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Circulate to Judges:	YES /NO
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HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: K/S 01/15
 Heard on: 22-23/06/2015
 Argued: 08/09/2015
 Delivered on: 16/09/2015

In the matter between:

THE STATE

AND

RUDOLPH COETZEE

Accused

JUDGMENT

KGOMO JP

1. The accused, Mr Rudolph Coetzee, a 23-year old man has been indicted and convicted on 45 sexual related offences. He pleaded guilty to all these offences which were comprehensively circumscribed in his s 112(2) of the Criminal Procedure Act, 51 of 1977 (CPA), statement. The State was satisfied with the factual matrix presented and accepted same.

2. The offences were committed over a period of four years: May 2010 to April 2014. The ages of the sexual abuse victims range between

3 (three) years and 12 years: boys and girls. These 45 offences may be categorised as follows:

- 2.1 Five (5) counts of Rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Act);
- 2.2 Twenty-two (22) counts of using children in the Production of Child Pornography, a contravention of s 20(1)(b) of the Act;
- 2.3 Sixteen (16) counts of Sexual Assault as contemplated in s 5(1) of the Act; and
- 2.4 Two (2) counts of Attempted Rape, a contravention of s 3 of the Act.

THE FIVE RAPE CHARGES.

3. By virtue of the fact that the victims were all under 16 the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the Minimum Sentence Act) are applicable. In other words a sentence of Life Imprisonment is prescribed.
4. In respect of Counts 15, 25 and 37 the victim of the sexual assault is JS, a 6-year old boy. On 04 April 2013 the accused penetrated the boy anally with his finger. On 13 October 2013 he caused the boy to penetrate his (the accused's) mouth with his penis (the so-called oral blow-job); and on 11 January 2014 the accused reversed the rolls by, on this occasion, penetrating the boy's mouth with his (the accused's) penis.
5. Photos of these incidents were taken by the accused. Victim impact reports were compiled by Ms Estie Botha, a Social Worker with an M.Soc.Sc degree in Forensic Assessment, for all the victims. Her investigation (Exh E) reveal that JS fears closing his eyes because he has an apprehension that something ominous might happen to him. Her evaluation and recommendation are as follows:

"11. EVALUERING

11.1 Die betrokke seun se maatskaplike funksionering is negatief. Sy emosionele en sosiale ontwikkeling is nie volgens sy ontwikkelingsvlak nie.

11.2 Die impak van die seksuele misbruik waaraan hy blootgestel was kom duidelik na vore deur geinternaliseerde boodskappe wat hy deel gemaak het van sy funksionering. Hy ervaar veral indringing van sy liggaamsgrense, hulpeloosheid en verloëning deur mense na aan hom."

The recommendations in respect of all the victims are essentially the same and will be jointly dealt with at a convenient stage.

6. The next rape victim is NF, a 6-year old girl: Count 21. The accused penetrated her vaginally with his finger. The incident occurred on 12 September 2013. She was also subjected to other forms of sexual molestations whilst this intimate photographs were taken. Ms Botha states in her victim impact report (Exh "F"):

"11. EVALUERING

11.1 Dit blyk dat die betrokke dogter se maatskaplike funksionering positief is.

11.2 Dit is duidelik dat die betrokke dogter oor weerbaarheid beskik wat haar help om die emosionele impak van die seksuele misbruik te absorbeer. Bekommernis bestaan egter dat sy die gebeure dissosieer wat beteken dat sy haarself van emosies en feite wat verband hou met die seksuele misbruik afsluit.

7. The third and last victim in respect of the rape charges is SL, a 3-year old boy, a mere toddler: Count 28. On 17 November 2013 the accused placed ("geplaas het") his penis in the buttocks of the little boy. Ms Botha reports (in Exh "D") that he presents with symptoms of a sick and broken toddler who is also hurt and angry. He suffers from enuresis (inability to control urine). The boy now displays the

strange behaviour of removing his underpants in public and urinates on other people. Ms Botha concluded her report:

"11. EVALUERING

11.1 Die betrokke seun se maatskaplike funksionering is negatief. Hy ervaar nie stabiele gesinsomstandighede nie en sy emosionele behoeftes word nie deur betekenisvolle persone in sy lewe aangespreek nie.

