REPUBLIC OF SOUTH AFRICA

**SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG**

CASE NO. A435/2013

In the matter between:

MOYO, DANISA Appellant

And

THE STATE Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The appellant, Danisa Moyo, was convicted in the Johannesburg regional court of one count of rape in contravention of section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and related matters) Amendment Act, 32 of 2007. He was sentenced to imprisonment for life.

[2] Leave to appeal against both conviction and sentence was granted by the court a quo on 15 February 2013.

SUMMARY OF THE EVIDENCE

[3] The State applied for the use of an intermediary in terms of section 170A of Act 51 of 1977. This application was not opposed by the appellant and was granted by the Court a quo having found that it would be in the interests of justice to receive the evidence of the complainant, who was 7 years old at the time of the commission of the offence.

[4] The complainant testified that during 2010 she stayed in a home at Regents Park with her mother and father. Their family occupied the main house. Outside in the yard was a garage which had been converted into living quarters for the appellant ('the garage'). Ordinarily, the appellant's wife would reside in the garage with him but on the day of the incident, she was not there.

[5] She testified that the appellant had called her to give her some sweets. When she complied, he dragged her into the garage. He placed her on the bed and covered her mouth with a pillow.

[6] With the aid of two anatomically correct dolls, she demonstrated that the female doll was lying on her back and the male doll was lying on top of the female doll. She stated that at that stage she wasn't wearing any underwear nor was the appellant. She demonstrated that the appellant had inserted his penis into her vagina. After this act, he gave her sweets, R2 and told her not to tell her parents. She said that she had thrown the R2 away.

[7] She testified that he had raped her a second time. She says that she was in the house, that the appellant had grabbed her and that he had

then taken her to the garage. Thereafter, he threw her onto the bed and undressed her and himself and that he then started with, what she had labelled, "the bumping". He also covered her face with a pillow. This he did to stop her from screaming.

[8] After finishing he gave her R1 and said that she should not tell her parents. She said she gave the R1 to a friend.

[9] She explained that her mom had seen her panties and that they had blood on them. Her mother asked her what had happened and she had told her.

[10] She explained that her mother had bathed her after the second incident.

[11] She said that the appellant was the only "Malumi", translated meaning “Uncle”, who was staying in the garage. She said the "Uncle" who had done this to her, was Ndlovo.

[12] The complainant’s mother had testified that the complainant had made a report to her regarding the two incidents. This happened whilst she was bathing her as she had complained that her abdomen was tender and that it was painful when touched.

[13] The complainant told her mother that the uncle had fetched her and had taken her to the garage where he stayed. The complainant had explained to her mother that he had taken his penis and had inserted it inside her. She said that he had made "bumping" movements on top of her.

[14] The father of the complainant had gone to church on the evening of the incident and was not at home. The complainant's mother was at work.

[15] The complainant's mother had examined her panties and had found blood on the front and the back of them.

[16] She then phoned the complainant's father and they went to the police station to make a report.

[17] Dr Sibongile Nkobi, the Chief District Surgeon in Soweto, based at the Medical-Legal Clinic, testified that she had examined the complainant on 12 March 2010, and had completed a form J88 that was received as evidence.

[18] After the examination Dr Nkobi concluded that the injuries were consistent with forceful penetration. She explained that the injuries were recent and had occurred within a period of 72 hours prior to the examination which time estimate, she could give by virtue of the fresh tears. The injuries she found included: redness of her clitoris, frenulum of clitoris, urethral orifice, para-urethral folds, labia majora, labia minora, the posterior fourchette and fossa navicularis. Her hymen was swollen with fresh tears at 3 and 9 o'clock

[19] The complainant had a discharge which Dr Nkobi was very reluctant to say was natural due to the fact that she was only seven years of age. She expressed the view that a child of seven, should not have an infection of that kind. She described the child of small build, she measured the child at 118 centimetres, weighing only 21,8 kilograms.

