian, are Danish citizens as is the case with you. You married a young Sotho woman from Lesotho – aged 22 at the time - on 22 January 2010, a few days after you had met her. At that stage you were still married to Vivian. Your new wife has been referred to as Tshidi throughout the trial and therefore also in my judgment in convicting you. Two sons, Paul and Christiaan, were born in 2011 and 2013 respectively from this marriage relationship. They are presently in temporary care of caretakers and I have been assured that once these proceedings are finalised, permanent orders will be made. I am satisfied that their best interests will be taken care of. I understand your longing for the two boys as this is a normal reaction of any parent. You indicated to me earlier that you really wanted to have contact with the boys and I suggested then that I believed the necessary arrangements might be made, once these proceedings have been finalised.

[3] Your father passed away some time ago, but your mother that is 91 years old, is still alive. Your brother financed your legal expenses to an extent and I accept that through him, you would have a support system in Denmark. None of your family members attended any of the proceedings before me and I do not know how tight the bonds between you and your children are. You have had little contact with your Danish sons since your incarceration. Your ex-wife, Vivian, is apparently not interested to remain in contact with you. Your Lesotho in-laws are from my observation not keen to be associated with you. You cannot bank on any of them to support you in future. Your sister-in-law, Ms Dimpho Molise, stated in her Victim Impact Statement – Exhibit "RR" – that you did not even contribute to Tshidi's funeral and furthermore, the family live in constant fear as they believe you have "eyes and ears everywhere."

[4] Your first venture in this country was a failure, but you invested money to buy a well-known and established firearms dealership in Bloemfontein, to wit Impala Arms. You even expanded the business by opening a branch under the same name in Maseru, the capital of the Kingdom of Lesotho. According to information provided by you to Mr Van der Merwe, the social worker employed by the Department of Correctional Services instructed by the court to consult with you and to prepare a report, you were running this business until 2017 and well beyond your incarceration.

[5] I do not want to say too much about your life in Denmark and later in Kenia. Mr Van der Merwe mentioned this in his report accepted as Exhibit "NN". He testified and confirmed the contents. You accepted the report, save the conclusion pertaining to sentence.

His version of your background is therefore not in dispute. Clearly, you were rather rebellious from a school-going age and consequently, you had two brushes with the law in your country of birth, both in respect of illegal possession of firearms. I refer to Exhibit "AA". In fact, you are a fugitive of justice in that you failed to serve the sentence imposed on you in your absence on 17 September 2010. Previously, and on 5 February 1997, you were also sentenced to 3 months' imprisonment for violation of the Danish Weapons Act. Therefore, when you applied for residency in this country and for the certificates and licences in terms of the Firearms Control Act, 60 of 2000, you were a convicted criminal which information you failed to tender to the authorities.

[6] You are what some may call a man's man. You are a hunter and you love firearms. You are charming and managed to take Tshidi to bed the same day you met her. You had at least two romantic relationships with a certain Maria and Michelle *ex facie* your own diaries at the time you were married to Tshidi and Vivian. You were described by Ms Peiso Maime as "a very welcoming person" and you had the ability to persuade her to subject herself to a circumcision which she later described as "something terrible" that had happened to her. You and Ms Sarah Sekhabisa, your ex-employee, were on the verge of having sexual intercourse one night as a result of your endeavours. You had friends in the South African Police Service as well as in the Lesotho Police Service. W/O Terblanche, who testified on behalf of the State, comes to my mind. There are other examples which I do not need to deal with. You apparently have the ability to manipulate and/or influence officials in the employ of the Department of Correctional Services to illegally supply you with

cellphones, alternatively to turn a blind eye, allowing cellphones to be smuggled in to you. Several cellphones have been confiscated from you.

[7] You used the opportunity before sentence to inform the court through Mr van der Merwe that you are totally innocent, save in respect of some minor charges. Even in those cases you claimed that notwithstanding your convictions, even where you made formal admissions, you are in actual fact innocent. You believe that you have done no wrong, trying to rationalise your deeds. You have shown no remorse at all and are unrepentant. When you became emotional during your evidence, it was in my view not a sign of remorse, but a matter of pitying yourself for the mess you found yourself in.

