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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A71/2013

(1)	**REPORTABLE: YES/NO**
(2)	**Of INTEREST TO OTHER JUDGES: YES/NO**
(3)	**DATE DELIVERED:**

In the matter between: DATE: 20/6/2014

N[…] L[…] S[…] Appellant

and

THE STATE Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] On 04 June 2012, the appellant ("S[…]") was covicted by Sebokeng Regional Magistrate Mkwetla ("the presiding officer") on a charge of rape of his then six (6) year old daughter ("the complainant") between 25 and 26 June 2011.

[2] He was sentenced to twenty (20) years imprisonment.

[3] S[…] was granted leave to appeal the conviction. In rejecting his application for leave to appeal the sentence, the presiding officer stated , amongst other things that *" In this matter I have departed from life imprisonment, I give you a lenient sentence that is imposed for people who rape children, that is 20 years imprisonment. You are very fortunate that you received only 20 years imprisonment. And I am of the view that if this appeal were to go on, that is in respect of sentence, there is only one path the court of appeal can take, is to increase this sentence to life imprisonment"*[1]

[4] It appears from the transcript of the record of proceedings that the appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that he was advised[2] of the prescribed minimum sentencing regime in terms of the provisions of section 51(1) of the Criminal

[1] Record, p.69 (para24) – p.70

[2] Due to the age of the victim, life imprisonment is mandatory unless the accused satisfies the court that there are substantial and compelling circumstances that justifies a lesser sentence.

Law Amendment Act, Act 38 of 2007 at the time when the charges were put to him.

[5] The appeal with regard to conviction was heard on 27 January 2014 and judgment was reserved.

[6] This judgment deals with the reasons why the appeal on conviction was dismissed, and in the later part, the reasons why the appeal court issued a notice to the appellant that it was considering to increase the sentence imposed on the appellant by the Presiding Officer.

THE RELEVANT FACTS

[7] Appellant resides with his wife, J[…] S[…], their biological children [3]and his step daughter known as A[…] L[…], who was 21 years old during trial.

[8] At the relevant time, Appellant was staying in a shack in the property whilst his wife and their children lived in the main house. It is common cause that they were estranged from each other and the wife would often sleep out, allegedly visiting her boyfriend , leaving the children with the appellant.

[3] There are three girls. The complainant is the youngest. Her sisters are were 16 and 13 years old. The boy's age was indicated as 4 years during testimony of the witnesses and 9 during address on setence.

On the night in question, the two younger children slept in appellant's shack. The complainant was on the bed with him and the younger sibling on the floor.

[9] The complainant testified that appellant told her to take off her panty and she did. He then inserted his penis inside her vagina and started to bump on top of her. She felt pain in her vagina. He told her to put her panty on and he also dressed himself up. He told her that she would get mad if she told anyone about what happened. She then went to her sister in the main house at about 05:00.

[10] Complainant only related the incident to her sister, A[…], after she asked what her father had done to her. A[…] then examined her vagina with her hand. She was taken to a doctor who also examined her and gave her an injection. She then made a statement at the police station.

[11] Under cross examination, the complainant indicated that she and her younger sibling often slept in her father's shack, she on the bed and the latter on the floor.

[11.1] She also testified that her sister put her fingers in her vagina when she examined her. Her mother came back after having been

called and she examined her too. She was also checked by other ladies in the neighbourhood before she was taken to a doctor.

[12] It appears from the record that the complainant 's answers during cross examination were not consistent with regard to how and who examined or checked her vagina. At some point she maintained that it was her mother and sister only, but at another point she indicated that other women in the neighbourhood also checked her but she had her panties on.

It seems from a further reading of the record that the complainant was not responding to most questions during cross examination and she closed her eyes and this led to an adjournment because she indicated that she was tired.