[20] The appellant testified that he knew the complainant and that he worked with her father at the same workplace. He denied having had sexual intercourse with her. He stated that the garage was partitioned and that another man occupied the one side of the garage. This man was from Zimbabwe but he could not provide the

name of this person despite having shared the garage for a considerable period of time.

ASSESSMENT OF THE EVIDENCE

[21] The record was incomplete and certain evidence was missing including most of the appellant's evidence in chief. However, the parties accepted that the appeal could be argued on the record as it stood and the matter proceeded on that basis. I too hold the view that the record is adequate for a proper consideration of the appeal,see S v Chabedi, 2005 (1) SACR 415 (SCA) at paras [5] and [6]. `

[22] It is common cause that the complainant was raped. The medical evidence supports this conclusion and this fact was not disputed by the appellant.

[23] The only question which falls for determination is whether the appellant has been reliably identified as being the perpetrator.

[24] The evidence of the complainant is that of a single witness. The court a quo had due regard to the cautionary rules applicable when assessing this type of evidence. It is clear that the court a quo was acutely aware of the fact that it could only convict on the evidence of a single witness, if the evidence was satisfactory in every material respect, see R v Mokoena, 1932 OPD 79 at 81 and Maemu v S [2012] JOL 28585 (SCA) :

24.1. It took into account the contradiction which existed in respect of the amount of times the appellant had been arrested. The complainant had testified that the appellant

had been arrested twice. Both the complainant's mother and the appellant testified that he was only arrested once. The court, quite correctly, held that this was not material. The court found that the child might have been mistaken. No reason was advanced on appeal how this inconsistency could have a bearing on the complainant's evidence in relation to her identification of the appellant.

24.2. Much was made of the fact that there might be two men resident in the garage. In my view, the magistrate, quite rightly, paid little heed to this criticism. As far as the complainant was concerned, it was only the appellant who was resident there. If, objectively, somebody else had stayed there, she was unaware of this fact and could thus not have confused the actual perpetrator with the other resident. It is, however, common cause that there was no other person resident on the property with the name of Ndlovo. The appellant did not deny that he worked with the complainant's father, nor did he deny that his name was Ndlovo. Nor did he suggest that there was another person by the name of Ndlovo on the premises or that her father had another friend by the name of Ndlovu who worked with him and who stayed at the premises.

24.3. It was argued on appeal that something had been suggested to the complainant during an adjournment of the complainant's evidence-in-chief. Prior to the

adjournment she had testified that she did not know what the appellant was doing on top of her and she did not feel that she had anything inside of her. After the adjournment she had testified that the appellant had put his manhood into her. The court a quo quite correctly, had placed on record that the child had used the word "pipi" for penis/manhood and "koekoe" for vagina. The intermediary when translating had used court appropriate language. In respect of the so-called "coaching" the State argued, that there was no indication on record, that she had been coached. This feature was certainly not explored during cross-examination. The court's attention was also not drawn to this aspect. Further, even if the complainant had consulted someone, she was testifying in chief. In any event, her evidence in respect of whether or not she had been raped, was not disputed and was, in any event, corroborated by Dr Nkobi. The issue in the trial was not whether or not the child had been raped. The issue was whether or not the appellant had properly been identified.

24.4. The complainant was criticised for not being clear about the whereabouts of her father at the time of the rape and this, so the argument ran, impacted on her credibility. Such criticism is devoid of merit. All the child knew was that her father was not at home during the attack on her. Had he been, the incident would not have occurred.

There were two incidents. She explained that her father had been at church and later that he had been at work. She might well have referred to the two respective incidents, but this "contradiction" is certainly not material and does not have a bearing on her identification of the appellant.