[8] You are not a first offender. I refer to your firearm convictions, but I do not intend to rely on these convictions for purposes of sentencing you, save to mention that seeds for your moral blameworthiness have been planted much earlier in your life. On 28 May 2015 you were convicted of being in illegal possession of an elephant tusk for which a fine of R2 500 was imposed in the Bloemfontein Magistrate's court. You have been acquitted on the charges relating to circumcision for the reasons set out in my ruling in terms of s 174 of the Criminal Procedure Act, 51 of 1977. I deem it necessary to make remarks about the videotaping of the procedure on Ms Peiso Maime and the inscriptions in your diaries. Your personality became clear from your appearance on the video footage. Anyone who has to consider this judgment in future will do the right thing to watch that video and read your diaries first. I

have seen many pictures of horrible scenes in my life, but I have never felt so much disgust and unease when I watched the video. I referred to your apparent satisfaction and sexual pleasure in paragraph 63 of the judgment on the merits and do not intend to repeat what I have said. Your diaries confirm that you made contemporaneous notes of several incidents, but in particular your sexual achievements with several females, including the minor NNM. You boasted about all this and the inscriptions are in many cases excessively proud statements.

[9] You are suffering from hypertension and gout, but as Me Sonti, the Operational Manager at the Department of Correctional Services, stated in her evidence, you receive medication and these conditions are under control. Although inscriptions of suicidal behaviour appear from your file, she believes that sufficient care is taken that you and any other inmates suffering from depression – which is quite normal – are properly managed to avoid such dire outcome. Your ailments are often found in middle-aged people, but over and above that, you appear to be a fit, strong, lean and healthy man.

The seriousness of the offences

[10] You have been convicted of several offences, some much less serious than rape, child pornography and conspiracy to commit murder. I start off with the less serious offences. You were convicted of contravening s 49(14) of the Immigration Act, 13 of 2002. Unlike as Ms Bester has submitted, the maximum sentence

is not a fine or 2 years' imprisonment as provided for in ss 49(1), but a fine or 8 years' imprisonment. I am satisfied that although you made a false representation to the authorities, you clearly had the intention to start a new venture in South Africa and that you in actual fact did commence with business later on through the company known as Danish Thatching (Pty) Ltd. You cannot be regarded as the typical illegal immigrant that has flocked to this country with no hope to obtain work and then become involved in illegal activities. The sentence will take into consideration that your goal was to become involved in the mainstream economy and that you intended to do business legally.

[11] The next offence to be considered is the assault on Tshidi. Ms Bester submitted that a sentence of 12 months' imprisonment should be imposed. I already accepted that you and Tshidi were involved in a stormy relationship. An altercation broke out the particular night between you. Although there were no visible signs of a physical assault, you instilled so much fear in her that she fled with the children and decided to sleep in her vehicle in the Bainsvlei police station's parking area that night. You should receive a harsh sentence and not only a tap on the wrist.

[12] The next convictions relate to the possession of child pornography as well as the production thereof. Ms Bester referred the court to *DPP v Alberts,* case no A835/14, an unreported judgment of the Gauteng North High Court delivered on 30 June 2016, dealing specifically with child pornography. I have to emphasize that the court in *Alberts* referred to several judgments from other

jurisdictions and in particular the effect of online sexual abuse. *In casu* there is no evidence that you ventured into the arena of online child pornography, *i.e.* that you posted any of the photographs found in your possession on the internet. This case must be evaluated and considered on the facts presented and accepted by me. No doubt, child pornography is extremely harmful to children and the broader community. It is universally condemned and the recent amendments to the Films and Publications Act, 65 of 1996 serve as proof that our legislature is committed to curb this serious crime. I again accept that you were in a position of trust and that you were in serious breach of such relationship when you took the photographs. You even arranged for the enlargement of some of these photographs. Your actions are nothing less than vulgar and morally reprehensible. It must be treated as such by meting out severe penalties. Mr Bruwer conceded the seriousness of the offences, but submitted that there are varying degrees of pornography. According to him, these pictures are not the worst one may imagine. They do not depict, *e.g.* sexual intercourse between adults and children and may be regarded as "soft porn." I wish to make it clear at this stage that I agree with Mr Bruwer's submission that the pornographic material presented to the court is of a low intensity, but more importantly, it was not produced for the eyes of the general public and therefore not distributed on social media *ex facie* the available and accepted evidence.

