THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 69/2022

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION (PRETORIA) **APPELLANT**

and

D M S **FIRST RESPONDENT**
A O L **SECOND RESONDENT**

Neutral Citation: *Director of Public Prosecutions, Gauteng Division, Pretoria v D M S and A O L* (69/2022) [2023] ZASCA 65 (12 May 2023)

Coram: SALDULKER, MOLEMELA, MEYER and MOLEFE JJA, and MALI AJJA

Heard: 24 February 2023

Delivered: 12 May 2023

Summary: Appeal against sentences in terms of s 316B of the Criminal Procedure Act 51 of 1977 – whether sentences imposed by the trial court were too lenient and induced a sense of shock – sentences imposed by the trial court set aside – sentences considered afresh.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Tlhapi J sitting as court of first instance):

1 The appeal is upheld.

2 The sentences of the trial court are set aside and replaced with the following:

'2.1 Accused 1 is sentenced as follows:

Count 1: Life imprisonment in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 2: 5 years imprisonment; and

Count 3: Life imprisonment in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

2.2. Accused 2 is sentenced as follows:

Count 1: 23 years imprisonment;

Count 2: 5 years imprisonment;

Count 3: 23 years imprisonment. The sentences imposed in respect of count 2 and 3 are to run concurrently with the sentence in respect of count 1.

2.3. In terms of section 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the names of both accused persons are to be entered into the Sexual Offenders register.'

3 It is directed that a copy of the pre-sentencing report compiled by Lieut Col Hayden Knibbs, dated 24 June 2016 and handed in as exhibit S1 during the trial, must be handed over to the heads of all correctional facilities in which

the second respondent may be incarcerated while serving his imprisonment sentence.

4 The sentences mentioned in paragraph 2.1 and 2.2. above are antedated to 2 September 2016.

JUDGMENT

Molemela JA (Saldulker, Meyer and Molefe JJA and Mali AJA concurring):

[1] It is often said that sentencing is the most difficult phase of a criminal trial, and rightly so. This case brings into sharp focus the dilemma that is often faced by the trial court when sentencing a minor for violent crimes.[1] In this instance, a psychologist's report described the minor in question as displaying traits of a serial killer, which evidence was not contested.

[2] The two respondents were arraigned in the Gauteng Division of the High Court before Tlhapi J (the trial court), on three charges, namely (i) murder, (ii) defeating the ends of justice, and (iii) contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape). Both respondents pleaded not guilty on all charges. In her plea explanation, the first respondent denied having committed the offences she was charged with, while the second respondent submitted a plea explanation as contemplated in s 115 of the Criminal Procedure Act 51 of 1977 (CPA), in terms of which he admitted having committed the offences but asserted that

[1] This dilemma is evident from the divergent views expressed in the majority and minority judgments in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC).

he had committed them under duress, as the first respondent had threatened to kill him if he did not rape and kill the deceased. He also explained that the first respondent was present during the rape and murder of the deceased.

[3] Several admissions were made in terms of s 220 of the CPA. Included among these admissions was the post-mortem report pertaining to an autopsy that was performed on the deceased, as well as a concession that the second respondent's DNA was found in the vestibule swab sample collected from the deceased's genitals. The first respondent made an admission to a Magistrate, in terms of which she acknowledged being present during the killing of the deceased but implicated the second respondent as the person who murdered the deceased.

[4] In a confession made to a Magistrate, the second respondent admitted to having killed the deceased but alleged that he had been coerced to do so by the first respondent, who had also played a role in the commission of the offences. The second respondent also made a pointing out. The first respondent tried to disavow the admissions she made to the Magistrate, but these were, following a trial-within-a-trial, admitted into evidence. The trial court rejected the second respondent's defence of necessity (based on the averment that the first respondent had coerced him to commit the offences) and convicted both respondents on all the charges.

