IN THE HIGH COURT OF SOUTH AFRICA

KWA-ZULU NATAL LOCAL DIVISION, DURBAN

REPORTABLE

THE STATE **CC 103/2015**

VERSUS

PATRICIA KERSHNIE ISHWARALL **Accused 1**

SALATCHEE VANITHA BASARICH **Accused 2 (deceased)**

SENTENCE

Delivered 08 November 2018

MOODLEY J

[1] As I did in the judgment, I refer to Ms Ishwarlall as 'the accused' and the now deceased Ms Basarich as 'accused 2'.

[2] The accused has been convicted on two counts of assault GBH, eight counts of child abuse in contravention of s 305(3) and (4) of the Children's Act 38 of 2005 ('the Children's Act'), and one count of murder. The State did not prove any previous convictions against the accused and she is therefore a first offender for the purposes of the Criminal Law Amendment Act 105 of 1997 ('the Criminal Law Amendment Act').

[3] The prescribed minimum sentence in respect of the two counts of Assault GBH read with s 51 and part 3 of schedule 2 of the Criminal Law Amendment Act is 10 years' imprisonment.

[4] In respect of the eight counts of child abuse in contravention of s 305(3) and (4) of the Children's Act, in terms of s 305(6), '[a] person convicted of an offence in terms of subsection. . .(3), (4). . .is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment'; and in terms of s 305(7) '[a] person convicted of an offence in terms of subsection. . .(3), (4). . .more than once is liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment'.

[5] Although the charge of murder was read with the provisions of the Criminal Law Amendment Act the court did not find that the accused acted in common purpose with accused 2. Therefore the minimum prescribed sentence on this count for a first offender is 15 years' imprisonment.

[6] In the sentence proceedings the State called two witnesses. Brandon Pillay, the Ward Councillor for Havenside, where the accused and the complainants resided, described the area as a middle-income area. He considered the home of the accused adequately furnished with all essential appliances including a television and linen. Mr Pillay testified that the community had been shocked when the death of Jamie occurred and the abuse of the children was exposed and there was a widespread outpouring of grief. Public support funded the child's funeral which her paternal grandfather attended. A Jamie Memorial Committee has been set up. Social development programmes have since been introduced into the community and schools in order to create awareness of abuse and prevent a recurrence of the abuse in the community. Mr Pillay conceded that inasmuch as members of the community demanded retribution against the accused, the complainants had not received the necessary support and assistance from the social worker, teachers, and the family members and other members of the community to whom the children had complained or were aware of the abuse.

[7] The second witness, Ms Mahashnee Naidoo, a social worker employed by the Department of Social Development as Deputy Director in Chatsworth, testified that she is

responsible for the accused's three minor children who have been placed in foster care, and became involved with them after the death of Jamie. She confirmed that she had been mandated to compile a report with a focus on the best interests of the minor children and that the contents of her report were in accordance with that mandate. The report is formally admitted as Exhibit 'Q'.

[8] I refer to the prosecutor as 'Ms *Naidu*', and the social worker as 'Ms M Naidoo'. Ms M Naidoo explained that after the children were placed in foster care, the responsibility to monitor the fostered children was that of the Chatsworth Child Welfare, which is an NGO overseen by the Department of Social Development. Qualified social workers are employed by the Chatsworth Child Welfare, which has both a manager and a supervisor who report to the Department of Social Development.. The Department exercises an oversight which involves statistics and the functions of the Chatsworth Child Welfare but there is no supervision of specific cases or case details. The social worker to whom the case of the accused's children was allocated has since resigned from the organisation, the reason for which was unknown to Ms M Naidoo.

[9] In amplification of her report Ms M Naidoo testified that the accused's three children A, D and I, have been placed at the Aryan Benevolent Child and Youth Care Centre in terms of the Children's Act.

[10] The youngest child, I, was assessed as malnourished and underweight according to the District Surgeon at the time of her removal. She initially reacted with fear and distrust towards people who were predominantly strangers to her and clung to adults who were mother figures, but has slowly adjusted into a comfortable routine and consistently developed appropriate behaviour. She has been exposed to the stimulation unit at the facility which provides age appropriate learning, and has progressed to Grade R in 2018. She now demonstrates affection and care openly, and has a good sense of humour. The child does not have a proper recollection of the events that led to her placement at the facility, but there are indicators in her present behaviour which demonstrate that her past trauma still impacts on her. As a result of past deprivation, she appropriates other children's belongings, in particular food, without their consent. Ms M Naidoo opines that this conduct is a direct result of the accused's neglect to meet the child's nutritional needs and her nomadic lifestyle and substance dependency. I's paternal family had contact with I around the time of Jamie's death and also with A and D. This was followed by a period of no

contact, but the family re-established contact with I and she has since spent a short period with them.

