REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A350/2017
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
16/8/2022

In the matter between:

STHEMBISO KENNETH BALOYI APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

DOSIO J:
INTRODUCTION

[1] The appellant was arraigned in the Regional Court, sitting in Soweto on two counts of rape in contravention of section 3 of The Sexual Offences and Related Matters Act 32 of 2007 ('Act 32 of 2007'), read with section 51 (1) of The General Law Amendment Act 105 of 1997 ('Act 105 of 1997').

[2] The appellant pleaded not guilty to both counts, however, he was convicted on all counts and sentenced to life imprisonment in respect to count one and count two.

[3] The appeal is in respect to conviction and sentence.

[4] The appellant was legally represented.

[5] Condonation for the late filing of the appeal was granted.

EVIDENCE

[6] The three important witnesses that testified for the State were [....] R [....] 1 ('the complainant'), L [....] 1 R [....] 2 ('the maternal aunt') and doctor L [....] 2 L [....] 3 Kuya ('doctor Kuya').[....] R [....] 1

[7] The complainant testified that she was twelve years old in 2011 when the first rape took place. At this time, she lived with her father and younger brother, who was eight years old. Her mother was staying at Braamfischerville as her parents were separated. The first incident occurred while they were visiting their paternal grandmother at Dube. It took place inside an outside shack belonging to her uncle. She, her father and brother were sleeping in one bed. She was on the side and her brother was in the middle, the father was on the other side of the bed. She testified that the father moved from where he was sleeping to her side. Although the lights were off, she could still see that it was her father who removed the blankets as the street lights were illuminating the inside of the shack. Her father then climbed on top of her and forced his private part into her private part causing her pain. He continued to make up and down movements while his penis was inside her vagina. He also wore no condom. He did not say anything and neither did she, as she was afraid. Her brother did not wake up. Thereafter her father went back to sleep where he was initially sleeping.

[8] As regards the other incidents of rape that occurred between January 2012 and November 2012, she testified that these would take place when her brother was away visiting her mother. He would go away on Friday and come back on Sunday or Monday morning. In August 2012, when her father raped her again, they were at Mofolo. She did not speak or visit her biological mother and did not want to reside

with her, because her mother had abandoned her, causing the complainant to continue living with the appellant.

[9] She reported these incidents after her school friend, B [....] , read her diary in which she had mentioned the rape incidents. B [....] confronted the complainant about these incidents. This diary was a 2010 diary and when making the entries, she wrote randomly without putting a date. She told the court that in this diary she wrote that her father had raped her.

[10] After the diary was discovered by B [....] , the complainant tore it up. As a result, the diary was no longer available when she testified. The complainant stated that she had written in the 2010 diary that she felt worthless. She confirmed that everything she wrote in this diary was the truth.

[11] The incident was reported after B [....] saw the diary and confronted the complainant. The matter was reported at Hillbrow SAPS. She was accompanied by her maternal aunt. She testified that she ultimately made a report to her aunt that her father had raped her from January until recently, namely, from January 2012 to August 2012. Her aunt was asked by the teacher to accompany the complainant to the police station. She was taken for a medical examination and was also given medication. Although she has gone for counselling, it did not help as she cannot forget what her father did to her.

[12] The complainant testified that in 2012 she had another diary in which she made entries. In this diary she made entries to the effect that there is no reason why she should continue living in this world and that she was not raised like other children. She left this diary in Mofolo where her father stays.

[13] This Court has questioned why she remained silent and never reported the incidents sooner, however, she stated that she was afraid to report the matter to her family. It is clear that this complainant had no relationship with her mother, as her mother abandoned her at an early age. Therefore, the first sympathetic witness one would expect the complainant to report such incidents to, was absent in her life. The next sympathetic witness one would expect the complainant to have reported these

incidents to is the paternal grandmother, as most of the incidents occurred during weekends whilst visiting and staying at the paternal grandmother's house. However, as stated by the complainant she was afraid to tell her father's mother as the grandmother might not believe her. As a result, she did not tell anyone, until B [....] confronted her about the incidents. Unfortunately, B [....] could not be traced as she had left the school.

[14] The complainant stated that she loves her father, even though she hated him due to what he had done to her. Her father was after all the breadwinner and cared for her. During her evidence in chief and during cross-examination she was adamant that her father raped her and she repeated this nine times during cross-examination.[1] This complainant was very confident as regards the abuse by her father.

[15] The complainant stated that all these rape incidents resulted in her not coping at school as she lost concentration. This also led to the complainant attempting to commit suicide on two occasions.

