

**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF  
GAUTENG DIVISION,**



**SOUTH AFRICA  
PRETORIA**

**CASE NO: CC07/2021**

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

03-05-2023  
DATE

PD. PHAHLANE  
SIGNATURE

**In the matter between:**

**THE STATE**

**And**

**PELETONA**

**ABEL**

**LEBELE**

**ACCUSED**

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**JUDGMENT ON SENTENCE**

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**PHAHLANE, J**

[1] The accused stands before this court to be sentenced after being convicted of eight (8) counts to which he pleaded guilty, in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977- ("the CPA"). At the commencement of the proceedings, the State withdrew counts 5; 8; 10; and 11 against the accused. He was convicted as follows:

1. Four (4) counts of Kidnapping – In respect of counts 1, 3, 6, and 9

2. Three (3) counts of rape in respect of counts 2, 4, and 7 – for contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) and Part I of Schedule 2 of Act 105 of 1997 (“the Act”)
3. One (1) count of rape in respect of count 12 – for contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(2) and Part II of Schedule 2 of the Act

[2] It is trite law that sentencing the accused should be directed at addressing the judicial purposes of punishment which are deterrence; prevention; retribution and rehabilitation as stated by the Appellate Division in the case of *S v Rabie*<sup>1</sup>. In considering the appropriate sentence, the court must also have due regard to the “triad” factors pertaining to punishment namely: “the nature and seriousness of the crimes committed by the accused; the personal circumstances of the accused and the interests of society” as enunciated in *S v Zinn*<sup>2</sup>. Added to these basic triad lately, is the fourth element distinct from the three: the interests of the victim of the offence. These factors fits perfectly into the foundational principles of sentence that punishment to be imposed should fit the crime as well as the criminal, and it must be fair to society. It should not be imposed out of a spirit of anger and where circumstances permit, be blended with a measure of mercy.<sup>3</sup>

[3] This principle was reaffirmed by the Supreme Court of Appeal in *Aliko v The State*<sup>4</sup> as per Dambuza JA that: “it remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed, and that the cardinal principle that the punishment should fit the crime - should not be ignored”.

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<sup>1</sup> 1975 (4) SA 855 (A).

<sup>2</sup> 1969 (2) SA 537 (A).

<sup>3</sup> *S v Rabie* 1975 (4) SA 855 (A) at 862G-H. Hastiness, the striving after severity and misplaced pity are out of place in the sentencing exercise, as are so-called exemplary sentences designed to use the crime to set an example for others in society: *S v Khulu* 1975 (2) SA 518 (N) at 521-522. The object of sentencing is not to satisfy public opinion, but to serve the public interest: *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189.

<sup>4</sup> (552/2018) [2019] ZASCA 31 (28 March 2019) at para 17.

[4] The offences which the accused has been convicted for are very serious in nature and prevalent in our society at large. It is common cause that two of the victims were under the age of 16 years, and the third victim had already attained the age of sixteen at the time of the offence. The accused confirmed in his section 112 statement that the victims in counts 2, 4, and 7 were of the ages of seven (7); thirteen (13) and sixteen (16) years respectively, and explained that he forcefully dragged all his victims to Tsakane cemetery where he raped them. He further explained that as regards the complainant in counts 3 and 4, he grabbed her by the neck and a struggle ensued between himself and the victim as the victim tried to run away. With regards to the complainant in counts 6 and 7, he explains that he hit her with an open hand across the face because she tried to resist.

[5] Rape has been described by the Supreme Court of Appeal in *S v Chapman*<sup>5</sup> as follows:

*“Rape is a very serious offence constituting as it does, a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work,...without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”*

[6] In *S v Ncheche*<sup>6</sup> the court stated that:

*“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone*

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<sup>5</sup> [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4; 1997 (2) SACR 3 (SCA) at 5a-d (1997 (3) SA 341) (at 345A-B).

<sup>6</sup> 2005 (2) SACR 386 (W) at para 35.

*who violates it does so at his peril and our Legislature, and the community at large, correctly expects our courts to punish rapists very severely."*

- [7] In *Kwanape v The State*<sup>7</sup>, the Supreme Court of Appeal described it as "an undeniably despicable crime". This court cited with approval the case of *N v T*<sup>8</sup> where the court described rape as "*a horrifying crime and a cruel and selfish act in which the aggressor treats with utter contempt, the dignity and feelings of his victim*".
- [8] The accused preyed on young vulnerable and defenceless children for three years - that is in January 2017; November and December of 2018 and August 2019. He stripped them off their innocence and infringed their right to dignity by sexually violating them, while using his power to throttle the sixteen year old, and threatened and assaulted the thirteen year old so that she could submit to his demands. He further infringed the right to bodily integrity of the complainants which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health<sup>9</sup>.
- [9] While the offence of rape is endemic in our society and the country at large, it remains a repulsive crime from which all victims - men; women and children alike, should be protected against. Hardly a day passes without a report in the media of children being beaten, raped or even killed in this country. Like any other violent crime, rape has become a scourge in our society and it should not be treated lightly, but deplored and severally punished. Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences which courts impose<sup>10</sup>.
- [10] Reflecting on the sexual nature of the crime, the court in *Masiya v Director of Public Prosecutions*<sup>11</sup> stated that: "*rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy*". This rings true because crime statistics

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<sup>7</sup> (422/12) [2012] ZASCA 168; 2014 (1) SACR 405 (SCA) (26 November 2012).

<sup>8</sup> 1994 (1) SA 862 (C).

<sup>9</sup> *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023) at para 58.

<sup>10</sup> *Maila supra* at para 57.

