Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A79/2023

Before: The Hon Mr Justice Erasmus
The Hon Ms Justice Nziweni

Hearing: 2 June 2023
Judgment: 5 June 2023

In the matter between:

STEVEN BOTSANE **Appellant**

v

THE STATE **Respondent**

JUDGMENT

NZIWENI, J

Introduction

[1] The appellant was arraigned in the Regional Court, Paarl on charges of rape (count one) and assault with intent to do grievous bodily harm (count two). The provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), were applicable to the count of rape. In both the two counts the complainant

was a 6 year old girl at the time. According to the charge sheet, the offences were committed in May and June 2022 respectively upon the same victim.

[2] The appellant pleaded guilty on both counts. On both the counts the court a *quo* found the appellant guilty based solely on his guilty pleas. Following the plea proceedings in terms of section 112 (2) of the Criminal Procedure Act, Act 51 of 1977, in respect of the rape count, the trial court found no substantial and compelling circumstances that warranted a deviation from the prescribed life sentence. The appellant was accordingly sentenced to the mandatory life sentence in respect of the rape charge, and six years on the assault count. Both sentences were ordered to run concurrently.

[3] Aggrieved by the sentence of life imprisonment imposed in count one, the appellant exercised his right of automatic appeal to this Court, to appeal only in respect of the life sentence,

Factual background

[4] The section 112 (2) statement of the appellant reveals that the appellant raped the child after he had bathed her. The facts of this matter further reveal that the appellant is the boyfriend of the mother of the minor girl victim.

[5] Regarding the count of rape, the appellant's plea discloses the following facts:

> "During June 2022 I was at the home with the complainant. I gave her a bath as her mother was not at home. I then laid the complainant down whilst she was naked. I then inserted my penis into her vagina and had sexual intercourse with her . . ."

[6] For the sake of completeness, I also find it necessary to recite the pleaded facts, relevant to the count of assault with intent to do grievous bodily harm. The appellant presented the following facts:

> "On the incident I was at home. It was already after 20h00 in the evening and the complainant was not at home yet. The complainant later came home. I got upset and lost my temper, seeing that it was not the first time that the complainant had done this. I then proceeded to hit the complaint with a belt over her legs, with the intent to cause grievous bodily harm . . ."

The appellant's assertions

[7] According to the appellant, this case presents a distinctive combination of mitigating circumstances that warrant a shorter sentence than the one imposed for the rape conviction. The appellant is contends that in the circumstances of this case, the life sentence imposed is manifestly excessive and inappropriate. It is thus contended on behalf of the appellant that the court a *quo,* by failing to deviate from the prescribed sentence, failed to exercise its sentencing discretion appropriately.

[8] Additionally, the appellant contends that an unjustified sentencing disparity has occurred due to the sentence imposed by the court a *quo.* As such, the sentence of life imprisonment warrants the intervention of this Court. Accordingly, it is asserted on behalf of the appellant that the life imprisonment sentence should be reversed and put

on par with other sentences that were previously imposed on similar cases involving the rape of a minor child.

[9] The appellant's counsel has also referred this Court to various cases that she views as comparator cases; in support of the assertion that the sentence of life imprisonment is inappropriate. It is also vehemently contended on behalf of the appellant that, the courts previously in similar or comparable crimes deviated from the prescribed sentence of life.

[10] It was strongly asserted on behalf of the appellant that, the fact that there was no physical violence during the commission of the rape, the appellant's guilty plea, the fact that he is a first time offender, that no expert evidence was presented to show that the child was going to experience long term effects of trauma, the age of the appellant, the fact that he is a father of two very young children, time spent in custody awaiting finalisation of the trial, together with appellant's other personal circumstances; cumulatively they constitute substantial and compelling circumstances.

[11] The critical question for this Court is whether the court below should have found that substantial and compelling circumstances exist if regard is had to all the relevant factors. Put differently, whether the sentence imposed by the court a *quo* is out of proportion compared to the severity of the offence.

Analysis

[12] It is settled that an appellate court must and should exercise deference to the court a *quo*'s sentencing discretion. It is also well established that a court of appeal may interfere with the sentence of the court a *quo* only if there is a material misdirection or that the sentence imposed is shockingly inappropriate.

[13] It is common knowledge that in our country crimes against children are rife. In any society, the protection of children is paramount. Child rapists rank among the worst offenders.

[14] Generally, crimes against a certain class of victim, for instance minors and elderly persons, are considered very serious offences deserving a severe punishment. With the ever-escalating incidences of abuse of children, it is plain that children are a vulnerable group that needs special protection. That position was fortified by the stance that was taken by the legislature as far as child rape is concerned.