24.5. Similarly, the child was criticised for saying that her aunt Judy was home and then for saying she had locked herself into her bedroom. Once again, she might well be referring to the two different incidents. This aspect of her evidence was used to demonstrate that the child could not distinguish between fantasy and reality. I disagree. She was raped. How her recollection of the whereabouts of the aunt (who did not come to her assistance and thus clearly was not around at the time of her ordeal) would have a bearing on assessing the reliability of the complainant's identification of the appellant, is uncertain.

[25] The following factors all point to the court a quo having correctly relied on the evidence of the complainant :

25.1. The complainant knew the appellant well.

25.2. The appellant and the complainant stayed on the same property and had been doing so for a considerable period of time.

25.3. The appellant was a colleague of the complainant's father.

25.4. No reason could be advanced why the complainant would falsely incriminate the appellant.

25.5. No reason could be advanced how she could have been mistaken.

25.6. Independent corroboration that the rape had taken place existed in the evidence of Dr Nkobi. She found the injuries consistent with forced penetration.

25.7. The complainant did not change her version.

25.8. The complainant had been cross-examined at length by the legal representative of the appellant.

25.9. The complainant's mother corroborated her version in that she had found her panties with blood on them.

[26] In the *Commentary on the Criminal Procedure Act* by Du Toit and Others, Vol 2, the learned authors comment as follows in Chapter 24, p 8A:

"That even the testimony of a child who was only three years of age at the time of the alleged offence may pass muster was demonstrated in Cele v S [2012] 4 All SA 182 (KZP), where there was need for "double caution" in view of the fact that she was a single witness in a rape case. The complainant, who was five years old at the time of trial, had re-enacted the event using male and female dolls; had described pain in her vagina; and her injuries were established by medical evidence. She gave a detailed and logical account of the rape, and her story was considered to be one that could not credibly emerge from the fantasy of a three-year old girl, as the "details were too graphically realistic and precise". She could, said the court, not have fantasised about the event as she had no idea about the nature of sexual acts and could not imagine something of which she had no idea or experience. Further, she had told her grandmother about the matter at the first opportunity; had blamed the appellant without hesitation in that complaint; had adhered to a version

throughout; and had remained unshaken throughout cross-examination. She was an intelligent five-year old at trial, who gave her evidence in a clear and convincing manner."

[27] The court a quo was also fully conscious of the principle that satisfaction of the cautionary rule will not necessarily warrant a conviction and that the ultimate requirement remains proof beyond a reasonable doubt which depends upon an appraisal of all the evidence.

[28] Appellant denied having raped the complainant. He admitted that he was known to the complainant and her family as Ndlovu. The appellant called his wife as a witness who was sworn in as 'Mrs Amelia Ndlovu'. This notwithstanding, she denied having ever heard anybody calling the appellant Ndlovu. She said that the appellant's name was Danisa Moyo and that everybody used to call him 'Malume'. The complainant identified the perpetrator by name. She said it was 'uncle Ndlovu'. The appellant's wife clearly distanced herself from the name 'Ndlovu' to protect her husband. He, by contrast though, admits being known as Ndlovu to the family of the complainant. Appellant's counsel argued that the evidence of his wife took the matter no further. I disagree. She testified that the two families were quite close, that she would at times take care of the complainant and that they would go to church together. When the complainant thus identifies the appellant by name, she knows exactly who she is talking about. It is also significant that the complainant had testified that the appellant's wife ordinarily resided with him but that on the day in

question, she was not there. This fact, is corroborated by the appellant's wife. She testified that she was in Zimbabwe at the time. It was also not suggested that the other 'Malume' who stayed in the other part of the garage, stayed there with his wife. The complainant did not mistake the appellant for the other occupant. She said it was uncle Ndlovu, who ordinarily stays in the garage with his wife but whose wife, on the night of the incident, was not there.

[29] The complainant could not have fantasised about the event. There is no evidence to suggest that she had any idea about the nature of sexual acts. In any event, it was not disputed that she had been raped. Also, she is corroborated by Dr Nkobi's evidence. She had blamed the appellant without hesitation and had adhered to a version throughout the trial. No motive exists for this child to identify the appellant as the perpetrator other than that he was the person who had in fact raped her.

