IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NUMBER A131/18

In the matter between

CASSIEM ABRAHAMS APPELLANT

AND

THE STATE RESPONDENT

CORAM: BAARTMAN J; THULARE AJ

JUDGMENT – 23 MAY 2019

THULARE AJ

[1] This is an appeal against sentence only. The appellant was convicted of rape of an 11-year old girl child (the complainant) in terms of section 3 of the Criminal

Law Amendment (Sexual Offences and Related Matters, 2007 (Act No. 32 of 2007) read with other applicable provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). He was sentenced to life imprisonment in terms of section 51(1) and Schedule 2 of the Prescribed Minimum Sentences Act, 1997 (Act No. 105 of 1997. The State submits that there is no merit in the appeal.

[2] The issue is whether there were substantial and compelling circumstances which existed and justified a deviation from the minimum sentence.

[3] The appellant was a security guard at a crèche in […] Street, Bonteheuwel, a township in the City of Cape Town. The residence of the complainant was in the same street as the crèche where the appellant worked. Her home was opposite the crèche. The children in the neighbourhood, including the complainant, used to play in the street. The crèche had no perimeter front fence and as such the games would include running, walking and occupying part of the crèche.

[4] The appellant was well-known to the community and the children, including to the complainant. He occupied and lived alone in a room situated within the yard of the crèche. He was a common sight to the residents, in uniform, during working hours. He would be seen drinking coffee in the morning outside his room. He interacted with the community, and used to visit in the neighbourhood and was a frequent visitor to the complainant's neighbours where he had a friend.

[5] During 2014, the complainant was playing in the street when the appellant called her. He took her to his room. He instructed her to get onto the bed. Once

the complainant was on the bed, he pulled off her pants and panties up to her knees. He thereafter pulled of his own pants, and whilst on top of her, inserted his penis into her vagina. After raping her, he told her not to tell anyone what had happened. The appellant threatened to harm her if she told anyone.

[6] Someone had seen the complainant when she was led by the appellant into the appellant's room and this did not sit well. However, no alarm was immediately raised as an urgent matter requiring intervention. A casual report was made to the appellant's father who then went looking for her. He came across her as she left the appellant's room. He confronted her about what she was doing in appellant's room alone with him. The complainant's father was awake to the risk to a girl-child to be raped. He told the complainant about that risk. He removed his belt and hit the complainant, ostensibly as his mark of displeasure to her self -exposure to that risk. The complainant did not tell her father about what had happened to her, and did not tell anyone about it.

[7] The complainant's personality and character changed for the worst. She was at the time of her rape dealing with the sudden death of her mother in a motor collision and the consequent absence of her mother in her life. She became more quiet and withdrawn after the rape. Her marks at school dropped. This led the complainant's father to have a discussion with the complainant's sister from the father's previous relationship. The sister was a student pursuing studies as an Educator.

[8] The complainant moved in with her sister in the beginning of 2015. The sister lived with her own maternal grandmother at the time. The sister worked night-shift in a different environment to teaching whilst she studied and was not home at night. The complainant was left in the care of the grandmother at night.

[9] The grandmother experienced the complainant's nightmares and screams during her sleep and reported her observations to the sister. The sister approached the school where the complainant attended and sought a referral of the complainant to a psychologist. The sister, on an occasion that she slept home, also got to experience first- hand the complainant's nightmares. The complainant in her sleep screamed and called out her father's name, pleading and asking her father to come and help her. The sister awoke the complainant. The complainant was scared and disorientated. She continued to scream and looked very afraid of her sister. It was only when she recovered, noted that the person with her was her sister, that she stopped screaming and broke down and cried. The sister reported her experience to the father.

[10] The complainant would not talk when the sister and the father later asked her about her nightmares. She only cried uncontrollably. The sister asked her father to leave them alone so that they can talk about it as sisters. When the complainant was ready to talk, she told her sister what had happened to her, and that it was the accused who raped her. At the time, the sister did not know the accused and saw him for the first time at court. The sister reported the rape to the police and accompanied the complainant to the doctor to whom the police referred them.

[11] The doctor found two old tears in the hymen and the findings, according to him, were consistent with vaginal penetration of the complainant in the past. The vaginal examination was essentially normal except for the multiple old tears that were seen in multiple places in the hymen. Any tearing of the hymen which examination revealed is older than 72 hours is old, and the one before 72 hours is fresh. It takes between six to 12 days for a hymen tear to heal. The complainant's vaginal injuries were consistent with being penetrated with a penis, which could cause the injuries that the doctor saw.