<sup>11</sup> 2007 (2) SACR 435 (CC) at para 78.

on violence against women and children have gone up<sup>12</sup>. Extensive research has been done on the motives of rapists and the overwhelming conclusion is that rape is not always about sexual desire. It is about power and an entitlement to women's bodies<sup>13</sup>. The offence of rape is a scourge which appears to be damaging the very fabric of our society, and it is the duty of the courts to send a clear and consistent message that this onslaught will not be tolerated in a democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society, such as children.

[11] Considering that rape has been used as a tool to relegate women by men who exercise their power and control, and strip women of their right to equality, human dignity and bodily integrity, the Constitutional Court in *S v Tshabalala & Another*<sup>14</sup> stated that:

*“This scourge has reached alarming proportions in this country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this court and courts around this country in the perpetuation of patriarchy and rape culture”.*

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<sup>12</sup> There were 42 289 rapes reported in 2019/2020, as well as 7749 sexual assaults. This translates into about 115 rapes a day. South Africa has the third highest rape incidence in the world, even higher than some countries at war (see: ‘Rape statistics by country 2022’, available at <https://worldpopulationreview.com>, accessed on 11 August 2022)

<sup>13</sup> see: eg Amanda Gouws’ Rape is endemic in South Africa. Why the ANC government keeps missing the mark. *The Conversation*: 4 August 2022 at 1, available at <https://theconversation.com/rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark-188235>, accessed on 11 August 2022.

<sup>14</sup> 2020 (2) SACR 38 (CC) at para 63.

- [12] In determining the appropriate sentence to be imposed on the accused, I must, in the exercise of my sentencing discretion, strike a balance and have due regard to the “triad” factors without overemphasizing or under emphasizing one aspect against the others, as it relates to the personal circumstances of the accused, the seriousness of the offences committed, and the interests of society. The court in *S v Zinn supra* recognised that the seriousness of the offences and the circumstances under which they were committed, as well as the victims of crimes are also relevant factors where the interest and protection of society’s needs should have a deterrent effect on the would-be criminals. Nonetheless, the court has a duty, especially where the sentences are prescribed by legislation, to impose such sentences.
- [13] Because of serious crimes such as the ones the accused has been convicted for, Parliament saw it fit to step in and address the problem, hence the Legislature passed the Criminal Law Amendment Act 105 of 1997 which is normally referred to as the Minimum Sentences Act. This Act was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. The actions taken by the legislature to fix prescribed terms of life imprisonment for offences such as rape is clearly an indication that these offences are prevalent and problematic, and the society needs to be protected from people committing these type of offences.
- [14] With specific reference to counts 2 and 7, the legislature has determined that it is this sanction, the gravest of all punishments that should ordinarily, and in the absence of weighty justification, be imposed for the rape of young children.<sup>15</sup> The minimum sentence of life imprisonment prescribed for child rape makes it clear that Parliament deems this offence as most appalling and horrendous. It also serves as an unequivocal confirmation of 'the gravity with which the legislature considers how the rape of children will impact on their general wellbeing and development, as well as on the

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<sup>15</sup> See *S v Bull* 2001 (2) SACR 681 (SCA) para 21. A meticulous weighing of all factors is required before such a punishment can be justifiably imposed: *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 61, quoted with approval in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC) para 8. Also see *S v Matiyi* 2011 (1) SACR 40 (SCA) para 23 and *Malgas v S* op cit fn 5 as quoted in *Otto v S* [2017] ZASCA 114 para 21.

interests of society, and its revulsion towards such a crime.’<sup>16</sup> Every child is meant to benefit from the constitutional rights to be protected from maltreatment, abuse and degradation, to freedom and security, which includes the right to be free from all forms of violence and to have their privacy and dignity respected and protected.<sup>17</sup> Society expects that courts will respond decisively to such crimes.<sup>18</sup> This rings true to the requirement that the courts must take into consideration the interests of society.

[15] The general principles governing the imposition of a sentence in terms of the Minimum Sentences Act as articulated by the Supreme Court of Appeal in **S v Malgas**<sup>19</sup> has been endorsed by our courts and cannot be ignored. The Supreme Court of Appeal in **S v Matyityi**<sup>20</sup> referring to **Malgas**, reaffirmed that:

*“The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present”.*

[16] The principle was further endorsed by the unanimous decision of the Constitutional Court in **Tshabalala v S; Ntuli v S**<sup>21</sup> when the following was stated:

*“[61] In 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act which prescribes minimum sentences for certain*

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<sup>16</sup> *S v Radebe* para 39.

<sup>17</sup> Ss 28(1)(d), 12(1)(c), 14 and 10 of the Constitution of the Republic of South Africa, 1996.

<sup>18</sup> See, for example, *S v Jansen* 1999 (2) SACR 368 (C) at 378h-379a, cited with approval in *K v S* para 25. Also see the recent judgment of Laing J in *Cook v S* [2022] ZAECGHC 13 para 21. In *S v Vilakazi* [2008] ZASCA 87 para 54, Nugent JA noted that ‘... there comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.’

<sup>19</sup> 2001 (1) SACR 469 (SCA).

<sup>20</sup> 2011 (1) SACR 40 (SCA).

<sup>21</sup> (CCT323/18; CCT69/19) [2020] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019) at para 61.

*specified serious offences. The Government's intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported..."*

[17] It is on record that the accused has been warned of the provisions of sections 51(1) and 51(2) of the Act by his counsel before the commencement of the proceedings, and he confirmed same to the court. In this regard, he has been convicted of the offences which carry the prescribed sentence of life imprisonment in respect of each count on counts 2, 4, and 7, while the prescribed minimum sentence is ten (10) imprisonment on count 12. These are offences which fall under Part I schedule 2 and Part II schedule 2 of the Act respectively.