[11] D was fearful and ambivalent when she was removed from the care of accused 2 in November 2014, with whom she had been placed when she was one year old. She was exposed to high risk because of the abuse A and Jamie were subjected to in her presence. She was deceptive and evasive when she spoke to others about her family and home and demonstrated erratic behaviour at the facility. She did not conform to routine and structure and was disruptive. D expressed her satisfaction that she receives food regularly at the facility which indicates prior deprivation of food. She is now a Grade 6 learner and although her work is not consistent, she has progressively improved and presently her results are satisfactory. D has expressed a desire to be placed with other family members should the opportunity arise, but unequivocally refused contact or placement with the accused.

[12] A was removed from the care of the accused and placed with his grandmother (erstwhile accused 2) when he was 4 years old. He described his placement with her as abusive as he was regularly beaten and deprived of food. Nevertheless, he expressed mainly sorrow and despair when he was removed from her care, but also expressed relief that he was finally rescued from his circumstances because he believed that had Jamie not died, they would have killed him instead. He had feared for his life and that of Jamie daily. His fears manifested on several occasions when he ran away from home and lived with strangers in the Durban Central Business District and in parks.

[13] A had attempted to protect his siblings and is still keenly affected by Jamie's death. Although he was threatened not to inform the authorities, he reported to his educators the abuse he suffered at home. During the investigation in 2015, when a social worker interviewed educators at his school, one educator stated that there was an occasion when A attended school with marks on his face. When questioned, he responded that his grandmother had burned him. The grandmother was summoned to the school but there had been no response.

[14] A expressed no desire to interact with the accused and refused to consider placement in her care. He demonstrated exceptional 'sincerity' (maturity more appropriate) in stating that he forgave her for what she has done but he will not accept her as a caregiver.

[15] Ms M Naidoo's evaluation was that the accused exposed the children to high risk behaviour by forcing them to live and beg on the streets whilst in her care. She also exposed the children to her drug-addiction and to circumstances which caused serious harm to their physical, mental and social well-being. A has been diagnosed with and is being treated for Attention Deficit Hyperactive Disorder ('ADHD') which may have stemmed from the accused's abuse of drugs whilst pregnant. But as ADHD may also be a result of brain injury, it may have been caused by the blows to his head inflicted by accused 2, from whom the accused did not protect him.

[16] Ms M Naidoo noted that the accused showed love and affection to each child while in her care. However, her behaviour towards them was not in their best interests as her life choices placed the children at constant risk, and once they were removed from her care, she demonstrated detachment and lack of interest in them. She has made no effort to have contact with I since she was removed from the accused's care. Therefore the mother-child bond no longer exists between the children and the accused as is evident from the responses of A and D. I does not recall her mother properly but expressed a preference to be with her siblings.

[17] Ms M Naidoo concluded that the accused's violent behaviour against her own children which resulted in the death of one child, and her lack of interest in her children over the last four years, rendered her ability to be a primary care giver to her children in the future doubtful. The children are being nurtured and cared for in a safe and structured environment by people who can demonstrate sensitivity to their unique circumstances and provide appropriate discipline. She concluded that it is in their best interests that they continue to be placed at the same facility. In response to questions by Mr *Pitman*, Ms M Naidoo confirmed that she is strongly of the view that it would not be in the best interests of the children that they be placed in the care of the accused or have contact with her at this stage.

Argument

[18] Mr *Pitman* referred to the personal circumstances of the accused as set out in her evidence-in-chief, and pointed out that although her impoverished circumstances were not unusual, the court had to deal with her in the light of her specific shortcomings. In particular, as established by her neurological assessment, she functioned at the age range of between

16 to 17 years, although she was physically 34 years old. She is also a first offender and has been in custody for four years.

[19] Mr *Pitman* conceded that the seriousness of the offences of which the accused has been convicted, in particular, murder and assault GBH, cannot be minimised and a custodial sentence is appropriate. But he contended that as the minimum sentence provisions do not apply to persons under the age of 18 and as the accused functions at a mental age below the age of 18, the court should assess her circumstances in the light of her mental age rather than her physical age. He submitted further that the accused's diminished responsibility was established by the evidence and confirmed by Ms Elkington. Although the accused had been able to appreciate the distinction between right and wrong and act in accordance with her appreciation, her cognitive disabilities contributed to her inability to act appropriately, which was exacerbated by accused 2's bullying of and control over the accused. Despite the expectation of society that the sentence should have a deterrent effect, there should be an element of mercy as the abusive circumstances in the accused's own life are inextricably connected to the treatment of her children.