[13] Having said all this, Mr Frederiksen you cannot escape long term imprisonment. This court's repugnance of your actions must be

reflected in the sentences to be imposed. The Films and Publications Act does not provide for penalties in the event of crimes committed as described in s 24B. The court is therefore at large to impose penalties which it deems fit. Ms Bester submitted 5 years' imprisonment for possession (s 24B(1)(a)) and 2 years each in respect of the counts dealing with production of the pornographic material (s 24B(1)(b)), such sentences to run concurrently so that you are sentenced effectively to a period of 10 years' imprisonment. The sentences to be imposed will signify my repugnance.

[14] The seriousness of the offences relating to conveyancing and possession of unregistered medicine must be considered. I merely need to refer to the evidence of Dr PN van Zyl. Xylocain is not a registered medicine in this country and can be extremely dangerous if used by a layman on others in uncontrolled conditions as you apparently did, Mr Frederiksen. The mere fact that there is no proof that people died or fell seriously ill as a result of your injections, is immaterial. You used the medicine, whilst in illegal possession, to conduct your reprehensible circumcision practice on women. In terms of s 30 of the relevant Act you may be sentenced to the payment of a fine or imprisonment not exceeding 10 years. Ms Bester submitted that a cumulative sentence of 8 years should be imposed and that the medicine be declared forfeited to the State for destruction purposes.

[15] You have been convicted on three counts of fraud relating to your applications for competency certificates, a firearms dealers' licence

and the renewal of these. Ms Bester suggested sentences of 5 years' imprisonment each, although portions should be ordered to run concurrently. Mr Bruwer conceded the seriousness of these offences. The SAPS should have been much more alert than *in casu.* I cannot believe that they did not regard it as absolutely necessary to contact the authorities in Denmark to establish your status. In the case of South African citizens the word of the applicant is not sufficient. His/her fingerprints are taken to establish whether the applicant has a clean criminal record. However, the loopholes in the SAPS system cannot be relied upon by you to obtain a lenient sentence. You have been convicted of serious offences and must be sentenced appropriately.

[16] Ms Bester requested me to take counts 58 and 59 together for purpose of sentencing and to impose 15 years' imprisonment. These counts are in respect of the illegal possession of firearms and ammunition. Mr Bruwer submitted that many of the firearms were old weapons and/or parts of firearms only and he doubted whether the firearms were still in a working condition. The sentence of 15 years is the maximum provided for in the Act and it needs to be considered whether it is an appropriate sentence. Fact of the matter is that we are confronted with a relatively high number of firearms. The conviction in respect of count 60 is about the loss of nearly a thousand firearms. The maximum sentence to be imposed in terms of the Act is 5 years' imprisonment. I wonder whether the legislature ever considered that so many firearms may be lost by one dealer at any given moment. It is perhaps necessary to reconsider the maximum sentence in this regard.

Obviously, it should be taken into consideration that the form of fault (*mens rea*) is mere negligence and not intent.

[17] The conviction in respect of s 18(a) of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 must now be considered. Ms Bester suggested 8 years' imprisonment. Mr Bruwer indicated that the maximum sentence to be imposed is life imprisonment. As in all other cases, he did not suggest what sentence shall be imposed. I have no doubt that particular behaviour and its consequences may call for extreme sentences, but this is not such a case. I have indicated *supra* that your personality is such that you can easily influence, if not manipulate, people, Mr Frederiksen, but I shall consider the value that Ms Numbi Pelepele could have added to the State's case. It is really minimal and perhaps only in respect of count 7. In any event, I have convicted you on that count. However, the evidence tendered showed your manipulative streak and strong personality. Your attempts to manipulate other State witnesses were unsuccessful, save perhaps in the case of Michelle who refused to testify.

