

## S v SN Case No. CC16/2022 ECD High Court Makhanda

Submitted by the Child Witness Institute

KEY CONCEPTS	
Medical evidence of penetration	Intact hymen
Rape of 10-year-old	Sentencing
Life imprisonment	Minimum sentencing
Therapy order	Counselling

### CHARGE

The accused was charged with rape. It is alleged that the accused, aged 46, committed acts of vaginal penetration on a number of occasions with a 10-year-old girl without her consent and against her will. In the event of a conviction, the prosecution requested the implementation of a sentence of life imprisonment in terms of minimum sentencing legislation in that the victim was under the age of 16 and had been raped more than once by the accused. The accused pleaded guilty and was accordingly found guilty as charged.

### FACTS

The complainant was 10 when the incident occurred and she was the accused's niece, the daughter of his brother. She lived with her paternal grandmother. The complainant and her younger brother would visit the accused at his house where they played. On the day in question he asked the complainant to fetch water for him after school. He then undressed her and had sexual intercourse with her. Two days later the complainant again went to his house after school to fetch water for her grandmother. He called her and asked her to fold his clothes. He then undressed her and had sexual intercourse with her. After he had sexual intercourse with her, one B, an 18 year old girl, entered the shack where he was with the complainant. He covered the complainant with a blanket so that B would not see her. B was suspicious and asked why he was under the blankets during the day. He told her that he was resting and she left. He told the complainant to go to her grandmother's house. B saw the complainant leaving the shack and reported the matter. The complainant's father, the brother of the accused, confronted him and wanted to know what he had done to his child in the presence of their sister. The accused admitted what he had done and said that he had been overwhelmed by sexual urges and raped the child. His brother stabbed him and the community assaulted him thereafter.

### DISCUSSION

#### Evidence in mitigation

The accused testified under oath in mitigation of sentence and the following points were highlighted:

- He was 46 years of age.
- He left school at Standard 5.
- He is unemployed and has been unemployed for many years.

- He is not married and does not have children of his own.
- He apologised for his actions to his grandmother, his family, the victim and to the members of his community.
- He spent approximately five months in prison awaiting trial.
- He suffers from high blood pressure which is under control.
- He confirmed that the complainant is his niece and acknowledged that he was supposed to protect the complainant and not be the person who hurt her.
- He took responsibility for his actions.
- He was stabbed by his brother below the left shoulder after he confronted him about the rape incidents. He subsequently laid a charge against his brother.
- He was further assaulted by the community which resulted in him sustaining fractures to his jaws.
- He was hospitalised for a period of fourteen (14) days.
- He asked for forgiveness and mercy from the court. He had not apologised to his brother or the complainant because he had not had an opportunity.
- He asked for a sentence of twenty years instead of life imprisonment .
- He acknowledged that what he did was wrong and that he would not commit the offences again.
- The accused took the court into his confidence, pleaded guilty and displayed genuine remorse.
- That the rapes do not fall into the category of the rapes that are regarded as worse.
- There is no DNA evidence and the accused chose to plead guilty and not to subject the minor child to secondary victimisation where she would be exposed to cross- examination and he admitted that he used his position of power.
- The accused is a suitable candidate for rehabilitation and is willing to attend certain programmes in prison to deal with his sexual urges.
- He is not a repeat offender. He submitted that a sentence of 20 years imprisonment will be adequate.

#### **Evidence in aggravation of sentence**

The State called the evidence of the doctor who examined the complainant at the hospital. She provided the following evidence:

- She examined the complainant and completed a medical report.
- She recorded that the complainant weighed 22,5 kg and her general body build was normal for her age but she was petite. Her breasts were still developing.
- The minor child did not know what a condom was.
- She did not observe any injuries or abrasions on her skin.
- She noted a white thick discharge coming from the child's vagina but she did not investigate it. She observed slight redness in the para- urethral folds.
- The hymen was "mostly intact micro perforated".
- She did not observe any tears or swelling.

The State called a social worker, who provided the following evidence in aggravation:

- The complainant was greatly affected by the rapes. She had been deprived of her childhood and she was not performing well at school.

- She was not able to state whether the child would ever recover from the emotional trauma. She recommended that the child should receive ongoing therapy to cope with the trauma and to deal with the anger that she was exhibiting when she was playing with other children as she was beating them.
- The child informed her that she was angry with the accused and wanted to beat him when she saw him. The child also informed her that the accused told her not to tell anyone about what happened and if she did he would kill her.
- She experienced stomach aches after the incidents.
- After the medical examination, the complainant vomited and did not eat.
- The family observed that they often She had to repeat herself when talking to the child.
- The complainant was always beating other children when playing with them.
- The grandmother of the complainant reported that the child had nightmares.
- The social worker observed that it became evident to her that the child was very angry and she needed therapy to manage that anger.
- The complainant blamed herself for her uncle's arrest because she did not see that he was arrested because of what he did to her, due to the fact that she is egocentric.