L [....] 1 R [....] 2

[16] This witness stated that she was called by the complainant's school as there was something that needed urgent attention pertaining to the complainant. At school she was called to a meeting with the principal, two teachers as well as a member of the SGB. In this meeting she was told that the complainant should no longer sleep in Mofolo. The complainant was then called and this witness asked the complainant whether she wanted to speak to her in the presence of other people or should they rather go home. The complainant stated they should go home. When they arrived at home, the complainant burst into tears and said 'my dad is busy raping me'. The complainant then narrated the same version to her aunt as stated in court, mentioning where it took place and what the sleeping arrangements were in the shack.

[1] Transcript pages 003-28 line 8, line 13, line 18 and line 23. Page 003-39 line5. Page 003-40 line 18. Page 003-41 line 1. Page 003-42 line 18. Page 003-45 line 22-23.

[17] The maternal aunt corroborated the complainant's version that whilst the appellant was raping the complainant, the complainant cried and then the appellant told her not to make a noise. The complainant also told her maternal aunt that she wrote about the incidents in the diary because she was afraid to speak to some of the family members. As a result of this report they went to Hillbrow SAPS on 15 November 2012 to open up a case. They were then referred to the Hillbrow clinic.

[18] This witness confirmed that that after this rape, the complainant changed in the manner she spoke to males, in that the complainant snapped when her grandfather accidentally said that he would take her back to her father's place. The complainant nearly physically beat her grandfather. This witness stated that the complainant's behaviour is regressing in that she is hateful, violent and she prefers to be alone or dead. This witness confirmed that the complainant told her that she tried to commit suicide, because she is tired of living and that she does not want to talk anymore and just wants to keep quiet.

Doctor Kuya

[19] He testified that the complainant was referred to him on 16 November 2012. He examined her and completed a medical J88 form. The doctor testified that the complainant informed him that her biological father has been sexually abusing her. The complainant informed him that the molestation started in August 2012 and the last incident occurred on Monday, 12 November 2012.

[20] The doctor concluded that the clinical findings were consistent with previous vaginal penetration because of the cleft at 9 o' clock in the hymen, which was indicative of an injury that had healed. The doctor was adamant that the presence of a cleft confirmed hundred percent that there was penetration. He stated that the penetration was not caused by a finger, as a finger rarely causes injuries to the hymen. The doctor stated that even if the complainant was penetrated more than once, it didn't necessarily mean it would cause more injuries than that seen at 9 o' clock. He stated that injuries to the hymen are determined by the size of the male organs and or the opening of the vagina.

The appellant

[21] He denied raping the complainant, but he agreed that he slept on one bed with his children. He stated that he never saw the earlier diary wherein the complainant wrote that she was abused by him, however, he did see the other diary but did not confront her about what was written in it. He believes the complainant was affected by the separation between himself and the complainant's mother and also because the complainant did not want to do household chores.

[22] The appellant testified that the complainant was also disobedient and he had to raise his hand to her. One week he had to roam the streets looking for her and it is the same week that the charges were laid against him. He was informed that the complainant had laid charges against him, but he thought the charge was that of child abuse since he had exercised his right of chastisement on her for not doing house chores. He heard from the elders that the allegations were that of rape. He stated that the complainant was fabricating the rape stories for unknown reasons. He disputed that the suicide attempt by the complainant was because he raped her. He said that she probably attempted suicide because she once came late and her mother applied corporal punishment on her.

AD CONVICTION

[23] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

[24] In considering the judgment of the Court *a quo*, this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[2]

[25] Counsel for the appellant contends that:

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[2] See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

’15.1 The trial magistrate erred in rejecting the evidence of the appellant in the light of the fact that the complainant was a single witness, and he alludes to the cautionary rule.

15.2 That the state failed to prove that the complainant was raped in the light of the medical evidence.’

[26] Counsel also contended that the following shortcomings in the complainant’s evidence were ignored by the Court *a quo*, namely:

‘32.1. There was no explanation or satisfactory explanation by the complainant as to why she failed to tell her brother who was sleeping on the same bed with them about the rape.

32.2. She proffered a flimsy explanation as to why she did not tell her paternal grandmothers of the first incident of rape. If her reasons for not telling her are true and genuine. The logical thing for her to do was to inform her maternal grandparents on her first visit after the alleged incident.

32.1. Her aunt testified that she had asked the complainant as to why she kept quiet for such a long period of time regarding the alleged incidences. She said the complainant failed to answer her. I submit that the trial court had completely ignored this part of the aunt’s evidence.

