

In search of sentencing guidelines for child rape: An analysis of case law and minimum sentence legislation*

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OPSOMMING

Vonnisriglyne vir kinderverkragting: 'n Analise van beslissings en minimumvonniswetgewing

Kinderverkragting is 'n emosiebelaaide misdryf wat die howe toenemend tydens 'n komplekse vonnisfase moet hanteer. Die hof moet in elke geval bepaal of dwingende en wesenlike omstandighede aanwesig is (artikel 51(3)(a) van die Strafregwysigingswet 105 van 1997) om sodoende 'n afwyking van die voorgeskrewe vonnis van lewenslange gevangenisstraf te regverdig. Alhoewel regterlike diskresie beskryf word as 'n kritiese aspek in die Suid-Afrikaanse reg, is ook bevind dat regterlike diskresie soms aanleiding gee tot onaanvaarbare en onregverdigbare verskille ten opsigte van sowel die vonnisproses as die opgelegde vonnis. Faktore wat hiertoe aanleiding gee, is onder andere die uiteenlopende benaderings van die regbank tydens die vonnisproses ten aansien van die erns van die misdaad en die bevinding en uitleg van tersaaklike versagtende en verswarende omstandighede. Hierdie artikel ontleed en konsolideer riglyne in die regspraak, minimumvonniswetgewing en geselekteerde buitelandse reg. Die doel is om toeganklike riglyne ten aansien van die vonnisproses te verskaf om sodoende by te dra tot 'n groter eenvormigheid in regterlike benadering in die bepaling van die erns van kinderverkragting asook die opweging van faktore vir die bevinding van dwingende en wesenlike omstandighede.

1 INTRODUCTION

Child rape is an emotionally-laden offence increasingly dealt with by the courts during a complex sentencing process.¹ In contrast to the situation during the trial, during the sentencing phase the judicial officer has to function in a quasi-inquisitorial way by taking on a central and active role. In addition, behavioural science – a discipline of which the judicial officer has little understanding – acquires greater importance during this phase. During the sentencing phase, the focus falls not only on issues regarding the accused's motive, dangerousness and degree of culpability, but also on issues relating to the impact of the crime on the victim.

* This article is based on a paper delivered at ARMSA *Training conference on sentencing challenges in the regional court* Johannesburg 15–17 Nov 2007.

1 Vervaeke, Bogaerts and Heylen "Onderkennen van seksueel misbruik bij kinderen" in Van Koppen, Hessing, Merckelbach and Crombag (eds) *Het recht van binnen: Psychologie van het recht* (2002) 179.

During the last decade there have been considerable developments in the legislative approach to the sentencing of perpetrators of child rape. Since May 1998, section 51(1) of the Criminal Law Amendment Act² prescribes life imprisonment as a sentence for, *inter alia*, the rape of girls younger than 16 years of age or gang rape, and ten years imprisonment for all other incidents of rape. The Criminal Law (Sexual Offences and Related Matters) Amendment Act³ created a new categorisation of sexual offences and now incorporates acts previously considered as indecent assault under the ambit of the discretionary minimum sentence legislation, as well as a gender-neutral approach to the rape of children.⁴ During sentencing the court is required to consider whether a finding of substantial and compelling circumstances (in terms of section 51(3)(a) of the Criminal Law Amendment Act⁵) could be made in order to deviate from the prescribed term of imprisonment and thereby avoid a grossly disproportionate sentence. From the beginning of 2008,⁶ regional court magistrates are authorised to impose life imprisonment *inter alia* in cases of rape involving children and are therefore no longer required, after conviction, to refer such a case to the High Court for sentencing purposes.⁷ Regional courts are thus themselves required to perform the determination of substantial and compelling circumstances and subsequent grading of these offences.

Notwithstanding the above developments, judicial discretion during sentencing (within the legal framework) has always been hailed as something to be guarded jealously and has been described as a crucial aspect of our law of sentencing.⁸ However, though it is accepted that this will have the effect that sentencing outcomes differ to a certain degree, judicial discretion has also given rise to unacceptable and unjustified disparity in the sentencing process, as well as in the actual sentences imposed in child rape cases. This disparity has been caused by diverse judicial approaches to the seriousness of these offences, to the recognition and interpretation of mitigating and aggravating factors, to the relevant circumstances of the offender and the victim, and to the relative weight given to each of these factors.⁹

2 105 of 1997.

3 32 of 2007. Chapters 1–4 came into operation on 16 December 2007. This legislation is implemented in a piecemeal fashion and is envisaged to be in full operation by 16 June 2008.

4 See ss 3 and 4 for the definition of “rape” and “compelled rape” respectively.

5 105 of 1997.

6 When the Criminal Law (Sentencing) Amendment Act 38 of 2007 came into operation – see s 9.

7 In terms of s 52 of the Criminal Law Amendment Act 105 of 1997.

8 Du Toit *Straf in Suid-Afrika* (1981) 127; Terblanche *Guide to sentencing in South Africa* (2007) 113.

9 SA Law Commission *Sexual offences: Process and procedure* Discussion paper 102 Project 107 (2001) 732. See also van der Merwe *Aspects of the sentencing process in child sexual abuse cases* (doctoral thesis Rhodes 2005) ch 4 paras 4 5 7 and 4 5 16 where it is indicated that judicial officers are either not aware of precedents laid down by higher courts, or are blinded by their own biases. See also Sentencing Guidelines Council *Guideline judgments case compendium* (2005) i at http://www.sentencingguidelines.gov.uk/docs/complete_compendium.pdf (accessed 1-04-2005) where it is acknowledged that consistency of approach by sentencers, as opposed to consistency in outcome, is essential to maintain public confidence.