[5] On 2 September 2016, the trial court imposed the following sentences on the respondents: the first respondent was sentenced to 15 years

imprisonment in respect of count one (murder), 5 years imprisonment in respect of count two (defeating the ends of justice) and 15 years in respect of count three (rape). The sentences in respect of count 2 and 3 were ordered to run concurrently with the sentence in respect of murder. Thus, the first respondent's effective sentence was a period of 15 years imprisonment. The second respondent was sentenced as follows: 12 years imprisonment in respect of count one (murder), 5 years imprisonment in respect of count two (defeating the ends of justice) and 10 years imprisonment in respect of count three (rape). The sentences in count 2 and 3 were ordered to run concurrently with that in respect of count 1. Thus, the effective sentence in respect of the second respondent was 12 years imprisonment.

[6] The matter came to this Court as an appeal brought by the Director of Public Prosecutions, Pretoria, (DPP) in terms of s 316B of the CPA against the sentences imposed on the respondents. In the grounds of appeal, the DPP submitted that the sentences imposed were too lenient and induced a sense of shock and therefore ought to be set aside. The appeal is with the leave of the trial court. There is no explanation regarding why the application for leave to appeal was only heard five years after the filing of that application.

[7] In a nutshell, the testimony adduced before the trial court was that during the night of 7 December 2013 to the early morning hours of 8 December 2013, twelve-year-old Ms Dimakatso Phahlane, whom I shall hereafter refer to as the deceased, became a victim of a brutal rape and gruesome murder perpetrated on her by her cousins, a female aged 21 years

and eight months, (the first respondent), and a male aged 17 years and five months, (the second respondent), (together referred to as the respondents). The respondents and the deceased were first cousins, as their mothers were sisters.

[8] The evidence revealed that the respondents and their uncles, Mr Ephraim Leso and Daniel Leso, respectively, and the second respondent's sister called Mankoko Leso lived in the same premises at Moloto in Kwa-Mhlanga. The second respondent had also accommodated his girlfriend, Ms Pretty Ngobeni as his live-in lover. The uncles occupied the main house, a four roomed house which was referred to as 'the RDP house' during the proceedings, while the respondents and Ms Ngobeni occupied a five roomed corrugated iron shack situated a few metres from the RDP house. The second respondent used a separate shack as his bedroom, which he shared with Ms Ngobeni. The RDP house used to belong to the respondents' and the deceased's grandparents. Following the death of the respondents' grandparents, the house was occupied by the respondents' parents, the two uncles, the respondents and the second respondent's sister. The RDP house and the shack were located in the same yard. It is common cause that both the first respondent and Ms Ngobeni were pregnant at the time of the incident. The deceased lived with her parents in their own home but used to visit her cousins during weekends. The deceased happened to be visiting her cousins on 7 December 2013.

[9] On the evening of 7 December 2013, Mr Ephraim Leso informed the family that he was going to attend a traditional feast in the village, where he intended to spend the night. Since he was not going to sleep at his house, the arrangement was that the deceased and the second respondent's twelve-year-old sister, Ms Mankoko Leso (Mankoko), would sleep in his bedroom. At the time of Mr Leso's departure, the deceased and Mankoko were playing in the RDP house. The two respondents and the second respondent's girlfriend, Ms Ngobeni, also happened to be in the RDP house at that stage, and everything seemed normal.

[10] According to Mankoko, the deceased went to bed earlier than her. When she eventually decided to go to bed, she found the second respondent in the bedroom, sitting on a chair next to the bed in which the deceased was sleeping. She joined the deceased in the bed and slept. That was the last time she saw the deceased alive.

[11] Mr Ephraim Leso's brother, Mr David Leso testified that he arrived at the house at 21h00. By then, Mr Ephraim Leso had already left. He noted that the first respondent and Ms Ngobeni were already in the shack but did not see the second respondent. He went to bed in the RDP house. At about 2am he heard what sounded like a muffled scream. However, he decided not to investigate the source of the scream, as he feared that he could be harmed, and subsequently fell asleep.

[12] It is common cause that in the morning, Mankoko discovered that the deceased was not in bed, went to the shack to ask the first respondent and Ms Ngobeni about the deceased's whereabouts and was told that they did not know where she was. It is also common cause that blood traces were spotted at the door of the RDP house.

[13] Mr Ephraim Leso's evidence was that he returned to his home the next morning and was immediately informed that the deceased was missing. He was also advised about the traces of blood that had been observed near the entrance of the house. He followed the blood-trail, and it led him to the neighbour's toilet, where the deceased's bloodied clothes and a spade were found. Upon further enquiries, he learnt that the second respondent was observed shovelling in the yard and laying grass on loose soil earlier that morning. He summoned the police.