The court accepted evidence of traumagenics, namely that the traumagenic dynamics alter a child victim's cognitive and emotional orientation to the world. These distortions often result in behavioural

problems that are commonly noted in victims of sexual abuse. The court further referred to the issue of betrayal and noted the social worker's observation that the child realized that someone she loved or whose affection was important to her treated her with total disregard. A complainant whose feelings of betrayal are intense often show signs of grief and depression over the loss of a trusted person. The complainant voiced that she was hurt by what her uncle did. Relying on literature, the social worker found that complainants tend to show aggressive behaviour in response to anger stemming from feelings of betrayal. This aggressive behaviour is argued to be a primitive way of trying to protect oneself against future betrayals and can develop into more serious antisocial behaviour and delinquency if untreated. She found that the child was experiencing fear and had reported that she felt that she felt hurt after her uncle threatened to kill her if she told anyone about the incidents.

#### **INTACT HYMEN**

The medical examination found that the complainant's hymen was mostly intact with a few perforations. However, the medical examiner explained that the hymen differs from person to person and that because the hymen was not torn did not mean that there was no penetration. She stated that because the child was very young the healing process in the vaginal area took place very quickly. She explained that the hymen could remain intact although there was penetration. She stated that during penetration the victim could experience what she referred to as thickening of the hymen itself, that the hymen can stretch with certain activities and if the patient is sweet-talked there would be less damage during penetration. The other reason is that if the victim was more relaxed and the pelvic muscles were relaxed then the victim would not experience brutal tearing. Penetration does not necessarily mean that the hymen should be torn because that would depend on how deep one penetrated the child.

The State highlighted the following as aggravating factors:

- The child is ten years old.
- She was raped twice by the accused.
- They are related and these family rapes are prevalent and particularly insidious because of the general taboo attached to them.
- He is the uncle to the complainant and by virtue of that he had easy access to her as a result of the familial link, they lived in the same house.
- The accused breached the trust of the complainant and that of his brother.
- The complainant's vulnerability due to age and family relationships was exploited.
- He was also in a position of authority relative to the complainant and he abused that position to commit the acts in question.
- The guilty plea was not a plea of remorse because the accused realised that he faced a strong case.
- He blamed his action on sexual urges and simply said he will do his best to make sure that his urges do not get the better of him. That, the State submitted, was not good enough reason to depart from the minimum sentences.
- The psychological sequelae will continue for years.
- The accused has not worked for a long time. He has not been a productive member of society. Where he was staying he was not paying any rent. She submitted that this is
- The State argued that this was an appropriate case to impose a life sentence. The State relied on the decision in *S v Booyesen* 2009 JDR 0273 (ECG) for her submission that life imprisonment will be adequate because in that case the complainant was ten years old , a tiny child , slender and was incapable of offering resistance to a sexual assault by an adult.

## DISCUSSION

According to Section 51(3) of the Criminal Law Amendment Act 105 of 1997, a court, when imposing a sentence in respect of the offence of rape, shall not regard the following as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence:

- i. complainant's previous sexual history;
- ii. an apparent lack of physical injury to the complainant;
- iii. an accused person's cultural or religious beliefs about rape; or
- iv. any relationship between the accused person and the complainant prior to the offence being committed."

In *The Director of Public Prosecutions, Grahamstown v Mantashe* (131/2019) [2020] ZASCA 05 (12 March 2020) at paragraph 13 the Supreme Court of Appeal stated:

"The high court found in the respondent's favour that there was no gratuitous violence although threats were made to the child not to disclose the rapes. Presumably, because there was no physical injury to the child, other than the rapes, this was held to be a mitigating factor. Lack of physical injury as constituting a substantial and compelling circumstance when imposing a sentence on a conviction of rape is specifically excluded in terms of section 51(3)(aA) of the Act. This is precisely because rape itself is an act of violence and has such devastating long-term sequelae."

The court referred to other applicable legislation:

- Section 8(1) of the Children's Act 38 of 2005 provides that the rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights. Section 8(2) requires that all organs of State any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.
- In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance must be applied. Section 28(2) of the Constitution provides that a child's best interests shall be of paramount importance in every matter concerning the child.