[30] Having regard to all the elements which point to the appellant's guilt, all those which are indicative of his innocence and having regard to the inherent strengths, weaknesses, probabilities and improbabilities on both sides, I have come to the conclusion that the balance weighs so heavily in favour of the respondent as to exclude any reasonable doubt about the appellant's guilt. See *S v Chabalala*, 2003 (1) SACR 134 (SCA) at para [15]. *S v Shackell*, 2001 (4) SA 1 (SCA) at para [30] and *Maemu v S*, [2012] JOL 28585 (SCA).

[31] The appeal against the conviction is dismissed.

SENTENCE

[32] Having been convicted of rape of a minor, the court a quo sentenced the appellant to the minimum prescribed sentence, being life imprisonment. The court a quo held that there existed no substantial and compelling circumstances to deviate from the minimum sentence.

[33] The issue before me, thus, is whether or not the court a quo was correct in this finding. Whether or not substantial and compelling circumstances exist, is, essentially, a factual enquiry. The appellant's submissions in respect of the existence of substantial and compelling circumstances were focussed on: (a) his age; (b) the fact that he is a first offender; (c) that he has never clashed with the law at all; (d) that he had lived a relatively stable life up to the commission of the offence; (e) that he had stood trial for a long period before sentencing took place. In this regard it was submitted that he had been arrested on 13 March 2010 and had been sentenced on 13 December 2012. He was thus in custody awaiting trial for two years and nine months.

[34] In *S v Matyityi*, 2011 (1) SACR 40 (SCA) at 46D-E Ponnan JA held as follows:

"S v Malgas is where one must start. … Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from Malgas: the fact that

Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present."

[35] In *S v Kwanape*, [2012] ZASCA 168, Petse JA cautioned as follows:

"[15] Recently this court reiterated in S v Matyityi 2011 (1) SACR 40 (SCA) that 'the crime pandemic that engulfs our country' has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that 'ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed."

APPROACH BY A COURT ON APPEAL AGAINST A SENTENCE IMPOSED IN TERMS OF THE ACT

[36] In *S v PB (supra*), Bosielo JA formulated the approach as follows:

"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are

ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

[37] *S v Vilakazi*, 2009 (1) SACR 552 (SCA), Nugent JA said at 562G : " *it is enough for the sentence to be departed from that it would be unjust to impose it* ". To determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing and referred to as "mitigating factors".

[38] In *S v Nkomo*, 2007 (2) SACR 198 (SCA) Lewis JA at 201e-f held as follows:

"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

CONSIDERATION OF FACTS PERTAINING TO SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

[39] I turn now then to the central issue and consider all the circumstances available to the court a quo to assess whether the facts which were considered are substantial and compelling or not, or, put differently, whether it would be unjust to impose life imprisonment in casu.

[40] A Victim Impact Report was received, and the probation officer who had prepared it, testified in respect thereof. The Victim Impact Report records the complainant's date of birth at 15 January 2003. The date of the offence was 10 March 2010. The complainant's mother did not advise the school about the incident as she was concerned about stigmatisation of the child. Although the complainant is doing well at school she is withdrawn and does not play with other children. She prefers to be by herself. The probation officer observed the complainant as being emotional. According to the complainant's mother, her behaviour has drastically changed as she isolates herself from other children and does not want to play with other children. Her mother says that the complainant is always tired and prefers to sleep most of the time. The probation officer gathered that the complainant had felt very vulnerable and powerless during her ordeal. The probation officer referred to certain studies in her report that the long-term effects of rape can include low self-esteem and depression. The complainant's mother had reported to the probation officer that the complainant had attended counselling but that it had not assisted her much. I quote her professional opinion verbatim: *"The victim was seven years at the time of the incident. The perpetrator is known to the victim. He abused the victim's trust in him, he was selfish and inconsiderate as he only focused on satisfying his needs and in the process he failed to think about the future of the child concerned and the impact on the family of the victim. She*

experienced psychological trauma as a result of rape and her self-esteem seems to be low. The victim has a sense of insecurity and instability. She might struggle to trust people as she was repeatedly violated by someone who is known to her. Some of the rapists do not murder their victims but one destroys their self-respect, self-esteem and their feelings of physical, mental integrity and security."