32.3. It is submitted that the delay in reporting the incidences of rape by the complainant cannot be easily ignored, especially, it appears on the face of it, as unreasonably long delay which calls not only for an explanation but a reasonable explanation. Particularly when regard is had to the fact that the complainant was in regular contact with all of these people, including her aunt, during the period in which these alleged incidences had occurred.

32.4. I submit that it boggles my mind that the complainant will continue to stay with the appellant from the date of the alleged first incident in December

2011 until November 2012 on the date on which all these incidents came to light.

32.5. In her evidence in chief the complainant detailed the incidences of rape, but when one look closely on her evidence she only recounted only two of such instances. She said that subsequent to the first incident, the second incident happened in January 2012 and a series of other incidences continued to take place, but all the other incidences, except the first one had taken place when her brother had visited their grandparents in BraamFischer. The logical question to be asked, would be, why she would remained behind with her tormentor and secondly, why it would be so comfortable for her to remain behind with the appellant, if indeed her allegations are true.

32.6. The trial magistrate erred by completely disregarding these crucial aspects of the evidence presented before her, and this aspect received no consideration by the magistrate in her judgment.

32.7. She contradicted the doctor's version, in that according to the doctor the complainant had told him that the first incident happened on August 2012. And in her evidence she told the court that the first incident took place in December 2011. This is the material contradiction which the trial magistrate had completely ignored.'

[27] The appellant's version was correctly rejected by the Court *a quo* for the following reasons:

(a) The complainant repeated her evidence during cross-examination, stating that although her brother was in the shack in 2011 when the appellant raped her, she did not tell him what was happening as she was scared he might tell the paternal grandmother. Furthermore, she repeated that she did not want the paternal grandmother to know because she would not believe that her own son had done something like this. She repeated she was afraid to tell the sister of her grandmother who was also staying with the

paternal grandmother. It is not uncommon for a daughter of tender years, as the complainant in the matter *in casu*, to remain quiet and conceal the crime out of loyalty towards her father's family and the relationship the paternal grandmother had towards the appellant.

(b) She explained in detail what happened when she was raped. She stated her father pulled her panty half way down to her knees and he also took his pants half way down. She did not stop the appellant from what he was doing, however she cried softly as the appellant had told her she must not make a noise as that would wake her grandmother. Although he did not like what was happening, she never made a noise as she was scared. She also did not wake her brother because he does not wake up easily during the course of the night.

(c)Although her mother came back to her father in 2012, she never told her about the incident because she thought since her mother had returned, her father would no longer rape her.

(d) She repeated that from January to August 2012, the appellant raped her again while they were at Mofolo and sleeping in the dining room. Although it happened again, she continued staying with him because she was attending school close to where they were staying and furthermore, she did not want to reside with her mother as her mother was not there to guide her. She confirmed that she did not report the incident to her friends in Dube nor her aunt because she did not want to. In fact, she repeated that she would never have told anyone, had B [....] not read her diary.

(e) She denied that she would come home late after playing with her friends or that she had a boyfriend. The Court notes the defence only asked one question about an alleged boyfriend. If there was certainty about the complainant having an affair with a boyfriend, a lot more questions would have been asked by the defence in this regard, however, this was not done. It is common cause that the complainant was never seen by the appellant in the company of a boyfriend. The complainant further denied that there were

quarrels between her and the appellant regarding her not cleaning the house or because she was returning home late.

(f) Although she loved her father, she admitted that she had a grudge against him and wanted him to die because of what he had done to her. This caused her to lead a difficult and painful life. A child would not say such things against someone whom she loved and who cared for her, unless such a person had done something terrible to this child. One cannot forget that this child hated her mother for abandoning her, and because she was left to live with the appellant, the situation must have been extremely difficult for her to disclose to anyone, knowing that it would lead to the incarceration of the appellant, thereby depriving her of the one person who was maintaining her.

(g) Although this child testified over 3 days, with various days in between each postponement, she maintained her version that the appellant had raped her.

(h) She stated that reporting the rape against her father has nothing to do with the stepmother. In fact, if she hated her stepmother so much, she would have made a case against the stepmother in her personal capacity, yet this was not done. The complainant denied she tried to separate her father and her stepmother by reporting these rape incidents.

(i) The appellant's version is a complete denial. However, he could not give a logical and corroborated explanation why the complainant had allegedly fabricated all this against him. He also called no witnesses to support that the complainant was trying to separate him and the complainant's stepmother.