[14] Upon arrival, the police observed loose soil in the yard, became suspicious and inspected the area. This led to a grisly discovery of the deceased's naked body in a shallow grave in the backyard. The body bore several deep gashes in the head and neck area. Once the body had been discovered, the second respondent made a report to Mr Leso, which led to the arrest of both the first and second respondents.

[15] Ms Ngobeni testified that during the night of the incident, the first respondent called the second respondent, after which they both left the shack. At some point during the night, the second respondent knocked at the door of

the shack. When she let him in, she noted that he was not wearing the jersey that he had on earlier that night, and that he was not wearing any shoes. She demanded an explanation from the second respondent but did not get any. Shortly thereafter, the first respondent knocked at the door of the shack. When she let her in, she asked her where the two of them were coming from at that time of the night. The first respondent told her that it was none of her business.

[16] Ms Ngobeni testified that once she was in the bedroom with the second respondent, he confessed to having killed the deceased. He claimed that he did so at the instance of the first respondent and mentioned that she had threatened to kill him if he did not follow her instructions. She asserted that the second respondent, however, refused to disclose the whereabouts of the deceased's body. She stated that the second respondent woke up very early the next morning. She saw him shovelling in the yard. Thereafter, Mankoko came to the shack to enquire about the deceased's whereabouts. She noticed the presence of blood stains at the door of the RDP house. She confirmed that after the arrival of the police, the deceased's naked body was found in a shallow grave.

[17] It is common cause that after the police had been called, the second respondent made an admission which led to him pointing out specific areas of the crime scene to the police. It is also common cause that the second respondent later made a statement to a Magistrate in Kwa-Mhlanga court, admitting that he had raped and killed the deceased and concealed her body

in a shallow grave after a failed attempt to throw her body into a neighbour's pit toilet. He however asserted that he committed the offences under duress, as the first respondent had threatened to kill him should he not commit the offences in question. Subsequent to his arrest, he pointed out various areas of the house and identified them as areas where serious injuries were inflicted on the deceased with a spade before her head was crushed with a rock.

[18] The essence of the appellant's grounds of appeal was that the sentencing discretion of the trial court was not properly exercised. It was also averred that the trial court had over-emphasized the personal circumstances advanced on behalf of both respondents and failed to take proper account of the seriousness of the offences they had committed and the interests of the community. It was also alleged that the trial court had paid insufficient regard to the absence of contrition on the part of both respondents.

[19] In respect of the first respondent, the crisp issue is whether the trial court should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment. This is a factual enquiry. In respect of the second respondent, the trial court was precluded from imposing the applicable minimum sentence of life imprisonment on account of him being a minor at the time of commission of the offence. Thus, the question central to the appeal is whether the sentences imposed on him are too lenient, as contended for by the DPP, or whether they are too harsh, as contended for by the respondents.

[20] It was submitted on behalf of the appellant that the trial court had failed to attach sufficient weight to the interests of the community and the nature and seriousness of the offence but had instead over-emphasised the respondents' personal circumstances. In respect of the first respondent, the appellant submitted that the trial court had misdirected itself by finding that there were substantial and compelling circumstances warranting a deviation from the minimum sentences of life imprisonment as set out in s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) in respect of counts 1 and 3. The appellant submitted that even if it were to be accepted that there were substantial and compelling circumstances that warranted deviation from imposing life imprisonment on the first respondent, the sentence ultimately imposed by the trial court was too lenient, all things considered.

[21] In respect of the second respondent, the appellant conceded that s 51 of the CLAA was not applicable to him, given the fact that he was below the age of 18 years at the time of the commission of the offences. The appellant however persisted with the argument that the trial court ought to have imposed life imprisonment sentence on the second respondent on the basis of the general penal jurisdiction set out in s 276(1) of the CPA. It was contended that the sentences imposed on the two respondents induced a sense of shock, were disturbingly inappropriate and in any event were not proportionate to the offences committed, even if it were to be found that there were substantial and compelling circumstances justifying a departure from the applicable minimum sentences. Counsel for the respondents submitted that there was no justification for tampering with the sentences imposed by the

trial court, as it had properly exercised its sentencing discretion and had not committed any misdirection.