[12] The appellant was 50 years at the time of his sentencing and resided at his father's place at […], Lavender Hill, Retreat in the city of Cape Town. He is married and has five children aged 29, 23, 14, 10 and 8 years old including from previous relationships. The 14 year old is the only child of his wife. The three under 18 children are living with his wife at a different address. She receives a child care grant for two children as the 8 year old is not yet registered for a grant.

[13] The appellant worked for Ithombi Ikhaya Security Services and earned R1500 per month. The crime was committed where he was posted as a security guard. He contributed between R500 and R700 for the children's maintenance. He went to school until standard 3. In mitigation he expressed remorse for the crime.

[14] The appellant has previous convictions of theft and robbery in 1986 and 1989 respectively for which he was sentenced to corporal punishment and 3 years of which 1 year imprisonment was suspended for 5 years on conditions respectively.

In 1993 he was convicted for indecent assault and sentenced to 2 years imprisonment of which 1 year imprisonment was suspended for 5 years on conditions. In 1996 the appellant was convicted of indecent assault and sentenced to 4 years imprisonment. The suspended part of the 1993 sentence was also put into operation. In 2000 he was readmitted to prison for breaking his parole conditions. In 2007 he was convicted of rape and sentenced to 10 years imprisonment.

[15] It is against this background that when this court heard applicant on his appeal, the court requested both the appellant and the respondent to prepare and address the court on the following question:

"The High Court is the upper guardian of minors. The Convention on the Rights of a Child and the Constitution of the Republic enjoins the High Court that a child's best interests are of paramount importance in every matter concerning the child.

Against this background, it would appear that section 50 of the Criminal Law (Sexual Offences and related Matters) Amendment Act, 2007 (Act No. 32 of 2007) has reference only against those accused persons serving a sentence of imprisonment or who has served a sentence of imprisonment "as the result of conviction for a sexual offence against a child or a person who is mentally disabled" [section 50(1)(a)(iii)].

The wording of the Act and its general scheme appear to suggest that persons like the accused, known by the State (Republic of South Africa) to have a record of previous convictions and to have served sentence(s) for indecent assault and/or rape (where the victim may not be a child or a person who is not mentally disabled) are not deemed by the State to be a danger to children as victims of sexual offences. If this is so, is this not a structural and systematic gap against every child's right to be protected from abuse?

As it is unclear from the record of proceedings whether exposure of the child survivor was a casualty of structural failure (absence of appropriate prescripts) or a systematic and operational

failure (failure at oversight and compliance), it would appear that the court has a duty to enquire and speak out in the best interests of our children.

The parties are invited to comment. The State is directed in its response, to invite comments from interested bodies and stakeholders in Child Law, like the Centre for Child Law, to make an input should such bodies deem it meet."

[16] The parties prepared a joint Memorandum for the court, of which the salient parts read as follows:

"3. The State as well as the Appellant engaged with various stakeholders with regards to the court's question.

4. The Department of Justice recognized that there are various challenges with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 as well as with the National Register for Sexual Offences (NRSO).

5. It is submitted that one of these challenges is that the Act does not take into account any sexual offence convictions committed against adult or older persons or any other group not mentioned in the Act. According to the Department of Justice, there is a huge public outcry for the amendment of Act 32 of 2007, especially with regards to whether it should include all victims of sexual offences.

6. It is further submitted that the Department of Justice is of the opinion that Act 32 of 2007 is in need of amendment in order to address these issues. The Department of Justice and all other stakeholders are looking at extending the scope of the Act to include all victims of sexual offences:

"You will note that the Chapter 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32, 2007 came into effect in June 2009, with the primary objective of protecting children and mentally disabled persons against convicted sexual offenders, ***whether the conviction was before or after the commencement of the Act.*** *The consequence being for them not to work, have access to, adopt etc. to children or mentally disabled persons. The Act does not take into account any sexual offence convictions committed against adult or older persons or any other group not mentioned in the Act. Therefore, if the offender has a previous sexual*

offence conviction against an adult person, his/her name would not be included in the National Register for Sex Offenders. Although the implications are that this particular person may end up having to the children/mentally disabled persons the Act to protect, thus defeating the very objective it seeks to achieve. Therefore in an attempt to address this particular challenge, the Department is looking at extending the scope of the Act to include all victims of sexual offences.

C. CONCLUSION

7. In the light of the above challenges with the NRSO, both systematically and operational, it is evident that the said Act 32 of 2007, as it currently reads, does not contribute to the safety of our children in the broader community.