[18] To avoid these sentences, the accused must satisfy the court that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the prescribed minimum sentences. For a court to come to that conclusion, it must evaluate and consider the totality of the evidence before it, including the mitigating and aggravating factors, and decide whether substantial and compelling circumstances exist<sup>22</sup>. The court is also enjoined with the powers in terms of section 51(3)(a) of the Act to deviate from imposing the prescribed minimum sentences where substantial and compelling circumstances exist justifying such a deviation. Of course, every case should be determined according to its own merits. It is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances. This is in keeping with the principle that the imposition of sentence is pre-eminently in the domain of the sentencing court.

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<sup>22</sup> S v Sikhipha 2006 (2) SACR 439 (SCA).



- [19] The sentence proceedings are proceedings *sui generis*. Both the State and the accused may lead evidence to aggravate or mitigate the sentence. As procedure would allow it, the State has a duty to begin in leading evidence in aggravation of sentence<sup>23</sup> to enable the accused to rebut any such evidence. By agreement between the parties, the J88 of the complainants in counts 2; 4; 7; and 12 were handed in as exhibits C1; C5; C6 and C8 respectively. The Birth certificate of the complainant in count 2 was also handed up as exhibit C2. A document identified as Victim Impact Statement (VIS) which I will comment on later in the judgment was also admitted by agreement as exhibit D.
- [20] Mr. Kgokane objected to the evidence of DNA results of all complainants being handed in as exhibits, and argued that even though the DNA results are not inadmissible *per se*, but given the stage of the proceedings, the evidence is irrelevant particularly because a plea of guilty tendered by the accused was accepted and the accused had already been convicted. He further argued that the DNA results do not seek to mitigate or aggravate any sentence. Coupled with this argument is the fact that the accused's constitutional right to challenge the State's case is compromised as he was not in a position, at this stage of the proceedings, to gainsay otherwise. It was submitted that the State had missed its opportunity of presenting DNA evidence at the relevant time and as such, the evidence of DNA should be inadmissible on the basis of relevance.
- [21] The State on the other hand argued and submitted that the DNA results was relevant for purposes of aggravation because the results serve to prove that the accused pleaded guilty because there was overwhelming evidence of DNA which link him to the commission of all the offences, and not because he was remorseful of his actions.
- [22] It seems to me that the objection was blindfoldedly raised, considering the acknowledgment or realization that the "*DNA results do not seek to mitigate or aggravate any sentence*". It was therefore immaterial for the defence to argue this point. It should be noted that in addition to the provisions of section 274(1) of the CPA

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<sup>23</sup> In terms of section 274(1) of Criminal Procedure Act 51 of 1977 which provides that: "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed".

as stated above<sup>24</sup>, nothing precludes the State from presenting evidence to assist the court in ensuring that sufficient information for purposes of sentencing is placed on record in order to assist the court in determining a suitable sentence. Such evidence should however not contradict the facts already admitted by the accused in his section 112(2) statement, and which have already been accepted for plea purposes.

[23] Affirming that the State is empowered to present evidence at the sentencing state, the court in *S v Radebe*<sup>25</sup> stated that:

*“102. However this does not mean that where there are gaps they cannot be filled in by evidence presented to the court at the stage of sentencing.*

*This is apparent from the right the prosecutor has under s112(3) to present evidence on sentencing in cases where a plea has been accepted.*

*103. Moreover, s274(1) entitles a court before “passing sentence, to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...”*

[24] Having considered the arguments and submissions by both parties, I was of the view that the DNA results are relevant and should be admitted for the following reasons:

- a) Both the DNA and the J88 already admitted by the accused are intertwined in that they both relate to the aspect that the complainants were sexually penetrated by the accused.
- b) The contents of the two documents confirms what has already been admitted and pleaded to by the accused –ie. That sexual intercourse had taken place.
- c) One document serves as corroboration of the other as regards sexual intercourse having taken place.

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<sup>24</sup> See: footnote 23.

<sup>25</sup> (A03/2017, 374/04/2016) [2019] ZAGPPHC 406; [2019] 3 All SA 938 (GP); 2019 (2) SACR 381 (GP) (10 July 2019) at 102-103.

- d) There is no merit to the submission that the accused would be deprived of the opportunity of challenging the DNA result in terms of section 35 of the constitution<sup>26</sup> when he had already pleaded guilty to the offences which he had been convicted for.

In the circumstances, the DNA results were admitted as exhibit C3; C4; C7; and C9 in respect of count 2, 4, 7 and 12 respectively.

[25] The accused elected not to testify in mitigation of his sentence and his counsel submitted that he holds an instruction to address the court from the Bar and that no evidence will be presented on behalf of the accused. It is worth noting that the accused has the right to remain silent and not testify which can be exercised throughout the proceedings<sup>27</sup>. The personal circumstance of the accused placed before court are as follows:

1. He was born on 2 December 1979 – [Although the accused’s SAP 69 reflects that he was born on 8 December 1978].
2. He is not married and has one child, a son aged 21 years old.
3. His educational background is that he went as far as Standard 5 (Grade 7) –and could not further his studies due to financial constraints.
4. His mother is deceased but his father is alive. Counsel informed the court that his father was present in court and has been attending court proceedings.
5. The accused suffers from high blood pressure but is taking medication to control the condition.
6. Before his arrest, he was employed as an assistant driver for a company known as Kempton Park Timelink Cargo, and would also assist in another department as a sales registrar. The court was informed that in 2018, prior to his arrest in connection with this matter, the accused had an accident at his workplace where a giant roll fell on him and he broke both his legs and he has metals embedded in both legs for support.

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<sup>26</sup> Section 35(3)(i) Every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence.

<sup>27</sup> Section 35(3)(h) of Constitution, Act 108 of 1996.