The aim in this article is to consolidate local judgments (scattered over many years in different law reports), minimum sentence legislation and selected foreign practices in order to offer readily accessible guidelines that will contribute to greater uniformity in the judicial approach during the sentencing process. These guidelines embrace general and specific principles, as well as relevant aggravating and mitigating factors and are intended to guide the judicial officer in the exercise of his or her discretion. The sexual abuse of children includes the offences of rape and sexual assault and, though guidelines may overlap, this article focuses on an analysis of materials regarding child rape.

2 JUDICIAL APPROACH IN THE SENTENCING PROCESS

2.1 General guidelines

Sentences in respect of the rape of children as listed in Schedule 2, Part I of the Criminal Law Amendment Act¹⁰ are consistently more severe than it was prior to the passing of the amending Act. Thus, even where a departure from the prescribed sentence is justified in terms of section 51(3)(a), precedents before 1998 are no longer relevant as far as the length of the sentence is concerned.¹¹ Case law, however, still serves as a source indicating the type of factors that should be considered as aggravating and mitigating in the grading process relating to child sexual abuse cases.¹²

In addition to the aims of sentencing and the well-known factors of the *Zinn* triad, the interests of the child victim have gained considerable attention during recent years.¹³ It can thus be argued that the sentencing triad is squared by focusing on the impact that the crime has had on the victim in a case of child sexual abuse. Though the court may take judicial notice of the fact that sexual offences committed against children are inherently harmful, serious harm should be proved by way of reliable evidence.¹⁴ Evidence by the mother, a teacher or a social worker regarding the symptoms of trauma resulting from the crime may, if not challenged, be accepted without psychiatric evidence on the effects of rape.¹⁵

10 105 of 1997.

11 *S v Abrahams* 2002 1 SACR 116 (SCA) 126b. See *S v G* 2004 2 SACR 296 (W) 301e where the legislative guideline of more severe penalties was followed explicitly. Note that the Supreme Court of Appeal interpreted s 51(3)(b), regarding life imprisonment for an offender aged 16–18 years at the time of the commission of the crime as being applicable to these juvenile offenders only in exceptional cases (see *Brandt v S* [2005] 2 All SA 1 (SCA) para 12; *Gagu v S* 2006 SCA 5 (RSA)). The Criminal Law (Sentencing) Amendment Act 38 of 2007 does not include a similar section, but by implication authorises a less severe approach by providing in s 51(5)(b) that in such a case up to a half of the sentence imposed in terms of minimum sentences may be suspended. By the time of writing, the Centre for Child Law, UP, has brought an application to challenge this section's constitutionality.

12 *Abrahams* (fn 11) 126c. Cf *S v M* 2007 2 SACR 60 (W) paras 103–109 for the refusal by a judge, in light of the absence of any guiding principles, to grade a case of child rape committed by a stepfather. See the list of aggravating and mitigating factors below that may be used for grading purposes.

13 *S v Blaauw* 2001 2 SACR 255 (C). See also Müller and Van der Merwe “Squaring the triad: The story of the victim in sentencing” 2004 (6) *Sexual Offences Bulletin* 17.

14 *S v V* 1994 1 SA 598 (A) 600j; *S v Mahomotsa* 2002 2 SACR 435 (SCA) 441j; *S v Sikhapha* 2006 2 SACR 439 (SCA).

15 *Abrahams* (fn 11) 124c.

Changes in behavioural and personality patterns following on incident(s) of sexual abuse should not be confused with normal child development. It is of further import that all available evidence with regard to the possible effect of the crime on the victim(s) should be received by the court and that the trauma experienced by male and female child victims of sexual assault is perceived as equally harmful.¹⁶ In an attempt to address this harm, recent approaches by the bench illustrate an ethic of care displayed towards the victim by making an order for counselling.¹⁷

A finding of serious harm should be given substantial weight in sentencing.¹⁸ In the case of offences falling under minimum-sentence legislation, however, only particularly damaging or distressing effects of the crime upon the victim should be taken into account by the court when imposing sentence, since the incorporation into minimum sentences already took account of the inherent harm caused in these cases.¹⁹

2.2 Sentencing aims

Though earlier draft legislation²⁰ emphasised the sex offender's possible rehabilitation as an overriding aim to be taken into account during sentencing, it appears that, currently, the main objective of sentencing in cases of child rape is to punish offenders.²¹ However, rehabilitation of sex offenders would be in the interest not only of the accused himself or herself, but is also in the interest of the young children with whom he or she may come into contact when released on parole. The mere question of treatment programmes for sexual offenders *per se*, as well as whether it should be conducted inside or outside of prison, are controversial matters.²² In addition, treatment programmes for sexual offenders in South Africa (both inside and outside of prison) are few and scarce. Nonetheless, courts have the option to make a written instruction to the Department of Correctional Services by referring the offender for evaluation by a psychologist. Including this into a warrant may ensure that he or she receives priority for participation in offender programmes.²³ It can serve as an attempt to prevent future offences and thereby protect children. Thereby the judicial officer can strive to ensure that the sentence is not only appropriate, but also effective.

