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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: CC6/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
4 August 2022

In the matter between:-

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

THE STATE

And

W[....] L[....]

ACCUSED 1

J[....] L[....]

ACCUSED 2

JUDGMENT - SENTENCE

MOKOENA A.J

[1] The Accused were convicted by this Court on Charges of contravention of Section 305 of Act 38 of 2005; assault common and contravention of Section 9(1) read with Sections 1; 4 and 31(1)(a) of Act 51 of 1992. Accused Nr. 2 was further convicted for contravention of Section 4(1) of the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013.

[2] Both the State and the Defence have addressed this Court in respect of mitigating . and aggravating circumstances for purposes of sentencing. Pre-sentencing reports were also handed in by the Defence for both Accused without any objection or challenge from the State.

[3] This Court is now required to determine the appropriate sentence for the offences committed by these Accused persons. Although Courts have a discretion to make such a determination, the extend of that discretion is limited by the applicable legislations in particular Section 51(1) of Act 105 of 1977 read together with Section 276(1) of Act 51 of 1977.

[4] The applicable minimum sentence prescribed for contravention of Section 4(1) of the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013 is life imprisonment; unless the Accused person succeed to convince the Court that there are substantial and compelling circumstances which justify a deviation from the prescribed minimum sentence **[See: Section 51(1) of Act 105 of 1997]**.

[5] A prescribed sentence for contravention of Section 305 of Act 38 of 2005 is a fine or imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment **[See: Section 305(3) read with Subsection 6 of Act 38 of 2005]**.

[6] Section 31(l)(a) of Birth and Death Registration Act, Act 51 of 1992 states the following in respect of sentencing for contravention of Section 9(1):-

"Any person who-

(a) Without reasonable cause fails to furnish any notice, information, statement or certificate required by this Act;

shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment."

[7] One cannot deny the fact that it is so outrageous, inhuman of the worst kind for parents to give birth to a child; assault and abuse that child especially when he cannot speak and protect himself against such an abuser. The traumatic state appearing on the face of such a poor child when he sees his parents who are his abusers, is easily imaginable.

[8] The radiant smile often observed on the face of babies when they see one of their parents or both of them, disappears on the face of an abused child. What worsen the situation, is when such a traumatised child is sold to unknown persons for a mere R500.00. This is the kind of behaviour that cannot be tolerated by civilised societies.

[9] It is therefore no surprise that the legislature has promulgated a piece of legislation which prescribe a minimum sentence for these type of crimes as an expression of the Society's abhorrence and discontent with the barbaric nature of these crimes.

[10] In as much as the legislature has prescribed a minimum sentence for these types of crimes, Courts still possess the discretionary powers to determine a fair and just sentence after considering the circumstances of a particular case. This finds expression in ***Dodo v The State 2001 (3) SA 382 (CC)***. The Constitutional Court said:-

'[26] The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually

determined case. Accordingly such power ought not, on general constitutional principle, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the Judiciary.'

[11] The particular circumstances under which the Accused committed the offences they were convicted for, were placed on record during the trial of this matter as an abuse of drugs and alcohol and the poverty under which the Accused find themselves and lived. These are some of the personal circumstances this Court must evaluate to determine whether as a whole they constitute substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.

[12] In the pre-sentencing report compiled on behalf of Accused Nr. 2, it is stated that she experienced a challenging upbringing. The report states that Accused Nr. 2 started to abuse drugs at the very young age of between fifteen and sixteen years, and she used to visit Pubs and Clubs at that age in the company of her father. During her life journey she met Accused Nr. 1 who encouraged and supported her life style of alcohol and drugs abuse.

[13] It is on record that Accused Nr. 1 was a drug addict who was on a drug rehabilitation programme and both himself and Accused'Nr'. '2 abused alcohol and drugs at the time of their arrest. Accused Nr. 2 was also employed at a Pub and alcohol was as a result easily accessible to her.

[14] The position of our law on the role of drugs in child abuse and neglect depends to the larger extent on the expert opinion evidence **[See: Commentary on the Criminal Procedure Act, Service 52, 2014 28-6B]**.

[15] In this matter, that opinion is expressed in Accused Nr. 2's pre-sentencing report where the author quoted a passage from a literature which reads:-

'Parental substance abuse interrupts a child's normal development,

which places these youngsters at higher risk for emotional; physical and mental health problems. Because parents who abuse alcohol or other drugs are more likely to be involved with domestic violence, divorce, unemployment, mental illness and legal problems, their ability to parent effectively is severely compromised. There is a higher prevalence of depression, anxiety, eating disorders and suicide attempts among children of substance abusers than among their peers.'