[22] It is well-established that punishment is pre-eminently a matter for the trial court's discretion. Thus, a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is shown that discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity, a material misdirection or is disturbingly inappropriate. This principle was echoed in *S v Van Wyk and Another*,[2] where this Court held that a court of appeal would interfere with sentences imposed by a trial court 'only where the degree of disparity between the sentence imposed by the trial court and the sentence the appeal court would have imposed was such that interference was competent and required.' The crucial question in the enquiry is 'whether there was a proper and reasonable exercise of the sentencing discretion bestowed on the court imposing sentence.'[3]

[23] In determining whether the sentencing discretion was properly exercised by the trial court, this Court must consider the applicable sentencing principles, taking into account the specific circumstances of this case. A consideration of the well-known triad of sentence consisting of the crime, the offender and the interests of the offender, is necessary. However, before I do so, it is appropriate to consider principles laid down by this Court as regards the consideration of appropriate sentences. This Court, in *S v Malgas*[4]

[2] *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) at para 31-32.
[3] *S v Kgosimore* [1999] ZASCA 63; (2) SACR 238 para 10.
[4] *S v Malgas* 2001 (2) SA 1222 (SCA).

(*Malgas*), cautioned that specified minimum sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. It further pointed out that speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, among others, were not intended to qualify as substantial and compelling circumstances.

[24] In *S v Matyityi*,[5] this court emphasised that courts are duty-bound to implement the minimum sentences prescribed in terms of the CLAA and cautioned that 'ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed.

[25] In *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (*Centre for Child Law*),[6] the Constitutional Court ordered that s 51(6) of the CLAA be read as if it provides that 'this section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of the offence contemplated in subsection (1) or (2).'[7] That being the case, it follows that even though in respect of count 1 (murder) and count 3 (contravention of s 3 of Act 32 of 2007 (rape)), the prescribed minimum sentence in respect of those offences is life imprisonment as set out in Schedule 2, Part I of s 51(1) of the CLAA, this sentence was not applicable to the second respondent on account of his age.

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[5] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 22-23.
[6] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC).
[7] Ibid para 77.

Thus, a consideration of substantial and compelling circumstances does not arise in relation to the second respondent.

[26] As regards the first respondent, it is common cause that the indictment mentioned that count 1 (murder) and count 3 (contravention of s 3 of Act 32 of 2007 (rape)), fell within the purview of the provisions of Schedule 2 Part I of s 51(1) of the CLAA, in respect of which life imprisonment was the applicable minimum sentence. It is trite that an offender's personal circumstances, cumulatively considered, may constitute substantial and compelling circumstances that justify deviation from the applicable minimum sentences. With that in mind, I turn now to consider the first respondent's personal circumstances.

[27] The first respondent did not testify in mitigation of sentence. Her personal circumstances were, however, placed on record by the defence counsel. As already mentioned, the first respondent was 21 years and eight months old at the time of the commission of the offence and 24 years old at the time of sentencing. She was a first offender. She had a difficult upbringing. Her mother passed away when she was 11 years old. The conception of her first child was as a result of a rape that was committed on her when she was 15 years old, as a result of which she dropped out of school. The second child was born before conclusion of the trial. It cannot be disputed that these are strong mitigating factors. That said, these mitigating factors cannot be considered in isolation. The seriousness of the offences committed, and the

interests of society are equally compelling considerations. It is to these aspects that I now turn.

[28] Regarding the seriousness of the offences committed, the medico-legal reports submitted as exhibits with the consent of the respondents' counsel paint a horrifying picture of a rape and murder that were accompanied by extreme brutality. The viciousness of the attack perpetrated against the deceased is evident from the serious injuries she sustained, which were, according to the second respondent, inflicted by both respondents with a garden spade and a large rock that was used by the first respondent to crush the deceased's head. The injuries sustained by the deceased included multiple bruises in the face, neck and chest area; extensive bruises on the wrists, a deep abrasion in the chin area, a 9 cm deep laceration on the right side of the neck, a 7 cm cut behind her ear, a 4 cm cut on the left cheek area, a deep 8 cm scalp laceration with gaping edges on the left parietal skull, a 7.5 cm irregular shaped cut on the right occipital scalp, a c-shaped deep and irregular cut on the occipital area of the skull. It was noted that 'all cuts have severe underlying fractures on them'.