7. He was arrested on 19 August 2019, and has been in custody for 3 years and 8 months.
8. He has one previous conviction of theft committed on 28 May 2005 and he paid an admission of guilt fine of R500 on 12 June 2005. There is previous conviction of robbery committed on 24 October 2008 and the sentence imposed by the court on 08 December 2008 was that of a 3 years' imprisonment which was wholly suspended for a period of 5 years, which the accused denied knowledge of.
  - Be that as it may, these previous convictions are more than ten (10) years old and for purposes of this proceedings and of the offence committed in this case, the accused will be regarded as the first offender.

[26] Because the accused has been convicted of the offences which fall under the purview of the Minimum Sentences Act, a variety of factors have to be weighed by the court in determining the appropriate sentence to be imposed. In this regard, the accused must prove the existence of substantial and compelling circumstances justifying a deviation from the imposition of the prescribed sentences. This means that the accused has a duty to provide the court with relevant information, to enable it to actually make a finding without speculation, by placing sufficient and acceptable evidence before the court to satisfy the court that the mitigating factors justify a departure from the imposition of the prescribed minimum sentences<sup>28</sup>. It is therefore not the duty of the State to prove the absence of substantial and compelling circumstances, as argued on behalf of the accused.

[27] As indicated above, imprisonment for life is mandatory where the accused has been convicted of rape especially when it is as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act where the victim is below the age of 16 years. There are other circumstances in which the sentence of life imprisonment is prescribed, such as where the offence involved the infliction of grievous bodily harm.<sup>29</sup>

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<sup>28</sup> SS Terblanche in his book - A Guide to Sentencing in South Africa, 3<sup>rd</sup> Edition (2016) at 211 states that: It is essential that a party wishing to rely on a particular mitigating or aggravating factor provide sufficient factual basis for that factor through the production of evidence. The court should not be left to speculate.

<sup>29</sup> In terms of Part I Schedule 2, read with section 51(1)

- [28] With regards to the J88, it was argued on behalf of the accused that the injuries sustained by the complainants are superficial injuries proving penetration, and with particular reference to the complainant in count 4, that the injuries seek to prove that there might have been a struggle between the accused and the complainant because there were bodily injuries such as a laceration of  $\pm$ 3cm long and swelling around the laceration; bruising and swelling on the front part of the neck, which according to the finding of the doctor who examined the complainant, the injury was described as being consistent with strangulation.
- [29] As far as count 4 is concerned, Mr. Kgokane correctly highlighted the injuries sustained by the complainant as reflected on the J88 (**exhibit C5**). Further injuries noted by the doctor include scratches on both thighs on the front part, related to a sharp object like a knife; and bruised posterior *fourchette* with extreme tenderness.
- [30] It was submitted that the injuries inflicted on the complainant do not constitute grievous bodily injuries because they are superficial. It was further submitted that even though the term “grievous” refers to severe injuries, the injuries suffered by the complainant in count 4 are not severe injuries. Counsel insisted that the evidence presented by the State does not prove that any of the victims sustained severe injuries which can be elevated to the level of grievous bodily injuries.
- [31] The State on the other hand submitted that the manner in which the rapes were committed is aggravating on its own, considering the *modus operandi* with which the offences were carried out. In this regard, the State argued that the attitude of the accused shows that the accused was out in the streets to get his victims particularly because he was armed with a knife<sup>30</sup> – which is an indication that he wanted to cause harm or had the intention to inflict harm on his victims.
- [32] The Cambridge English Dictionary defines the word “grievous” as “serious; severe; grave; bad; critical; dreadful; terrible; and awful”, while the English Oxford Dictionary meaning of the word “grievous” means having very serious effects or causing great

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<sup>30</sup> Reference was made to exhibit C5 where the doctor noted that the injuries on both thighs of the victim could have been inflicted by a sharp object such as a knife.

pain". While some authorities<sup>31</sup> are of the view that 'an injury can be serious without there being necessarily an open wound', the court in *S v Ferreira*<sup>32</sup> stated that:

*"One must assess the question of whether the injuries are serious or not, directly with reference to the particular victim who has suffered them and not some arbitrarily defined average human being."*

[33] In light of the above considerations, I do not agree with Mr. Kgokane's submission that the injuries sustained by the complainant in count 4 as noted by the doctor in **exhibit C5** do not constitute grievous bodily harm. Consequently, the rape on count 4 remains within the ambit of section 51(1) of the Act.

[34] Now that the provisions of section 51(1) remains applicable in count 4, I have to consider whether there are substantial and compelling circumstances justifying a deviation from the imposition of the prescribed minimum sentences with regards to all the counts of rape.

[35] It was submitted that the personal circumstances of the accused taken cumulatively constitutes substantial and compelling circumstances justifying a deviation from the imposition of the prescribed sentences. It was further submitted that the accused's approach of the case in pleading guilty and admitting the wrongfulness of his actions; and the fact that he is a first offender, should be taken as positive indicators showing signs of genuine remorse, and that he bears good characteristics of rehabilitation.

[36] A further submission related to the fact that the accused did not go far in school, and because of that - he did not know better when committing the offences. It was also submitted that the 3 years and 8 months spent by the accused in custody awaiting finalization of his case is exceptionally long because, had he been sentenced 4 years ago, he would have made inroads with his sentence and that since there was no fault on any of the parties that caused the delay, the accused should not be prejudiced because if life imprisonment is imposed, this would mean that the accused would

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<sup>31</sup> See: *S v Rabako* 2008 JDR 1068 (O).

<sup>32</sup> 1961 (3) SA 724 € at 725F-G .

have to start his sentence afresh and sit for 25 years before he could qualify for parole.