[20] Mr *Pitman* submitted that the convictions in terms of the Children's Act ought to be placed on the lower end of the spectrum of seriousness. He pointed out that in cases of murder with *dolus eventualis* and diminished responsibility, the sentences imposed range from five to six years' imprisonment in the main to 18 years' imprisonment. He suggested that the court should consider the appropriate cumulative effect of the imprisonment, bearing in mind that the accused had already spent four years in custody, and the net sentence should not be in excess of ten years.

[21] In response Ms *Naidu* contended that the accused had not demonstrated diminished responsibility as was confirmed by Dr King, inter alia she was able to control her responses to each child. The court should therefore distinguish between diminished responsibility and substantial and compelling circumstances which warrant a deviation from the prescribed minimum sentences. She conceded that the accused's mental age constitutes such a substantial and compelling circumstance, but disputed that the sentence proposed by Mr *Pitman* was appropriate. Ms *Naidu's* view was that a cumulative sentence of 25 years was appropriate, but she also submitted further that the court should not minimise the serious offences of which the accused had been convicted by ordering them to run concurrently or taking them together for the purposes of sentence.

[22] Ms *Naidu* drew attention to the current statistics in respect of violence against children and emphasised that the escalating incidents of violence demand a sentence with an appropriate deterrent effect and which would serve the interests of the community. She pointed out that the accused had deprived her children of their rights in terms of s 28 of the Constitution, and argued that the accused's background of abuse ought not to detract from the seriousness of her offences, especially as she acted independently of accused 2 in assaulting the children and subjecting them to severe mental, emotional and physical abuse and even encouraged their abuse by accused 2.

Legal principles

[23] In *S v PB* 2013 (2) SACR 533 (SCA) para 19 Bosielo JA stated:

'. . .it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing . . . .'

[24] These established and valid principles as set out in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H are that the punishment should fit the offender and the offence, the interests of society must be considered and there should be a measure of mercy. The court must also consider the main purposes of punishment which are deterrence, reformation or rehabilitation and retribution.

[25] The right to a fair trial is not confined to the process of determining guilt or innocence but extends to the sentencing process. Therefore, in determining sentence, the court should remain dispassionate and carefully weigh the relevant facts and factors in order to fulfil its responsibility and function to ensure that a convicted offender is treated fairly, and not be swayed by public sentiment or argument that society demands a severe sentence as advanced by Ms *Naidu* in argument and Mr Pillay during his testimony.

[26] Although society has an indisputable interest that a fair sentence be imposed, the purpose of sentencing is not to satisfy public opinion but to serve and promote the public interest. A court has the duty to impose a fearlessly appropriate and fair sentence, even if such a sentence would not satisfy public opinion. In *S v Gardener & another* 2011 (1) SACR 570 (SCA) para 68 Heher JA explained as follows:

'True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence, and why a court, *in loco parentis* for society, is responsible for working out the answer.'

[27] In my deliberations on sentence I have also remained vigilant not to confuse the unlawful acts of the accused with that of accused 2, and to distinguish the acts which were perpetrated by both of them, the acts perpetrated by accused 2 in the accused's presence and the acts initiated by the accused. I have dealt with the unlawful acts in detail in my judgment and do not intend repeating them except for the purposes of clarification.

The offences

[28] I turn firstly to the offences of which the accused has been convicted. In his book *Guide to Sentencing in South Africa* 3 ed (2016) at 211, S S Terblanche states as follows on the seriousness of crime:

'Almost every kind of crime has its own inherent set of factors which aggravate that crime and, therefore, call for a more severe sentence. In crimes of *violence* major factors which may aggravate the crime include the degree and extent of violence used, the nature of any weapon, the brutality and cruelness of the attack, the nature and character of the victim, whether the victim was unarmed or helpless, and so on.' (Footnote omitted)

[29] It is indisputable that the offence of murder is extremely serious under any circumstance. In this instance a defenceless and totally dependent young child died as a result of the act of violence perpetrated on her by her mother with a high heeled shoe. But she faced imminent death anyway as a result of prolonged starvation and continued abuse at the hands of both the accused and the erstwhile accused 2. The seriousness of the other acts of abuse against her also cannot be downplayed, as urged by Ms *Naidu*. The child was deprived of her constitutionally entrenched right to life and basic needs such as nutrition and care by the accused. The appalling statistics for May 2018 indicate that 2 600 children have been murdered in South Africa since 2016 and 99 per cent of the children studied had witnessed or been subjected to violence. The recommendation was that violence against children be viewed as a national disaster.