[29] An additional medico-legal report recorded that deep abrasions were seen on the vaginal wall and deep bleeding cuts on the sides of the vagina. The chief post-mortem findings were recorded as follows:

'The body is that of a young black female child. Multiple bruises to the face, wrists, chest, abdomen. Deep lacerations to the scalp area. Skull fracture with bleeding brain tissue. Signs of strangulation with deep neck muscles involved. Genital or vaginal injury'.

[30] A disturbing feature of this case is that the rape and senseless murder were committed by the respondents who were both much older than the deceased. Being above the age of 21 years old at the time of commission of these offences, there was no suggestion that the first respondent committed the offences as a result of her immaturity. Her age was therefore a neutral factor.[8] That both respondents deemed it appropriate to perpetrate such dastardly deeds on their own cousin is beyond shocking. The first respondent, being a woman who was once a victim of rape, is someone who would ordinarily have been expected to be protective of the deceased. Instead, she fetched a child from the bedroom in which she was sleeping, took her outside and orchestrated a vicious attack against her.

[31] The deceased's muffled screams did not discourage the first respondent from harming her. Even though the first respondent had already seen the second respondent inflicting the most horrendous injuries on the deceased with the use of a garden spade, the first respondent showed her no mercy and used the same spade to hit her in the chest and abdomen. Furthermore, based on the evidence accepted by the trial court, it was at her suggestion that the deceased was brutally raped, as a result of which she sustained deep lacerations inside her vagina.

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[8] Compare footnote 6 above para 14, where this Court said:
'In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.'

[32] As a pregnant woman carrying life, the first respondent did not think twice about snuffing life out of the deceased. Once that had been achieved, she was ready to dispose of the deceased's body in a neighbour's pit toilet. When that proved impossible, she suggested that the second respondent dig a hole in which the deceased would be buried.

[33] While a failure to show remorse is not in and of itself an aggravating factor, it would have redounded to the first respondent's favour if she had at least shown some appreciation of the devastation of her actions.[9] At no stage did she show any contrition. Her flippant attitude about the brutal rape and murder of the deceased is laid bare by her reaction to Ms Ngobeni, when, in response to her question about what was going on, the first respondent nonchalantly told her that it was none of her business and then went to sleep. The prevalence of rape and murder in this country is an aspect that has enraged the community and rightly so. It behoves this Court to take all these serious aggravating factors into account.

[34] This Court is alive to the fact that the first respondent has two minor children. It appears that the first child was being raised by the first respondent's aunt at the time of the commission of the offence. Soon after her arrest, the first respondent was released on her own recognisance. At the time of the birth of her second child, she was residing with her aunt, Ms Martha. Although the first respondent was receiving child support grant from the State in respect of her two children, her aunt also contributed to the welfare of both children. These children will in all probability suffer

[9] *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 16.

psychological harm as a result of the first respondent's incarceration. However, this aspect should not be considered in isolation; all the circumstances of this case must be taken into account.

[35] As aptly mentioned in *S v M*,[10] when a caregiver is imprisoned, the children of the caregiver 'lose the daily care of a supportive and loving parent and suffer a deleterious change in their lifestyle'. In that matter, the Constitutional Court cautioned that even though sentencing officers cannot always protect the affected children from these consequences, they ought to pay appropriate attention to their interests and take steps to minimise the damage. The court acknowledged that the difficulty is how, on a case-by-case basis, to balance the triad of sentencing without disregarding the peremptory provisions of section 28 of the Constitution. All the interlinked factors in the sentencing process must be considered, paying careful consideration to the 'intricate inter-relationship between sections 28(1)*(b)* and 28(2) of the Constitution, on the one hand, and section 276(1) of the CPA on the other'.