[15] The legislature recognised the unique and egregious nature of such offences and took measures to ensure that children are protected. The seriousness with which the legislature views an offence of rape of a child less than 16 years of age is apparent from the prescribed sentence. Hence, it [the legislature] put crimes involving the rape of a child under the age of 16 within the ambit of the CLAA.

[16] By making the punishment for such a crime more onerous, the legislature intended that this type of conduct be sentenced to the maximum sentence allowed by law. As already observed, the legislature has made it clear that anyone who makes himself or herself guilty of child rape must expect to receive a substantial custodial sentence, which will afford children sufficient protection. Clearly, by prescribing life imprisonment for child rape, the legislature envisioned that the sentence would serve both the aims of deterrence, retribution and protection of children.

[17] I bear in mind that it is of paramount importance that offenders should be treated consistently. The sentence should also be aligned to a particular victim, the personal circumstance of the offender, recognise the gravity of the offence and the interest of society. The sentence imposed by the sentencing court should be balanced, substantial and comparable to the facts of the matter, the offender and the interests of society. In other words, there should be correlation between crime and punishment.

[18] The appellant was aged 26 at the date of the offence and was a first time offender. Before his incarceration, he was gainfully employed and earned R980, 00, per week. He is a father of two minor children, aged 7 years and 5 months old. He was held in custody for six months before he was convicted. The appellant had considerable difficulty in explaining his conduct.

[19] I must take into account that, the fact that the appellant gave the child victim a bath means that the child had been entrusted to the appellant's care. In this case, a very young child was violated by someone who was in a position of trust and 20 years

her senior. A six year old child is extremely young and there is quite a gap between six years and the benchmark age for the mandatory life imprisonment. Surely, it goes without saying that, the younger the victim is, the more aggravating the offence becomes.

[20] The appellant purported to act as someone who is carrying about the well-being of the victim when he gave her a bath. Clearly this created an opportunity for the rape to happen. The behaviour can only be described as evil. It is frightening to know that a father of two young children, can do this to a child who is almost the same age as his own child. The opportunistic nature of this offence and the significant breach of trust aggravate this offence.

[21] Moreover, the rape offence does not appear to be an isolated incident. Let it not be forgotten that the evidence also reveals that the conduct of the appellant towards the child in May was not an isolated incident as he also assaulted the child with the intent to commit grievous bodily harm in June. This occurred within in a short period of time, after the rape was committed.

[22] It is so that the appellant has already been sentenced for the count of assault with intent to do grievous bodily harm. I am also mindful of the fact that the two counts happened on different occasions. However, the assault count may be considered for the purpose of deciding whether or not there was a habit or a pattern to the appellant's conduct.

[23] Regarding the conduct of the appellant in the assault count, it reflects that the appellant engaged in a pattern of abusive behaviour toward the child. In this matter, there is a clear evidence of a continuing pattern of child abuse. This evidence does not cast the appellant's character in a positive light.

[24] The assault of the child with the belt went beyond chastisement. The appellant tried to shame and discredit the child's character by punishing her for ill-discipline for coming home late. Clearly, after what he had done to the child, the appellant did not have any moral ground to judge the child.

The facts of this matter demonstrate that the appellant has shown himself as someone who has tendencies of physical abusive behaviour and perverse lust for innocent children.

[25] It bears commenting upon that, in so far as it is suggested by the appellant that he committed the offence at a time of weakness; by contrast, the appellant here has subjected the child to the sexual abuse and physical violence for his own gratification within a span of a month.

Sentences imposed in other matters

[26] It is desirable that unwarranted disparities between sentences for similar offences and conduct be avoided. Potential disparity can be avoided by comparing offenders with similar records who have been found guilty of similar conduct.

[27] It is however to be borne in mind that as far as sentencing is concerned, the factual circumstances in one case will rarely accurately emulate the facts in another case. In my view, this case presents different factual circumstances to those which were considered in the comparator cases.

[28] It has been contended on behalf of the appellant that the life sentence imposed on the appellant, by the court a *quo,* falls outside the range of sentences imposed by the courts previously. I feel the need to expressly acknowledge and address some of the cases identified by the appellant. From the onset I wish to state that the cases referred to by the appellant, do not necessarily show similar set of facts, as the in the present case.

[29] The severity of the conduct of the appellant can never be exaggerated. The nature and circumstances of this case are brutal and particularly troubling. The appellant showed no restraint or regard for child. This case is certainly distinguishable from the case of *S v Maxabaniso* 2015 JDR 0843 (ECG). In *Maxabaniso* for instance, the victim was not a child and there was no breach of trust. For that matter, the appeal court in the case of *Maxabaniso* never made a finding that the rape was not the 'worst kind of rape'.