[30] The assaults on A by the accused left the child not only physically traumatised but also confused. He was burned and beaten by her but he did not know the reason for her ill-treatment of him. The accused did not intervene when he was sexually abused by accused 2 but assisted her by kicking and holding him down. Despite his own abuse, he was even more troubled by the abuse of Jamie in particular. He was clearly protective over her and was deeply affected by her death. His anger against the accused was evident during his testimony. These observations are confirmed by Ms M Naidoo in her report. She has added that A feared that he would have been killed too.

[31] A and D testified about their unhappiness at being made to beg. It was correctly pointed out by Ms *Naidu* that the children would bear mental scars and that they had been placed at risk. But sadly begging by children is not an unusual phenomenon –as one drives on the roads of Durban at practically every robot is an adult who sends a child or children to beg from motorists, thereby placing their lives at risk from the traffic and even worse, abduction. And this is not confined to Durban but is a tragic feature of all South African cities.

[32] It is also evident from I's constant craving for and theft of food and D's comments about having regular meals now that all of the accused's children were nutritionally deprived, although she alleged that she returned home to ensure that her children did not starve and she collected the proceeds of the begging. Yet the children, except I, were recipients of foster care grants which were intended to be utilised for their benefit by accused 2. I was also malnourished when examined by the district surgeon. The accused spent money on her drug addiction which could instead have been utilised for the benefit of her children.

The offender

[33] The personal circumstances of the accused are on record. I am mindful that she was herself a victim of abuse by accused 2 and others. But against this one must weigh, as correctly highlighted by Ms *Naidu*, that the accused pleaded not guilty and alleged ignorance of the abuse of the children and the assaults they were subjected to. Her attitude and evidence in this respect have been evaluated comprehensively in my judgment.

[34] The accused does not have any previous convictions and is therefore a first offender. A first offender is treated with mitigation because the offender might prove to not

likely to repeat the crime, and is susceptible to rehabilitation. However, the nature of the crime and the callousness and brutality of the offender's actions may show that he or she has no regard for other people. In such a case the interests of society become more important than the interests of the individual offender. For these reasons it is sometimes held that first offenders are not entitled to non-custodial measures.

[35] It is appropriate at this stage to consider Mr *Pitman's* submissions in respect of the applicability of the minimum sentence provisions and diminished responsibility.

The application of the provisions of the Criminal Law Amendment Act.

[36] Section 51(6) of the Criminal Law Amendment Act as amended by s 26 of the Judicial Matters Amendment Act 42 of 2013 provides that s 51 of that Act does not apply to persons who were under the age of 18 years at the time of the commission of the crime.

[37] Mr *Pitman* submitted that the provisions of the CLA Act should not apply to the accused because, although she is 34 years of age she has been found by this court to function at a mental age of 16 to 17 years old. Ms *Naidu* has conceded that his submission in respect of the functional mental age of the accused is in accordance with the judgment, but she has contended that this finding should constitute a substantial and compelling circumstance, and not affect the application of the CLA Act.

[38] It is common cause that the accused has an IQ of 60. Although it has been decided that sub-normal intelligence can reduce the blameworthiness of the offender, the courts are reluctant to give any weight to this factor. In *S v Francis* 1993 (1) SACR 524 (A) at 528e-h the court found that despite a relatively low IQ, the evidence showed that the accused did not have sub-normal intelligence. Therefore the court has to be satisfied that the offender really is sub-normally intelligent and that that lack of intelligence has something to do with the commission of the crime. I am satisfied both from the observation of the accused during the trial, including her ability to express herself and to comprehend and process the evidence and give appropriate instructions to her counsel, that the accused does not have sub-normal intelligence.

[39] In my view, the CLA does apply to the accused as set out in the relevant charges, but the assessment that she functioned mentally at the time when the offences were committed at an age much lower than her physical age, must be taken into consideration. That assessment, and the fact that she is a first offender, constitute substantial and

compelling reasons which warrant departure from the prescribed minimum sentences as contemplated in *Price & another v S* [2003] 4 All SA 26 (SCA) and *S v Malgas* 2001 (1) SACR 469 (SCA).

Diminished responsibility

[40] Section 78(7) of the CPA provides that:

'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

[41] In my judgment I stated:

'[194] I am however satisfied that the traumatic brain injury suffered by the accused and the brain atrophy, neither of which is in dispute, constitute mental defect or illness as contemplated in s 78(1).

[197] It is therefore not in dispute, and in fact has been established, that despite her mental defect, the accused did have the ability to appreciate the wrongfulness of her act or omissions.