[41] Her recommendation reads as follows: "*As already indicated in the report, the victim stated that she needs further therapeutic intervention as she is still not coping with the ordeal. The Probation Officer has made arrangements with the Social Worker at Teddy Bear Clinic for the victim and her mother to attend further counselling."*

[42] The appellant did not testify in mitigation. A pre-sentence investigation report prepared by a forensic criminologist, Dr Eon Frederick Sonnekus, was received as evidence and he also testified. He found that the appellant still possessed reform abilities. He stated that the appellant had consented to attending the non-admitters sexual offenders' program. He said that he had a good vocational history and that he had also interviewed his previous employer as well as his wife. The appellant's wife still wants to maintain a marriage relationship with the appellant. He stated that he found that the appellant's profile did not fit in with that of a very dangerous paedophile that fixates on sexual gratification mostly with children. He could, however, not exclude such possibility. Dr Sonnekus testified that he had spoken to the

appellant's employer, Mr Baker, and that he had stated that the appellant had been a very good employee. He had recruited him from the level of a gardener to become an assistant welder in his business. He had completed approximately three years of successful employment within the factory and he would be more than willing to re-employ him eventually, even after a 20-year sentence. He recorded the following further facts in respect of the appellant:

[43] The appellant was born on 25 February 1970 in Zimbabwe. His father passed away when he was about two years old. He is the second child of a family of four children. His older brother was interviewed and indicated that the appellant was a well-mannered child and that no complaints had been lodged against the appellant with regard to his behaviour towards girls during his teenage and juvenile years. He has been married to his wife for thirteen years and has three children. The appellant passed Grade 7 and did not receive and secondary or tertiary education. The appellant came to South Africa during 1991. He initially worked as a gardener. He has become a South African citizen.

[44] He was eventually recruited by Mr Baker who employed him on a permanent basis as an assistant welder. Mr Baker indicated that he was willing to re-employ the appellant in the event of parole being granted in the distant future. Dr Sonnekus then proceeded to list and discuss possible mitigating factors. They included:

44.1. the appellant is a first offender both in South Africa and in Zimbabwe;

44.2. the appellant has three dependents a son, aged 19, a daughter, aged 9 and another son, aged 4. All the appellant's children live in Zimbabwe. The two younger children live with their grandmother;

44.3. the appellant was employed and earned a monthly salary in the sum of R2 900 of which he sent R1 000 per month to Zimbabwe for the maintenance of his three children;

44.4. the appellant has been in custody from 13 March 2010;

44.5. the appellant suffers severe mental anguish as an inevitable result of his crime notwithstanding the fact that he denies that he committed the crime;

44.6. he had drunk a bottle of Autumn Harvest wine on the day of the crime.

[45] I interpose to caution that a substantial portion of the factors listed under "Mitigation" by Dr Sonnekus, falls within the category that would qualify as "flimsy" grounds that *S v Malgas,* 2001 (1) SACR 469 (SCA) cautions should be avoided.

[46] Also, in *S v Vilakazi (supra)* Nugent JA at 574D commented as follows: "*Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided.*"

[47] The time spent in prison awaiting trial, being 2 years and 9 months, certainly does not qualify as ‘flimsy’ grounds but will return to the issue of whether or not, in view of the circumstances of this case, it can be considered to constitute substantial and compelling circumstances which could warrant a deviation from the imposition of a life sentence .