[28] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* [3] the Supreme Court of Appeal held that:

[3] *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA)

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on (a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

(i) The witness's candour and demeanour in the witness box,
(ii) His bias, latent and blatant,
(iii) Internal contradictions in his evidence,
(iv) External contradictions with what was pleaded on his behalf or with established fact or with his own ……. statements or actions,
(v) The probability or improbability of particular aspects of his own version,
(vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it'.[4]

[29] Although there may be some contradictions as to the exact dates when these rape incidents occurred, the complainant maintained her version that it was the appellant that raped her. The Court *a quo* was correct in finding her a credible witness. The version of the appellant that the complainant falsely implicated him was correctly rejected by the Court *a quo.*

[4] Ibid paragraph 5

[30] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court ***a quo's*** factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the Court *a quo*. The State proved the guilt of the appellant beyond reasonable doubt, and the Court *a quo* correctly rejected the version of the appellant as not being reasonably possibly true.

AD SENTENCE

[31] It is trite that in an appeal against sentence, a Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[32] A sentence imposed by a lower court should only be altered if;

(a) An irregularity took place during the trial or sentencing stage.

(b) The trial court misdirected itself in respect to the imposition of the sentence.

(c)The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[5]

[33] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[34] In the matter of *S v Malgas* [6], the Supreme Court of Appeal held that:

> 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[5] See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A) and *S v Petkar* 1988 (3) SA 571 at 574 C

[6] *S v Malgas* 2001 (1) SACR 496 SCA

[35] In *S v Salzwedel and other* [7] the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.[8]

[36] The following aggravating factors are present, namely:

(a) The appellant maintained his innocence and showed no signs of remorse.
(b) The evidence indicates that there was a measure of persistence on the part of the appellant in continuing with his actions over an extended period of time.
(c) The appellant is the biological father of the complainant.

[37] The following factors were stated in a pre-sentence report and were presented in mitigation of sentence

(a) That the appellant was fifty-five years old when the sentence was imposed.
(b) That he has a previous conviction of theft committed thirty years ago and that he should therefore be regarded as a first offender.
(c) That the complainant and her brother were abandoned by their biological mother, who left them in the care of the appellant.
(d) That the appellant continued to provide a predictable presence and stability in the lives of his children.
(e) That there was an absence of physical injuries and permanent scars arising from the rape incidences.
(f) That until the appellant's incarceration, the appellant was the primary attachment figure in the lives of both the complainant and her brother.
(g) That the appellant provided for his children all the basic needs and cared for them as a single parent in the absence of their mother.

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[7] *S v Salzwedel and other* 1999 (2) SACR 586 (SCA)
[8] Ibid at page 588a-b

(h) That the appellant's neighbours who were consulted by the social worker, revealed that the appellant presented with a positive behaviour profile in their community. Furthermore, they described the appellant as a responsible father who was very supportive and cared well for his children.

[38] The appellant's counsel contended that all the above-mentioned factors, considered together, constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment. Counsel also contended that the appellant could not solely be held responsible for the psychological trauma that the complainant was going through, as the complainant in her own evidence, explicitly expressed her anger towards her mother and refused to stay with her or her grandparents in BraamFishersville. Furthermore, that the complainant appeared to be a child in trouble even before the alleged incidences of rape.

[39] The offences for which the appellant has been found guilty are serious offences. Section 51(1) of Act 105 of 1997 states that in an instance where the crime of rape was committed on a child below the age of sixteen years, and where the victim was raped more than once, then it resorts to a part 1 schedule 2 offence and such person will be sentenced to life imprisonment.

[40] In the matter of Malgas [9] the Supreme Court of Appeal stated that:

> '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.' [10]

[41] Section 51(3) of Act 105 of 1997 as amended is of importance in that it states that:

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[9] *Malgas* (note 6 above)
[10] Ibid paragraph I

'(3) *(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence that the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(*a* A) when imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) An apparent lack of physical injury to the complainant;

(iii) An accused person's cultural or religious beliefs about rape; or

(iv) Any relationship between the accused person and the complainant prior to the offence being committed.' [my emphasis]

[42] In the matter of *S v Mahomotsa* [11] the Supreme Court of Appeal held that:

'It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial court, subject of course to the obligation cast upon it by the Act to take due cognisance of the legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the

[11] *S v Mahomotsa* (85/2001) [2002] ZASCA 64; [2002] 3 All SA 534 (A) (31 May 2002)

degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams* 2002 (1) SACR 116 (SCA) "some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para 29).' [12] [my emphasis]