[37] Although counsel on behalf of the accused submitted that he is mindful of the fact that the legislature had deliberately found it fit to comment in the Sexual Offences and Related Matters Amendment Act that the absence of bodily injuries should not be taken as substantial and compelling circumstances, he nevertheless argued that even though the complainants were minors, no evidence was placed before court to prove that the complainants in counts 2 and 7 sustained serious injuries. It was submitted that - but for the fact that “children” were raped, the rapes perpetrated on the complainants are not the worst kind of rapes that have been committed because there are no aggravating factors which should persuade the court to impose the prescribed sentence of life imprisonment. Relying on the case of *S v Nkomo*<sup>33</sup> and *S v Qamana*, Mr. Kgokane submitted that lack of serious bodily injuries should be regarded as a mitigating factor.

[38] In my view, this submission is misplaced because the Legislature has acknowledged that rape in itself deserves the imposition of the most severe punishment possible, hence the enactment of the provisions of section 51 of the Act. On the other, it has been well documented that “irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm”.<sup>34</sup> The victims were stripped off their dignity when they were sexually violated by the accused who perpetrated these acts to satisfy his ‘sexual desires’. Having said that, the Legislature also specifically amended the Criminal Law Amendment Act to provide categorically that, the fact that a complainant was not injured during rape cannot be considered as the basis for concluding that compelling or substantial circumstances are present.

[39] Put differently, lack of physical injury does not justify a deviation from the prescribed minimum sentence, and cannot be regarded as a mitigating factor for purposes of reducing the prescribed sentence. Section 51(3)(aA) of the Act specifically provides that when imposing a sentence in respect of the offence of rape, “an apparent lack of

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<sup>33</sup> 2007 (2)SACR 198 (SCA).

<sup>34</sup> Amanda Spies ‘Perpetuating Harm: Sentencing of Rape Offenders Under South African Law’ (2016) (2) *SALJ* 389 at 399.

physical injury to the complainant shall not constitute substantial and compelling circumstances” justifying the imposition of a lesser sentence.

[40] In my view, it is preposterous and nonsensical for the accused to submit that the rapes perpetrated on the complainants are not the worst kind of rapes in light of the exclusionary provisions of section 51(3)(aA). The submission made on behalf of the accused that the court should look at him favourably because the complainants did not sustain serious injuries is without merit for the reasons already mentioned above. Based on these reasons, I can find no justifiable basis to deviate from the provisions of section 51(3)(aA)(ii) of the Act.

[41] In **Radebe v S**<sup>35</sup> the court stated that:

*“If substantial and compelling reasons are present in cases of the rape of an under-aged child then it cannot be found only in the absence of physical injury. If regard is had to the triad of factors (which must also accommodate the impact on the victim) then I would venture that something sufficiently extraordinary would have to be demonstrated by an accused in respect of his reduced moral blameworthiness, other personal circumstances, the circumstances surrounding the rape or as unlikely as it may seem, possibly even the victim's circumstances in order to displace the opprobrium and moral turpitude which informs the interests of society to punish in the manner reflected in the legislation in cases involving the rape of an under-aged child”.*

[42] The defence submission seem to suggest that there are degrees of rape and ignores the fact that rape in itself is a most heinous act that equates with the most humiliating and invasive attacks on a person's bodily integrity and mental wellbeing. Accordingly, to suggest that there are degrees of rape depending on the extent of the physical assault, disregards the fact that rape *per se* equates to the most degrading and invasive of assaults on both the physical integrity and the psyche of the individual, and it is insensitive to grade rape as being more or less serious.

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<sup>35</sup> at para 53.



[43] Rape therefore is not just the invasion of a right not to be physically harmed. It significantly diminishes a large number of the fundamental bundle of rights which the Bill of Rights either expressly or implicitly secures for each individual - worst still, child rape. The Constitution places the highest store upon children and the responsibility of fellow citizens and the state to provide, as far as is sustainable, the best possible future for them. Section 28 thereof sets out in detail the rights specifically enjoyed by children over and above the other rights accorded to all. Among them is the right to be protected from maltreatment, abuse or degradation.<sup>36</sup>

[44] Child rape has been held to be a scourge that shames the nation. It has been described by the court in **S v Jansen**<sup>37</sup> as follows:

*“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”*

[45] In **S v Radebe**<sup>38</sup>, the court stated that:

*“The legislature understood that, aside from actual physical injury, or threat of physical injury, rape per se is a grievous assault. It*

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<sup>36</sup> Radebe v S (A03/2017, 374/04/2016) [2019] ZAGPPHC 406; [2019] 3 All SA 938 (GP); 2019 (2) SACR 381 (GP) (10 July 2019) at para 23.

<sup>37</sup> 1999 (2) SACR 368 (C) paras 378G – 379A.

<sup>38</sup> 2019 (2) SACR 381 (GP) para 33.

*constitutes a gross violation of bodily integrity, and degrades, humiliates and renders the victim vulnerable. The legislature would also have been aware of the overwhelming body of professional literature on both the immediate and long-term emotional and psychological trauma and degradation generally experienced by rape victims”.*

- [46] With regards to the issue of remorse and the question whether the accused can be rehabilitated, Mr. Kgokane correctly submitted that the court should in considering the appropriate sentence, consider whether the accused poses serious risks to the community even years to come if released. What is rather shocking is the submission that because *“the accused did not go far in school, he did not know better when committing the offences”*. The accused’s background is not unique and cannot justify his callous deeds. There are many persons with similar and more challenging backgrounds who do not resort to crime and who live as good citizens, respecting the law and rights of their fellow human beings<sup>39</sup>.
- [47] In my view, there is no merit in the submission that the accused did not know better when committing these offences. The accused is not of a young age. When he committed the first offence of rape in 2017, he was 39 years old. He committed two more rape offences the following year when he was 40 years of age and the last offence was committed when he was 41 years old. I was informed by his counsel that he has a 21 year old son. With respect, it would be totally absurd to conclude that the accused did not know better, while he has confirmed and made it clear in his section 112 statement that *“he knew at all material times during the commission of these offences that his actions were unlawful”*.
- [48] Clearly as a parent himself, he should have known better than to prey on young vulnerable children. The accused did not only commit a violation on the person of the complainants by depriving them of their freedom of movements and raping them, but he is also a danger to society because he perpetrated these offences for three

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<sup>39</sup> The Director of Public Prosecutions, Limpopo v Motloutsi (527/2018) [2018] ZASCA 182 (04 December 2018) at para 20.

consecutive years. It therefore follows that the answer to the question whether the accused would re-offend in future should be answered in the affirmative. In my view, there is no justification for the actions of the accused, and the submissions made on his behalf cannot stand.