8. The fact that not all sexual offences are reported, whether it's against a child, mentally disabled person and/or an adult person, leaves a huge gap in curbing and combating sexual offences crimes against children in the broader community.

9. It is respectfully submitted and recommended that, since the Department of Justice is looking at extending the scope of the Act, as mentioned above, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, be referred back to Parliament for amendment."

[17] In *S v Hewitt* 2017 (1) SACR 309 (SCA) at para 8 and 9 the principles applicable to an appeal against sentence were restated as follows:

"[8] It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appeal court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court

would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.

[9] It is against this backdrop that the question, whether the court *a quo* exercised its sentencing discretion improperly or unreasonably in the circumstances of this case, must be determined."

[18] The approach to sentencing in prescribed minimum sentences for serious crimes and the interpretation of the provision for substantial and compelling circumstances justifying a lesser sentence was set out in *S v Malgas* [2001] 3 All SA 220 (A) at para 8, 9 and 12 as follows:

"[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[*9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, "a requirement to give reasons concentrates*

the mind, if it is fulfilled the resulting decision is much more likely to be soundly based – than if it is not." Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. … But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante Omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration. …

[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence".

[19] The triad referred to in considering a suitable sentence in the circumstances of a case, was set out as follows in *S v Zinn* 1969 (2) SA 537 (A) at 540G:

"What has to be considered is the triad consisting of the crime, the offender and the interests of society."

[20] It is not known how a person with the record of previous convictions like the accused was allowed to work in the security industry of the Republic. It seems to me that a company whose business is provision of security services employed the appellant without ensuring that he passed a background check, if any was conducted at all. Worst still, he was deployed to patrol and monitor a crèche which was so popular that even children in the neighborhood who were not enrolled played there, when his background was itself an alarm.

[21] The report on his previous convictions objectively assessed, without anything more, points to him being a potential danger that posed a threat to all females including vulnerable girl children. It remains a mystery as to how his employment missed the safety nets provided by the Department of Social Development and the Department of Education in relation to who gets employed to work with or in the nature of their work have access to children.

[22] The appellant communicated effectively with the child survivor to disarm her of her reason. He abused her youth for her to impulsively and intuitively follow his invitation which led her to his room. The appellant was quick in thinking and critically used the moment when no adult person was watching and the child had an error of judgment. He was mindful of and chose an easy prey when neither his employer nor the community were observing. The appellant possessed knowledge of the times, movements and family life of the child-survivor's family

and struck when she was most vulnerable and exposed by their absence and lack of supervision. He used his good judgment to present a dangerous situation for the young girl child. The rape was premeditated.

[23] The child was subjected to lasting shock as a result of the disturbing experience and the physical injury that she suffered. The appellant forcefully penetrated her and tore her hymen whilst she was still a young child. This caused the young girl child trauma in the mind. Her childhood experience traumatised her mentally. The horrors of what she went through caused her to have nightmares and she woke up many times at night too scared to even trust anyone. The child's school work was affected. Her whole life was turned upside down. Her interpersonal relationships were adversely affected as she lost trust. Her own father, as she left the room where she was raped by the appellant, removed his belt and hit her several times without hearing her. By listening to an elder, the appellant, the child was opened up for and suffered double jeopardy.

[24] The parties are agreed that there is a huge public outcry in relation to sexual offences committed against children, and the response of the criminal justice system to such offences. Society abhors violent crime, and where such crime includes infringements of privacy and is an assault on the gender and person of the child as a girl, these factors on their own are aggravating circumstances. In sentencing offenders found guilty of such crimes, courts are enjoined to reflect acknowledgement of such crimes as intolerable. The message from the bench must be concise, clear, bold and have the sting that says we will protect our children.

[25] I am not inclined to interfere with the sentence imposed by the trial court. In my view, the absence of appropriate prescripts, like the relevant provisions in Act 32 of 2007, is part of the gap that allowed the appellant with his previous convictions to have access to the crèche and indirectly to the child survivor. The systematic and operational failures, with specific reference to oversight and compliance with laws which regulates who should be employed to work with children or who is to work having access to children, is something that require further investigation.

For these reasons I would make the following order:

1. The appeal against sentence is dismissed.
2. A copy of this judgment is to be served on the Honourable Chairperson of the Portfolio Committee on the Department of Justice as well as on the Honourable Speaker of Parliament of the Republic of South Africa, for their attention.

……
DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

……..
ED BAARTMAN
JUDGE OF THE HIGH COURT

Counsel:
Appellant: Adv. MW Strauss
Respondent: Adv. DJ Els