[13] The next witness for the state was complainant's sister, A[…] L[…]. She testified that complainant and her younger siling, known as S[…] came to the main house in the morning of 26 June 2011. S[…] told her that the complainant slept in the same bed with their father the previous night. A[…] then observed the complainant and realized that she was walking with difficulty. She called her and asked what was wrong, and she then told her that her father had instructed her to take off her panties and that he took his trousers off and climbed on top of her and "*was busy on top of her*". She then complained to her father that he was hurting her. He then climbed off.

[14] A[…] checked the complainant's private parts and observed that it was red in colour. She further testified that she does not know why the children slept in the shack on the day in question.

[15] Under cross examination, A[…] testified that:

[15.1] Her mother had gone to visit her boyfriend, as she usually does, when the incident occurred.

[15.2] The complainant was still in the appellant's shack when S[…] gave her the information that she slept on their father's bed. She then called the complainant to come where she was.

[15.3] The relationship between all children and the appellant was good.

[15.4] She denied inserting her fingers in the complainat's vagina.

[15.5] She confirmed, after being asked by the presiding officer, that appellant was HIV positive and her mother was not.

[16] The complainant's mother was also called to testify. She only confirmed the age of the complainant , that she took her to a doctor where blodd samples were taken and that the child was HIV negative.

She also confirmed that her husband was HIV positive and she has known about this some three years before this incident.

[17] The medical report (J88) was handed in, with the appellant's consent. The findings of the medical examination were put to the appellant by the presiding officer during his cross examination .

[18] The appellant testified in his own defence. He did not call any witnesses.

[19] He denied having told the complainant to take off her panty or raping her.

[20] When asked why the complainant would lie against him and claim that he raped her, the appellant testified that she was probably used by her mother who has tried many times to eject him from the property as she

wanted her boyfriend to move in with her. They have been fighting since 2008 and his wife has failed to get him out of the property.

[21] He testified further that his relationship with A[…] was good. He brought her up since she was four years old. He paid her school fees until she dropped out on her own. She respects him very much and has never insulted him.

The complainant liked him a lot and they were inseparable. They only started to drift apart because of the criminal trial against him.

[22] Under cross examination, he explained why he slept in the shack with the complainant on the night in question. Their mother was not home and he had to cook for them. He had prepared fire (brazier) for warmth and the children did not want to go and sleep in the main house because it was cold. He prepared a sponge for them on the floor and he slept alone on his bed.

[23] He confirmed having slept in the main house before with the children and that no one has ever laid a charge against him. He also confirmed that the complainant knew nothing about sexual activities.

[24] He maintained that his wife had influenced the complainant to lay what he believed was a false charge against him. He could not explain though why his wife choose a six year old and not the elder sister.

[25] The following findings were recorded in the medical report[4]:

[25.1] The urethral orifice was bruised.

[25.2] *"The findings were compatible with sexual penetration pass labia majora"*.

CONVICTION

[26] In convicting the appellant, the Regional Magistrate;

[26.1] rejected the alleged plot by appellant's wife to implicate him in the rape charge on the basis that she was not present when the incident occurred and secondly, the investigation by A[…] came about after a four year old child reported that her sister (complainant) slept on the same bed with their father. A[…] observed that the child walked with some difficulty, and then asked her what her father did.

[26.2] accepted the findings of the medical examination as corroborating the allegations of the sexual assault. He referred to cases such as S V S 1990 (1) SACR 1 AD and R V W 1949 (3) SA at 780 and 783.

[4] Record, p 72. The examination was carried by Dr N. Kalonji on 26 June 2011 at 14:05 at Kopanong Hospital.

[26.3] took into account the fact that the complainant was a single witness . and that her evidence should be treated with caution. Her evidence, however, was corroborated by the findings of the medical examination.

[26.4] rejected the defence of the appellant, which is a bare denial as not true.

DID THE PRESIDING MAGISTRATE ERR BY CONVICTING THE APPELLANT ??

[27] This question should be answered in the context of the grounds of appeal, and not on any other[5] theoretical or academic basis .