[30] In the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA), the complainant was much older than the child in this matter. In the *Vilakazi*, matter the Supreme Court of Appeal (SCA) found that the court a *quo* committed a misdirection as far as the age of the complainant was concerned. Equally, the case of *S v Abrahams* 2002 (1) SACR

116, is entirely distinguishable from this case. In the Abrahams matter the appellant was convicted of raping a 14 year old child; the court a *quo* found that there were substantial and compelling circumstances and the SCA found that the suicide of the appellant's son influenced his conduct and led to diminution of the appellant's judgment.

[31] There are several aspects of the alleged offences which indicate that this case is truly distinguishable from the cases which were quoted, for instance; the child was also subjected to physical violence by the same perpetrator. The appellant tried to discredit the child by assaulting her on a pretext of disciplining her for late coming. Thus, in the circumstances of this case there is nothing that justifies parity.

'Worst kind of rape'

[32] It has been contended on behalf of the appellant that the conduct of the appellant is not the 'worst kind of rape' and the complainant did not sustain serious injuries. It is further submitted that in the present case there was no violence or serious injuries.

[33] Rape on its own is violence. Rape by its very nature is a violent crime as it involves threats or force. I cannot fathom as to how it can be said that the lack of physical injury in a rape of a six year old is mitigating. Additionally, in this matter, the appellant stated in his plea that when he raped the child, he put his penis in her vagina

and had intercourse with her. On the version of the appellant alone, it is highly likely that the child endured pain and suffering during the rape.

[34] In this case the actions of the appellant were not immediately exposed. Equally, the medical record of this matter also reveals that the doctor who examined the child on 29 June 2022, did not do any gynaecological examination of the vagina. However, it is difficult if not impossible not to imagine pain and suffering during the rape of a 6 year old child. It is noteworthy that the doctor mentions that a yellow vaginal discharge was found which had been due to a recent infection, According to the doctor the infection is a sequela of possible sexual act.

[35] Furthermore, it is undeniable that the effects of rape on the victim can be lifelong and can have long-term physical and mental ramifications. To illustrate the point, the victim in this case had an infection that was due to a possible sexual act. Obviously, a six year old child is not sexually active.

[36] The victim impact statements reflects that the victim suffered mental stress and experienced nightmares. The court a *quo* was told that the victim had fear of the appellant to the extent that when she would see him approaching, she would hide herself under the bed until there was an adult around. These speaks to the level of brutality involved in this case. Based only on the above facts, it is plain that the child suffered immensely at the hands of the appellant. The terror and mental anguish alone are unimaginable.

[37] The rape on a child has been described as a grave violation different from any other type of crime and that has to be reflected in the sentences which are imposed by courts. The rape of a child is highly reprehensible, abhorrent and traumatising. It ranks at the most serious end of the scale of sexual offences, as such, it deserves a serious punishment. In my view, it is even worse when the child victim is six years old. A six year old is more vulnerable. In the case of *S V SMM* 2013 (2) SACR 292 (SCA), the victim was 13 years old.

[38] The actions of the appellant have possibly destroyed and created immensely a wedge between a mother and a daughter. Similarly, the impact of the abuse on the child may also affect her interactions with others as she grows older. Clearly, the victim in this case has been dealt a horrible start to her life.

Personal circumstances of the appellant

[39] The court a *quo* adequately explained why it imposed the sentence in question. The court a *quo* considered the different factors including the appellant's personal circumstances, in determining the appropriate sentence. The court a *quo* also took into account the circumstances surrounding the offence. It seems that the appellant wanted the court a *quo* to give more weight to some factors than it did.

[40] In this case we have two occasions where serious offences were committed on the same child. This in a way shows the court what kind of character it was dealing with. Though the appellant has got an unblemished record, however in this case he

has shown himself to be someone who does not have a good character and children are not safe around him. What he did to the child is a socially reprehensible act.

[41] For that matter, the fact that the appellant is a first time offender does not warrant a deviation from the prescribed sentence because that was already considered when the CLAA was enacted. Likewise, the fact that there are no injuries to the victim does not warrant a lesser offence.

[42] Surely, the fact that an offender is 26 year old does not warrant a deviation from the prescribed sentence. A sentence cannot be based largely on the youth of the accused person. Youthfulness, in the region of the twenties, is a very common factor that may apply to most accused persons. For youthfulness to be a mitigating factor of great weight, it depends upon the facts and circumstances of each case. In S *v Matyityi* 2011 (1) SACR 40 (SCA), on page 47 paragraph 14 A-G and page 48 A-C, the SCA clearly and succinctly stated the following:

> "[14] Turning to the respondent's age: What exactly about the respondent's age tipped the scales in his favour was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness' without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about

his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. 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. At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did".