[18] I shall now deal with rape. It was aptly stated by the Supreme Court of Appeal in *De Beer v S* (121/04), an unreported judgment of the SCA delivered on 12 November 2004 at paragraph [18] as follows:

> ‘Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.

[19] With regard to sentence, the nature of the multiple rapes of NNM, and her age - she being 6 or 7 years old at the time - brought the matter within the purview of s 51(1) of the Criminal Law Amendment Act, 105 of 1997, read with Part I of Schedule 2 thereof which prescribes a minimum sentence of life imprisonment, unless substantial and compelling circumstances are present. Clearly, the legislature had in mind to provide for harsh sentences in the belief that these kind of offences deserve severe sanctioning. Rape has been labelled by several judges as a despicable crime and rightly so.

[20] The Supreme Court of Appeal found in *MDT v S* (548/2013) [2014] ZASCA 15 (20 March 2014), delivered on 20 March 2014 at paragraph [6] that one can rightly ask what could be considered more heinous than the rape of a child by a father. The SCA referred with approval to the remarks of Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at paragraphs [17] – [23].

[21] As mentioned in paragraph [7] of *MDT supra* *“child rape is a national scourge that shames us as a nation”*. The courts have a serious duty to

prevent young girls from being abused. Sachs, J stated the following in a unanimous judgment of the Constitutional Court in *Bothma v Els* 2010 (2) SA 622 (CC) at paragraph [47]: *"Child rape is an especially egregious form of personal violation…. By its very nature it is frequently characterised by secrecy and denial. There is accordingly a special public interest in taking action to discourage and prevent rape of children. Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eyewitness corroboration."*

[22] Conspiracy to commit a crime is regarded as serious as the crime itself. Mr Frederiksen, you were incarcerated and not supposed to be in possession of a cellphone. However, you managed to get hold of one and arranged with a willing partner in crime – a paraplegic – to carry out your mandate to kill Tshidi. You had a clear motive to do so and this is in line with your declared intention – communicated to the Sallings - that you will get rid of someone in order to survive. Tshidi's death was crucial for you to stand a chance to survive and you knew it. Ms Bester asked for life imprisonment, whilst Mr Bruwer submitted that a lesser sentence would be appropriate, emphasizing the destructive relationship between the parties. I am satisfied that an abhorrent crime was committed and that you should be sentenced appropriately, Mr Frederiksen.

The interests of the community

[23] The community must be protected. I wish to refer to the remarks of the Appeal Court in *S v Chapman* 1997 (2) SACR 3 (AD) at 5(c-e) and several other judgments of eminent judges thereafter. I quote from *Chapman,* acknowledging that the *dicta* relate to women as a group and not to small children as *in casu*:

> "They (females) have a legitimate claim to walk peacefully in the streets, to enjoy their shopping and entertainment, to go to and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.
>
> The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: we are determined to protect the equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights."

[24] The Chapman judgment led to the promulgation of Act 105 of 1997. Notwithstanding the minimum sentences legislation the spate of crime in our country, especially involving female and child victims, has not abated. Prior to Chapman and Act 105 of 1997, the former Appeal Court emphasized that the community and children in particular should be protected. See the judgment of Corbett JA in S v E 1979 (3) SA 973 (AD) at 978 A – B. Also, in S v D 1995 (1) SACR 259 (AD), Van den Heever JA stated the following at 260 f - j:

> "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….. Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the Court's strong disapproval and hopefully acting

as deterrent to others minded to satisfy their carnal desires with helpless children."

[25] The crimes relating to conspiracy to commit murder, child pornography and firearms to mention just these, have a serious impact on our community. Too many people are killed with unlicensed or stolen firearms. Our communities must be protected against criminals that want to kill their loved ones. They also need protection against people that carelessly deal with firearms and/or should never have been allowed to deal with them in the first place. Child pornography has become one of the most popular crimes and it appears as if men, especially older men, find this an attractive hobby. It is a disgusting crime and should be combatted with vigour. The young mother, Tshidi, would have been alive, was it not for your heinous deed to obtain willing partners and instruct them how to execute your wife. This kind of action should not be allowed in a civilised society. As indicated, Mr Frederiksen, you had instilled fear in the Molise family who believe that you are able to harm them even whilst you are incarcerated. Action like yours, you being in essence the general, boss or gang leader, manoeuvring your troops from the safety of your prison cell, must be rooted out by imposing heavy sentences.