The court examined the triad principles applicable when a court sentences an accused person, and noted that the interests of minor children do not feature as a separate consideration especially where the children affected are victims of crime or abuse. The triad involves the accused, the crime and the interests of society. Although the courts do take into account the interests of the children ( for example, where a breadwinner is to be sentenced to a term of imprisonment), in criminal matters those interests are not standalone interests but are more often than not lumped together with those of the society.

Davis J in *S v Jansen* 1999 (2) SACR 376 ( CC) at 378 g-379 stated :

"Rape of a child is 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."

## **FINDING**

The court found that there were substantial and compelling circumstances which warranted deviation from the imposition of life imprisonment. The reasons for the decision are as follows:

- The accused in his plea and admission statement gave a very detailed account of his actions. Those facts were accepted by the State and that demonstrated that they were truthful or at least reliable otherwise the state would have rejected them and tendered evidence. He pleaded guilty and he gave a frank account of the events. He testified under oath and apologised throughout in his evidence about what he did to the complainant. He apologised to the complainant, to his brother, his family and the community. The court observed the apologies and was satisfied that not only did he verbalise his remorse but he displayed it as he was testifying. The fact that he tendered an apology to the victim was good and would positively contribute to the healing journey of the complainant.
- The court acknowledged that, in terms of s51(3), lack of physical injury does not constitute a substantial and compelling circumstance justifying the imposition of a lesser sentence, but argued that the circumstances in this case were different. The medical evidence is that the perforation on the hymen was normal. It also revealed that no force was used and that the hymen remained intact demonstrating that the perpetrator did not penetrate the child deeper and forcefully. It is not lack of physical injury that is a consideration but the gravity of

those injuries. The complainant suffered injuries associated with an act of rape. The gravity of the injuries is not known but she suffered emotional trauma. The doctor testified that the child was in pain and uncomfortable and she could not perform digital vaginal examination. The medical evidence was that no force was used.

- The accused was stabbed by his brother when he confronted him about the incident. A few days later the community also assaulted him and he was hospitalised for (14) fourteen days having sustained fractured jaws. The court found that the attack on the accused by the community was not and could not be to advance the legitimate needs of society. The accused was punished by his brother and the community and sustained physical injuries. According to the court, this ought to be a factor to be considered as forming compelling and substantial circumstances.
- The accused does not have previous convictions related to sexual offences and should be regarded as a first offender. As to his other convictions, there was a period of at least 15 years between 2003 and 2019 where he committed no offences. This means that the accused is a candidate for rehabilitation. For fifteen years he did not commit any offence. He was 46 years old and there was no evidence upon which a finding could be made that he was not able to be rehabilitated if given a sentence other than life imprisonment.
- The State submitted that the accused was not a useful member of the community because he has been unemployed for a long time, but the court was unable to make that assumption based only on the fact that he was unemployed. No evidence was presented about his behaviour within the community. Being unemployed does not render a person not useful.

Although these factors are substantial and compelling circumstances to deviate from the imposition of life imprisonment, this does not mean that a lighter sentence should be imposed.

- The complainant was introduced to the adult world in a harsh manner.
- She is suffering from psychological trauma.
- The accused had easy access to her because of familial relations. He breached the trust that this child had in him.
- Family rapes are prevalent and particularly insidious because of the general taboo attached to them.

## **THERAPY ORDER**

The court was of the view that the interests of children, who are victims of crime or abuse, must be addressed prior to the conclusion of the trial to ensure that the well-being of an abused child is taken into account by the trial court. That, according to the court, would pave the way for those children to grow and become emotionally, mentally and physically strong future members of society. Once sentence is imposed on an accused person that is the end of the trial. If nothing is said about the child victim other than condemning the unlawful act itself, the child will go back home with no support from the justice system.

The court recalled the social worker and instructed her to investigate and prepare a proper schedule of the therapy for the complainant. The social worker made arrangements for the complainant to receive therapy and the arrangement was confirmed by the State and a draft order was prepared, which contains the schedule for the complainant's therapy. The court also called the complainant's aunt, who will be responsible for taking the complainant to the therapy sessions. She is the complainant's caregiver and resides with her. She agreed to take the complainant to therapy on the dates contained in the schedule and undertook to adhere to the order that the court will issue. The

court then confirmed with the father that he would ensure that there were sufficient funds for the transport of the complainant to attend therapy.

The court then made an order that the complainant undergo counselling, and included the schedule of therapy (dates and times) for a period of two years. Progress reports needed to be filed with the court by the counsellor every six months. The guardian was also order to ensure that the child attend the therapy sessions.

### **SENTENCE**

The court was of the opinion that the sentence to be imposed must send out a strong message to would-be offenders that the rape of minor children is a serious violation of the child's body, mind and soul. This unlawful conduct should not be tolerated.

The accused was sentenced to 25 years imprisonment.