[16] The effect and the role of the toxic relationship Accused Nr. 2 had with Accused Nr. 1 is explained in her pre-sentencing report, as follows:-

'The accused's relationship with W[....] shows the same characteristics as her relationship with her father. He did not act in the best interest of the accused or his children. Their relationship was rife with physical and emotional abuse, with no emotional or financial support from him. The accused's relationship with W[....] left her in a hopeless and abusive situation, but the accused chose to stay in the relationship even though her family tried to assist her. Her addiction to illegal substances probably played a role in her choice to stay in the relationship with W[....].'

[17] It is clear from the reading of that report as a whole that the ability of Accused Nr. 2 to parent effectively was indeed compromised by substance abuse and the type of the relationship she had with her father and Accused Nr.1.

[18] Despite these facts, the State maintains that life imprisonment is an appropriate sentence in the circumstances; relying exclusively on the aggravating circumstances without reference to any of the mitigating factors mentioned in the pre-sentencing report.

[19] In response to the State's submissions, I am tempted to, quote certain passages in the Constitutional Court judgment of **Dodo** supra. They read as follows: -

[35] In the phrase "cruel, inhuman or degrading" the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics..... While it is not easy to distinguish between the three concepts "cruel", "inhuman" and "degrading": the impairment of human dignity, in some form and to some degree, must be involved in all three. One should not lose sight of the fact that the right relates, in part at least, to freedom.

[36] It should also be emphasised, as was pointed out by the Canadian Supreme Court in Smith, that the effect of a sentence imposed must be measured and that such effect is often a composite of many factors; it is not limited to the length of the sentence but includes its nature and the conditions under which it is served... one is concerned chiefly with the effect of the duration of a sentence of life imprisonment. Consequently the freedom aspect of the right in question and its relation to human dignity looms large.

[37] The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman, or degrading, particularly where, it is almost exclusively the length of time for which an offender is sentenced that is in issue..... In order to Justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

[38] To attempt to Justify any period of penal incarceration, let alone imprisonment for life.....without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity.'

[20] The notion proportionality is best defined by some authors in the following statement: '*one ought not to use a sledgehammer to crack a nut*' [See: Cora Hoexter, **Administrative Law in South Africa, 2nd Edi. 344**].

This definition if applied in the present case simply means that this Court may impose a less drastic punishment prescribed by law if that punishment has the effect to curb the offence and punish the offender.

[21] One must however, not to lose sight or ignore what is said in **S v Malgas [2001] 3 All SA 220 at 232** which substantively emphasises this notion of proportionality. The relevant passages read: -

'D The specific sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (.....) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.'

[22] In **S v V 1972 (3) SA 611 AD at 614C-E** Homes J.A said: - ."

"Punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy;....The element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal; True

mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal, or permissive tolerance. It is an element of justice itself."

[23] I am of the view that there must be objective facts upon which Courts must rely for showing some mercy to the offender. Those facts in the present case are set out in the pre-sentencing report compiled for Accused Nr. 2. For this Court to ignore them would imply that it is detached from the realities of Accused Nr. 2's challenges in her upbringing and the abuse she was exposed to throughout her life journey during her teen years. Those are not flimsy or speculative hypothesis.

[24] The Probation Officer noted in the pre-sentencing report that whatever that Accused Nr. 2 said regarding her upbringing, was corroborated by her mother.

[25] Her pre-sentencing report further recorded that Accused Nr. 2 is a first offender of 31 years of age, and she has a good support system in place who are her mother and sister who are willing and able to assist her in the completion of any sentence. This conclusion by the Probation Officer strongly suggest that Accused Nr.2 can be reformed and mend her ways after completion of a period in jail.

[26] This brings me to the question of what would be an appropriate period in jail after taking into consideration Accused Nr. 2's personal circumstances and the serious nature of the offence of contravention of Section 4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 in particular.

[27] This question becomes relevant should this Court comes to the conclusion that there are substantial and compelling circumstances for it to deviate from the prescribe minimum sentence of life imprisonment.

[28] I answer this question by reference to what Holmes J.A said S v V, supra at 614F-H. He said the following:-

'...a long period of imprisonment, involving properly directed discipline and training, might well result in reformation. In the meantime, society would be adequately protected.

The law operates to protect women ('and children') against outrage. As to that, if there be any who doubt whether a massive sentence; of imprisonment for 20 years will not be a sufficient expiation for the gravely evil misdeeds ..., let them cast their minds back in their own lives over that period, and consider how much has happened to them in those two decades, and how long ago it has seemed, although enlivened by domestic happiness and the free pursuit of their avocations. No such ameliorations attend the slow tread of years when you are locked up.' (emphasis added).