16 *S v Tshabalala* case no A1955/03 of 7 February 2005 (unreported TPD); "Judge slams rape discrimination" *Legalbrief Today* (8 Feb 2005).

17 See *M* (fn 12) para 50 where the court ordered two sessions with the social worker in order, firstly, to convey the message to her that she did the right thing to disclose the rape by her stepfather and, secondly, explain to her the sentencing process and the court's decision. The author is also aware of a few other cases where the court, after being informed by a victim impact statement about the unattended trauma suffered by the victim, made an order for counselling in an attempt to ensure that the child receives therapy.

18 *Abrahams* (fn 11) 124d.

19 *R v Perks* 2000 *Crim LR* 606 proposition 2.

20 See the guiding principle (Sch 1(l)(v)) in the Criminal Law Sexual Offences Amendment Bill 2003 B50 2003 *GG* 25282 of 30 July 2003.

21 See s 2 of the draft Sentencing Framework Bill 2000 and discretionary minimum sentences in Sch 2, Part I–IV of the Criminal Law Amendment Act 105 of 1997.

22 Bergh "Psychological programmes in correctional facilities, declaration of dangerous offenders, s 286A Act 51 of 1977" (unpublished paper delivered at ARMSA *Training conference on sentencing challenges in the regional court Johannesburg* 15–17 Nov 2007).

23 *Ibid.*

2.3 Life imprisonment

Notwithstanding child rape being a serious crime, it may be classified according to differing degrees of seriousness, with some cases, depending on the relevant aggravating and mitigating circumstances, being considered more serious than others. Surrounding circumstances can, on a scale of abhorrence, make it more or less serious.²⁴ The statutory, discretionary minimum sentence of life imprisonment should thus be reserved for the “worst” cases.²⁵ By creating this test the Supreme Court of Appeal reiterated that not all rapes merit the same punishment. Terblanche²⁶ is of the opinion that the setting of this standard implies that the prescribed sentence of life imprisonment in rape cases will therefore ordinarily be departed from.

2.4 Aggravating and mitigating factors

Aggravating and mitigating factors influence the “extent to which the offender is to be blamed for his crime and how much he therefore deserves to be punished”.²⁷ Mitigating factors are those factors that are favourable to the accused and generally result in a lighter sentence, while aggravating factors have the opposite effect. Although there has been very little theoretical discussion of the concepts of aggravating and mitigating factors,²⁸ the Supreme Court of Appeal has referred to them in the context of determining substantial and compelling circumstances as though these concepts have a clear and definite meaning. First, it was held in *S v Malgas*²⁹ that the content or meaning of the term “substantial and compelling circumstances” in section 51(3)(a) of the Criminal Law Amendment Act³⁰ should be determined by weighing the mitigating and aggravating factors. When the aggravating factors are outweighed by the cumulative effect of the mitigating factors, then, in order to avoid an unjust and disproportionate sentence, the court may deviate from the prescribed minimum sentence. Secondly, in *S v Abrahams*³¹ it was held that, although precedents in respect of sentences imposed prior to the Criminal Law Amendment Act 105 of 1997 should not be followed with regard to length of sentence, they could still be followed (and used in the above process) with regard to the factors considered to be aggravating and mitigating. The court’s acquired insight into the characteristics and effect of incest, as well as its sensitivity to, and awareness of, the constitutional values of dignity and equality, led to the consideration and recognition of an aggravating factor overlooked by the court *a quo*. The attitude of the father

24 In *S v Sauls* 1982 PH H131, Van den Heever J held that even rape can vary from a “trifling matter to a capital crime”. Olivier AJA referred to this dictum in *S v A* 1994 1 SACR 602 (A) 608c.

25 *Abrahams* (fn 11) 127d; *Mahomotsa* (fn 14) 444b; *G* (fn 11) 299c. These cases echoed what was held in *S v Swartz* 1999 2 SACR 380 (C) 386b–c: “That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.”

26 67.

27 Terblanche 185.

28 When the death penalty was still a sentencing option, the difference between extenuating circumstances and mitigating factors received attention, but such difference is not relevant at present (*ibid*).

29 *S v Malgas* 2001 1 SACR 469 (SCA) para 9.

30 105 of 1997.

31 *Abrahams* (fn 11) 126b.

to his daughter, whom he regarded as a chattel, not merely to be used at will, but, once the first entitlement had been exercised, to be discarded for similar use by others, was accorded substantial aggravating weight and contributed to the increase in sentence from seven years' to 12 years' imprisonment.³² Thus, where a judicial officer fails to recognise the existence of a particular factor, or wrongly recognises it, or attaches the incorrect weight to a factor in a particular case, the process becomes unbalanced and the sentencing decision may be overturned on appeal.³³ However, it has also been acknowledged that, though many factors may be listed as aggravating or mitigating, some only have a neutral value and do not really influence the process.³⁴ In the analysis below neutral factors are listed separately and previous cases where these factors had been regarded as mitigating should thus no longer be followed.