11.2 Die impak van die seksuele misbruik waarvan hy blootgestel was kom duidelik na vore deur geïnternaliseerde boodskappe wat hy deel gemaak het van sy funksionering. Hy ervaar veral magteloosheid, voel chaoties en verloën deur betekenisvolle persone in sy lewe."

THE 22 CHARGES OF MANUFACTURING OF CHILD PORNOGRAPHY.

8. These are Counts 1, 3, 4, 11, 13, 16, 18, 20, 22, 23, 26, 29, 31, 33, 35, 38, 39, 41, 42, 43, 44 and 45. In respect of these photos no fewer than 126 pictures were taken of the exposed private parts or exposed rear orifices of the children. Only boys were involved in these charges. The photos that were taken on a particular day are counted or treated by the State as one count. Some counts have only one photo whereas others range from two to 39 photos. The ages of the children range from three years to 12 years. Some of the boys who feature in these photos are amongst those who have been raped. A minority of the victims were classified as unknown. Those who were known are: TP, RC, CL, JS, ZL, DW and NF. The production was made between 23 May 2010 and 23 April 2014. The most photographed boys are JS and ZL. On 02 May 2011 at least 39 photos were taken. Sometimes two or more children were snapped naked together. This must have been excruciating for them.
9. For manufacturing pornography s 51(2)(B) of the Minimum Sentences Act is applicable. The offences are incorporated in Part III

of Schedule 2 which prescribes a minimum sentence of 10 years imprisonment.

THE SEXUAL ASSAULT CHARGES: 16 COUNTS.

10. These are Counts 2, 6, 7, 9, 10, 12, 14, 17, 19, 24, 27, 30, 32, 34, 36 and 40. These offences were committed between 13 June 2010 and 10 January 2014. The same boys were abused in this regard: RC (12 years), CL (12 years), JS (6 years), TP (12 years) and an unknown boy (age also unknown). In this regard the accused parted the boys' buttocks with his penis and on two occasions touched them indecently.

ATTEMPTED RAPE: COUNTS 5 AND 8.

11. On 02 May 2011 the accused attempted to penetrate TP, a 10-year old boy, without his consent: Count 5. On a different occasion on the same day he again attempted to rape TP anally: Count 8.
12. The other victim impact reports prepared by Ms Botha relate to TP (Exh G); CL (Exh H); DW (Exh J) and RC (Exh I). Needless to say there won't be any report in respect of the unknown victim(s). The accused had seven known victims within his facade.

12.1 TP, 10 years old, was the target of the attempted rape charges. Ms Botha (in Exh "G") points out that TP is deprecating himself because he feels that he should have baulked at the accused's advances from the outset. He also blames himself for the plight of some of the boys because he accompanied them to the accused's place where they were abused. The revelation of these vile deeds have made him irritable and aggressive. Ms Botha's evaluation of TP is as follows:

"11. EVALUERING

11.1 Dit blyk duidelik dat die betrokke kind se maatskaplike funksionering negatief is. Hy ervaar nie stabiliteit ten

opsigte van gesinsomstandighede nie. Sy skoolvordering is swak en sy portuurgroepverhoudings is negatief.

11.2 *Die impak van die seksuele misbruik waaraan hy blootgestel was kom duidelik na vore deur geïnternaliseerde boodskappe wat hy geïntegreer het. Die betrokke kind ervaar selfblaam en stigmatisasie as gevolg van die seksuele misbruik."*

12.2 C L, (Exh "H"), 12 years old, is in Grade 9, which he repeats for the third time. The school says he lacks concentration, he is easily distracted, he fails to do or submit his homework. He abuses drugs, has become rebellious and violent and has stabbed another boy with a knife. Ms Botha's evaluation is:

"11. EVALUERING

11.1 *Dit blyk duidelik dat die betrokke kind se maatskaplike funksionering negatief is. Hy ervaar nie stabiliteit ten opsigte van gesinsomstandighede nie. Sy skoolvordering is swak en sy portuurgroepverhoudings is negatief.*

11.2 *Die impak van die seksuele misbruik waaraan hy blootgestel was kom duidelik na vore deur geïnternaliseerde boodskappe wat hy geïntegreer het. Die betrokke kind ervaar stigmatisasie en selfblaam as gevolg van die seksuele misbruik waaraan hy blootgestel was."*

12.3 RC was 12 years old. In Exh "I" Ms Botha explains that the boy has repeated Grade 9 several times. It must be remembered that he is now 16 years old. He "bunks" school or lessons. RC informed Ms Botha:

"RC presenter met intense gevoelens van hulpeloosheid.