[49] Still on the issue of remorse, Mr. Kgokane submitted that he fully agrees with the decision of the Supreme Court of Appeal in *S v Matyityi* regarding the guidelines given on how an aspect of remorse should be approached, but makes a contrary submission that the accused 'does not have to take the stand and tell the court that he is remorseful' because his approach to this case shows that he is remorseful. The defense' contention is that the court 'should investigate the circumstances of this case and decide whether in those circumstances, the accused is genuinely remorseful'. The problem with this contention is that there are no factors placed before this court to find in favour of the accused.

[50] It does not assist the accused in any way to criticize the State and aver that the State has failed to prove the absence of his substantial and compelling circumstances. Whilst the accused retains the right to remain silent, even at the sentencing stage, it remains his duty to prove that substantial and compelling circumstances exists, which includes showing the court that he is truly remorseful. A remorseful offender is expected to take the court into his confidence<sup>40</sup>. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor.<sup>41</sup>

[51] Remorse remains an important factor and lack thereof, must however not be overemphasised in relation to the other factors that must be considered. It is trite that if the accused shows genuine remorse, punishment will be accommodating, especially when the accused has taken steps to translate his remorse into action<sup>42</sup>. It is an indication that the accused has realised that a wrong was done and has to that

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<sup>40</sup> See: *S v SMM* 2013 (2) SACR 292 (SCA) at para 27; *S v Van der Westhuizen* 1995 (1) SACR 601 (A) at 605; *DPP, North Gauteng v Thabethe*:2011 (2) SACR 567 (SCA) at para 22.

<sup>41</sup> *S v Barnard* 2004 (1) SACR 191 (SCA) at 197.

<sup>42</sup> *S v Brand* 1998 (1) SACR 296 (C) at 299i-j.

extent, been rehabilitated. It is therefore important when the court must decide - as to the degree of mercy to be applied when sentencing.

[52] The Supreme Court of Appeal in *S v Mabuz*<sup>43</sup> recognised that remorse or the lack thereof must be considered when determining sentence. The fact that accused pleaded guilty and admitted the wrongfulness of his actions, cannot be interpreted as a sign of showing remorse or that he can be rehabilitated when relevant factors have not been placed before court, and no evidence has been led to satisfy the elements/guidelines stipulated in the authorities referred to hereunder, to make that determination.

[53] The Supreme Court of Appeal in *The Director of Public Prosecutions, Limpopo v Motloutsi*<sup>44</sup> stated that:

*“[15] The fact that the respondent pleaded guilty is not in itself an indication of remorse...The evidence linking him to the crime was overwhelming DNA evidence. The other factor that militates against a conclusion that the respondent has shown genuine remorse is his decision not to testify in mitigation of sentence. His evidence would have demonstrated his candour, by subjecting his personal circumstances to the scrutiny of cross examination. This may have assisted him in bringing to the court’s attention information about his background and upbringing, to enable the court to make a determination regarding his level of maturity and therefore his moral blameworthiness. I find that the respondent pleaded guilty in the face of overwhelming DNA evidence”. (Underlining added for emphasis)*

[54] I am inclined to agree with the State that the accused pleaded guilty because there was overwhelming evidence of DNA against him.

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<sup>43</sup> 2009 (2) SACR 435 (SCA)

<sup>44</sup> (527/2018) [2018] ZASCA 182 (04 December 2018) at para 15.

[55] Genuine remorse was correctly described by Ponnann JA in *S v Matyityi*<sup>45</sup> supra when he stated that:

*“...In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions.”* (Underlining added for emphasis)

[56] With regards to the question whether the period spent by the accused in custody pending finalization of his trial can be regarded as constituting substantial and compelling circumstance, the State argued that the time spent by the accused in custody awaiting finalization of his trial cannot be measured to the offences he committed and that there are no substantial and compelling circumstances to warrant a deviation from what the Legislature has ordained in terms of the Minimum Sentences Act. It was submitted that the personal circumstances of the accused are just ordinary circumstances that do not warrant a deviation from the imposition of the prescribed sentence.

[57] Counsel on behalf of the accused submitted that a period of 3 years and 8 months spent by the accused in custody is exceptionally long. As stated above, it is contended that the accused would be prejudiced if life imprisonment is imposed because he would have to start his sentence ‘afresh’ and sit for 25 years before he could qualify for parole. It was submitted that the accused should not bear the brunt due to the delay caused in having the matter finalized.

[58] Pre-sentence detention is one of the factors to be taken into account when considering the presence or absence of substantial and compelling circumstances. It is

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<sup>45</sup> At para 13.

merely a factor to be taken into account cumulatively with, and as part of the consideration of other mitigating and aggravating factors in determining whether the effective period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. It should therefore not be misconstrued as punishment or a sentence already being served by the offender.

[59] Accordingly, the accused cannot claim prejudice when it is common cause between the State and the defence that neither of the parties is to blame for the period spent by the accused in custody. In this regard, Mr. Kgokane correctly pointed out that there was no fault on any of the parties that caused the delay in seeing the matter finalized as it is common cause that the accused was referred for psychiatric evaluation. I do not deem it fit to comment on the psychiatric evaluation of the accused because this court does not know the circumstances which led to a recommendation being made for this step to be taken, and neither were the circumstances of this aspect placed before court.