[36] In considering the plight of the first respondent's children, due consideration must be paid to the fact that the life taken by the first respondent is that of an innocent child. Based on the familial relationship, the deceased would undoubtedly have felt safe in the presence of the first respondent, as she was the only adult in the house after Mr Ephraim Leso's departure. Thus, the deceased would have had no reason to fear that the first respondent would harm or violate her. It was the first respondent who fetched the deceased from the safety of her bed, interrupted her blissful sleep and

[10] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) para 40-42.

placed her in the yard. It was she who orchestrated the rape and murder of the deceased and thereafter proposed the concealment of her body. She hit the deceased with the spade and crushed her head with a rock after the deceased had already sustained serious injuries. She played a leading role in the commission of what can truly be described as barbaric and despicable deeds.[11]

[37] The fact that the first respondent murdered a child left in her care is a serious aggravating factor in the consideration of this matter. In my view, a custodial sentence is inevitable for the first respondent – a view which was also expressed by the probation officer who prepared her pre-sentence report. The first respondent indicated that her aunt had been assisting her with the care of her children. She also indicated that she still had a good relationship with her father and younger sibling. The relevant State departments will have to step in to ensure that the best interests of these children are catered for. Attempts should be made to ensure that these children are placed in the foster care of those who had been assisting the first respondent with their care, and that child support grants are paid to the caregivers.

[38] Despite the presence of mitigating factors mentioned above, I am of the view that the aggravating factors in this matter far outweigh the first respondent's personal circumstances. As pointed out in *Malgas*, a court is not expected to shy away from imposing minimum sentences on account of maudlin sympathy. In *S v Vilakazi*,[12] this Court said that '[i]n cases of serious

[11] *Centre for Child Law* note 7 above para 125.
[12] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396; 2009 (1) SACR 552 (SCA) para 58.

crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.'

[39] In *S v RO and Another*,[13] this Court said '[t]o elevate the appellants' personal circumstances above that of society in general and these two child victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution.' In my opinion, there are no substantial and compelling circumstances that warrant a deviation from the applicable minimum sentences of life imprisonment in respect of count 1 and 3. Insofar as the trial court found that such circumstances were present, it misdirected itself when assessing the appropriate sentence. This material misdirection warrants the setting aside of the sentences imposed by the trial court. This court is therefore at large to consider the first respondent's sentences afresh. Having considered all the circumstances of the case, I am of the view that the applicable minimum sentence of life imprisonment is proportionate to the serious offences committed in counts 1 and 3. It follows that the sentences imposed by the trial court in respect of these two offences must be set aside.

[40] It is now convenient to consider whether the sentences imposed on the second respondent were too lenient, as submitted by the appellant. Like the first respondent, the second respondent did not testify in mitigation of sentence and his personal circumstances were placed on record by the defence counsel.

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[13] *S v RO and Another* 2010 (2) SACR 248 (SCA) para 20.

[41] The second respondent was a first offender. He was only 17 years and 5 months old at the time of the commission of the offences, and 20 years old at the time of sentencing. His mother died when he was 11 years old and his father when he was 13 years old. Following the death of his parents, he stayed with his uncles. He went to school as far as grade 8 and dropped out at age 15 after failing a grade and also due to financial constraints. He was employed as a gardener at the time of the commission of these offences. At the time of his arrest, he had a live-in lover who was expecting his child. His first child was therefore born while he was in custody. The probation report mentioned that he had a difficult upbringing, and as a result, he became a delinquent who 'associated with the wrong people' and smoked dagga.

[42] According to the pre-sentencing report filed on behalf of the second respondent, he informed the probation officer that he was a member of the Black Devils gang. He indicated that he joined that gang because 'they were the strongest and biggest gang in his area and he enjoyed fighting' because he harboured a lot of anger.

[43] It is trite that in the sentencing of a child, every court must take into account the provisions of s 28 of the Constitution. Section 28(2) of the Constitution provides that the best interests of the child are paramount in every matter concerning them. It is on account of this constitutional right that a custodial sentence can be imposed on a child only as a matter of last resort and for the shortest appropriate period of time.

[44] It was contended on behalf of the second respondent that his age was a strong mitigating factor. It was submitted that the fact that he had not denied his participation in the offence ought to be accepted as a sign of remorse. In the same breath, it was also submitted that the fact that he admitted to committing the offences he was charged with displayed his level of immaturity and lack of reasoning capacity. It was contended that even though he was already staying with a pregnant woman, this did not detract from the fact that he was still a youthful offender when these offences were committed.