'Ek voel hartseer, as mense sleg aan my doen, my wil seermaak.

'Hartseer as mense my woorde gee, wat ek verkeerd gedoen het.

'Mense wil my afbreek, as ek wil beter doen.'

'Voel sleg, hartseer, wil hê hy moet iets oorkom.'

'Ek kind wat huil, as ek gedagte vat aan wat hy gedoen het.'

'My hart het swak gevoel toe hy dit doen, ek was bang en hartseer.'

'Soos `n pyn in my – hartseer toe hy dit gedoen het.'"

12.4 DW was 12 years old. Ms Botha in the victim impact report (Exh "J") states that since the revelations concerning the sexual abuse DW felt ostracised from his peer group. He now associates with older delinquents and "street-kids" or homeless boys. He is addicted to smoking dagga and abuses liquor to the point of being senselessly drunk. He experiences an identity crisis, displays signs of depression and has projected suicidal tendencies. The report proceeds:

"DW het intense magteloosheid ervaar ten tye van die seksuele misbruik:

'speel met my ding (geslagsdeel), nie lekker gevoel nie, hy sê moenie worry nie, lê net stil. Het gedink netnou maak hy my seer, nie geweet of hy my gaan seermaak of gaan rape nie.'

'ek het geskrik, gestres, wou net huis toe, weet nie hoe om by die huis te kom nie.'

'Rudolf het gesê ek mag vir niemand sê nie, was bang vir hom, bang hy rape my.'"

Later:

"DW het skuld en intense skaamte geïnternaliseer en beleef hy homself net as `n objek wat misbruik word. 'wys die foto's wat hy van ons geneem het op die computer, ek het baie skaam gevoel. Gewonder of hy dit in die koerantpapiere gaan sit, hy is `n fotograaf.'

'ons moes afbuk, bene straight maak, ek was baie skaam.' Dit het `n baie negatiewe effek op sy selfbeeld. DW kan nie vir

hom positiewe boodskappe gee nie en internaliseer hy dat hy sleg is. 'mense dink dat ek baie sleg is.'

'my maats sê dat ek baie rou is.'

'ek voel die slegste wanneer ek iets verkeerd doen.'"

Ms Botha's evaluation of DW is:

"11. EVALUERING

11.1 Dit blyk duidelik dat die betrokke kind se maatskaplike funksionering negatief is. Hy ervaar nie stabiliteit ten opsigte van gesinsomstandighede nie. Sy skoolvordering is swak en sy portuurgroepverhoudings is negatief.

11.2 Die impak van die seksuele miskbruik waaraan hy blootgestel was kom duidelik na vore deur geïnternaliseerde boodskappe wat hy geïntegreer het. Bekommernis bestaan ten opsigte van selfmoordneigings en DW sal dringend terapie moet kry."

PROBATION REPORT IRO THE ACCUSED.

13. Mr M M Ndadza is a Social Worker and Probation Officer attached to the Department of Social Development of the Northern Cape Province. He has compiled a pre-sentencing report (Exh "B") on the background and circumstances of the accused. The accused was born on 19 October 1991 and has two siblings. His father died when he was nine years old and was brought up by his mother, a tutor, as a single parent. He attended school and passed Grade 10 and dropped out of school for no apparent good reason.

14. I will go along with the following submission of the accused's counsel in his Heads of Argument at para 34:

"34. It is respectfully submitted that in casu the essential question in understanding the accused can be phrased as follows:

'The accused is a 22 year old youthful male, who grew up in a

stable and supportive family structure with a Christian foundation. His father (until his death) and mother were gainfully employed and supported the accused and his siblings emotionally and financially. His mother is a qualified teacher. The accused had a harmonious relationship with his immediate and extended family. There is no history of any abuse or that the accused and his siblings' basic needs were not fulfilled. The accused suffers from no addiction to any narcotic substances. A synopsis of his personal and family history reveals an average stable environment without any exposure to criminality. Why would such person (accused) then commit such offences?"