[28] The grounds of appeal may briefly be summarized as follows:

[28.1] There were contradictions in the version put forward by the state witnesses, as such, it should not have been accepted.

[28.2] The appellant's version was more probable because he adduced evidence that indicated the witnesses' motive to implicate him in the rape.

[5] Although complainant is a child and single witness with regard to the incident of rape, the appellant has not attacked the reliability of her evidence in this regard.

[28.3 The court erred by emphasizing that the appellant raped the complainant to cure himself of HIV/AIDS whereas there is evidence that he was already taking treatment for the illness.

[29] The alleged contradictions in the state version are :[6]

" 1.3 That the State witness gave evidence in a satisfactory manner whereas there were contradictions in their evidence, reference made to the following:

1.3.1 The complainant , (……) testified that she voluntarily reported the incident to her sister, A[…] L[…] at 05:00.

1.3.2 A[…] L[…] on the other hand testified that she asked the Complainant as to what happened after a report was made to her by their younger brother, Sy[…], to the effect that the Complainant had slept with the Applicant on the bed the previous night.

1.3.3 The Complainant testified that A[…] L[…] who is the first report witness , inserted her fingers inside the Complainant's vagina and proceeded to wash her hands afterwards. A[…]

[6] Record, p.83 , paragraph 1.3 of Notice of appeal

contradicted the Complainant by saying that she did not put her fingers inside the Complainant's vagina.

[30] I have already dealt with the reasons why the presiding magistrate, correctly so, rejected appellant's version , in particular the alleged plot by his wife to falsely implicate him .

[31] The alleged contradictions relate to the circumstances under which the first report of the incident of rape was made. In my view , even if there are contradictions (which is not correct) they are immaterial. The principles in this regard established in the instructive case of **S V Mafaladiso and others 2003 (1) SACR 583 (SCA)**, that has been followed in many subsequent cases.

In the matter of **SV Tau and Another**[7], Van Rooyen AJ stated the following:

> "*[6] Counsel for appellant 1 argued that contradictions between the two witnesses as well as Dambusa's contradictions with the testimony of the complainant, were substantial in that they affected the circumstances under which the report was made. It is true that there were contradictions. She said that the men were unknown to her and that she wore long pants, while Mohale said that he knew her for some time. Mohale testified that she was wearing long pants, while Dambusa said that she was wearing a long dress. It was argued that Dambusa referred to a long dress so that he could testify more readily that he saw the bruises. However, Mohale in fact confirmed her evidence that she was wearing long pants. It was significant, it was argued, that the witness who testified directly after the complainant, contradicted her while Mohale, who had the potential to discuss the matter with the complainant, confirmed what she had said.*
>
> *[7] I do not agree. The contradictions were slight and peripheral. It is understandable that a witness could easily, at that time of the night, mistakenly believe that a woman is wearing a long dress, while she in fact had long pants on. It was dark, in any case. The fact that she described them both as unknown to her, is not really important and does not justify an inference of collusion between Mohale and the complainant. The differences as to where they met her, are also immaterial. Contradictions must always*

[7] S v Tau and Another (A2898/03) [2005] ZAGPHC 328 (3 October 2005)

be judged within context. See S v Mafaladiso en Andere 2003(1) SACR 583(SCA) where Olivier JA said the following at p 593-4 in an incisive analysis of the approach to contradictions:

> *"Die juridiese benaderingswyse tot weersprekings tussen twee getuies en weersprekings tussen die weergawes van een en dieselfde getuie (soos o a tussen sy of haar viva voce getuienis en vorige verklaring) is, in beginsel (indien nie in graad nie) identies. Die doel is immers in geen geval om te bewys welke van die weergawes die korrekte een is nie, maar om oortuiging te bring dat die getuie kan fouteer, hetsy weens 'n defektiewe rekolleksie of weens oneerlikheid (sien Wigmore a w paragraaf 1017). In die geval van self-weerspreking, in die besonder, word tereg deur Wigmore (t a p paragraaf 1018) gesê:*
>
> > *'(a) Since, in the words of Chief Baron Gilbert (§ 1017 supra), it is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used assertively; i.e., we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other - but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one.'*
>
> *Wigmore se benadering t a p is onderskryf in S v Oosthuizen **1982 (3) SA 571** (T) deur Nicholas R op 576 A - 577 B, wat op sy beurt deur hierdie Hof in S v Mkohle 1990 (1) SA SV 95 (A) op 98 f - g goedgekeur is.*
>
> *Die blote feit dat daar self-weersprekings voor hande is, moet deur 'n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê, ten einde te bepaal of daar 'n weerspreking voor hande is en wat die presiese omvang daarvan is. In hierdie verband moet die feite-beoordeelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal- en kultuurverskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is in die weg staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Tweedens moet dit steeds voor oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking of afwyking die getuie se geloofwaardigheid aantas nie (sien S v Mkohle1990 (1) SASV 95 (A) op 98 f - g). Nie-wesenlike afwykings is nie noodwendig relevant nie. (Sien S v Bruiners en 'n Ander 1998 (2) SASV 432 (SOKPA) op 437 g e v.)SOKPA) op 437 g e v.)*
>
> *Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheid of geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik - en die kwaliteit van dié verduidelikings - en die samehang van die weersprekings met die res van die getuie se getuienis moet o a in ag geneem en opgeweeg word. (Sien S v Mkohle, supra, op 98 f - g; sien ook R v Gumede, supra, op 756 - 758 in medio; S v Jochems 1991 (1) SASV 208 (A) op 211 f - j; S v Bruiners en 'n Ander, supra, op 437 i - 438 a.)" (emphasis added).*

[32] The four year old sibling reported that complainant slept on their father's bed before she (complainant) and her elder sister saw each other.

When she was confronted, she then explained what happened. It is not correct that she testified that she made a report voluntarily.

[33] There is no merit in the allegation that the conviction was based on the questions or sentiments expressed by the presiding officer about the appellant's HIV status.

The presiding magistrate has explained the context of his sentiments and questions in this regard in his judgment on the application for leave to appeal.[8]

His explanation is that his sentiments about rape accused' belief that they would be healed by sleeping with young girls was made during sentencing stage. It did not influence his judgment on conviction and does not appear anywhere in the judgment except that he did ask A[…] during her testimony about her father's HIV status.

[34] There is no merit, in my view , in the allegation that the conviction was based on the presiding magistrate's views about HIV. As stated above, the presiding magistrate accepted the version of the complainant that her father told her to take off her panty and that he penetrated her vagina. This evidence was supported by the findings made by the medical doctor.

[8] Record, p.67, line 21 to p.68

This is the basis of the conviction on the charge of rape, and nothing else. The evidence of the other witnesses did not corroborate the incident of rape because they were not there, but simply the details thereafter with regard to the first report to the sister, the examination of her vagina by the sister and mother as well as the fact that she was taken to a doctor. These are pheripheral issues.

[35] Accordingly, the appeal on conviction has no merit, and is dismissed.

AD SENTENCE

[36] There was no appeal on sentence before us because as stated above, appellant was denied leave in this regard.

[37] The court, on its own considered the sentence imposed which, on the face of it appeared to be inappropriate, firstly on the basis that the victim is a young child of six years and secondly, because it does not appear from the record how the presiding magistrate exercised his discretion to deviate from the minimum prescribed sentence.