[43] In so far as the appellant's guilty plea is concerned, a guilty plea cannot by itself bar a sentencing court from imposing a sentence prescribed in the CLAA. Sentence imposed should not demonstrate lack of comprehension of the magnitude and severity of the offence. For that matter, there is nothing in this case that evinces that without the appellant's plea of guilty, the State did not have any prospect of successfully prosecuting the case against the appellant. See *S v Matyityi, supra, at paragraph 13G-H.*

[44] Beyond the fact that the appellant pleaded guilty and is a first time offender, there are no mitigating factors in this matter that are weighty enough to constitute substantial and compelling circumstances. The aggravating circumstances far

outweighed the mitigating circumstances. Under the circumstances of this case, if this Court finds that the life sentence imposed by the court a *quo* is inappropriate, it would be difficult to imagine the kind of offender deserving of such sentence.

Conclusion

[45] In terms of section 28 of the Constitution, a child's best interests are of paramount importance in every matter concerning the child. The record reveals that during the proceedings, there were concerns that the mother might be guilty of a grave failure to protect the child from her boyfriend. The court a *quo* even concluded that the mother is guilty of a grave failure to protect the child from her boyfriend. Based on the appraisal of the record, it is evident that the court a *quo* and the prosecutor were alive to the fact that the child may be a child in need of care and protection.

[46] By their very nature, issues related to child care and protection are matters which require urgent attention. In most instances, courts dealing with sexual offences cases are at times best placed to identify child abuse or neglect or a family which needs support. Section 150 of the Children's Act, Act 38 of 2005, (the Children's Act), provides:

> "(1) A child is in need of care and protection if, the child—
>
> (a) has been abandoned or orphaned and has no family member who is able and suitable to care for that child;
>
> (b) displays behaviour which cannot be controlled by the parent or care-giver;
>
> (c) lives or works on the streets or begs for a living;
>
> (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
>
> (e) has been exploited or lives in circumstances that expose the child to exploitation;

(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

(g) **may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;** (Own emphasis)

(h) is in a state of physical or mental neglect; or

(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker:

(a) a child who is a victim of child labour; and

(b) a child in a child-headed household."

[47] It hardly needs to be pointed out that, if a court is seized with a matter involving child abuse, it should always be mindful of the importance of the provisions of section 150 of the Children's Act. Undoubtedly, courts have a central role to play in the vindication and safeguarding of children's rights. For that matter, all the courts are part of the stakeholders that provide for a harmonised and interconnected system for an active and prompt response to child abuse and neglect. In cases involving physical and sexual abuse of children, identification of children in need of care, for instance, and adequate protection of the child are critical.

[48] It is particularly important that the courts should bring any case that involves suspected child abuse or neglect, to the attention of Department of Social Development as early as possible. This is so because of the potential danger to the

welfare of the child. The importance of this vigilance cannot be sufficiently emphasised. In the present matter, the court a *quo* and the public prosecutor had the inherent authority to bring this case to the attention of the Department of Social Development authorities.

[49] Both the trial courts and the public prosecutors have important roles to play in ensuring that abused children's rights and welfare are protected. They are obliged to assume a proactive role in such matters, in order to accord children a high level of protection and to safeguard the best interests of the child, by, for example, enquiring if the matter has been brought to the attention of social services, enquiring from the public prosecutor about the living circumstances of the child, directing that the matter should be brought to the attention of social services and making follow up orders. Likewise, the public prosecutor can request the court to refer the matter to the Department of Social Development.

[50] The trial courts, therefore, bear significant responsibility in ensuring that such cases should be brought to the attention of the Department of Social Development, to investigate whether a child victim is a child in need of care and protection.

[51] In light of the abovementioned, I am of the view that this judgment should be brought to the attention of the Department of Social Development, to investigate if the child is not a child in need of care and protection.

[52] In the circumstances, I propose the following order,

52.1 Appeal is dismissed.

52.2 I direct that a copy of this judgment should be immediately forwarded to Ms van Der Made of Paarl, Department of Social Development, to investigate promptly if the child is not a child in need of care and protection. Ms van Der Made, is directed to report back to this Court within a period of three months from the date of this order, the outcome of the Children's Court inquiry.

[redacted]

C.N. NZIWENI
JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

[redacted]

NC ERASMUS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellant		**Adv N Abdurahman**
Instructed by		**Legal Aid South Africa** **CAPE TOWN**
Counsel for Respondent	:	**ADV MJ September**
Instructed by		**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS** **WESTERN CAPE, CAPE TOWN**