[214] However, I am also of the considered view that the evidence and the assessments may sustain the finding of diminished responsibility for her conduct, given the level of her adaptive functioning and mild intellectual impairment, although Dr King was of the view that the accused did not demonstrate diminished responsibility. But, as correctly submitted by Ms *Naidu*, this has no impact on her criminal capacity, and only becomes relevant at the sentencing stage.'

[42] As pointed out by counsel in their address, Ms Elkington conceded that there was an element of diminished responsibility in the accused's conduct while Dr King was of the view from her reading of the evidence in the trial, that the accused did not display diminished responsibility. However I have in my judgment accepted the opinion of the three experts that the accused does have a mental defect. I have also found that she was capable of goal directed behaviour and that she was able to resist accused 2 in certain instances and act independently of her. However I am unable to agree with Ms *Naidu* that I cannot therefore find that the accused had diminished responsibility in respect of all her conduct at the relevant time.

[43] A finding in terms of s 78(1) of the CPA does not preclude a finding in terms of s 78(7). To the contrary, as stated in *Hiemstra's Criminal Procedure* at 13–30 'the legislature

confirms *ex abundanti cautela* the common-law principle that mental illness which is not of such a serious nature that it leads to a finding of total incapacity can nevertheless lead to diminished responsibility which mitigates punishment. The subsection can be applied in all cases in which there is a mental illness of not so serious a nature that criminal incapacity is the result'. See also Terblanche *Guide to Sentencing in South Africa* above at 224-226.

[44] As Nugent JA stated in *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) para 67:

'While the insights of psychiatrists or psychologists might at times be helpful they are not indispensable. . . .For ultimately a court must reach its own conclusion on that issue on an assessment of all the evidence.' (Footnote omitted)

[45] In my evaluation I am guided by the following comments of the court in *S v Mnisi* 2009 (2) SACR 227 (SCA) para 5:

'Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively.'

[46] In *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) para 31 Cloete JA stated that an accused 'who acted with diminished responsibility is guilty, but his. . .conduct is morally less reprehensible because the criminal act was performed when the accused did not fully appreciate the wrongfulness of the act, or was not fully able to act in accordance with an appreciation of such wrongfulness'. Diminished responsibility is therefore not a defence but is extremely relevant for purposes of sentencing because it reduces culpability.

[47] In *Van Der Westhuizen* the court accepted diminished responsibility as a substantial and compelling circumstance as contemplated by s 51(3) of the CLA Act. The court held further at para 91 that deterrence and retribution as purposes of sentencing will only recede into the background in cases of substantial diminished responsibility.

[48] Having considered of the conduct of the accused, which I have evaluated in great detail in my judgment, together with the fact that she suffers a mental defect and cognitive deficiencies, I am of the view that there was a degree of diminished responsibility in her conduct which may be accepted as a compelling and substantial circumstance as contemplated by s 51(3) in accordance *Van der Westhuizen*.

Interests of the community and retribution, rehabilitation and deterrence

[49] Earlier in this judgment I referred to the distinction between community opinion and community interest, and the concession by Mr Brandon Pillay that the community had failed the children, particularly Jamie. I intend to elaborate on the issues that emanate from these references.

[50] A, despite being warned by both accused, revealed to his teachers and friends at school that he had been burned or assaulted. But he received no assistance beyond a perfunctory request that the grandmother present herself which she did not, as is evident from Mrs M Naidoo's report and the evidence of A, Roxanne and the accused herself. There was no follow through by the school authorities, which in my view is unacceptable. Had the abuse been investigated and referred to the police or social welfare authorities, the tragic outcome may have been pre-empted. This failure begs the question of just how many other children seek assistance and are failed similarly by educators who are meant to be *in loco parentis* while the children are in their care.

[51] It is also relevant to note that there were adults other than both accused living with the complainants – accused 2's son, daughter and boyfriend, and for a time the accused's boyfriend who was the father of Jamie and I. However, apart from a few protests there appears to have been no active intervention by any of them to assist the children. Mr Brandon Pillay spoke of awareness programmes held at schools. In my view these programs should for therefore encompass teachers, pupils and their parents and caregivers.

[52] In terms of s 181 of the Children's Act one of the main purposes of foster care is to 'protect and nurture children by providing a safe, healthy environment with positive support'. Section 186(2) provides that a children's court may place a child in foster care with a family member for more than two years, and extend such an order for more than two years at a time or order that the foster care placement subsists until the child turns 18 years. Section 186(3) further provides that a social service professional must continue to visit a child in foster care at least once every two years to monitor and evaluate the placement.