[38] In sentencing the appellant to a period of twenty (20) years imprisonment, the presiding magistrate acknowledged that the appellant had been convicted of "*an offence in Part 1 of Schedule 2 of the Criminal Law Amendment Act 38/2008 , which prescribe life imprisonment unless there are substantial and compelling circumstances which exist to justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment*"[9]

[39] After enumerating the aggravating circumstances[10], the presiding magistrate went on to state that :

> "Be that as it may be, there are substantial and compelling circumstances in this matter and I wish to put them on record as follows. Accused is a first offender capable of rehabilitation. He is not a confirmed criminal, not a (inaudible), not a person for whom there is no hope of reformation"[11]

[40] He went on to state that " *In the case of Skipa vs State 2006 SCA, 71 RSA, has been considered for the purpose of sentence. In that matter a 13 year old girl was raped. And a sentence of 20 years imprisonmnent was imposed in the Skipa case. And I must also*

[9] Record., P 54, line 15-20.

[10] Record, p.57, line 2 to p.58 , line 1-5

(a) Complainant, a six year old biological daughter of the appellant, was at risk of acquiring HIV/Aids,

(b) The appellant was aware that he is HIV positive

(c) The appellant , as a father had a duty to protect the complainant

[11] Record, p. 58, from line 5

indicate that in this case there are more aggravating circumstances which outweigh those in the Skipa case, because of HIV which was to be injected to that child, and because of the fact that the injector is the biological father of the complainant.

[41] He concluded by stating that : *"The court is satisfied that the prescribed sentence is unjust in the circumstances of this case, it is disproportionate to the crime, to the accused and the needs of society. Accused is to undergo imprisonment for 20 years……."*

[42] By noting that there are more aggravating circumstances in this case than in the Skipa case he sought to compare it as well as his remarks when refusing leave to appeal the sentence that the appeal court would most likely increase it, the presiding magistrate was aware that the sentence he was imposing was disproportionate to the crime and the circumstances under which it occurred.

[43] Does the fact that appellant is a first offender who is likely to be rehabilitated constitute substantial and compelling circumstances that would justify deviation from the minimum sentence of life imprisonment?

The correct approach in answering this question is whether, in the light of all mitigating factors (circumstances under which the offence was committed, the nature and effect on the complainant) life imprisonment was an appropriate sentence.

[44] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if :

[44.1] There was an irregularity during the trial or sentencing of an accused person.

[44.2] The lower court misdirected itself in respect of the imposition of the sentence.

[44.3] The sentence imposed by the court could be described as disturbingly or shockingly inappropriate.

[45] The question is not whether the sentence is right or wrong, but rather whether the lower court exercised its discretion properly and judicially[12].

[46] The presiding magistrate misdirected himself by failing to consider what the appropriate sentence would be by striking a balance between the circumstances under which the rape occurred, the impact it is likely to have on the complainant and the mitigating factors (what he referred to as substantial and compelling circumstances).

The fact that he went ahead and deviated from the prescribed minimum sentence despite being aware that the circumstances are worse than in the Skipa case constitute a misdirection that entitles this court to intervene.

[12] S v Pillav **1977 (4) SA 531** (A) at p 535 E-G

[47] In the matter of **MUDAU v STATE**[13], **Majiedt JA**[14] undertook an analysis of recent court decisions to illustrate the approach adopted by our courts on the issue of substantial and compelling circumstances in view of the prescribed minimum sentences regime. There appears to be consensus that each case should be judged on its own merits and that the correct question to ask is whether life imprisonment is the appropriate sentence under the circumstances of each case.

[48] The cases referred to in the judgment of Madjiet JA in the paragraphs quoted below are illustrative of this fact.

> *[20] In S v Abrahams*[21] *a sentence of 7 years' imprisonment imposed on a father for raping his 14 year old daughter was increased on appeal to a sentence of 12 years. Cameron JA, writing for a unanimous court, emphasized the reprehensibility of rape committed within a family context. As stated above, the learned Judge also pointed out that 'some rapes are worse than others' (see para 17 above) and, with reference to the dictum of Ackerman J in S v Dodo, supra at para 38, emphasized the need for proportionality.*
>
> *[21] In Bailey v S,*[22] *an appeal against a sentence of life imprisonment imposed on a father for the rape of his 12 year old daughter was dismissed. In distinguishing that case from others such as, inter alia Abrahams and Nkomo, referred to above, Bosielo JA (Brand, Heher, Malan and Pillay JJA concurring) laid heavy emphasis on the drastic effect which the rape has had on the victim, as evidenced by the victim impact report, which had been handed in by consent. That report enumerated the following severe sequelae of the rape on the complainant: (a) anxiety, fear and sleeping disorder; (b) misplaced feelings of guilt and shame; (c) mood swings; (d) a loss of trust in mankind and a great sense of anger and hostility towards her father. She also had to leave school prematurely when she discovered that she was pregnant and suffered two miscarriages. Bosielo JA emphasized the need to decide on the imposition of an appropriate sentence based on the particular facts of each case. The primary difficulty*