Sentences in respect of crimes, excluding rape and conspiracy

[26] I do not want to downplay the seriousness of the offences, other than rape and conspiracy, or your liability in that regard, but my sentences will show that I am not in full agreement with Ms Bester in respect of some of the sentences proposed. I believe that the sentences to be imposed will do justice to the purposes of sentence and should be regarded as the result of a balanced approach to sentencing. It is necessary to consider the cumulative effect of the sentences which may be shocking if no order is made in terms of s 280 (2) of the Criminal Procedure Act, 51 of 1977. It is deemed appropriate to order the sentences to run concurrently to prevent an injustice to the accused. If it is not done, the effective sentence would be in excess of fifty years. That would be unfair and ridiculous.

The search for substantial and compelling circumstances

[27] I shall deal with substantial and compelling circumstances in a moment. Let me say this at this stage. When a balanced sentenced is considered, your personal circumstances need to take a backseat in the event where the court is confronted with serious offences such as *in casu.* The purposes of punishment are also considered with more emphasis on deterrence and prevention and less on rehabilitation. You may be sentenced more lenient than the prescribed minimum sentence of life imprisonment if I find substantial and compelling circumstances. I accept that a number of factors may cumulatively be considered to be substantial and

compelling, although each of them does not on its own qualify as substantial and compelling.

[28] The following was emphasised in *S v Malgas* 2001 (3) All SA 220 (SCA) at paragraph 8:

> '[8] [A] court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'

[29] In terms of the provisions of s 51(1), read with Part I of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997, the prescribed minimum sentence for the rape of NNM, she being under the age of 16, is life imprisonment. Although you are not the father of NNM, Mr Frederiksen, you are her stepfather insofar as you have been married to her mother. NNM in all probabilities accepted you as her father and therefore trusted you as children trust their own parents.

[30] In *S v PB* 2013 (2) SACR 533 (SCA), in line with *S v Matyityi 2011(1) SACR 40 (SCA),* the Supreme Court of Appeal

emphasised in paragraph [20] that prescribed minimum sentences should not be departed from lightly or for flimsy reasons. The SCA refused to interfere with the prescribed sentence of life imprisonment imposed on a father who had raped his 12 year old daughter.

[31] I am conscious that life imprisonment is the ultimate penalty that the courts can impose and should not be imposed lightly. Even where life imprisonment is prescribed as a minimum sentence, the fact that it is the ultimate penalty must also be taken into account; therefore it must not be imposed lightly.

[32] The sentiments of the Supreme Court of Appeal expressed in *S v EN* 2014(1) SACR 198 (SCA) paragraph [14] are apposite to remind prosecutors and presiding officers of their responsibility during the sentencing stage, particularly in rape cases:

> 'Sentencing is the most difficult stage of a criminal trial…Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion. In rape case for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; justify that sentence.'

[33] I wish to refer to some authorities to deal with your reliance on old age, Mr Frederiksen. The ailments you complain of are often found in much younger persons. You still look healthy and strong for a man of 66. I also refer to what I shall record *infra* pertaining

to your enjoyment of life until incarceration. A few decades ago 60 years was considered old. Twenty years ago 70 was considered old. Nowadays people are still enjoying life in their eighties; therefore age is a relative concept depending on many factors. In *S v Zinn* 1969 (2) SA 537 (AD) at 541 and 542 the court dealt with old age. The court said the following on 542 A – D and I paraphrase:

> "… but generally speaking old age is not a ground for leniency,….Having regard to his age and the fact that he deliberately committed fraud over a period of eight years, ….the appellant's claim to a sentence which would give him the opportunity to reform and start life afresh is necessarily greatly weakened. ….. The interests of society … demand that a man like the appellant must be put away for a long time, not only to protect society against a man who has no conscience … , but also as punishment for crimes committed over an extended period and as a warning to businessmen who might feel inclined to abuse the confidence that must necessarily exist in a civilised state …".