[60] The court was referred to the case of *S v Kwaza and Others*<sup>46</sup> where the accused spent 6 years in custody awaiting finalization of their trial and were each sentenced to life imprisonment in respect of the murder count, by the trial court. In my view, this case is distinguishable from the current case, but most importantly, the full bench of this division was unable to make a determination as regards the question whether the prescribed minimum sentence of life imprisonment can be altered. The reasoning was purely simple – the SCA has not given any consideration to the aspect of pre-sentencing detention in cases where life imprisonment has been imposed. The matter was as a result referred to the SCA for consideration. (Underlining added for emphasis).

[61] This decision clearly confirms two aspects: (1) that each case is distinguishable from the other and should as such be determined according to its own merits, and (2) that the settled principle of law as correctly submitted by Mr Kgokane is that - sentencing is a

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<sup>46</sup> 2023 (1) SACR 335 (WCC) (6 September 2022).

matter for the discretion of the trial court. Gamble J, in **S v Kwaza** *supra* stated the following:

*"[30] The cases which have served before the SCA on the aspect of the relevance to sentence of pre-sentencing detention all related to instances of finite sentences, where adjustments to the imposed sentences were notionally possible. This Court was unable to find any instances where that factor was considered by the SCA in respect of an indeterminate sentence such as life...*

*[31] The Court was unable to find any comparable period of time which had been considered by any other court.*

*[32] ..The SCA has not yet spoken on the consideration of pre-sentencing detention in cases where the sentence ultimately imposed was life imprisonment".*

[62] In light of the circumstances of this case, I do not agree with the submission that the accused would be prejudiced if the prescribed minimum sentence applicable to counts 2, 4, and 7 is imposed. The proper approach in assessing a period of detention pre-sentencing is set out in **S v Radebe**<sup>47</sup> as follows:

*"There should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial ... A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful.... The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining...whether*

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<sup>47</sup> 2013 (2) SACR 165 (SCA) at para 16. See also: S v Vilakazi; S v Kruger; S v Dlamini 2012 (2) SACR 1 (SCA); S v Dodo 2001 (3) SA 382 (CC).

*substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997, ... the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one*". (Underlining added for emphasis)

[63] As indicated above, although exhibit D was admitted by agreement between the parties, Mr Kgokane argued that the defense bemoaned the fact that exhibit D does not assist the court as it contains notes supposedly made by the victim in count 4 and that the contents thereof were not read into the record. Referring to the case of **Rammoko**, he submitted that the State failed in its duties to assist the court as it was mandated to obtain a report by the psychologist or qualified expert who might have shed light or gave an opinion on the impact which the incident might have had on the complainant, to properly assist the court to evaluate the circumstances before it. It was further submitted that the court should find adversely against the State for such failure and come to a conclusion that the mitigating factors far outweigh the aggravating factors. The State on the other hand was of the view that exhibit D is evidence on affidavit by the complainant who has noted how the incident has impacted her life, and that it should be taken into account by the court.

[64] It may very well be that the court in **Rammoko** opined or held the view that evidence in respect of the psychological impact which the incident had on the complainant – should have been obtained. I have already stated that every case must be determined according to its own merits. One must appreciate the context within which the decision in **Rammoko** was based, alternatively, the surrounding circumstances which prompted the comment made by that court.

[65] In the case of **Rammoko**, the complainant and her mother testified, and so did Dr. Storm who examined her. The evidence of the complainant revealed how she felt during the rape incident<sup>48</sup>. The SCA noted that the complainant's mother and the

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<sup>48</sup> At para 7 of the judgment.



doctor were never invited to comment on the extent of the effect which the incident had on the complainant, or the likely effect which the ordeal will have on the complainant in future as she grows older. Since it was apparent from the record that no investigation was done in that regard, her post-rape condition was of significance because she began crying when asked how she felt about what the appellant had done to her, and how she related with her friends and other boys<sup>49</sup>. It is within this context that the SCA opined that the evidence of the complainant's mother, her school teacher or a psychologist should have been led. It is also on this basis that the court held that it was important to place this information before the sentencing court.

[66] A victim impact statement (VIS) is generally prepared for purposes of aggravation as an effective way of giving the victim the opportunity to participate in the last phase of the trial, to voice out his/her feelings on how the crime has affected him/her. This way, it serve the purpose of informing the court how the victim of rape have been impacted by the crime.

[67] In the present case, the circumstances are not of such a nature where it would have been peremptory or absolutely necessary – to have the VIS of the complainants, considering the fact that the State was faced with a guilty plea of the accused. Be that as it may, the absence of the VIS would not have debarred the enquiry as to whether substantial and compelling circumstances exists, and ultimately making a determination of whether the prescribed sentences should be departed from, having regard to aspects such as the “triad factors”, and the “judicial purposes of punishment”, among others. As far as exhibit D is concerned, it would have been preferable if it were compiled by an expert and its contents cannot be considered as it was not read into the record.

[68] As fully articulated by the court in *Malgas*, “the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained”. It remains the paramount function of this court to exercise its sentencing discretion

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<sup>49</sup> At para 9 of the judgment.

properly and reasonably in considering what an appropriate sentence should be, in the light of the circumstances of this case.

[69] In applying the triad principles in **Zinn** to the circumstances of this case as it relates to the offence, the gravity in this case is aggravated by the fact that two of the victims were 7 and 12- years-old, and far too younger than the accused's son. Even though no evidence was presented of the psychological trauma which the complainants would have endured, common sense dictates that 'the trauma' could not have been trifling. This court will reiterate on what was echoed by Mocumie J in **Maila v S** that:

*"[59] Courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences...When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children.*

*[60] The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children".*

[70] With regards to the interests of society, in view of the high incidence of cases of violence against women and children, those who commit rape and invade the most personal and cherished attributes of womanhood should expect no mercy but, on the contrary, should expect the courts to deal with them severely<sup>50</sup>. The following remarks of the court in **S v Ro and Another**<sup>51</sup> are apposite:

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<sup>50</sup> This is in line with many judicial pronouncements:- see: S v C 1996 (2) SACR 181 (C); and S v Chapman.