Although the categories of offences selected by the legislature in the schedule on minimum sentencing are qualified by aggravating features and factors in order that the offences concerned may be ranked amongst the most serious of sexual offences, in those same categories, other aggravating and mitigating factors will influence the final grading done by judicial officers in court, however strange this may sound. In the absence of any other source, such as legislation or sentencing guidelines, case law would appear to be the main source for establishing mitigating and aggravating factors. However, recent legislative intervention, namely the Criminal Law (Sentencing) Amendment Act,³⁵ excludes in section 51(3)(aA) certain factors that may be taken into account as mitigating factors in cases of rape, namely the complainant's previous sexual history, the apparent lack of physical injury to the complainant, an accused person's cultural or religious beliefs about rape or any relationship between the accused person and the complainant prior to the offence being committed. Precedent contrary to this section should thus in future be ignored.

Normally, factors that were present before, during or after the commission of the crime will be taken into account. In terms of the recent referral practice of cases to the High Court for sentencing purposes,³⁶ a longer period elapsed between conviction and the date of sentencing. With regard to the victim (and offender), the court had far more information available than before. Despite criticism of the practice of divided cases, it would seem that, where evidence regarding future harm was considered,³⁷ the court was able to get a more accurate picture, depending of course on the way in which such evidence was interpreted. Notwithstanding, as mentioned earlier, from the beginning of 2008, when the Criminal Law (Sentencing) Amendment Act³⁸ came into operation, these cases are finalised in a shorter period of time. Although less accurate information on future harm may now be available, relevant aggravating and mitigating

32 *Idem* 122g 123c.

33 As was done in *Abrahams* (fn 11) and *Mahomotsa* (fn 14).

34 *S v E* 1992 2 SACR 625 (A) 632a. The court *inter alia* referred to the fact that the complainants had not suffered adversely. This, it is submitted, was purely coincidental and not as a result of any precaution or consideration on the appellant's part.

35 38 of 2007.

36 In terms of s 52 of the Criminal Law Amendment Act 105 of 1997.

37 *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA) 205f deems it an essential consideration.

38 38 of 2007.

factors in these cases will be determined by the regional courts themselves and they will also have the benefit of having handled the trial.

Traditionally in South Africa the factors influencing the imposition of a sentence have been grouped under the factors of the sentencing triad, namely the crime, the offender and the interests of society.³⁹ With the victim having been accorded an independent position in sentencing,⁴⁰ it is submitted that aggravating and mitigating factors should be divided into four categories, namely factors relating to the circumstances surrounding the commission of the crime, factors relating to the personal circumstances of the accused, factors having a bearing on society's interests and factors pertaining to the harmful effects of the crime on the victim.

Each type of offence has its own inherent set of aggravating factors.⁴¹ No attempt of which the author is aware has been made to list the most important aggravating or mitigating factors recognised by the various courts over the years in cases of child rape. The following is, therefore, in addition to the selected foreign practices, a compilation of such factors based on an analysis of case law and minimum-sentence legislation. The factors are divided into four categories, namely, the interests of the child victim, the offender, circumstances related to the commission of the crime and society's interests. The first category addresses the after-effects of the crime, other than physical injuries, since the courts have traditionally taken the physical injuries of the victim into account under the circumstances related to the commission of the crime. Those aggravating and mitigating factors which are criticised for being outdated or incorrect are highlighted. The following aggravating and mitigating factors have been identified in cases of rape against children.

2 4 1 *The victim*

2 4 1 1 Aggravating factors

The Supreme Court of Appeal has accepted that the physical injuries and the psychological effects of the incident on the complainant in child sexual abuse cases are essential factors to consider in cases where minimum sentences are prescribed.⁴² Despite this, it was subsequently held by the High Court that some cases may be finalised without evidence regarding the impact of the crime.⁴³ The reason for the court's decision is that, regardless of the emotional *sequelae* for the victim, some cases of rape may be so serious that they justify life imprisonment based on a finding of the absence of substantial and compelling circumstances justifying a lighter sentence.

When the psychological effects of the incident on the complainant are considered, the Supreme Court of Appeal further accepted that the following symptoms displayed by the victim justify an interpretation and conclusion that a complainant has been deeply and injuriously affected by rape: reluctance to enter her own room after the rape; a fear of sleeping alone; sudden rejection of a parent or caregiver and the repelling of physical contact; deterioration in schoolwork/failure of

39 Terblanche 186ff, following *S v Zinn* 1969 2 SA 537 (A).

40 Müller and Van der Merwe 17.

41 Terblanche 186.

42 *Rammoko* (fn 37) 205e.