Why indeed? The puzzle is unravelled below.

15. The accused is unmarried and conducted his own business called RCR Photography and Printing from which he derived an average income of about R10 000-00 per month. It is this photographic skill that steadily escalated to the charges and sentence that he is currently facing.
16. Mr Ndadza recommends *"that the accused, Rudolf Coetzee, be sentenced in terms of Section 276(1)(b) of the **Criminal Procedure Act, 51 of 1997.**"* Ndadza's supervisor, unidentified, has countersigned the report that could have been better prepared. I will leave it at that.
17. Another pre-sentencing report (Exh C2) was compiled by Major Hayden Lee Knibbs, a Chief Clinical Psychologist of the Investigative Psychologist Section, Forensic Service Division of the South African Police Service (SAPS). He holds the following degrees: B Soc Sci (Psychology), Hons Soc Sci (Psychology and Msc: Clinical Psychology). The report was commissioned by the State but was handed in by consent as truthfully evidencing the contents thereof.

After the contents thereof were read into the record I enquired from counsel whether anyone of them required Major Knibbs to appear to clarify any aspect or to be examined or cross-examined. They were satisfied to dispense with such evidence, and so did I.

18. I will therefore quote a few extracts from this lengthy (26 pages) report on crucial aspects only:

18.1 *"The aim of this report is to classify the behaviour of the accused and to comment on risk facts and rehabilitation prospects. The purpose of this information is to aid the Court in determining an appropriate sentence."*

18.2 **"5.2 CURRENT CRIMINAL OFFENCES**

The accused stated that in 2009 he came across a website online with child pornography while searching for regular pornography ---. He described how he saw the potential of financial gain in the pornography industry as "sex sells". He stated that initially he wanted to make "ordinary" pornography for financial gain, however he did not know who he could ask to take pornographic photos of, so he photographed a child. He indicated that the reason why he used the child was that he already knew him and it was easier to convince him to undress for photography. He described how later on "more children came" and that's when he did the "other things". He added that it was all just for photos. He indicated that he never thought that having sex with them as one would with an adult. He stated that later on he thought of ideas for photographs in which he and the children were involved in "a thing" but not for sex, just sexual photos. He added that he never sold the images, however the idea of "it" grew. The accused described that the aim was for a bigger variety of pornography. He indicated that it was easier to persuade children to participate than to persuade adults to participate. He stated that he thought about selling the images, however he added that there were too many "terms and conditions" on the website. When probed he stated that he did look at pictures that he had taken and masturbated while viewing them. The accused stated that when he was doing "things" and the child said "no" he would stop there and then and not take it any further. He stated that he did not want to hurt them and that was why he stopped when they said no, as he did not want them to undergo

physical pain. He added that he also did not want them to undergo "mental" pain but that's something he can do nothing about now."

18.3 "CLINICAL IMPRESSION OF THE ACCUSED

During the interview the accused lacked depth in his emotional understanding of the impact of his behaviour on the victims and their families. The accused was unable to imagine what the families must feel and think about the situation. By minimizing the impact of his crimes, downplaying the child pornography and the rapes by shifting the focus of his attraction, from children to "neatness". He displayed distortions of his cognition that have the potential to facilitate paedophilic sexual behaviour. An example can be seen in the accused's description of how he would stop his abuse when the victim felt any pain. The cognitive distortion here is that the victim didn't really suffer.

Although the accused's remorse was diluted by his lack of genuine emotional understanding, he did show regret for his behaviour and some concern for the victims and their families. (Emphasis added).

18.4 "As can be seen, the accused fits the diagnostic criteria of paedophilic disorder and as such the diagnosis of this disorder can be made.

5.4.2 Elements of grooming can be seen in the behaviour of the accused in the following way:

The accused "groomed himself" through the use of cognitive distortions that serve to justify the behaviour and lighten the severity of the abuse on the children. These cognitive distortions involved beliefs that he was not really hurting the child, as he stopped if the children told him to, or if he hurt them. Furthermore he referred to the rapes as "a thing" and justified that they were not for sex, just for sexual photographs. The accused "groomed himself" by integrating himself onto the community in positions that gave him access to children. [He] was a professional photographer, which gave him direct unsupervised access to children. Furthermore [he] revealed that he had previously volunteered at a Crèche.