<sup>51</sup> S v Ro and Another 2010 (2) SACR 248 (SCA) para 15.

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

[71] In **R v Karg**<sup>52</sup> Schreiner JA stated that:

*“It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may be inclined to take the law into their own hands.”*

[72] I have taken due consideration of the cumulative effect of the personal circumstance of the accused, his pre-detention period, including the fact that he is a first offender. While all considerations should be carefully weighed, the prescribed minimum sentences are not to be departed from lightly and for flimsy reasons<sup>53</sup>. Taking into account the judgments in **Motloutsi**, **Matyityi**, **Barnard**, and **Mabuza** I am not persuaded by the submission that the accused is remorseful for his actions. I align myself with these authorities and I am of the view that the accused have not shown any remorse. Having regard to the purposes of punishment, there is no doubt in my mind that the only appropriate punishment for the accused is a sentence of long-term imprisonment.

[73] Consequently, the question is whether the period spent by the accused in custody awaiting trial - having regard to the period of imprisonment to be imposed - justify a departure from the sentence prescribed by the legislature. In my view, the time spent

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<sup>52</sup> 1961 (1) SA 231 (A) at 236B.

<sup>53</sup> S v Malgas.

by the accused in custody awaiting finalisation of his case, does not justify any departure as it is not proportionate to the crimes he committed.

[74] The Supreme Court of Appeal in **S v Vilakazi**<sup>54</sup> stated that:

*“In cases of serious crime, the personal circumstance of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that **Malgas** said should be avoided”.*

[75] The Supreme Court of Appeal in **S v Swart**<sup>55</sup> stated that:

*“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.*

[76] In **S v Ro and Another** *supra* the majority of the Supreme Court of Appeal held that:

*“To elevate the personal circumstances of the accused above that of society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution”.*

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<sup>54</sup> 2009 (1) SACR 552 (SCA) at para 58; S v Matyityi at para 23.

<sup>55</sup> 2004 (2) SACR 370 (SCA)

[77] I agree with, and I am bound by the doctrine of *stare decisis*. Having considered all the circumstances of this case; the personal circumstances of the accused and his lack of remorse; the seriousness and aggravating features of the offences he committed; the purposes of punishment; and all the other factors to be considered when imposing sentence, I am of the view that the cumulative personal circumstances of the accused are just ordinary circumstances. It is also my considered view that the aggravating factors in this case outweigh the mitigating factors, and the substantial and compelling circumstances, individually or cumulatively, are not present to justify a departure from the prescribed minimum sentences. Accordingly, I cannot find any truly convincing reasons and justification why this court should depart from imposing the prescribed minimum sentences, and I can find no other suitable sentence other than the one of life imprisonment on counts 2, 4, and 7 and a sentence of 10 years imprisonment on count 12 as ordained by the Legislature.

[78] Regrettably, I find it necessary and appropriate at this stage to comment on an aspect which seems to me to be one of the important considerations not to be taken lightly by the parties when it comes to preparation of cases. It is rather disturbing to say the least, for the State to come to court unprepared, especially when dealing with sensitive issues such as in this case. Every counsel is expected to take greater care in the presentation of their cases and not leave everything in the hands of the court and simply state that the facts of the case speak for themselves. The address by the State was only focused on count 4 and exhibit D that was not even read into the record, and no efforts were made to deal properly with the other 3 counts of rape. To add to the unpreparedness of the State, reference was made to the offence of assault GBH which does not feature anywhere in this case. Not only did the State make reference to the non-existent charge, but the interpretation of the provisions of section 51(3)(aA)(ii) of the Act were completely misinterpreted. The following is noted from the address by the State: *“when the legislature referred to the offence of assault GBH, it simply means the assault with the **intent** to cause the injuries – and not assault with the infliction of injuries being present. It is submitted that it is not about the injuries inflicted but the intention to inflict injuries”*.

[79] In my view, this is a case where the State's remissness has failed the complainants and the interests of society. Taking a lackadaisical approach can jeopardize the success of each case a legal practitioner deals with. The manner in which the State treats victims of crimes and in particular, rape, must be beyond reproach. Nonetheless, besides these shortcomings, justice must be served, and it must be seen to be done.

[80] In the circumstances, the following sentence is imposed:

1. **Count 1** (Kidnapping) : Five (5) years imprisonment
2. **Count 2** (Rape of a 7 year old girl - read with the provisions of section 51(1) : Life imprisonment
3. **Count 3** (Kidnapping) : Five (5) years imprisonment
4. **Count 4** (Rape of a 16 year old girl - read with the provisions of section 51(1) : Life imprisonment
5. **Count 6** (Kidnapping) : Five (5) years imprisonment
6. **Count 7** (Rape of a 12 year old girl - read with the provisions of section 51(1) : Life imprisonment
7. **Count 9** (Kidnapping) : Five (5) years imprisonment
8. **Count 12** (Rape - read with the provisions of section 51(2) : Ten (10) years imprisonment
9. It is ordered that the name of **PELETONA ABEL LEBELE** be included in the National Register for Sex Offenders in terms of section 50(2)(a)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.



PD. PHAHLANE  
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the State : Adv. L. Shivhidzo  
Instructed by : Director of Public Prosecutions, Pretoria  
Counsel for the accused : Adv. Kgokane  
Instructed by : Legal Aid South Africa  
Heard on : 17 April 2023  
Date of Judgment : 09 May 2023