43 *S v Ncheche* 2005 2 SACR 386 (W) para 29 and *S v Snoti* 2007 1 SACR 660 (E) 663c.

examinations for the first time; rebelliousness and disobedience at school; an inability to work through the rape; nightmares and the development of phobias; decreased ability to concentrate for long; the victim is ill-tempered, aggressive and rebellious and has withdrawn from family members as well as neighbourhood children and an inability to discuss the rape and a need for long-term psychotherapy.⁴⁴ The after-effects could also entail that the victim becomes an aggressive bully herself and might develop a personality disorder if the trauma would remain unattended.⁴⁵ In the case of incest the court found that the after-effects are more lingering and stigmatising than other forms of sexual assault.⁴⁶ Of importance is the fact that recent research found that stranger rape, relationship rape and acquaintance rape are experienced as equally traumatic and harmful by victims.⁴⁷ A mitigating factor found in an earlier appellate decision,⁴⁸ namely that the victim had been raped by people from the same social milieu and who were known to him or her, should thus no longer be accepted.

Other aggravating factors accepted by courts refer to circumstances where the victim does not complete her schooling as a result of the rape,⁴⁹ where the victim is ostracised by some members of the community for sleeping with men and is intimidated by the accused's family and friends,⁵⁰ the victim and her family had to move house because they were not able to live where the crime had taken place,⁵¹ the victim becomes pregnant,⁵² the victim was a virgin,⁵³ the victim was pregnant or menstruating at the time of the commission of the crime⁵⁴ and the victim is very young,⁵⁵ a physically disabled person⁵⁶ or a mentally-ill person.⁵⁷

2 4 1 2 Mitigating factors

Mitigating factors referring to the victim in child rape have been held to be where the victim has overcome the after-effects of the rape incident, or is making

44 *Abrahams* (fn 11) 124c.

45 See *S v Dayimani* unreported case no CC 12/2007 (E) of 26 Aug 2007.

46 *Abrahams* (fn 11) 125c: "What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. Love thus expressed becomes the negation of love, and the violation of the trust that should sustain it extreme. Its effects may linger for longer than with extra-familial rape." Of further importance is that the damaging effect of incest has been held to require particular attention with regard to deterrence and retribution in sentencing.

47 Sentencing Advisory Panel *Research report – 2: Attitudes to date rape and relationship rape: A qualitative study* (May 2002) at <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13-04-2003); *R v Milberry* 2003 1 CR App R (S) 396; [2003] 2 All ER 939.

48 *S v A* 1994 1 SACR 602 (A) 608j.

49 *Rammoko* (fn 37). The victim was sent back by her uncle, with whom she lived in town, to her parents who lived on a farm without any schooling facilities.

50 *S v Njikelana* 2003 2 SACR 166 (C) 174h.

51 *S v M* 1993 2 SA 1 (A) 7g.

52 *S v B* 1996 2 SACR 543 (C) 554a.

53 *S v Boer* 2000 2 SACR 114 (NC)117e; *G* (fn 11) 300h.

54 *S v V* 1989 1 SA 532 (A) 239b.

55 *S v Tyatyame* 1991 2 SACR 1 (A) 6e; *Blaauw* (fn 13) 261a. See *G* (fn 11) 300h–i where the court held that the younger the victim the more blameworthy the accused is. (The accused shows greater "sexual perversity" where he rapes a sexually immature and physically underdeveloped child.) See also *Snoti* (fn 43).

56 Refer to rape in Sch 2 Part I, (b)(ii) of Act 105 of 1997.

57 Refer to rape in Part I, (b)(iii).

good progress in that regard.⁵⁸ Courts should, however, be aware of the danger of a finding that no harm has been caused, based purely on the victim's appearance in court.⁵⁹

2 4 1 3 Neutral factors

The fact that a complainant is refined, civilised or from a good home⁶⁰ should not play any role during the sentencing decision, neither should the fact that a victim had sexual intercourse with someone else two days before the rape,⁶¹ nor where the victim has not lost her virginity as a result of the crime of rape.⁶² In fact, section 51(3)(aA) of the new Criminal Law (Sentencing) Amendment Act⁶³ excludes taking into account the victim's sexual history. Another factor that should not be to the accused's advantage is when the victim, despite the accused being aware of his HIV-positive status, did not contract AIDS.⁶⁴

2 4 2 *The offender*

2 4 2 1 Aggravating factors

Where the accused is in a position of trust, such as a father, teacher, pastor or care-giver, and abused the trust of the child or his position of responsibility it has always been regarded as one of the most important aggravating factors.⁶⁵ More recently the Supreme Court of Appeal recognised in two instances the attitude of the accused towards the victims as an important aggravating factor, a factor that had been overlooked by the trial courts. For example, a father who is sexually/possessively jealous with regard to his daughter and is determined to precede other young males in any possible carnal access to her should not be tolerated. Such an attitude, as mentioned above, results in the daughter being viewed as a chattel, not merely to be used at will, but, once the first entitlement has been exercised, to be discarded for further similar use by others.⁶⁶ Further, an accused who considers young girls as objects to be used to satisfy his lust is considered by the courts to be a sexual thug.⁶⁷

58 *Rammoko* (fn 37).

59 Such as that made in *S v Gqamana* 2001 2 SACR 28 (C) 37a and *B* (fn 52) 554a. Cf *G* (fn 11) 297j–298a for noteworthy insight from the court.

60 Taking this factor into account as aggravating would amount to discrimination among victims. Cases such as *S v Pieters* 1987 3 SA 717 (A) and *S v S* 1988 1 SA 120 (A) should thus no longer be followed in this regard.