Finally, the accused "groomed the children" by introducing a sexual element into his relationship with them, and by employing strategies to lower the likelihood of them disclosing the abuse. These strategies contained bribery and threatening

elements. According to the witness statements, in one of the instances the accused showed the victim pornographic material whereby sexualizing the interaction. Furthermore the accused purchased a bicycle for one of the victims, however he would not allow the victim to take the bicycle home. Not only does this behaviour draw the victim back to the accused, but it also serves to lower the chances of the victim reporting the abuse, as the victim knows that he will lose the access to the bicycle should he report the abuse. Furthermore, the accused stated that he told one of his victims not to tell about the abuse, indicating a more direct strategy to groom a victim into non-disclosure. Finally, the photographs taken by the accused, not only serve a sexual function but simultaneously serve as threatening evidence in the possession of the accused. The possession of the photographs act as a means to deter the victims from reporting the abuse as the accused has embarrassing evidence of them in his possession."

18.5 "5.5.1 RISK OF THE ACCUSED

The following are the relevant risk factors, and can be seen as increasing the likelihood that the accused will reoffend.

- *Diagnosis of Paedophilic Disorder*
This diagnosis indicates a sexual desire towards children, signifying a strong probability that he accused will at some point act on this sexual desire. Furthermore this diagnosis has a poor prognosis in treatment.
- *Age*
The diagnosis of Paedophilic disorder indicates a lifelong sexual attraction to pre-pubescent children, as such, the age of the offender is an important risk factor. Generally speaking, the younger the age at release, the higher the likelihood that this kind of offender will re-offend (Phenix, Doren, Helmus, Hanson & Thornton, 2008)."

18.6 "DESIRE FOR TREATMENT

During the clinical interview the accused expressed a desire for psychological treatment, even though he has not yet received any treatment over the one year period that he has been in prison. He justified this by stating that the social worker in the prison would not see him as he has not yet been sentenced. Even though this shifting of responsibility, placing blame on the social worker for the wellbeing of the accused

may indicate a lack of genuine drive to seek assistance, **the benefit of the doubt is given to the accused as he did show a measure of regret and concern for the victims.** As such the accused's desire for treatment is seen as a risk reducing factor."

18.7 "6. CONCLUSION AND RECOMMENDATION

After final consideration of the relevant risk and protective factors, it is indicated that **the accused poses a high risk to children in society of a similar age to the victims in the index offences.**

Even though the prognosis is poor, for the purposes of rehabilitation, it is recommended that the accused attends intensive psychotherapy with an experienced clinical psychologist. It is recommended that the therapeutic intervention focus on the risk factors highlighted in this report as well as facilitating a deeper emotional sensitivity within the accused.

It is further recommended that copy of this report be included in the documentation accompanying the accused and be reviewed when considering parole and/or treatment." (Own emphasis).

19. In **S v Dodo** 2001(1) SACR 594 (CC) the Constitutional Court endorsed the approach of the Supreme Court of Appeal in **S v Malgas** 2001(1) SACR 469 (SCA) at p 594. The Court then went on to hold at p 614 (para 37) that:

"[37] The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognised in *S v Makwanyane*. Section 12(1) guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all

relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. 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."

20. Adv V Z Nel, for the accused, proffered the following factors and circumstances, assessed or considered cumulatively, as constituting substantial and compelling circumstances through which he sought to persuade me to deviate from imposing the life imprisonment sentences ordained in respect of the rape charges in Counts 15, 21, 25, 28 and 37. See paras 3 to 7 (above) of this judgment. These proposed mitigating features are following:

20.1 No violence was inflicted on any of the complainants to enable the commission of the offences nor was any threats of violence directed at the complainants to induce them to consent to the acts. Furthermore, no physical injuries were inflicted on the complainants nor did the sexual acts committed cause any physical or bodily injuries to the complainants.

20.2 That the aforementioned shows that the accused does not have a propensity towards violence; and in fact does not pose any **violent** threat to society at large. In other words he is not inherently cruel or sadistic nor was egregious violence inflicted on them.