In *S v Barendse* 2010 (2) SACR 617 (EC) the full court found that the advanced age of the appellant was a factor to interfere with a sentence of life imprisonment whereupon the sentence was reduced to ten years' imprisonment. The appellant was 72 years old and the offences of indecent assault and rape were committed some years earlier.

In *S v Kearns* 2009 (2) SACR 684 (GSJ) the appellant's sentence of life imprisonment in respect of rape of a 9 year old girl, causing serious psychological and physical injuries, was dismissed by the full court. He was 59 years old at the time of sentencing.

[34] I also used the opportunity to do further research and wish to refer to the following recent and not so recent judgments of the SCA.

(a) In *Hewitt v The State* 637/2015 [2016] ZASCA 100 (9 June 2016) a 75 year old offender's appeal against his sentence of 6 years' imprisonment for rape and indecent assault of young girls committed three decades ago, was dismissed. It must be reiterated that prior to the promulgation of Act 105 of 1997 rape accused were not sentenced nearly as severely as now. The SCA dealt with the appellant's old age and stated in paragraph [15] that it was certainly not a bar to a sentence of imprisonment.

(b) In Sikhipa *v The State* [2006] SCA 71 (RSA) a sentence of life imprisonment was set aside and substituted with a sentence of 20 years' imprisonment. Although the court mentioned at paragraph [18] that no evidence was led about the psychological consequences for the complainant, it accepted that there was no doubt that the rape was traumatic for her. The SCA blamed the court *a quo* for not considering the appellant's personal circumstances in mitigation. These were quite different from that of you, Mr Frederiksen. In *S v PB supra* at paragraphs [15] to [21] Bosielo JA, writing for a unanimous full bench of the SCA, criticized what he called a trend to substitute sentences of life imprisonment with other sentences. Reference was made to *Sikhipha supra* and *S v Nkomo* 2007 (2) SACR 198 (SCA). I respectfully agree with the sentiments expressed.

(c) In *Moses Tshoga v The State* (635/2016) [2016] ZASCA 205 (15 December 2016) the SCA bench was split. The majority found

that the sentence of life imprisonment in respect of the rape of a 10 year old girl was in order. In that case a report from a counselling psychologist of the Teddy Bear Clinic was presented as evidence by agreement with the appellant. The majority found at paragraph [34] that the rape was regarded as extremely serious as the complainant was raped by a relative who was trusted by the family, causing her devastating psychological life-long consequences. The appellant was not a first offender and has raped before.

(d) In *Shawn Palmer v The State* (599/2016) [2017] ZASCA 107 (13 September 2017) life imprisonment for rape was substituted by a sentence of 15 years' imprisonment. The complainant was a 13 year old girl. The facts in that case differ totally from the matter *in casu.* The SCA stated that it was not necessary for the court *a quo* to find so-called exceptional circumstances in order to deviate from the prescribed minimum sentence. It found at paragraph [20] that when the aggravating and mitigating factors were taken into account, the prescribed minimum sentence was inappropriate.

(e) In *De Beer v The State* (1210/2016) ZASCA 183 (5 December 2017) the SCA reinstated the sentence of 15 years (5 years was suspended) imposed by the Regional Court and set aside the High Court's sentence of life imprisonment imposed on appeal. The appellant committed acts of sexual penetration by inserting his fingers into an 8 year old girl's private parts on numerous occasions over a period of four months. The SCA warned in paragraph [19] that courts should "… guard against an injustice being perpetrated by adhering slavishly to the prescribed minimum sentences." I also wish to refer to the explanation in paragraph [20] pertaining to the proportionality of life sentences in rape cases.

(f) In *Ngcobo v S* (1344/2016) 2018 ZASCA 06 (23 February 2018) an appeal against the imposition of a life sentence was dismissed. The court found at paragraph [18] that the court *a quo* was correct in finding that there was an absence of substantial and compelling circumstances. At paragraph [20] it found that the sentence was not disproportionate with the severity of the offence. A 16 year old girl was physically assaulted and raped twice at different locations.