61 Unlike *Mahomotsa* (fn 14) 442h. See also s 51(3)(aA)(iii) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 that prohibits taking into account the complainant's sexual history.

62 Unlike *Mahomotsa idem* 441d.

63 38 of 2007.

64 *Snoti* (fn 43).

65 In *S v R* 1995 2 SACR 290 (A), the accused was a teacher. It has been stated further that, for a father to abuse his position to obtain forced sexual access to his daughter's body constitutes a deflowering in the grievous and most brutal sense (*Abrahams* (fn 11) 123d). In *G* (fn 11) the accused (aged 32 and unemployed) lived with the victim's mother and the victim and her mother trusted him completely. In *M* (fn 12) a stepfather abused his position towards his stepdaughter aged 14. See also *Snoti* (fn 43) where the accused lived in the same household as the victim (aged 9) and also shared a room with her.

66 In *Abrahams* (fn 11) 122g the sentencing court was criticised for not considering as an aggravating factor such an attitude on the part of the accused to his daughter.

67 In *Mahomotsa* (fn 14) 443d the accused on separate occasions threatened two girls aged 15 years, took them off the street, locked them up and raped them.

Repeated acts of raping a victim, who has been kidnapped and locked up, were found to be indicative of the accused's use of his position of power to the full.⁶⁸ Likewise, it was accepted as aggravating that the accused used his superior physical strength when he gagged or overpowered the victim.⁶⁹ Other aggravating factors refer to circumstances where the accused has previous convictions for sexual offences against children, or for crimes against the person,⁷⁰ where the accused was awaiting trial for a similar offence when he committed the rape,⁷¹ where the accused displays certain character traits, such as the commission of another rape only six weeks before,⁷² where a youthful offender consumes alcohol together with adults before the rape⁷³ and where a degree of planning/cunning was involved in the accused's commission of the offence.⁷⁴ Further, not only apparent methods or conduct, but also the grooming process used by the sexual offender to win the trust of a child in a manipulative way and to obtain access to the child, are indicative of planning.⁷⁵

With regard to whether the accused shows remorse or not there has been conflicting views. On the one hand showing no remorse has been considered as aggravating,⁷⁶ while on the other hand it was held that the total lack of remorse on the part of the accused was not in itself an aggravating factor, but simply meant that he could not rely on remorse as a mitigating factor.⁷⁷ It is submitted that the latter viewpoint is to be followed. Terblanche⁷⁸ argues in this regard that, in light of the accused's right to plead not guilty, his exercise of such right should never be seen as a lack of remorse to be held against him during the imposition of sentence.

2 4 2 2 Mitigating factors

It would appear that where the accused, although not a juvenile any more, is of a young age, he deserves a lesser punishment.⁷⁹ In *Mabuza, Simongo, Sithole v The State*⁸⁰ the accused were 20, 19 and 18 years during the commission of the crime and it was held that despite their ages not *per se* being a mitigating factor, the court cannot disregard youthfulness because it would "deny the youthful offender the human dignity to be considered capable of redemption".

When the accused is immature or has deficient and inadequate personality traits this could make him less blameworthy.⁸¹ The effect of alcohol on the

68 *Ibid.*

69 *S v Jackson* 1998 1 SACR 470 (SCA) 478a.

70 *Mahomotsa* (fn 14) 444d.

71 *Ibid.*

72 *S* (fn 60) 123g.

73 *Boer* (fn 53) 120c.

74 *Blaauw* (fn 13) 261a; *S* (fn 60) 122h.

75 Gillespie "'Grooming': definitions and the law" 2004 *New LJ* 587.

76 *S v R* 1996 2 SACR 341 (T) 344j; *S v M* 1994 2 SACR 24 (A) 30h.

77 *Njikelana* (fn 50) 175d.

78 217.

79 *Blaauw* (fn 13) 263e; *Mahomotsa* (fn 14) 441d; *Gqamana* (fn 59) 37c; *Boer* (fn 53) 119d-f.

80 2007 (SCA) 110 (RSA) para 23.

81 *Blaauw* (fn 13) 262a-j.

accused has also been accepted by courts to diminish his sense of judgment.⁸² Terblanche⁸³ submits that diminished responsibility is one of only a few factors that have a mitigating influence on sentencing.

Other factors favourable to the accused refer to circumstances where he was under the influence of an older accused,⁸⁴ where he has an unfavourable personal background,⁸⁵ where he has the potential for development or rehabilitation,⁸⁶ where he shows remorse⁸⁷ and, lastly, where he has no previous convictions (especially where the accused is already middle-aged or older⁸⁸). However, with regard to first offenders falling under discretionary minimum sentences, the court recently distinguished Act 105 of 1997 Schedule 2 Part I offences from the other listed offences by pointing out that there is no provision to treat first offenders differently as is provided for those listed in Parts II to IV.⁸⁹ This decision may be open to criticism if it is to be applied in all cases, especially when real remorse is found. But, as indicated in paragraph 2 4 2 3 below, where breach of trust is present there is often a history of grooming and abuse prior to the first conviction which may justify such interpretation.