[29] Jansen J.A in the same judgement at 62 1A said the following:-

'The consideration that upon his release at the expiration of his sentence, or sooner by an error of judgement on the part of the authorities concerned, an accused would still constitute a danger to the public, rests upon the assumption that a sentence of imprisonment, however long, would fail to have any corrective effect.'

[30] Courts do not decide matters on assumptions or speculations. There must be facts upon which they arrive at a decision and to state the reasons for their decisions.

[31] The State has placed on record the medical report of baby **X** which is dated 1 April 2020. It generally reflected that the baby **X** is growing and developing well with some medical conditions which the Doctor said his healing will depend much on how he respond to medical treatment. Currently baby **X** is at the place of safety.

[32] Having considered all these factors, I am satisfied that Accused Nr. 2 has succeeded to convince this Court that there are substantial and compelling

circumstances which justify a deviation from the prescribed minimum sentence of a life imprisonment in respect of Count 1 which is the contravention of Prevention and Combating of Trafficking in Persons Act.

[33] I now turn to deal with the personal circumstances of Accused Nr. 1. I must state from the outset that his pre-sentencing report paints a picture of someone who is dishonest and unreliable.

[34] The report mentioned that Accused Nr. 1 said:-

'he changed his version during cross examination to that he assumed the victim (baby X) had fallen from the couch - his intend was to protect accused Nr. 2.' It is further stated in that report he admitted the responsibility for failing to register the birth of baby X with Home Affairs.

[35] Accused Nr. 1 went further to inform the Probation Officer that his mother is responsible for his bad upbringing and want this Court to believe that such a bad upbringing played a role in his current life situation. Interestingly, the Probation Officer mentioned in the report that his mother disowned him. She said she had nothing to do with Accused Nr. 1 thus she refused to corroborate what Accused Nr. 1 said about his upbringing.

[36] I must mention also that Accused Nr. 1 abused and neglected baby X because he had no love for him. There is evidence before this Court that he at some stage he threatened to kill baby X and referred to him as a bastard. There is further evidence that he consumed the baby X's formula meant to feed baby X and instead fed him a drink commonly known as *cool-eight (a sugar powder mixed with water and consumed as a cold drink)*.

[37] Despite this overwhelming evidence against Accused Nr. 1, he refused to accept liability for abusing and neglecting baby X. He is therefore not remorseful for what he did to baby X. Based on these facts, I find it difficult for this Court to show mercy to someone who was not merciful to his own

child and still fails to be remorseful.

[38] It is quite disturbing to note further from the report that Accused Nr. 1 informed the Probation Officer that there is a lot of drugs in prison and he still smokes weed (*dagga*) on a regular basis. This compels me to quote from the Constitutional judgement of **S v Makwanyane and Another 1995(6) BCLR 665(CC) at 715F**, the then Chief Justice Chaskalson said the following:-

"The greatest deterrent to crime is likelihood that offenders: will be apprehended, convicted and punished. It is that which presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness"

[39] In this matter drug abuse played a major role in the abuse of baby X. It is quite worrying to this Court to hear that the very same drugs are accessible to Accused Nr. 1. This is an indictment to the State and Prison authorities. If this situation is not addressed in earnest, will most definitely defeat the purpose of sending offenders to jail.

After considering all these factors this Court is of the view that the Accused should be sentenced as follows:-

1. For contravention of Prevention and Combating of Trafficking in Persons Act, Accused Nr. 1 is sentenced to 20 years imprisonment.
2. For contravention of Section 305(3) of Act 32 of 2005 which is neglect and abuse of baby X, both Accused are sentenced to 10 years imprisonment.
3. In respect of assault common both Accused are sentenced to a period of three (3) months imprisonment without an option of a fine.
4. For contravention of Section 9(1) of Act 51 of 1992, that is the failure to register the birth of baby X with Home Affairs, both the Accused are sentenced to five (5) years imprisonment without an option of a fine.

5. All the sentences to be served concurrently in terms of the relevant legislation and must take into account the time both Accused spend in jail during their trial proceedings.

M.B MOKOENA
ACTNG JUDGE OF THE HIGH
COURT

Date of Hearing: From 28 July 2022 to 29 July 2022
Judgment Delivered: 04 August 2022

APPEARANCES

For The State: Adv. A. Roos
Instructed By: NATIONAL DIRECTOR OF PUBLIC PROSECUTION

For Accused Nr.1: Adv. M. Moloi
Instructed By: **THE PRETORIA JUSTICE CENTRE**
LEGAL AID SA
317 FRANCIS BAARD STREET
4TH FLOOR LOCARNO HOUSE
PRETORIA

For Accused Nr.2: Adv. P. Mtsweni
Instructed By: **THE PRETORIA JUSTICE CENTRE**
LEGAL AID SA
317 FRANCIS BAARD STREET
4TH FLOOR LOCARNO HOUSE
PRETORIA