[45] I have already alluded to the gravity of the offences committed by the respondents. As a result of the rape committed by the second respondent, the deceased sustained deep bleeding cuts in the vagina. The infliction of this bodily harm attests to the brutality of the rape. Furthermore, in the second respondents' own words, he used a garden spade to 'chop' various parts of the deceased's head. According to the post-mortem report, the gashes on the deceased's head were accompanied by underlying skull fractures. It is clear that the second respondent carried out heinous crimes which involved high levels of violence. That the deceased was his own cousin of the same age as his own sister did not matter to the second respondent.

[46] Significantly, the Chief Clinical Psychologist, Lieut Col Knibbs, compiled a pre-sentence report which served before the trial court. In that report, he opined that the second respondent was unlikely to be rehabilitated and that there was a high risk that he will re-offend. He also stated that the second respondent posed a risk to society and fell under the classification of a

serial murderer despite his second victim having survived the 20 stab wounds inflicted on her after being raped. He explained that this was because the second respondent had, after raping and stabbing his victim, left her for dead, and as such, there was a 'completed attempt' of the offence of murder.

[47] Col Knibbs further opined that the 'presence of Paedophilic traits in the [second respondent] can be seen as a risk increasing factor and should be factored into any parole consideration.' This Court accepts that the rape and attempted offences that the second respondent committed after his release on warning cannot be viewed as previous convictions in relation to the matter under consideration, as they were committed after his arraignment in respect of the offences committed against the deceased in this matter. The commission of these offences, however, is a factor to be taken into consideration when assessing the feasibility of the second respondent's capability for rehabilitation. Notably, the conclusions and findings made in Lieut Col Knibbs' pre-sentencing report, in terms of which he found that the second respondent was not a good candidate for rehabilitation, were repeated in his testimony in court. His evidence was largely uncontested, and his recommendations were not challenged during his cross-examination.

[48] It is noteworthy that the probation officer who prepared a pre-sentence report on behalf of the second respondent, Ms Shabangu, opined that there is a high risk of the second respondent 'committing another sexual offence against a child or a person who is mentally disabled, looking at his victims'. In the face of such findings, it is not open to this Court to ignore the opinion of

professionals in favour of merely hoping that the second respondent will be rehabilitated once he starts participating in counselling programs available for offenders in prison, as was submitted by the second respondent's counsel.

[49] The expert opinion expressed by the Chief Clinical Psychologist and the probation officer is a weighty aspect that bears consideration when the period of incarceration is determined. Moreover, at no stage did the second respondent express any remorse for his actions. This failure to take accountability for his actions is another aspect that gainsays prospects of rehabilitation.

[50] In *S v Swart*,[14] this Court pointed out that each of the elements for the purpose of punishment need not be given the same weight, but rather that proper weight must be accorded to each according to the circumstances of the case. It held that 'serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.' Mindful of the fact that imprisonment of an offender who was a minor must be imposed as a last resort, I am of the view that there are substantial aggravating factors that call for the imposition of a lengthy custodial sentence for the second respondent. I have already alluded to the fact that he was about seven months shy of the age of 18 years when he committed the offences he has been convicted of.

[51] On the authority of *Centre for Child Law*, I am not persuaded by the appellant's contention that even though life imprisonment cannot, on the

[14] *S v Swart* 2004 (2) SACR 370 (SCA) para 12.

strength of the provisions of s 51(6), be imposed on an offender below the age of 18 years, the same sentence (life imprisonment) can be imposed on the strength of a discretion envisaged in s 276(1) of the CPA. An approach of that nature is impermissible, in my view, as it amounts to circumventing the provisions of s 51(6) of the CLAA.

[52] Although the second respondent was not diverted to a Child Justice Court within the contemplation of the Child Justice Act 75 of 2008, the provisions of s 77 of that Act are useful in determining an appropriate custodial sentence for him. In terms of s 77(3)*(a)* and (4) of that Act, a child who is 14 years or older at the time of sentencing and who has committed offences listed in Schedule 1 of that Act (these include murder and rape) may not be sentenced to an imprisonment term exceeding 25 years.

