



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 08 June 2022

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Botha v The State* (546/2021) [2022] ZASCA 87 (08 June 2022)

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Today the Supreme Court of Appeal (SCA) handed down a judgment dismissing an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA concerned the question of whether the cumulative effect of 36 years' imprisonment imposed by the high court for a range of sexual offences, was shockingly or disturbingly inappropriate.

Over a period of five years, the appellant sexually abused the complainant, a minor boy. The sexual abuse started when the complainant was only six years old. Because the complainant's parents were employed during the school holidays, he would be sent to his paternal grandmother's house, where the appellant, who lived with the complainant's paternal grandmother, offered to take care of him when his paternal grandmother was at work. It was mostly during those times when the complainant's paternal grandmother was at work that the appellant groomed the complainant, which eventually led to the sexual abuse of the complainant. In April 2012, the complainant found the courage to report to his mother that he had been repeatedly sexually abused by the appellant.

Following this, the appellant was convicted in the regional court (Pretoria) on the following charges: three counts of indecent assault in contravention of s 14(1) of the Sexual Offences Act 23 of 1957 against a boy under the age 16 years; six counts of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007 - thus committing an act of sexual violation against a boy under the age of 16; and three counts of rape - thus committing sexual penetration in contravention of s 3 of Act 32 of 2007 against a boy under 16 .The appellant was sentenced to three terms of life imprisonment for his convictions of rape, three years' imprisonment for each conviction of indecent assault, and five years' imprisonment for each conviction of sexual assault.

On appeal to the high court, the convictions and sentences in respect of counts one, four, five, eight and eleven were set aside. The conviction in respect of count six (rape) was set aside and replaced with common assault. In addition, the conviction in respect of count seven (rape) was replaced with assault with intent to do grievous bodily harm. The high court sentenced the appellant as follows: five years' imprisonment for each of the two indecent assault convictions; five years' imprisonment for the conviction of assault; 10 years' imprisonment for the conviction of assault with intent to cause grievous bodily harm and five years' imprisonment for each of the three convictions of sexual assault. The high court ordered that the sentences imposed should not run concurrently without providing any reasons. Accordingly, the cumulative effective sentence imposed was 36 years' imprisonment.

The SCA held that a guiding principle in sentencing was that all sentences must be proportionate to the seriousness of the offence. Accordingly, sentences could be appealed if it was believed that the sentence was disproportionate to the crime committed or unfairly imposed. Accordingly, the SCA held that in determining an appropriate sentence, three guiding principles must be considered, collectively.

These principles are known as the 'triad of Zinn' and included the gravity of the offence, the circumstances of the offender, and public interest.

The SCA considered that the trial court took into account two reports, a victim impact report and a pre-sentence report, which were compiled on behalf of the complainant and the appellant respectively. Following this, the SCA held that the trial court had regard to the triad of factors and also warned itself to balance them. Consequently, the SCA held that the aggravating factors were numerous. The sexual abuse took place over a period of five years, the complainant was only six years old when he was first violated, the appellant gave no indication that he was going to stop his deviant behaviour, the complainant had to undergo surgery because his foreskin was damaged, the complainant was groomed over a sustained period, he was threatened and manipulated to engage in sexual conduct with his cousins and the appellant threatened to kill his family.

The SCA found that the various acts of sexual abuse occurred at the grandmother's house, over a period of five years and were therefore not acts that could be considered to be part of one single transaction. Moreover, the appellant had shown no remorse for his behaviour. He, in fact, influenced the complainant to have sex with other children. Unfortunately, as noted, the SCA did not know what impact that had on other children. In addition, the SCA held that, although the high court did not give reasons for its order that the sentences should not run concurrently, it was clear that the appellant had no intention of stopping. He had every intention of continuing with his deviant behaviour. Hence the SCA held that cases dealing with sexual abuse of the vulnerable are a plague in this country and continue unabated. According to the SCA, the heinous crimes committed in this case, viewed in its totality, were of a serious kind and nature.

Finally, the SCA held that the aggravating factors far outweighed the mitigating factors. Thus, the individual sentences were not severe. Similarly, the gravity of the offences and the scourge of such offences on helpless and vulnerable children cannot be downplayed and the effect of these crimes cannot be understated. Moreover, the impact on the family structure and community, as well as the psychological harm and adverse emotional impact on the child, were well known. Thus, a concurrence of the sentences was not possible on account of the abominable conduct of the appellant. Given that, the SCA accepted that a sentence of 36 years' imprisonment was severe, but the facts of this case were such that a sentence of 36 years' imprisonment was not shockingly disproportionate to the crime. According to the SCA, the high court did not exercise its discretion unreasonably. Hence, there was no reason to interfere with the sentences imposed. As a result, the SCA dismissed the appeal against the sentences.

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