[53] The following excerpts, which I have found significant and relevant to the facts of this case particularly in respect of the abuse of the complainants, the identification of the visible signs of abuse on them and the action to be taken by the social worker, are extracted from

the IGMSS manual provided to social workers by the Department of Social Welfare to which I have had access:

'In most cases children who appear to be in need of care and protection are reported to a social worker by different people including members of the public, relatives, teachers, and neighbours.

A child in need of care and protection… is a child who inter alia:

(a) Is in a state of physical or mental neglect. A child who is physically abused may be identified by being grossly underweight with stunted growth and clear signs of malnutrition. Before approaching the court with a view of finding that child in need of care and protection, the designated social worker may, where applicable, assist the family to meet the nutritional needs of the child. This would depend on whether the family is only destitute but is in a position to provide for the child's emotional and psychological needs. Other role-players may be approached to assist the family.

(b) Is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights, a family member or a person under whose care the child is. Abuse in this case includes assaulting a child or inflicting any other form of deliberate injury on a child; sexually abusing a child or allowing a child to be sexually abused; allowing a labour practice that exploits a child; or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

It is important for the designated social worker to consider early intervention programmes in an attempt to deal with the problem before approaching the court. This should only be done where there are prospects of success and where the child's life is not in danger. …A designated social worker to whom a report is made, must investigate the report and the circumstances of the child.

Powers and responsibilities of persons suitable to investigate child abuse or neglect [Regulation 37]

A social worker who has received a report alleging the abuse or neglect of a child, must:-

(a) Investigate that report in accordance with the broad risk assessment within a reasonable time that may be dependent on the severity of the case.

(b) In cases of sexual abuse, refer the child immediately but within 72 hours to a medical health professional for medical treatment.

(c) If necessary, accompany the child or cause the child to be accompanied to a police station for the purpose of laying a complaint.

(d) If necessary, accompany the child or cause the child to be accompanied to a medical facility for the purpose of medical treatment.

(e) Facilitate counselling and support to reduce trauma to the child and his or her family members and, if necessary, refer the child to other relevant professionals.

(f) Co-ordinate the available and applicable child protection services to ensure the safety and well-being of the child.

(g) Develop and implement a child protection plan in consultation with the child, his or her parents, guardian or caregiver and, if required, other relevant professionals.

(h) Review the child protection plan on a six-monthly basis or earlier, depending on the severity of the abuse or neglect.

(i) Take protective measures, where applicable and necessary, by removing the child to temporary safe care.

The broad risk assessment framework includes the following indicators that serve as a guide to confirm or substantiate a report that a child has been abused or neglected:

(a) The presence of indicators of physical abuse include the following:-

(i) Bruises or grasp marks on the arms, chest, face or other parts of the body.

(ii) Variations in bruising colour. The presence of many injuries at various stages of healing makes it obvious that injuries did not occur as a result of one incident.

(iii) Black or blue eyes.

(iv) Belt marks.

(v) Swollen areas or broken bones.

(vi) Missing patches of hair.

(vii) Torn tissue or cuts around or behind the ears.

(viii) Cigarette or other burn marks.

(ix) Cuts, lacerations, welts, fractures, head injuries.

(x) A child's behaviour might signal that something is wrong. Victims of physical abuse may display withdrawal or aggressive behavioural extremes, complain of soreness or uncomfortable movements, wear clothing that is inappropriate for the weather, express discomfort with physical contact or become chronic runaways.

(b) The presence of indicators of deliberate neglect include extended or slightly hardened abdomen; thin and dry skin; dark pigmentation of skin not related complexion, especially on extremities; abnormally thin muscles; developmental delay and lack of fatty tissue.'

[54] All these indicators resonate with Dr Ntsele's findings in his post-mortem report on Jamie.

[55] During the trial there was evidence that complaints were lodged by the neighbours and that a social worker conducted visits to the accused's home. The social worker would speak to accused 2 and leave. At times the accused would be at home but she hid in the bathroom because she had no right of contact with the children. The significance of this evidence is twofold – the failure of any intervention by the social worker, let alone meaningful and necessary intervention. And yet the signs of abuse were clearly visible on Jamie. Following the guidelines in the manual I have quoted, she was a textbook case of abuse and deliberate neglect, which the social worker failed to observe or deliberately ignored.