[53] As regards what constitutes an appropriate sentence for the second respondent, I am unable to agree with the submission made on behalf of the appellant, insofar as it was opined that the provisions of s 77(4) of the Child Justice Act do not apply to the second respondent because he was 20 years old when the trial court sentenced him. The appellant contended that the sentencing regime set out in the Child Justice Act only applies if the offender was below the age of 18 years at the time of sentencing. The fact that an offender who was below the age of 18 years at the time of the commission of the offence is older than 18 years at the time of his sentencing does not, in my view, place him beyond the ambit of the provisions of that Act. The trigger

remains the date of commission of the offence.[15] Although the second respondent was above the age of 18 years at the time of sentencing, this does not detract from the fact that he was still a minor at the time of commission of the offences. This court must accept that on account of his age, the second respondent had a level of immaturity[16] at the time of commission of the offence, even though he already had a live-in lover and was working as a gardener.

[54] Given the provisions of s 77(4) of the Child Justice Act, I accept that the maximum custodial sentence that can be imposed on the second respondent is 25 years' imprisonment. That said, it must be borne in mind that s77(5) of that Act stipulates that a child justice court imposing sentence on such an offender 'must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed'. The second respondent was detained at a youth centre until he reached the age of 18 years, after which he was kept at a correctional facility until he was sentenced. He thus spent two years in custody while awaiting trial.

[55] In considering an appropriate sentence for the two respondents, sight must not be lost of the gravity of each of the offences they have committed. These offences were committed in a brutal fashion, which exposed the deceased to an amount of suffering before her death. Considering the

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[15] Compare *Mpofu v Minister of Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae)* [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC).

[16] In *S v Matyityi*, fn 6 above, this Court remarked that someone under the age of 18 years may be regarded as 'naturally immature'.

prevalence of violent crimes perpetrated on women and children, it is unsurprising that society demands the imposition of harsh sentences upon those who commit these monstrous offences as a form of retribution in the hope of deterring would-be offenders. In respect of this matter, the second respondent was on two occasions rescued by the police from community members who were angered by his deeds and wanted to take the law into their own hands.

[56] Having considered all the circumstances of this matter, including the fact that the victims of the second respondent's offences were children, I am of the opinion that the sentences imposed on the second respondent in respect of counts 1 and 3 induce a sense of shock, are in the circumstances shockingly inappropriate and fall to be set aside. All things considered, a lengthy custodial sentence is inevitable. It must be a sentence that removes him from society for long enough to provide him with ample opportunity to take stock of the seriousness of his offences and to take responsibility for them. In my view, an effective sentence of 23 years' imprisonment would be appropriate. Like the trial court, I am of the view that Lieut Col Knibbs' pre-sentence report dated 24 June 2016 and handed in as exhibit S1 must be handed over to the heads of all correctional facilities in which the second respondent may be incarcerated while serving his imprisonment sentence.

[57] In the result, the following order is granted:

1 The appeal is upheld.

2 The sentences of the trial court are set aside and replaced with the following:

‘2.1 Accused 1 is sentenced as follows:

Count 1: Life imprisonment in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 2: 5 years imprisonment; and

Count 3: Life imprisonment in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

2.2 Accused 2 is sentenced as follows:

Count 1: 23 years imprisonment;

Count 2: 5 years imprisonment;

Count 3: 23 years imprisonment. The sentences imposed in respect of count 2 and 3 are to run concurrently with the sentence in respect of count 1.

2.3 In terms of section 50(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the names of both accused persons are to be entered into the Sexual Offenders register.’

3 It is directed that a copy of the pre-sentencing report compiled by Lieut Col Hayden Knibbs, dated 24 June 2016 and handed in as exhibit S1 during the trial, must be handed over to the heads of all correctional facilities in which the second respondent may be incarcerated while serving his imprisonment sentence.

4 The sentences mentioned in paragraph 2.1 and 2.2. above are antedated to 2 September 2016.

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M B Molemela
Judge of Appeal

Appearances:

For appellant:	P.W. Coetzer
Instructed by:	Director of Public Prosecutions, Bloemfontein
	Director of Public Prosecutions, Pretoria
For respondent:	K. J. Mogale (2nd respondent)
Instructed by:	Legal Aid, Bloemfontein
	Legal Aid, Pretoria