IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **A192/2023**

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

.... 28 MARCH 2024

SIGNATURE **DATE**

In the matter between:

P N Appellant

and

THE STATE Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 28 March 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This appeal is brought by way of the appellant's automatic right of appeal as against sentence only. The sentence was handed down in the Reginal Court, Pretoria on the 16th August 2022 [Court *a quo*]. The Court *a quo* found the appellant guilty of 5 (five) counts of rape and acquitted him on the 6th count in respect of the charge of sexual assault in April 2016.

[2] Counts 1 and 2 attracted the prescribed minimum sentence of life imprisonment in terms of Part 1 of Schedule 2 read with section 51(1) of Act 105 of 1997 as amended [the Act] in that the appellant raped the complainant more than once when, at the time, she was a minor and under the age of 16 years. The Court *a quo* sentenced the appellant to life imprisonment in respect of both counts 1 and 2. In respect of counts 3 to 5 the appellant was sentenced to 10 (ten) years imprisonment for each count. In addition, the appellant was declared unfit to work with children in terms of the section 120 of the Children's Act 38 of 2005 [Children's Act], his name was to be entered into the register of sexual offenders in terms of section 50(1)(a)(i) of Act 32 of 2007 and he was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

[3] The thrust of this appeal relates to the enquiry whether life imprisonment was indeed an appropriate sentence in respect of counts 1 and 2. Th appellant's argument was advanced raising two issues, namely, the Court *a quo*'s failure to deviate from the prescribed minimum sentence of life due to its failure to find compelling and substantial circumstances and that, the sentence of life imprisonment was shockingly inappropriate in the circumstances.

[4] In dealing with the first issue, the Court a *quo's* failure to deviate from the prescribed minimum sentence, the appellant in noting his appeal relied on the Court *a quo*'s failure to cumulatively find that his age, his scholastic qualifications, and the time he spent in custody as constituting substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence [deviation enquiry].

[5] In dealing with the second issue, the Court *a quo's* failure to hand down an appropriate sentence, the appellant stated that the Court *a quo* incorrectly imposed life sentences in respect of count 1 and 2 as a life sentence was only reserved for more serious and violent rape incidents. According to the appellant, the Court *a quo*, under-emphasizing his personal circumstances and over-emphasized the seriousness of the offence. In consequence the glaring disproportion which, itself, was argued to constitute a substantial and compelling circumstance justifying a deviation[1][seriousness enquiry].

[6] This Court in dealing with the two issues finds it constructive to first entertain the seriousness enquiry in that, should this Court find that the Court *a quo* misdirected itself and failed to strike a balance, it may be dispositive of the remaining deviation enquiry on appeal. To begin with, the material facts in support of the arguments which were before the Court *a quo*, require scrutiny.

MATERIAL FACTS

[7] The appellant is a father of three daughters, the complainant is the oldest of the three daughters. The complaint was 22 (twenty-two) years old when she testified in camera. She testified that from the age of 15 (fifteen) years old her father repeatedly raped her. These sexual offences occurred in the family home and at times, in her own bedroom and always whilst her mother was absent. The years in which these sexual offenses occurred were 2014, 2016 to 2017.

[8] In 2014 the appellant raped the 15-year-old complainant twice by inserting his finger into her vagina without her consent. According to her testimony the complainant in that same year, 2014, and because of the repeated rape incidents attempted to commit suicide by slitting her wrists. These facts are repeated in respect of count 1 and count 2.

[9] The appellant being undeterred raped the complainant again. In fact, several times between 2016 and 2017. The appellant was found guilty of repeatedly raping the complainant yet again, again and again, twice in 2016 and

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[1] **S v Vilakazi** 2009 (1) SACR 552 (SCA); **S v Madikane** 2011 (2) SACR 11) (ECG).

once in 2017. The complaint again testified that she attempted to commit suicide twice between 2015 and 2016, again, in the same manner as in 2014. These facts are repeated for in respect of counts 3,4 and 5.

[10] The missing link in the chronological chain of events is the year 2015. In 2015, the complainant testified that the appellant did not reside with them at home as her late mother had chased the appellant away due to matrimonial issues. During that time, the complainant did not have physical contact with the appellant and no incidents of rape were complained of. Unfortunately, on or about the 16 March 2016 the appellant returned to the common family home and the sexual transgressions commenced soon thereafter, as early as April 2016.

[11] The first sexual offense committed by the appellant after his return in April 2016, was different from the previous two incidents in 2014. The appellant during the first incident in early April 2016 was accompanied by physical threats of throttling and instead of using his finger to commit the acts of rape, the appellant inserted his penis, after which he withdrew and ejaculated on his daughter's bedroom floor.