(g) In *D v The State* (89/16) [2016] ZASCA 123 (22 September 2016) the court found on appeal that a sentence of life imprisonment was in order. The biological father of a 16 year old daughter raped her on two occasions, causing her to fall pregnant. He pleaded guilty.

(h) In *Kaywood v S* (394/2016) [2016} ZASCA 179 (28 November 2016) the SCA did not interfere with the sentence of life imprisonment imposed in respect of rape. No doubt, the complainant in that case was gruesomely assaulted, so much so that appellant was also convicted of attempted murder and sentenced to 16 years' imprisonment. The case is therefore distinguishable on the facts. The following was said at paragraphs [15] and [16]:

"[15] The appellant's personal circumstances pale against the abhorrent nature and level of cruelty with which he committed the crimes under consideration…….

[16] Consequently, it is my view that in this case a departure from the minimum prescribed sentence would be nothing short of maudlin sympathy."

[35] The evidence presented by the State by means of Victim Impact Statements of NNM and her aunt in respect of the trauma experienced and their evidence was not disputed. I do not intend to repeat the evidence, and merely wish to state that their ordeals had a severe traumatic impact on them. Victim Impact Statements were obtained from Ms Dimpho Molise, Tshidi's sister and NNM and accepted without objection as Exhibits "RR" and "SS". The versions are to a certain extent repetition of what they testified under oath. I do not deem it necessary to quote from these statements.

[36] Mr Bruwer submitted that the court should find substantial and compelling circumstances. He referred to your age, Mr Frederiksen. In respect of the rape, he argued that one gets varying degrees of rape and that *in casu* the degree is less than found in many other cases. Pertaining to the conspiracy conviction he argued that the destructive relationship between you and Tshidi should be considered, together with your age, as substantial and compelling circumstances. Over and above the factors mentioned, you have been incarcerated for two and a half years and therefore, so he submitted, the cumulative effect is sufficient for a finding that substantial and compelling circumstances exist, warranting a lesser sentence than life imprisonment. Mr Bruwer conceded that a long term imprisonment will take into account the objective gravity of these offences and their prevalence in this country.

[37] I thought long and hard in order to arrive at appropriate sentences in respect of the rape on NNM and conspiracy to commit murder. I accept that courts should be entitled in exercising their discretion to consider the vast difference between the minimum sentence of 10 years prescribed for rape in Part III of Schedule 2 read with s 51 (2) of Act 105 of 1997 and life imprisonment prescribed in Part I of Schedule 2, read with s 51(1) of that Act. However, it would be wrong to impose life imprisonment only in the most severe rape cases. The question to be imposed will always be: what is the most severe case? Is it only when the complainant's private parts were torn open and she was so severely assaulted and left in the veld that she succumbed of her injuries two days later, or does a less serious incident of rape qualify as well. I believe the answer should be an emphatic "yes."

[38] I accept that NNM experienced the ordeal as traumatic. The social worker, Mr Van der Merwe, did not consult with NNM, but provided unchallenged evidence of his experience relating to the emotional trauma experienced by rape victims. The Victim Impact Statement presented as evidence is just what it is called: a version of the complainant. It is not supported by expert evidence. Ms Bester submitted that it is apparent from facts presented in similar cases that psychological effects often materialise at a much later stage and that psychologists will in many times not be in a position to make any relevant conclusion, especially in the case of young children. No doubt, NNM will take a long time to get over the

emotional trauma. Mr Van der Merwe testified that rape victims do not really recover emotionally from the trauma of being raped.

[39] I do not believe that any responsible person can hold the view that NNM could survive the various incidents of rape without suffering severe emotional trauma. In *Kearns supra* the full court commented as follows in paragraph [15]:

> "Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The physical scar may heal, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury, but the deep sense of some deathless shame … By the very nature of the offence it is an obnoxious act of the highest order."

At paragraph [17] the court continued as follows:

> "To impose anything less than the punishment as contemplated by our law, in the circumstances of this case, would be to render the justice system of our country suspect."

I immediately accept that the complainant in *Kearns* sustained serious physical injuries which is not the case in this matter.