20.3 The acts of sexual penetration and sexual assault committed were only fleeting and momentary in order to capture the act

on the photographic images whereafter the acts were immediately seized;

20.4 That despite the reprehensibility of the accused's conduct, the aforementioned shows that the accused did not subject the complainants to prolonged acts of sexual assault for his own sexual gratification, but that his primary intention was to capture and produce the photographic images;

20.5 That the accused, from the moment of the first police visit, confessed his actions and co-operated fully with the police. He thus immediately admitted the wrongfulness of his actions and took responsibility therefor;

20.6 That the aforesaid is a recurring feature. The accused, from the onset, instructed that he wishes to plead guilty to the offences and wishes to acknowledge the wrongfulness of his actions;

20.7 The accused subsequently pleaded guilty to all 45 counts preferred against him and made full disclosure in respect of each and every incident to the satisfaction and acceptance of the prosecution;

20.8 The sincerity of his wish to accept responsibility is further illustrated in that he disclosed the names of the respective complainants in eight (8) counts where the prosecution could not establish the identity.

20.9 The accused's election to plead guilty and accept responsibility furthermore prevented further and secondary emotional trauma to the young complainants;

20.10 The accused also stated unequivocally that his acknowledgment of his criminal conduct is with the full appreciation of the seriousness of the offences and with genuine remorse;

20.11 That the accused voluntarily and without hesitation agreed to subject himself to a psychological analysis by Major Hayden Knibbs, a State witness, and others which were initiated by the prosecution in aggravation of sentence. His counsel has submitted that this conduct is further indicative of the accused's genuine desire to accept responsibility and require the help needed to mend his ways.

20.12 That the accused accepted the contents of the psychological report by the major including the diagnoses and prognoses which provides an expert explanation for the mental disorder which rendered him predisposed to the commission of the current offences;

20.13 Convoluted and ironic as it seems, the accused is classified as a first offender with no history of unlawful conduct or blemishes which, counsel contended, is indicative of a prior law abiding character. This point, it must be stated, is almost immediately rendered nugatory by the accused's four-year harmful trade (May 2010–April 2014).

20.14 That the aforementioned factors truly distinguishes the accused's moral blameworthiness from, probably, the majority of offenders who continuously refuse to accept responsibility

for their actions and persist in a denial of their criminality; thereby being beyond reformation and rehabilitation, counsel contended. All these factors, it was submitted, also point to remorsefulness.

21. Both counsel, with differing emphasis, underpin their submissions by invoking **S v SMM** 2013 (2) SACR 292 (SCA) at 297f-298b (para 14) where Majiedt JA had this to say:

"[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. In S v RO [and Another 2010(2) SCAR 248 SCA] I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge — the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much-quoted Zinn dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in

sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives."

At p 302 b-g (para26) the Learned Judge continued:

*"[26] In respect of the severity of the rape --- it is plain from the medical report that the doctor did not find any serious physical injuries ---. And there was no further violence in addition to the rape. Similarly in S v Nkawu [2009 (2) SACR 198 (SCA)] the complainant had not suffered any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances existed justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(a)(ii) of the Criminal Law Amendment Act 105 of 1997, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences. I agree with the learned judge that 'to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied'. **He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate***

sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually.” (Empasis Added).

22. The aggravating factors, on which both counsel are more or less *ad idem*, are the following:
 - 22.1 Rape is a serious offence which seriousness is exacerbated by the fact that the victims were as young as three years (cherubic toddlers) and the eldest being 12 years old. They mainly were immature, gullible, impressionable, innocent, ignorant, vulnerable and defenceless;
 - 22.2 As the evidence shows some of the children were repeatedly abused over a period of time; in other words the multiplicity of offences over a prolonged period (up to four years) is an adverse factor;
 - 22.3 The impact report shows that the accused has literally destroyed the lives of at least seven children. They perform poorly at school, they are being mocked by other children, some abuse drugs and alcohol, others suffer from insomnia, one little boy undresses himself in public and urinates on unsuspecting strangers, yet another has become suicidal; the list of devastation goes on and on. The mental and emotional sequelae or scars run deep and will endure;
 - 22.4 The accused groomed himself, the environment and the complainants in order to facilitate the commission of the offences in order to prevent the reporting thereof;
 - 22.5 The accused betrayed the trust relationship that existed between him and the children and that reposed in him by their parents and guardians. The accused was *in loco parentis* towards them and therefore exercised inherent power and control over them;