[48] Dr Sonnekus then summarised and discussed the possible aggravating factors as follows:

48.1. Under the heading "The seriousness of the crime", he records: *"The seriousness of the crime of rape against a minor girl can never be underestimated. (b) The fact that the victim was approximately only seven years old when the rape took place left her almost totally vulnerable. … The seriousness of the crime does not only pertain to the age of the victim, but also to the application of the brutal force that the offender allegedly used. The painful and irritated genital areas of the victim, accompanied by a recent tear in her hymen, according to the medical evidence before the court, confirms the seriousness of the rape. The same applies to the bloodied panties of the victim that her mother discovered approximately two days after the rape took place."*

48.2. The appellant served within a position of trust as a co-worker of the complainant's father who also worked for Mr Baker. The appellant rented a space in a garage on the premises and was known to the complainant. The complainant respected the appellant and called him "Malume", meaning "Uncle".

[49] As to the prevalence of the crime, Dr Sonnekus quite correctly points out that: "*The victim vulnerability of especially women and*

children as victims of sexual crimes is of great importance and the protection thereof remains a national priority."

[50] Dr Sonnekus records the possible distribution of the HIV virus by sex offenders that could shorten the lifespan of victims.

TREND TO SUBSTITUTE TERMS OF IMPRISONMENT IN THE PLACE OF THE ORDAINED LIFE IMPRISONMENT

[51] To use as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust, is an acceptable method. See *S v Malgas* (supra) at 480H-481A.

[52] The cases of *S v Abrahams*, 2002 (1) SACR 116 (SCA), *S v Sikhipha*, 2006 (2) SACR 439 (SCA) and *S v Nkomo*, 2007 (2) SACR 198 (SCA) do not constitute bench-marks or precedents binding on other courts. That such a view is a misconception was stated in *S v PB*, 2013 (2) SACR 533 (SCA) at 539. In paragraph [16] Bosielo JA addressed the so-called trend to substitute terms of imprisonment in the place of the ordained life imprisonment as follows:

"Can this trend, if it can be called that, qualify to be elevated to the status of a precedent which is intended to bind all the courts which have to consider sentence whilst sentencing an accused who has been convicted of rape read with s 51(1) of the Act? Is a court expected, without proper consideration of the peculiar facts of this case, to slavishly follow the so-called trend not to impose life imprisonment for rape? By doing so, a court would be acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court, albeit in a similar case. It follows in my view that such a sentence

would be appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all."

APPROACH TO YOUNG RAPE VICTIMS

[53] In *S v Kwanape*, [2012] ZASCA 168, Petse JA held as follows in paragraph 17:

"[17] Rape is undeniably a despicable crime. In N v T it was described as 'a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In S v Chapman this court said it is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. Its gravity in this case is aggravated by the fact that the victim was a 12 year-old child. In S v Jansen rape of a child was said to be 'an appalling and perverse abuse of male power'. The court there went on to say:

> *[I]t is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background . . . and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer the added psychological trauma which resulted in a marked change of attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.*
>
> *It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution."'*

[54] In *S v GK*, 2013 (2) SACR 505 (WCC) Matthee AJ in a minority judgement, makes the following observations in respect of a victim, 7 years of age, which I endorse. He observes:

"[56] The victim in the present matter was 7 years old when she was raped by appellant. The mere fact, that I can imagine a worse rape than the present one, does not assist appellant. A crucial consideration is the age of the victim. The minimum sentencing provision germane to the present matter stipulates the age of the victim as needing to be younger than 16 years. The victim in the present matter was less than half that age. In my opinion that in itself makes it 'horrendous enough to justify the imposition of the maximum penalty'.

[57] I recognise the danger of a degree of arbitrariness when drawing a line at one age, as opposed to another age - for example 15 years old, as opposed to 11 or 12 years old. In this regard a reading of the Child Justice Act 75 of 2008 (hereafter the Act) is instructive.