[13] 2013(2) SACR 292 (SCA)

[14] **MTHIYANE DP**, **CACHALIA JA**, **ERASMUS** and **SALDULKER AJJA** concurring.

in the case before us is that no victim impact report was placed before the trial court, an aspect to which I shall revert shortly

*[22] Ndou v S**23** concerned the rape of a 16 year old girl by her stepfather. The sentence of life imprisonment was set aside by this court, which substituted in its stead a sentence of 15 years' imprisonment. In its judgment this court (per Shongwe JA) referred to a misdirection on the part of the trial court which. . .'[created the impression] that the minimum sentence of life imprisonment had to be imposed regardless of the circumstances'.**24** The learned Judge also made mention of the fact that no evidence was led on the effect the rape had on the victim, but accepted that it must have been very traumatic.**25** The court found that a sentence of life imprisonment would be disproportionate and imposed 15 years' imprisonment.*

[23] Lastly there is the judgment of Kwanape v S. I must immediately point out that the rape in that matter had not been perpetrated in a family setting. This court (per Petse JA, Nugent JA and Erasmus AJA) dismissed an appeal against a sentence of life imprisonment imposed on a 24 year old first offender who had raped a 12 year old girl. One of the numerous aggravating factors in that case was the fact that the appellant had abducted the complainant while she was in the company of her friends and effectively held her hostage for an entire night. In this matter too, a victim impact report was handed in by consent, from which it appears that the rape has had a devastating impact on the complainant. She was forced to leave school, compelling her mother to give up her employment in order to render emotional support to the complainant. The latter had become a recluse so as to avoid being ridiculed by her peers.

[49] It is also correct that the appeal courts have on numerous occassions reduced[15] sentences imposed on rape accused, however, this has been

[15] The following remarks of Boshielo JA (Brand, Heher, Malan and Pillay JJA concurring) in the matter of **Bailey v The State (454/11) [2012] ZASCA 154 (01 October 2012)** are relevant in this regard.

> [15] It is true that *Abrahams*, *Sikhipha* and *Nkomo* all involved rapes that fall under s 51(1) of the Act. Yet the court after having considered all the relevant facts came to the conclusion that, in those cases, a sentence of life imprisonment was disturbingly disproportionate to the offence to a point where it could be described as unjust. The court then imposed various terms of imprisonment in respect of each of the cases in the place of the ordained life imprisonment.
>
> [16] What then is the value of such a comparative analysis of previous cases. 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

stated as in no way creating a precedent or a directive on lower courts to follow precedents slavishly. The sentencing court has a duty to consider whether in that particular case there are substantial and compelling circumstances to justify a deviation from the minimum sentence regime.

[50] In a recent case of **MDT v S**[16] Navsa JA[17] stated the following:

> "[7] In remarkably similar circumstances, this court in *S v PB* **2013 (2) SACR 533** (SCA), after stressing that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons, refused to interfere with a prescribed sentence of life imprisonment imposed on a father who had raped his 12 year old daughter. While this can only serve as a guideline, it emphasises the necessity to impose heavy sentences in cases such as the present, to prevent young girls from being abused. Before us counsel for the appellant was constrained to concede that child rape is becoming

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appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all. Commenting on the utility of such a comparative approach Marais JA in *S v Malgas* **2001 (1) SACR 469** (SCA) para 21 said the following:

> 'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done.' (own emphasis.)