[12] The complainant testified that the frequency of the incidents of rape from April 2016 escalated. She testified that the appellant would rape her in the early mornings before she had to go to school.

[13] The last sexual offence, perpetrated by the appellant for which he was found guilty was on the15 January 2017. The evidence demonstrates that the appellant gained confidence now raping the complainant, not in private but, whilst she and her two younger sisters were sleeping in their mother's bedroom. This occurred whilst their mother was away again and at a time, when amidst domestic violence allegations, the appellant and his late wife were not sharing the same bed nor bedroom.

[14] Fortunately for the complainant her younger sister aged 14 years at the time [sister], woke up during the committal of the offence and was able to testify about what she had seen. The sister's waking up triggered several

important reactions. The first reaction was that the appellant, now aware that the sister may have awaken up stopped the sexual act and rather resorted to following the complainant into the bathroom. According to the evidence, the second reaction, the appellant followed her into the bathroom so that he could control the complainant's actions, namely her silence. This was achieved both verbally and by his actions. The complainant testified that the appellant stood in the bathroom watching her. The complainant was denied privacy by appellant, her own father, in a particular moment when she intended and in fact began to wash herself after the sexual perpetration. The appellant who, at that moment must have been aware of the complainant's lack of privacy, deemed it appropriate to command that the complainant remain silent.

[15] Notwithstanding and, despite the appellant's attempts to control the complainant's actions, he was unable to control that of an eyewitness. It was the complainant's sister who would later tell her late mother of the event she witnessed. The sister testified that she became aware of what she had witnessed after a lesson on 'rape of children by their fathers' during a Life Orientation lesson at school. Armed with this knowledge she testified that she was able to put the pieces together and, on the 17 January 2018, told her mother.

[16] On 18 January 2018, the appellant left the family home abandoning his daughters and with it, failed to exercise any parental rights and responsibilities as provided for in the Children's Act in respect of his three daughters, this included the payment of any further maintenance. The trigger event occurred because he was confronted by his late wife about the sexual offences perpetrated against the complainant. The South African Police were called to assist.

[17] The appellant left the common home without gathering his personal belongings, eventually relocating to Durban where he was finally arrested.

[18] Conversely the complainant, the appellant's victim, the one who was subjected to live in fear, anguish, and horror by the hands of her father could not simply just leave and relocate and start a new life, she was a child. She was a young girl trapped in untenable circumstances. She testified acting out in anger

against the appellant and as already dealt with, attempt to take her life three times. She did, however, receive counselling for her trauma at the Steve Biko hospital in 2017 and 2018 after the appellant left the home. No hospital records were made available however a probation officer, Ms T Mbatha, authored a report in which she reports the complainant presents with unresolved trauma issues which have had a profound impact on her psychological distress, her decrease in perceived security and her increased feelings of personal vulnerability. This is because a sexual offence or as in this case sexual offenses occurred within a trust parental relationship and after being reported, it results in the termination of the family unit.

[19] The complainant's mother died in July 2021.

THE SERIOUSNESS ENQUIRY: WAS THE RAPE SERIOUS ENOUGH?

[20] At first blush to even consider the necessity to determine the seriousness enquiry itself appears inappropriate. This is simply because the crimes involve the repeated incestuous rape of a daughter by her own father. This at times, whilst she was still a minor. However, this Court is reminded that "*a sentence must be tailored to the seriousness of the crime committed and one expressing the natural indignation of ordinary citizens would compensate for seriousness of the crime committed*",[2] whilst always striking a balance.

[21] The seriousness of this crime was aptly described by Cameron JA, as he then was, in S v Abrahams,[3] [Abrahams matter] when he stated: "*Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including the father, is indeed in the position of authority and command over a daughter. This is a position to be exercised with reference in the daughter's best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter's body, constitutes deflowering in the most grievous and brutal sense*."

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[2] **D v The State** (89/16) [2016] ZASCA 123 (22 September 2016) at para 14.

[3] 2002 (1) SACR 116 (SCA) at par [17].

[22] In Bailey v S,[4] [Bailey matter] this Court is reminded by the remarks of Bosielo JA who described the rape of young girls by their fathers as not only scandalous but morally repugnant to all right-thinking people. The learned Judge expressed concern about the fact that the rape of young girls by their fathers have "*emerged insidiously in recent times as a malignant cancer seriously threatening the well-being and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric*".

[23] The appellant, without appealing his conviction, is of the belief that a sentence of life imprisonment was shockingly inappropriate. This belief infers that the appellant is of the view that the seriousness of the acts he perpetrated against his own daughter were not serious enough to warrant a life sentence and in consequence disproportionate and unjust.