- 22.6 The accused was arrested after one of the children reported his ordeal at the hands of the accused. If this had not happened the accused would still be destroying young lives, regard being had to his diagnosis. It is not as if he had a Damascene conversion or was overcome by a feeling of guilt.
- 22.7 Intensive therapy, which the parents or guardians can ill-afford, is required to assist the victims to digest and come to terms with the emotional trauma they had been subjected to;
- 22.8 The accused has been diagnosed with a Paedophilic Disorder. Major Knibbs states that effective intervention for child sexual abusers is extremely problematic as successful treatment requires a desire to change on the part of the offender. He maintains that treatment does not stop an offender from re-offending whilst undergoing psychotherapy and while on medication. In short, the recidivism rate of child sexual abusers is very high.
23. Having regard to the guidelines set out in **S v Malgas** (supra) I wish to abstract three of them:
- 23.1 *"D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses 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 --- are to be excluded."*
- 23.2 *"G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained."*
- 23.3 ***"I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be***

disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence." (Own emphasis).

24. It does seem to me that the window of hope ought to be left ever so slightly open for the 23 year offender who committed the offences from the age of 19 until he was 22 years. He co-operated with the police from the time that he was caught. He pleaded guilty and spared the hapless and vulnerable complainants secondary or collateral trauma that they would have undergone in the witness box. He was able to exercise restraint when his victims were in anguish. Major Knibbs states that the accused has expressed a desire to undergo psychological treatment. The major sees this "*as a risk reducing factor.*"
25. The factors in para 24 (above) considered with those enumerated in para 20 (20.1 – 20.14), although individually "*weighing but like a feather*", combined however they do press down to bring about some equilibrium sufficiently to find that Life Imprisonment would be "*unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence.*" State council was unduly pedantic in holding that no mitigating factors existed at all and calling for life imprisonment for that reason. I cannot agree. However, a lengthy sentence which his counsel foreshadowed, uncomfortably so, as being in the order of 20-25 years is eminently realistic.
26. I therefore impose the following sentences:
- 1) The Rape charges in respect of Counts 15, 21, 25, 28 and 37: The accused is sentenced to 24 (twenty-four) years imprisonment in respect of each count.

- 2) In respect of the 22 Counts of Manufacturing Child Pornography: All these counts are taken together for purposes of sentence and the accused is sentenced to 10 (ten) years imprisonment.
- 3) In respect of the 16 charges of Sexual Assault: All these counts are taken together for purposes of sentence and the accused is sentenced to 10 (ten) years imprisonment.
- 4) In respect of the two Attempted Rape charges (Count 5 and 8): Both counts are taken together for purposes of sentence and the accused is sentenced to 8 (eight) years imprisonment.
- 5) It is ordered that all sentences run concurrent so that the accused would effectively serve 24 (twenty-four) years imprisonment.
- 6) It is ordered that the appellant's name be recorded forthwith in the Register of Sex Offenders. In terms of s 41(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 the accused may henceforth not:
 - 6.1 Be employed to work with a child in any circumstances;
 - 6.2 Hold any position, related to his employment, or for any commercial benefit which in any manner places him in any position of authority, supervision or care of a child, or which, in any other manner, places him in a position of authority, supervision or care of a child or where he gains access to a child or places where children are present or congregate;
 - 6.3 Be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or where children are present or congregate; or
 - 6.4 Become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.

6.5 The accused must further comply with the provisions of sections 46, 47 and 48 of the same Act a copy of which provisions has been handed to him to be explained by his counsel, Adv VZ Nel.

- 7) As requested by Major Hayden Knibbs who compiled the accused's Pre-Sentencing Report: It is ordered that his report, Exh "C2", be included in the documentation accompanying the accused to the correctional facility where he would be detained and be reviewed when considering his parole and/or treatment.

F DIALE KGOMO
JUDGE PRESIDENT
High Court of South Africa

On behalf of the State:

Adv R Makhaga
Adv J. Rosenberg
Director Public
Prosecutions (KIMBERLEY)

On behalf of the Respondent:

Adv V.Z Nel
Legal Aid Centre
(KIMBERLEY)