2 4 2 3 Neutral factors

Factors that should not influence the sentencing process refer to situations where the offence was not premeditated,⁹⁰ the accused has marital problems that caused sexual frustration,⁹¹ the accused's cultural or religious beliefs⁹² and the virility of a young man.⁹³ Further, in cases involving intra-familial child abuse or breach of trust, less emphasis than usual should be placed on the fact that the offender is of good character or has no prior criminal record.⁹⁴ Finally, a plea of guilty does not necessarily indicate remorse – its sincerity should be investigated.⁹⁵

82 *R* (fn 76) 345b; *S v J* 1989 1 SA 669 (A) 686h; *S v M* 1994 2 SACR 24 (A) 30c; *Njikelana* (fn 50) 174d–e.

83 228.

84 *S v V* 1989 1 SA 532 (A) 542d.

85 In *Blaauw* (fn 13) 262a–j it was found that the accused had been negatively influenced by years of rejection and assault by his father, a lack of a family life, a low intelligence and his stay in a reformatory; in *Abrahams* (fn 11) 126j the accused's son had committed suicide two years prior to the rape of his daughter and it was found that this had adversely influenced his conduct within the family and had led to a diminution in the judgment that he brought to bear as a father; see also *Gqamana* (fn 59) 35g–i.

86 *R* (fn 76) 346b; *S v V* 1996 2 SACR 133 (T) 138j–139a; *Sikhipa* (fn 14). In these cases, the slightest possibility of rehabilitation sufficed.

87 See *M* (fn 12) for a discussion of the circumstances under which a court should make a finding of remorse.

88 *Abrahams* (fn 11).

89 *M* (fn 12).

90 *S v M* 1982 (1) SA 590 (A) at 593a should thus not be followed.

91 *S v V* (fn 86) 136b–c should thus not be followed. It is suggested that this factor can, at most, provide some explanation for the conduct of the accused, but should never be a ground for holding him less blameworthy.

92 S 51(3)(aA)(iii) of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

93 *Mahomotsa* (fn 14) 442d–e.

94 Canadian Department of Justice "Sentencing to protect children" *Consultations and outreach* (24/4/03) 3. See also *M* (fn 12) 80–81.

95 See *M* (fn 12) paras 70–82 for a discussion in this regard.

2 4 3 Circumstances related to the commission of the crime

2 4 3 1 Aggravating factors

Children are vulnerable and therefore defenceless, thus by choosing a child as victim the accused increases his blameworthiness.⁹⁶ As mentioned earlier, this was acknowledged by the legislature when the rape or compelled rape⁹⁷ of any child under the age of 16 was categorised as deserving of life imprisonment.⁹⁸ Other aggravating features elevated to this category are instances where the victim is under the age of 18 and the rape has resulted in the death of the victim,⁹⁹ or where the victim is between the ages of 16 and 18 years – and was raped more than once, or by more than one person acting under common purpose,¹⁰⁰ the accused has been convicted of two or more offences of rape and has not yet been sentenced,¹⁰¹ the accused knew that he/she was HIV-infected¹⁰² and where grievous bodily harm is inflicted on the victim.¹⁰³ It has also been accepted that circumstances which contribute to the accused deserving a more severe punishment include those where the accused used force¹⁰⁴ or threats¹⁰⁵ or assaulted the victim during the commission of the crime.¹⁰⁶ It is equally so when the act of rape caused physical injuries to the child¹⁰⁷ and particularly when the physical injuries caused permanent damage.¹⁰⁸

In *S v Tyatyame*¹⁰⁹ the act of rape committed by the accused was found to display callousness or a lack of feeling. Where the victim was exposed to further humiliation it was also taken into account as unfavourable to the accused, for example, where the victim was left naked while witnesses arrived¹¹⁰ and where

96 *S v D* 1995 1 SACR 259 (A) 260g–h; *M* (fn 12) para 116; Terblanche 191.

97 In terms of ss 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

98 Sch 2 Part I, (b)(i) of Act 105 of 1997.

99 Refer to murder in Part I, (c)(i).

100 Refer to rape in Part I, (a)(i) and (ii). This feature voices the recognition of gang rape as an aggravating circumstance as acknowledged in *Boer* (fn 53) 117d; *S v M* 1979 4 SA 1044 (BH) 1051e: “Dit is ’n beesagtigheid;” *V* (fn 54) 540a; *Mabuza* (fn 80) para 29: “They invaded her body, humiliated her and stripped her of her dignity.”

101 Refer to rape in Part I, (a)(iii).

102 Refer to rape in Part I, (a)(iv). If the complainant is fortunate enough not to contract HIV/AIDS, the mere taking of ARV medication before the tests may still have substantial negative side-effects: in *S v Segole* 1999 2 SACR 115 (W) 124c the complainant could not go to work, was nauseous, stayed in bed for about six weeks and her hair started falling out. If the accused is HIV-positive, life-threatening diseases may also be transmitted to the victim (*Blaauw* (fn 13) 260g).

103 Refer to rape in Part I, (c).

104 *Jackson* (fn 69) 478b; *V* (fn 54) 540a; *Attorney-General, Eastern Cape v D* 1997 1 SACR 473 (E) 477e; *S v M* 1985 1 SA 1 (A) 9c.

105 *R* (fn 76) 343j; *S v M* (fn 51) 5b.

106 *Boer* (fn 53) 117e; *M* (fn 100) 1051f; *Pieters* (fn 60) 725a–j.