[56] A and D were old enough to be interviewed by the social worker. Even if the house were small and did not allow privacy the social worker could have made the necessary arrangements to interview them in more conducive circumstances, which may have encouraged the children to be forthright. A told his teachers of his abuse although he was under threat by both accused. This failure to take any action is an indictment on the

relevant social worker and her management and the children allocated to her were the victims. The tragic waste of Jamie's life and the sustained abuse of the children could have been prevented had the relevant social workers carried out their responsibilities diligently and with full consciousness that they are responsible for the lives of the children who are assigned to them. The unfortunate reality is that Jamie and her siblings are just one family whose plight has gained media and community attention. Arising from the statistics quoted in this judgement, there are many more children who are not receiving the intervention necessary to rescue them from a similar fate.

[57] I have however not factored the conduct of the community or the other persons I have alluded to as relevant to the determination of a sentence for the accused.

[58] Adverting to the third point of the *Zinn* Triad, a sentence must serve the interests of the community. In determining what is in the interests of the community, one must consider the effect of the offence on the community. The startling and horrific statistics quoted by Ms *Naidu* indicate why appropriately severe sentences are required to punish offenders against children and act as a deterrent. However I am mindful as properly urged by Mr *Pitman* that an accused ought not to be sacrificed on the altar of deterrence by a sentence where the individual is treated harshly and unfairly in the hope, not knowledge, that such treatment would prevent other potential crimes and promote law-abiding conduct in the community at large. In *S v Furlong* 2012 (2) SACR 620 (SCA) para 14 the court warned that:
'… a court must not allow the retribution demanded by the community and the deterrence of the accused and other like-minded persons intended by the sentence, to detract from its responsibility to consider the prospects of rehabilitation of the accused.'

[59] As stated by Goosen J in *S v McLaggan* (CC70/2011) [2012] ZAECGHC 75 (28 September 2012) para 8:
'The interests of society also require that as far as reasonably possible offenders should be reintegrated into the society, having endured the punishment of imprisonment, as rapidly as possible so that they may contribute positively and valuably to the society. The sentence must nevertheless clearly and unambiguously show that punishment will be meted out for serious offences of this nature.'

[60] The accused is currently 34 years old. She is also the recipient of a compensatory award which although utilized to fund her defence, will facilitate her financial independence. During her detention of four years pending the finalization of the trial she has been drug

free and it is evident from her conduct prior to her arrest and in court that she is capable of taking care of herself. Finally rehabilitation commences with remorse. The accused has however not expressed any remorse or taken the court into her confidence, and in her defence pinned the blame for the offences solely on accused 2.

The appropriateness of a custodial sentence

[61] The accused was the primary caregiver of I until her arrest. In *S v M (Centre For Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 36 the Constitutional Court dealt inter alia with the issue of what the duties were of a sentencing court in the light of s 28(2) of the Constitution of the Republic of South Africa, 1996, and of any relevant statutory provisions, when the person being sentenced was the primary caregiver of minor children, and provided the following guidelines to promote uniformity of principle, consistency of treatment and individualisation of outcome. Firstly, a sentencing court should determine whether an accused was a primary caregiver wherever there were indications that this might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence if such a sentence was being considered. Thirdly, if on the '*Zinn*-triad' approach (which required the court to consider the crime, the offender and the interests of society) the appropriate sentence was clearly custodial and the accused was a primary caregiver, the court must apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated.

[62] The Constitutional Court held further, that two competing considerations had to be weighed by the sentencing court: the first was the importance of maintaining the integrity of family care; the second was the State's duty to punish criminal misconduct. The community had a great interest in seeing that its laws were obeyed and that criminal conduct was appropriately penalised; it was also in the interests of children that they grow up in a world of moral accountability where criminality was publicly repudiated. In practical terms the difficulty was how appropriately to balance the three interests required by *Zinn* without disregarding the peremptory provisions of s 28.

[63] Ms *Naidu* has provided the social worker’s report to assist me to act in accordance with the aforesaid guidelines, for which I express my appreciation. It is common cause that the nature of the offences demand a custodial sentence be imposed on the accused. With the benefit of the report of Ms M Naidoo I am satisfied that the children, specifically I is

adequately cared for at the facility at which she has been placed. She has little recollection of the accused and she has the benefit of the presence of her two siblings. There has been contact with her paternal family and it is to be hoped that a familial bond will be established in due course.

[64] A and D, in the absence of interest in them by members of their maternal family, will also benefit by remaining in the facility where they were placed four years ago, thereby acquiring a degree of stability and wellbeing in their lives. They have also settled into respective schools. There is no reason to disrupt their lives, despite my concern about what I can only hope was an isolated incident at the facility to the detriment of D. Further, both children have no desire for any contact with the accused nor has she shown any inclination to re-establish communication with them. Ms M Naidoo's report that the accused shunned responsibility for the children and has become detached corroborates Roxannes's evidence in the trial that the accused loved each child until the next arrived and then abandoned the older child, like an old toy. Therefore there is no integrity of natural or maternal family care which is at risk, and the proper penalisation of the accused's criminal conduct must be effected. I am in the premises satisfied that a custodial sentence will not impinge adversely on the paramount interests of the children.