[40] Having mentioned all this, the question still remains whether life imprisonment would be disproportionate with the seriousness of the crimes with reference to the lack of expert evidence pertaining to the after-effects suffered by the complainant. Mr Frederiksen, I

am convinced that NNM was subjected to your illegal actions over a period of time whilst you were supposed to care for her and that this caused her severe trauma and emotional shock. You were in a position of trust, but you failed your responsibilities due to your fixation with females' private parts.

[41] Mr Frederiksen, I am not prepared to find that your age, the duration of your incarceration, the lack of physical injuries, other mitigating factors, or even the lack of expert evidence to prove that NNM suffered emotional trauma, individually or cumulatively, should be regarded as substantial and compelling circumstances in order for me to deviate from the prescribed sentence. You were clearly still an active person conducting your own business and were so energetic that you not only married a 22 year old girl, but apparently enjoyed an active sex life with her and at the same time with other women as well. I take cognisance of the authorities quoted *supra,* but in my view you cannot now rely with success on old age. You caused the case to be delayed in that numerous pre-trial procedures had to be held in order for you to eventually obtain the services of your present attorney. Mr Van der Merwe did not consult with NNM, but his evidence based on his many years of experience was not challenged. NNM and MM were so afraid of you, Mr Frederiksen, that they did not even tell their mother. It was really by co-incidence that information was obtained from them after your arrest and their mother's death. The rape on NNM, committed over a period of time by a person who was in a trust relationship with her, should be penalised by imposition of the prescribed minimum sentence.

[42] Life imprisonment would not be disproportionate to the seriousness of the crimes of the rape of the minor and conspiracy to kill your wife. I shall impose a sentence which I deem appropriate. I am of the view that life imprisonment is required notwithstanding the tendency by some judges to substitute life sentences imposed by the lower courts on appeal to *e.g.* 15 years' imprisonment as mentioned *supra*.

[43] The murder of Tshidi was committed in Lesotho and this court does not have jurisdiction to adjudicate that. You were not charged for the crime of murder. The murder was pre-meditated and planned. You were the general and you orchestrated the murder. The prescribed minimum sentence for a pre-meditated and planned murder is life imprisonment. In accordance with s 18(2) of Act 17 of 1956 you are liable to the same punishment to which the person convicted of actually committing the murder would be liable. Having considered all aggravating and mitigating factors, I am satisfied that life imprisonment is the only suitable sentence. I earnestly considered whether long term imprisonment of say 20 years would not be appropriate and achieve the purposes of punishment. The only way in which I could have decided **not** to impose two sentences of life imprisonment would be to show "maudlin sympathy" towards you and that I am not prepared to do, bearing in mind the seriousness of the offences and the interests of the community. The court room is filled with mainly female members of our community. This is not strange. They are,

together with their children, valuable, but also vulnerable, members of our society. They, in particular, must be protected against persons like you. Long term imprisonment will not suffice. You must be removed permanently from society.

ORDERS:

[44.1] You are sentenced as follows:

Count 1- Payment of a fine of R5 000 or 6 months' imprisonment.

Count 7 – 12 (twelve) months' imprisonment.

Count 28 – 3 (three) years' imprisonment.

Counts 29 - 47 – Taken together for purposes of sentence: 8 (eight) years' imprisonment.

Count 48 – You are sentenced to life imprisonment.

Counts 49 – 53 – Taken together for purposes of sentence: 8 (eight) years' imprisonment.

Count 54 – You are sentenced to life imprisonment.

Counts 55 – 57 – Taken together: 8 (eight) years' imprisonment.

Counts 58 and 59 – Taken together: 15 (fifteen) years' imprisonment.

Count 60 – 5 (five) years' imprisonment.

Count 61 - 3 (three) years' imprisonment.

[44.2] All sentences imposed herewith shall run concurrently in accordance with s 280 (2) of the Criminal Procedure Act, 51 of 1977.

[44.3] It is ordered in terms of s 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 that accused's name shall be included in the Register established in terms of s 49 of that Act.

[44.4] It is declared that all Xylocain, the medicine in respect of which the offences in counts 49 to 53 have been committed, shall be forfeited to the State for destruction.

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JP DAFFUE, J