[24] His belief spilled over into his attorney's written heads of argument and, too in his argument. This occurred, at first glance, by reference to the word 'offence' in its singular form instead of "*offences*" in its plural form. This seemingly insignificant, repeated soft-pedal is not insignificant and warrants highlighting for want of relevance. Relevant to the weight of the authorities this Court was invited to consider by the appellant's attorney,[5] relevant to the facts the Court *a quo* accepted when it exercised its sentence discretion[6] and relevant to this Court sitting as a court of appeal.

[25] The relevant proven facts are that of repeated incestuous rape over a period of 4 (four) years, 2 (two) counts occurring when the complainant was still a minor.

[26] To appreciate the seriousness of the crimes in this matter is not only to consider the description referred to previously by Cameron JA in the Abrahams,

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[4] (454/11) [2012] ZASCA; 2013 (2) SACR 533 (SCA) (1 October 2012) at para 13.

[5] **S v MN** 2011 (1) SACR 286 (ECG); **S v MM**, **S v JS**; **S v JV** 2011 (1) SACR 510 (GNP).

[6] **S v De Jager** 1965 (2) SA 616 (A) at p.629; **S v Pieters** 1987 (3) SA 717 (A).

matter[7] but to reconsider the highlighted misconception that benchmark matters exist which must slavishly be followed in matters relating to the rape of children, albeit by their fathers. This misconception was clearly obliterated by the SCA in the Bailey[8] matter, and it is from this premise that this Court is of the view that an expansion of an enquiry into the cumulative effect that the repeated offenses had on the complainant becomes relevant and vital in this matter. In consequence, the offenses in this matter should not be viewed in isolation nor, as simply 'an offence' in the singular but, cumulatively. The cumulative effect consideration not being an anomaly in the exercise of any Court's discretion.

[27] To view the result of the offenses through a cumulative effect lens assists to bring into focus a clearer picture from which the weight or, for that matter, the over-emphasis thereof by the Court a *quo*, if any, can be considered as against the appellant's own personal circumstances. This the nub of the seriousness enquiry argued by the appellant's attorney.

[28] From the evidence the picture which comes into focus is the depiction of a father, gradually, skilfully and deviously grooming his own daughter for repeated penal penetrative sexual intercourse. This gradual grooming commenced with a method of desensitizing her by, commencing the act of rape with his finger, before introducing repeated penal vaginal penetration. The repeated incidents took place in the 'sanctity' of the family home and mostly in the complainant's own private bedroom.

[29] The repeated incidents of rape were supported by the clinical findings. The clinical observations as too, the consequences of the acts of vaginal intrusions were observed, recorded and confirmed by the expert witness, Dr O. Eales in 2017. The weight of the evidence is not in the absence of acute injuries to the female genital tract, but in the observations of an old, healed hymen injury and the clinical picture of her vagina, which, at her age, allowed a bulky medical instrument known as a speculum, to be inserted with ease. Dr Eales testified that

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7 Footnote 3.

8 Footnote 4 at para 19, Benchmark matters of **S v Nkomo** 2007(2) SACR 198 (SCA), **S v Sikhipha** 2006(2) SACR 439 (SCA) and **Abrahams** matter at footnote 3.

the insertion of the bulky speculum indicates that it is highly probable that a patient had previous sexual intercourse as to even insert the instrument in patients who have never had sexual intercourse is sometimes impossible.

[30] In consequence, although the clinical picture does not support a picture of an obvious and brutal physical injurious rape,[9] the observations support the evidence of repeated acts of rape which were a continuous brutal attack inflicted on the complainant. These grievous brutal attacks took their toll on the complainant psychologically and physically. The repetition and the anguish of living with your own perpetrator was sufficiently serious enough to cause the complainant, as previously alluded, to attempted suicides and need to seek help in the form of trauma counselling after the fact.

[31] The Court a *quo* had the opportunity of observing and considering the cumulative effect of the repeated offenses and understood that it had a profound impact on the complainant's own personal life. This was comprehensively captured in the probation officer's report which the Court *a quo* considered and to which reference was made in sentencing.

[32] In contrast, the appellant showed no remorse, was convicted and did not appeal the conviction. Notwithstanding the appellant does not admit his guilt nor has he taken responsibility, resorting rather to blaming his life sentence on others and, in a cavalier manner still maintains and describes his relationship with complainant in a positive light.

[33] In striking the balance it is important to note that the benchmark matters referred to in the Bailey matter all involving rape which fell under section 51(1) of the Act, and absent compelling and substantial circumstances, the Courts after considering the facts, concluded that a sentence of life imprisonment was disturbingly disproportionate to the offence to a point where it could be described as unjust.