Concurrent sentences and the cumulative effect of the sentences imposed for multiple convictions

[65] An order that sentences run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent'. See *S v Mokela* 2012 (1) SACR 431 (SCA) para 11.

[66] While I remain mindful of Ms *Naidu's* submission that the court should not minimise the serious offences of which the accused had been convicted by ordering them to run concurrently or taking them together for the purposes of sentence, it is also the responsibility of this court to ensure that the cumulative effect of the sentences imposed is not unduly harsh or so severe that the 'real prospect' of rehabilitation is destroyed. A court must be mindful of the cumulative effect of sentences because the combination of two sentences can be shocking while concurrently served sentences in terms of s 280 of the CPA may prevent an accused from undergoing a severe and unjustified long effective term of imprisonment.

[67] In *S v Kruger* 2012 (1) SACR 369 (SCA) para 9 Shongwe JA said:

'The trial court as well as the High Court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and at different times. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is a daunting exercise indeed.'

In *S v Moswathupa* 2012 (1) SACR 259 (SCA) para 8 the court held '[w]here multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together.'

In *S v Muller & another* 2012 (2) SACR 545 (SCA) para 10, it was held that '[a]n effective sentence of 30 years' imprisonment is an extremely severe punishment that should be reserved for particularly heinous offences'. In this case the appellants had been convicted of three armed robberies of businesses and sentenced to 10 years' imprisonment on each count, resulting in an effective 30 years' imprisonment for offences. The Supreme Court of Appeal found that the individual sentence for each individual count was appropriate but the cumulative effect was not. At para 11 Leach JA said:

'In addition, although they were by no means first offenders, the appellants were not hardened criminals who had previously served long terms of imprisonment. There is nothing to show that a lengthy period of imprisonment will not bring home the error of their ways. It would be unjust to impose a sentence, the effect of which is more likely to destroy than to reform them. However, the cumulative effect of the sentences imposed on the appellants smacks of the use of a sledgehammer; it seems designed more to crush than to rehabilitate them.'

It is also relevant that the accused has been in custody for four years.

[68] I have accordingly sentenced the accused on each count and thereafter determined the concurrent running of the sentences with what in my view is the appropriate cumulative sentence.

[69] Having weighed the aforesaid mitigating and aggravating factors and the other factors relevant to sentencing together with a measure of mercy, the following sentences are imposed:

Order

Count 1: Assault GBH of A: 5 years' imprisonment.

Counts 2 and 7: Child abuse of A and D respectively in contravention of s 305(3) of the Children's Act (teaching the children to beg and making them beg): 2 years' on each count.

Count 4: Child abuse in contravention of s 305(3) of the Children's Act allowing sexual assault on A by Accused 2: 5 years' imprisonment.

Count 5: Failure to provide medical assistance to A in contravention of s 305(4) of the Children's Act: 2 years' imprisonment.

Count 10: Assault GBH of Jamie: 10 years' imprisonment.

Counts 11 and 12: Child abuse in contravention of s 305(3) of the Children's Act (starving and tying Jamie to the bed - taken as one for the purposes of sentence): 10 years' imprisonment.

Count 14: Child abuse in contravention of s 305(3) of the Children's Act allowing the sexual assault of Jamie by Accused 2: 10 years' imprisonment.

Count 16: Failure to provide medical assistance to Jamie in contravention of s 305(4) of the Children's Act: 5 years' imprisonment.

Count 17: Murder of Child Jamie – Guilty with criminal intent in the form of *dolus eventualis*: 12 years' imprisonment.

In terms of s 280(2) of the Criminal Procedure Act, it is ordered that:

1 The sentences imposed on counts 2, 4, 7 and 5 shall run concurrently with the sentence of 5 years' imprisonment on count 1.

2 The sentence imposed on count 16 shall run concurrently with the sentence of 12 years' imprisonment imposed on count 17.

3 Seven years of the sentence of 10 years' imprisonment imposed on each of counts 10, 11 and 12, and 14 are ordered to run concurrently with the sentence in count 17, so that a total period of 12 years' imprisonment is served.

4 Three years of the sentence of 10 years' imprisonment imposed on each of counts 10, 11 and 12, and 14 shall run concurrently so that a total period of three years' imprisonment is served.

The cumulative effective sentence is 20 years' imprisonment.

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Moodley J