107 *R* (fn 76) 343f–i; *Tyatyama* (fn 55) 6g.

108 In *S v M* 2002 2 SACR 474 (SCA) 418d it was found that the trauma caused to the genitals of his daughter, aged six, by a father who raped her over a period of six months, would result in lifelong painful intercourse, with probable problems in enjoying adult relationships. In *Tatyama* (fn 55) 6g–h it was found that a seven-year-old girl would endure lifelong suffering as a result of a lack of bowel control and would not be able to have children.

109 *Idem* 6f; also *B* (fn 52) 553h: “[S]y inlywing tot die seksdaad was simpatieloos.”

110 In *Boer* (fn 53) 117g.

the two accused had posed as policemen, had taken the complainants by force to a dam, and had laughed at and mocked the complainants while they took turns in raping them.¹¹¹ Other aggravating factors relating to the circumstances under which the offence is committed refer to the abduction of the victim;¹¹² where the accused left the victim behind in a deserted spot,¹¹³ when the rape was committed after breaking into the victim's house¹¹⁴ or when the complainant was forced into her house where the rape was then committed,¹¹⁵ the victim was raped in her own bedroom¹¹⁶ or the rape took place in the presence of other family members.¹¹⁷

2 4 3 2 Neutral factors

A factor that has been held not to be aggravating is where the accused did not use a condom during the act of rape.¹¹⁸ On the other hand, factors that should be regarded as neutral factors, with no mitigating weight include the absence of a weapon, the absence of any physical threat by the accused, the absence of any cruelty or unnecessary violence, the rape incident caused no physical harm¹¹⁹ and any relationship between the accused person and the complainant prior to the offence being committed.¹²⁰ The fact that the victim "consented" to the sexual act(s) after a grooming process is also not mitigating, as this amounts to ostensible consent.¹²¹

2 4 4 *The interests of society*

2 4 4 1 Aggravating factors

As far back as 1979 the high incidence of rape in South Africa has been taken into account during sentencing.¹²² In light of an escalation of child rape cases, where sentences are too lenient, those cases may cause a public outcry.¹²³

111 V (fn 54) 539j.

112 M (fn 104) 9c; V (fn 54) 540a.

113 R (fn 76) 343j; *Tyatyama* (fn 55) 6f; J (fn 82) 683h.

114 M (fn 51) 5a; *Mabuza* (fn 80) para 29.

115 M (fn 100) 1051f.

116 M (fn 12).

117 In M (fn 51) both the girl and her mother were raped in the presence of the girl's father and brother.

118 *Gagu* (fn 11).

119 See s 51(3)(aA)(ii) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 for the statutory guideline excluding it. In *S v Jansen* 1999 2 SACR 368 (C), the crime was classified as a borderline case because of the fact that there was no physical harm. This case should thus not be followed in this regard.

120 S 51(3)(aA)(iv).

121 See Van der Merwe ch 5 para 5.4.

122 M (fn 100). See *Dayimani* (fn 45) 13–14 for a thorough analysis of the rape statistics in the Eastern Cape and specifically in the court's area of jurisdiction. It was observed, *inter alia*, that every third day the rape of a girl between 5 and 15 is reported. The court described it as a plague and referred to the 32% increase of child rape in Eastern Cape: "[O]ur country faces an evil of gigantic proportions especially when it comes to the barbaric dehumanisation and brutalisation of girl children by means of rape" (13). "A court has the responsibility to uphold the Constitution [in terms of s 28] and must protect all girls and make sure they are safe" (14). This remark will, in the light of rape now being a gender-neutral offence, certainly apply to any offence of rape.

123 *D* (fn 104) 478f; *G* (fn 11) 300j.

3 CONCLUSION

This article consolidates judicial and legislative guidelines regarding the sentencing process in child rape cases. Such guidelines address general matters as well as the factors relevant to the accused, the complainant, the circumstances relating to the commission of the crime and society's interest. The article attempts to provide clarity regarding the factors that are considered to be aggravating or mitigating in the offence category of child rape, as well as regarding the weight that should be attached to them. The ultimate aim is to assist judicial officers (and other role players addressing the court on sentence) in their task, to minimise unjustified disparity and, therefore, to treat sex offenders (and victims) with greater equality during the sentencing process.

The appellant had a heavy onus to discharge. He had to prove to the satisfaction of the court that, by reason of his complete and permanent reformation, he is in no way likely to fail in the future to discharge all of the obligations appertaining to his profession. In the case of a serious defect of character, reformation is known to be difficult and, therefore, to establish reformation as sufficiently probable, might require more cogent evidence than in respect of a less serious fault . . . Little, if anything, is put forward by the appellant that might mitigate the heinousness of his conduct. Moreover, it must count against the appellant that his misdeeds were committed when he was no longer a young man. For, even at that mature age, the appellant was lacking in the most basic standards of his profession. He displayed a contempt for the law, the courts and for honest dealings with his clients, at least one of whom occupied a position of particular vulnerability in relation to him. Simply put, the appellant was everything that an attorney ought not to be.

Ponnan JA in Swartzberg v Law Society, Northern Provinces [2008] 3 All SA 438 (SCA) para 28.