IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO: CC55/2016

In the matter between:

THE STATE

versus

M D Accused no 1

N M Accused no 2

SENTENCE

MBENENGE J:

[1] Accused 1 was found guilty of rape on the basis that he raped the complainant on 30 June 2015 and 3 November 2015, and accused 2 was found guilty, on count 2, on the basis that she aided accused 1 to rape the complainant on 30 June 2015. The accused were convicted on 2 December 2016, on which date the matter was postponed to 23 January 2017 for sentence proceedings. On 23 January the relevant pre-sentence reports had not come to hand, hence the matter was further postponed to 10 March 2017. On 10 March, after the reports all of which are dated 6 March 2017 had come to hand, the parties' legal representatives addressed the court on sentence, which was reserved for handing down today.

[2] The complainant, who was nine years old during the fateful year, is the offspring of the accused and stayed with them during the time in question. She, together with her sibling (Hlomla), stay with their grandmother, since the incarceration of the accused. By reason of the complainant's age as also the fact that she was raped more than once, the provisions

of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (read with Part 1 of Schedule 2 of that Act) prescribing life imprisonment apply to the rape count.

[3] In imposing an appropriate sentence I am duty bound to consider the triad of factors relevant to sentencing namely, the interests of society, the nature and seriousness of the crime and the personal circumstances of the accused.

[4] From the society's point of view, rape, of which accused 1 has been convicted, is a serious offence considered to be *"a scourge or a cancer that threatens to destroy both the moral and social fabric of our society*"[1] which shames us as a nation.[2] The manner in which courts of law deal with rape should never convey to the society the feeling that acts such as that we are here dealing with have become acceptable.[3] A great measure of retribution is called for. An appropriate sentence should thus be one that not only protects the accused's family members, but other similarly vulnerable members of the society

[5] Rape of young girls who are more vulnerable members of the society are more serious. But in this matter we are dealing with a rape of a child by a father, about which Cameron JA (as he then was), in *S v Abrahams*[4], remarked:

> "[17] 'Of all grievous violations of the family bonds the case manifests, this is the most complex, since a parent including a father is indeed in a position of command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes deflowering in the most grievous and brutal sense.'
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> …
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> [23] …
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> (a) …
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> (b) 'Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes.'

[1] *Director of Public Prosecutions v Thabete* 2011 (2) SACR (SCA) at para [16].

[2] *MDT v S* (548/2013) [2014] ZASCA 15 (20 March 2014) at para [7].

[3] *B v S* (CA 447/2015) [2016] ZAWCHC 161 (09 September 2016).

[4] 2002 (1) SACR 116 (SCA) at para [17].

(c) 'Third and lastly, the fact that family rape generally also involves incest (I exclude foster and step-parents, and rapists further removed in the family lineage from their victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape and it exploits and perverts the very bond of love and trust that family relation is meant to nurture.'"

[6] I turn now to deal with the first two factors (interests of society and nature and seriousness of the offense) in relation to count 2 of which accused 2 has been convicted. There is no doubt that society frowns upon and abhors mothers who aid others in committing rape on their offspring. That a mother would aid her partner to commit rape with the partners' offspring is despicable. The seriousness of this offense finds expression therein that a person such as accused 2 who aids another person is liable on conviction to the punishment to which a person convicted of actually committing the offense itself would be liable.[5]

[7] The preamble to the Sexual Offences Act takes cognizance of women and children as being particularly vulnerable and more likely to become victims of sexual offences. Accused 2 has, in a manner of speaking, betrayed the womenfolk in whose interest the Sexual Offences Act was enacted.

[8] The actions of the accused have affected the complainant adversely. According to the social worker's interim impact report (exhibit "C"), much as the complainant is physically and psychologically sound (or was at the time of her interview, on 13 February 2017) she cried when being interviewed stating that she has been repeatedly subjected to recounting the experience, and it hurts whenever she has to do that. The incident has affected the complainant's family life and the health of her grandmother who has had to relocate to Cape Town to stay with her son.

[9] The accused's personal circumstances tendered from the Bar are as follows: accused 1 is 43 years old, having been born on 3 March 1974. He is single, but was cohabiting with accused 2, with whom they have two offspring (one of whom is the complainant). Due to financial constraints, he dropped out of school whilst doing grade 11. Prior to being arrested, he was gainfully employed with Spindrift Construction Company as a general worker earning R3 500.00 per month. He left his employment upon being arrested in connection with this case. He is a first offender.