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[9] Lack of apparent injury not a factor of obvious injury see section 51(3)(aA)(II) of Act 105 of 1997; S **v M** ([2007] (2) SACR 60 (W) and **S V Ncheche** [2005] (2) SACR 386 (W) at para 386, rape can be serious regardless of emotional s*equelae*.

[34] Following the Bailey matter approach, the benchmark are guidelines and not straitjackets and that an appropriate sentence should be tailor made to fit the crime in each matter. This is because each matter presents with a variation of personal circumstances, not only of the accused, but in this case the importance of the cumulative effect consideration on the complainant. Certain facts and factors arising because of them and, not in spite of them, are germane to the sentencing discretion to be applied by a Trial Court. This matter is no different.

[35] In considering all the facts argued by the appellant's attorney and weighing up the cumulative effect on the complainant this Court is satisfied that the offenses perpetrated are serious enough and were not over emphasised, as argued, and accordingly the outcome of the facts into the seriousness enquiry does not result in a factor to be considered as a substantial and compelling factor. However, having determined that, this Court is enjoined to consider the deviation enquiry to ensure that a just and proportionate outcome is achieved.

DEVIATION ENQUIRY

[36] The appellant's attorney in advancing the misdirections of the Court *a quo* when applying the cumulative effect of the appellant's personal circumstances to justify a deviation from the life sentence, in addition to advancing the appellant's age of 46 years and his scholastic qualifications (grade 11) now, also sought to advance, as a factor, the fact that the appellant was a father of 3 (three) children and that he was providing for his family. These being the only circumstances relied on in support of the deviation enquiry.

[37] These additional factors were, of course, ill-founded in the extreme, not only because factually, albeit for one daughter, "*his children*", now majors were 'abandoned' by him in January 2017. He factually failed to maintain them nor exercise any parental rights and responsibilities he legally possessed so that he could get on with another life in Durban. He left all of that to their mother who was able to do so.

[38] The appellant by his own hand destroyed any father/daughter relationship which could ever had existed with his daughters the very first time he abused the complainant by raping her in 2014.[10] These obvious and inescapable facts render the additional factors argued more as cumulative aggravating factors for consideration rather than compelling factors which the Court *a quo* may have failed to consider and/or attached insufficient weight to when applying the deviation enquiry. Furthermore, to bolster this Court's point, the consequence of the appellant being incarcerated, on the facts, has not had a negative impact on any of his dependants. In fact, the reverse is true.

[39] As for the remaining factors in the notice of appeal, the appellant's attorney failed dismally in his argument eventually conceding after enquiry by this Court that, cumulatively the appellant's age and his scholastic qualifications were neutral factors thereby failing to shift the needle one way or another. Furthermore, he agreed that the Court *a quo* did consider the appellant's age and his scholastic qualifications as factors when it considered sentence. In consequence, the appellant's attorney failed to convince this Court that it should interfere with the Court *a quo*'s discretion applying the cumulative personal factors.

[40] The Court *a quo* did not fail to underestimate the appellant's personal circumstances, nature and circumstances under which the offense was committed and the consequence of imprisonment on the appellants 'dependants. No substantial and compelling circumstances evident warranting interference.

[41] In a final attempt and to remedy the failed contentions, the appellant's attorney argued that the period which the appellant spent in detention prior to his sentencing remained a factor for this Court to consider. This he advanced accepting what the SCA stated in Radebe v S[11] that consideration of a period of detention pre-sentencing is, but one factor to consider and that the test is not whether the period of detention constitutes a compelling circumstance, but whether the effective sentence proposed, in this case life, is proportionate to the

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10 Footnote 2 at para 13.

11 (726/12) [2013] ZASCA 31 (27 March 2013) at par 14.

crimes committed. In other words, was the sentence, inclusive of all the circumstances and the time spent in detention prior to sentencing a just one.

[42] Considering the absence of compelling and substantial circumstances, having regard to the best interest of the complainant at the age of 14 years for which both life sentences where imposed, the cumulative effect the offenses had on the complainant, the aggravating factors, the Court *a quo* reference to SCA matter of D v The State,[12] the sentence is proportionate to the crimes perpetrated and thus just.

[43] This Court does not wish to disturb the sentence discretion of the Court *a quo.* The provisions of Correctional Services Act 111 of 1998 and section 39(2)(a)(i) apply.

In consequence, the following order:

1. The appeal is dismissed.

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L.A. RETIEF
Judge of the High Court
Gauteng Division

I concur,

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BALOYI-MERE
Acting Judge, High Court
Gauteng Division, Pretoria

[12] See footnote 2.

Appearances:

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