[16] 548/2013) **[2014] ZASCA 15** (20 March 2014).

[17] SHONGWE & LEACH JJA concurring

prevalent in Limpopo. Indeed, child rape is a national scourge that shames us as a nation"

NOTICE TO APPELLANT THAT APPEAL COURT WAS CONSIDERING TO INCREASE THE SENTENCE IMPOSED

[51] It is with the background sketched above that this court, after deciding to uphold the appeal on conviction decided to give the appellant notice that it was considering to increase the sentence imposed.

[52] Supplementary heads of argument were filed on behalf of both the appellant and the State and the matter was duly set down for hearing on 27 March 2014.

[53] The argument advanced by counsel for the appellant, Ms Augustyn in her heads of argument is that:

[53.1] This court should take into account what has been stated in the matter of S V Malgas in particular where appeal courts are

cautioned not to usurp the powers of the trial court in the absence of evidence of a misdirection.

[53.2] She also referred to the case of S V Dodo 2001 91) SACR 594 (CC) where the principle of "Proportionality and the Determinative Test " of sentencing were emphasized. In essence, there must be proportionality between the offence and the term of imprisonment.

[53.3] She also referred us to the matter of S V SMM 2013 (2) SACR 292 (SCA) where the principle of individualisation of sentence to fit the crime and the circumstances of the case was emphasized.

[53.4] In conclusion, Ms Augustyn cautioned the court that it should not "*merely sentence the Appellant to Life imprisonment as a norm in an attempt to satisfy public's opinion of rape as an offence* in general " as this would amount to a misdirection. In her view, "*the trial magistrate has carefully balanced all the circumstances and it cannot be argued that he misdirected himself or erred when he sentenced the appellant to an effective term of 20 years imprisonment*"

[54] Counsel for the State, Mr Moetaesi submitted in his heads of argument that:

[54.1] The factors that the presiding magistrate found to be substantial and complelling circumstances were what has been described in previous appeal cases as "*flimsy reasons*" for departing from imposing the minimum sentence.

[54.2] He also referred, to amongst others the case of Kwanape v The State where as in the present case a 12 year old girl was raped by an HIV positive man who knew of his status .

[54.3] Mr Motaesi also submitted that the fact that the appellant was the complainant's father was an aggravating factor and that, as stated in the Vilakazi case, once an offence is one that is punishable in terms of minimum prescribed sentence, the normal personal mitigating factors such as marriage and number of children do not count.

Finally, he submitted that the sentence imposed by the court a quo was "shockingly lenient and inappropriate and that it should be increased to the one of life imprisonment"

[55] As I have already stated above, the presiding magistrate was well aware that the sentence he imposed was shockingly inappropriate because he indicated in his reasons for refusing leave to appeal that the appeal court would have , in his own words, one path to go, and that is to increase the sentence.

[56] The approach adopted by the trial court to determine whether there are substantial and compelling circumstances was wrong as I have already stated. Accordingly, this court is free to intervene and impose its own sentence.

[57] I will not repeat the circumstances under which this offence was committed and other aggravating factors . They outweigh the fact that the appellant is a first offender who is likely to be rehabilitated. Accordingly, there is no reason to depart from imposing life imprisonment in this case.

[58] I propose the following order:

[58.1] The appeal on conviction is dismissed.

[58.2] The sentence imposed by the Magistrate is set aside and substituted with the following:

" *'The accused is sentenced to life imprisonment"*

TAN MAKHUBELE

Acting Judge of the High Court

I agree, and it is so ordered

A.J BAM

Judge of the High Court

APPERANCES:

APPELLANT: **ADVOCATE L AUGUSTYN**

Instructed by: Pretoria Justice Centre

THE STATE: **ADVOCATE M.T MOETAESI**

On behalf of Director of Public Prosecutions, Pretoria.