[58] Dating back to Roman law, the age when a child was deemed to be doli incapax was set at children below 7 years old. Between 7 years old and 14 years old a child was deemed to be doli capax - in other words, there was a rebuttable presumption that the child lacked criminal capacity. The Act has retained this distinction between doli incapax and doli capax. However, it has increased the age from 7 years old to 10 years old of children deemed to be doli incapax.

[59] Quite clearly the legislature was of the view that children less than 10 years old need to be distinguished from children older than 10 years old and needed added special protection as a result of their age. Similarly, the Act provides children between 10 years old and 14 years old with more protection than children older than 14 years old.

[60] No doubt, underpinning these distinctions, inter alia, are the different developmental stages of children at different ages. Although in the present matter the legislature has not drawn a distinction between a 15-year-old child and a 7-year-old child, it would fly in the face of the rationale of the said distinctions in the Act, and indeed in the common law before the Act, not to draw a distinction between such children when assessing the gravity of a rape and the need to give protection to them against rapists."

APPLICATION OF ALL THE AFOREGOING PRINCIPLES TO THE CURRENT APPEAL AGAINST A SENTENCE IMPOSED BY THE ACT

[55] The facts reveal a young girl, in effect devoid of any means, physical or intellectual, to protect herself against the appellant. He enticed her with sweets and then dragged her little frame, weighing less than 22 kilograms, and standing 118 cm tall, into the garage where the appellant raped her. Her tender years would compromise her ability to give meaningful evidence pertinent to the issue of long-term damage to herself. Her mother testified though that subsequent to the ordeal, she has changed dramatically. She has become a withdrawn child preferring to sleep rather than go out and play as children of her age should be doing. This Court should protect her and other children of 7 years old. Indeed, children younger than 10 years of age, should receive added protection.

[56] The appellant, a 40-year old man at the time of the commission of the offence, was known to the complainant and lured her to the garage before forcibly dragging her into the garage. He covered her head with a cushion to muffle her screams. He then gave her

money to buy her silence. This nightmare he inflicted upon her twice.

[57] The rape by the appellant has forever changed the life of the complainant. In effect she has been given a life sentence by the appellant.

[58] When it comes to sentencing rapists, especially of children as young as 7 years old, it cannot be "business as usual" (*S v Malgas (supra)*) and the protection of possible future victims must be taken into consideration into any decision on an appropriate sentence. The appellant has shown no remorse. His offer to attend a "non-admitters: sexual offenders program" rings hollow and offers very little comfort. On record there exists not a shred of remorse or insight by the appellant as regards his monstrous treatment of the victim. The failure by the appellant to in any way

[59] grasp the evil of what he has done, militates against the possibility of his future rehabilitation

[60] The court a quo very carefully analysed all the facts placed before him by Dr. Sonnekus and the probation officer. He looked at the authorities and concluded that he could not find any substantial or compelling circumstances justifying the imposition of a lesser sentence, other than that prescribed in terms of section 51(1) of the Act.

[61] Although the period awaiting trial might under different circumstances have qualified as constituting substantial and

compelling circumstances, *in casu*, the other factors mentioned herein, neutralise such a finding.

[62] I am unpersuaded that the court a quo erred in its conclusion that substantial and compelling circumstances were absent. I hold the view that to come to a contrary decision in this case would constitute a failure to heed the caution in *S v Malgas* (supra) that "*the specified sentences are not to be departed from lightly or for flimsy reasons*" and that "*speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders … are to be excluded.*" (See S v *Kwanape* (*supra*)).

[63] In the result the appeal against the sentence of imprisonment for life is dismissed.

_____

I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

_____

B MASHILE
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 25 March 2014
Judgment delivered: 4 April 2014
Appearances:
For Appellant: Adv.C Van Veenendaal
Instructed by: Johannesburg Justice Centre

For Respondent: Adv JG Wassermann
Instructed by: Office of the Director of Public Prosecutions