[5] Section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act).

[10] Accused 2 is 37 years old and her level of education is grade 12. She is a recipient of a disability grant. She too is a first offender. She was unemployed and stayed at home supposedly looking after the children, with accused 1 having been the sole breadwinner.

[11] The accused pleaded not guilty, with the result that they put the complainant through the traumatizing experience of testifying about what her parents did to her. Both their actions perpetrated against her and the fact that she had to testify about the incident will no doubt leave an indelible mark in her. According to the impact report, even though she was subjected to counseling, the future impact of the incident is hard to predict.

[12] Mr *Skade*, who appeared for accused 1, argued that there were substantial and compelling circumstances justifying the imposition of a sentence lesser than life imprisonment. In pursuit of that proposition, and somewhat tentatively, he pointed to the fact that accused 1 is first offender who *"was a productive member of the society … working and supporting his family"* and with *"good prospects of rehabilitation".* He also argued that "*there was no physical trauma which would be permanent on the complainant"*. A case that springs to mind and in which a young, gainfully employed supporter of his family whose rape did not cause serious or permanent injury and in which the court considered those factors, taken cumulatively, as amounting to substantial and compelling circumstances is *S v Nkawu.*[6] The facts in that case are completely distinguishable from those in the instant matter. *Nkawu* was sentenced to 20 years' imprisonment for raping a ten year old girl he abducted from the sanctity of her home, and raped *per anum*. We are here dealing with the case of a father who raped his nine year old daughter – an incestuous act – on two occasions. In the *MDT* case *(supra*) the SCA was not convinced that first offendership and absence of physical injuries (apart from personal circumstances, in a case such as ours involving the rape of a child by a father) constituted substantial and compelling circumstances.[7]

[6] 2009 (2) SACR 407 (E) at para [19].

[7] *B v S* (A447/2015) (2016) ZAWCHC 161 (09 September 2016) where the court upheld life imprisonment in respect of a 44 year old accused who raped his nine-year old daughter. He was a first offender who pleaded not guilty to the charge but later made admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977 effectively admitting all the elements of the crimes). See also *S v Kleyn & Another* (CC 01/2013 ECD), by Hartle J delivered on 12 August 2014 at the Eastern Cape Local Division, Port Elizabeth.

[13] Were I to uphold the contention advanced on behalf of accused 1, I would be departing from the prescribed minimum sentence lightly, and for flimsy reasons.[8]

[14] Accused 1 evinced no remorse and maintained his innocence throughout the hearing, denying having raped or attempted to rape the complainant, despite even the testimony of accused 2 to the contrary.

[15] Accused 1, upon whom it was incumbent to protect his offspring, became a molester, destroying completely the natural father daughter relationship.

[16] I therefore find that, in relation to count 1, there are no circumstances justifying the imposition of a lesser sentence as far as accused 1 is concerned.

[17] Accused 2 as well owed the complainant motherly protection. She failed in that regard and, instead, aided accused 1 to rape their daughter. Accused 2's version that she had been compelled to assist accused 1 in raping their child did not prevail. The court made moment of the fact that even on her own version she had failed to call for assistance of her neighbours and was able to resist accused 1 whom she had molested on previous occasions.

[18] I am also mindful of the plea of the complainant that her mother be forgiven. We should not lose sight of the fact that this is a child's perspective with all its limitations. Were the court to give heed to the complainant's quest it would be failing in its duty to promote the best interests of a child as upper guardian of all children in the Republic. The pre-sentence report prepared on behalf of accused 2 records her as verbalizing elements of remorse, but at the same time acknowledging that the law must take its course as she claims to have betrayed her child. Imprisonment is the way to go, even in the case of accused 2. She has been in custody since about November 2015. That factor is relevant.

[19] I have taken into account all the relevant factors, in mitigation and aggravation of sentence. This is a case of parents who breached their sacred duty to rear their child in love, to provide for her physical and spiritual needs, to teach her to love and serve others and to be a law abiding citizen wherever she lives.

[20] In the result:

(a) Accused 1 is sentenced to undergo life imprisonment.

[8] *S v BP* 2013 (2) SACR 533 (SCA).

(b) Accused 2 is sentenced to undergo 10 years' imprisonment, antedated to her date of arrest.

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S M MBENENGE

JUDGE OF THE HIGH COURT

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Sentence proceedings concluded on: 10 March 2017

Sentenced handed down on: 31 March 2017