[43] It is clear from the provisions of s51(3) (*a* A) of Act 105 of 1997 that the lack of physical injury to the complainant is not a compelling and substantial circumstance not to impose life imprisonment, however, in the matter of *S v Vilakazi* [13] the Supreme Court of Appeal took into consideration the fact that the appellant had reached the age of 30 years without any serious brushes with the law and his stable family circumstances were not indicative of an inherently lawless character. As a result, the Supreme Court of Appeal imposed a sentence of fifteen years imprisonment for the crime of rape. The Court held further that:

'A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.' [14]

[44] In the matter of *S v Make* 2011 [15] the Supreme Court of Appeal held that:

'When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard a matter made the order which it did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for

[12] Ibid paras 18
[13] S v Vilakazi (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)
[14] Ibid paras 59
[15] *S v Make* 2011 (1) SACR SCA 263

their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice'. [16] [my emphasis]

[45] The Court *a quo* did state that the appellant pleaded not guilty and that he abused the trust that his daughter had in him. In addition, the Court *a quo* stated that this rape had a devastating effect on the complainant in that she attempted to commit suicide. Notwithstanding that rape of a daughter is reprehensible, in the matter of *Mahomotsa* [17], the Supreme Court of Appeal stated that there are different categories of rape, which although all serious, may not necessarily justify the imposition of life imprisonment. There is a difference between a rape where a victim is raped by a gang of unknown men and brutally assaulted, on numerous occasions, as opposed to the circumstances in which the rapes occurred in the matter *in casu*. This does not mean that rape within a family is less reprehensible, however, it means that the sentence of life imprisonment ordained by s51 of Act 105 of 1997 should be reserved for such appropriate cases.

[46] In the matter of *S v Abrahams* [18] the Supreme Court of Appeal dealt with a similar set of facts as the matter *in casu*, where the accused had been convicted in the regional court of raping his daughter on one occasion whilst she was under the age of sixteen years. The complainant was equally traumatised by the rape resulting in nightmares and a change in behaviour, causing her to be ill-tempered, aggressive and rebellious. The accused was fifty-four years old and a first offender. He was sentenced to seven years imprisonment. The Supreme Court of Appeal increased the sentence to twelve years imprisonment. In the matter *in casu*, the appellant was fifty-three years old at the time of his arrest and fifty-four years old when he was sentenced on 12 August 2015. It is true that the appellant in the matter *in casu* committed these acts over a period of time, as opposed to only once, however he is currently sixty-two years old and his age is a factor which must be considered.

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[16] Ibid page 269 paras 20
[17] *Mahomotsa* (note 11 above)
[18] *S v Abrahams* 2002 (1) SACR 116 (SCA)

[47] Although the aggravating factor exists that this rape occurred within a family situation, which is deserving of condemnation, the appellant has no previous convictions of sexual assault. The Court *a quo* stated that the appellant was not someone who would rehabilitate, however, no reasons were given why such a finding was made. Although the Court *a quo* ascribed the complainant's psychological problems solely to what the appellant did, it is clear to this Court that this complainant suffered immensely from the absence of her mother in her life and blamed her for not having guided her as a child should be guided. The absence of a mother figure, and an inability to divulge to her what the appellant was doing, must have impacted on the psychological breakdown of this complainant as well.

[48] The mitigating factors alluded to by the appellant's counsel have been considered by this Court in determining whether the sentence imposed by the court *a quo* is appropriate. It is noteworthy that the respondent's counsel did not deal with the sentencing aspect in the heads of argument and merely addressed this Court that life imprisonment should be imposed. I am satisfied that the circumstances of this case render the prescribed sentence of life imprisonment too severe in respect to both counts.

[49] In the premises, I find that the sentence imposed is disturbingly inappropriate. The Court *a quo* should have found that the age of the appellant was a substantial and compelling Circumstance, justifying the imposition of a lesser sentence than the prescribed sentence of life imprisonment. The sentence imposed does induce a sense of shock.

[50] In the premises I make the following order;

> The appeal in respect to conviction is dismissed. The appeal against sentence is upheld. The sentence imposed upon the appellant is set aside and the following sentence is substituted:
>
> 'The accused is sentenced to fifteen years imprisonment in respect to count one and fifteen years imprisonment in respect to count two. In terms of

s280(2) of Act 51 of 1977 the sentence imposed on count two will run concurrently with the sentence imposed on count one.'

D DOSIO
JUDGE OF THE HIGH COURT

I agree

AK RAMLAL
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 14h00 on 16 August 2022

Appearances:

On behalf of the Appellant	: Adv. S. Hlazo
On behalf of the Respondent	: Adv. P. Marasela
Date Heard	: 1 August 2022
Handed down Judgment	: 16 August 2022