**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTH GAUTENG, PRETORIA)**

**CASE NO: A218/2014**

**DATE: 23 SEPTEMBER 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

**M[...] T[...] N[...]** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**JUDGMENT**

**Date of Hearing: 18 SEPTEMBER 2014**

**Date of Judgment: 23 SEPTEMBER 2014**

**KUBUSHI, J**

[1] The appellant, M[...] T[...] N[...], was convicted and sentenced on 15 November 2013 in the regional court of Mpumalanga on two counts of the rape of a 12 year old girl. He was sentenced to life imprisonment in respect of each count. The charges were taken together for purpose of sentence and the appellant was as a result sentenced to life imprisonment. He was in addition declared unfit to possess a firearm. He was at all material times hereto legally represented during the trial proceedings. He is before us, leave to appeal having been granted by the trial court against sentence only.

[2] The complainant in respect of both counts is N[...] P[...] N[...], she is related to the appellant. The appellant was also a neighbour of the complainant or regularly visited his deceased brother's place which was adjacent to the complainant's residence. The two rapes occurred at the appellant's brother's place inside a rondavel where the appellant stayed when he visited the place. The evidence is that the first rape occurred in December 2012. It is alleged that the appellant sent the complainant to the shop to buy cigarette for him. On her return she went into the rondavel and placed the cigarette on the chair. The appellant, who was in the rondavel at the time, rushed to close the door and pushed the complainant onto the bed where he had sexual intercourse with her. The second incident happened in January 2013. According to the complainant she was at her friends' residence, the appellant informed her that her grandmother was looking for her. She rushed home but did not find her grandmother. The appellant told her that her grandmother was in the rondavel. She went to the rondavel and again the appellant pushed her onto the bed and had sexual intercourse with her.

[3] It is trite that a court of appeal may not and will not interfere with an imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably or where the sentence induces a sense of shock or is startlingly inappropriate. [1]

[4] The charge sheet makes specific reference to both ss 51 and 52 of the Criminal Law Amendment Act No 105 of 1997 (the Act). The appellant who was duly represented during the trial, was therefore aware of the consequences of the provisions of the said sections.

[5] The jurisdictional facts, namely the rape of a person under the age of 16 years, in this instance 12 years, meant that the trial court was enjoined, in terms of s 51 of the Act, to sentence the appellant to the prescribed minimum sentence of life imprisonment, unless there were substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[6] The essence of the attack on the decision of the trial court, as set out in the appellant's heads of argument, is based on the following:

> a. First, the trial court erred in coming to the conclusion that the appellant's personal circumstances did not constitute substantial and compelling circumstances which warrant a deviation from the prescribed minimum sentence of life imprisonment. The appellant's contention is that the trial court should have considered the following factors: the fact that the appellant, at an advanced age of 39 years had no previous convictions - he managed to keep a clean record for the biggest part of his active life; the appellant was a first offender and as such does not have a propensity to commit crime - he is thus not likely to re-offend.
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> b. Secondly, the trial court erred by failing to do the necessary investigation, which may have

included having a probation officer's report and or calling witnesses to testify in the matter. In this regard he referred to the judgments in S *v Dlamini* 2000 (2) SACR 266 (T); S *v Samuels* 2011 (1) SACR 9 (SCA) and S *v Van de Venter* 2011 (1) SACR 238 (SCA).

c. Thirdly, the trial court erred in over-emphasising the seriousness of the offence and the interest of society whilst the appellant's personal circumstances were under-emphasised.

d. Lastly, the trial court erred in imposing life imprisonment as it is not proportionate to the offence committed and the interest of society and as such shockingly harsh and induces a sense of shock and does not have a deterrent effect. The appellant's contention is that an effective period of not more than 20 years imprisonment should have been imposed. Alternatively, part of the imprisonment term should have been suspended and/or ordered to run concurrently. This according to appellant would serve as a deterrent against the commission of further offences by the appellant.

[7] At the hearing of the appeal, the appellant's counsel who it appears was not the one who prepared the heads of argument, argued on the basis of the proportionality of the sentence to the degree of the blameworthiness of the appellant's conduct. According to counsel, the trial court should have considered the seriousness of the offence in the light of the lack of violence used during the commission of the offence, the lack of evidence on the detrimental effect of the trauma experienced by the complainant and the fact that the appellant having lived a clean life until the age of 38, and being a first offender, should have been considered for rehabilitation.

[8] When considering whether there are substantial and compelling circumstances, the trial court took into account the nature and gravity of the offence, the interest of society and the personal circumstances of the appellant. It is my view that the trial court did not underemphasise the personal circumstances of the appellant. The personal circumstances of the appellant were considered in full: the appellant was 38 years old at the time of sentencing; he was not married and does not have children; he was a loner; he was a builder by profession and self-employed - his earnings are not stated; he was in custody awaiting trial for a period of ten months; he did not attend school and is an unsophisticated person; there was not always harmony between the appellant and the rest of his family, in particular his sister K[...]; he is a first offender and does not have a propensity to commit crimes.

[9] In aggravation of sentence the trial court considered the nature of the offence, the interest of society and the interest of the victim. It also concluded that the appellant did not show remorse. It as a result concluded that there are no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.

[10] My view is that the moral blameworthiness of the appellant overshadows his personal circumstances. He raped a girl of 12 years who is his relative and neighbour. The child who trusted him. He raped her not only once but twice. After the first rape he was brazened by the fact that the complainant did not report him. He goes to the extent of calling the complainant from her friend's place whilst she is playing with other children, under the pretext that her grandmother was looking for her. He has the audacity to approach the complainant's grandmother also under the pretext that he heard about the rape from someone else whilst in fact he is checking whether the grandmother is aware that he has raped the complainant. He even goes further and threatens the complainant when her grandmother goes into the house.

[11] In regard to the appellant痴 contention that the trial court failed to investigate the appellant痴 personal circumstances by for instance calling for a probation officer痴 report, it has been held that the probation officer痴 report is not an end in itself but one means of placing reliable information before a court in order to enable it to impose a properly informed sentence. If information can be placed before the court in another satisfactory way, there is no need for a probation officer痴 report. [2]

[12] The principle laid down in the judgments we were referred to, is that, despite the fact that an appellant is legally represented, there is nonetheless a duty on a court considering sentence to call for such evidence as is necessary to enable it to exercise a proper judicial sentencing discretion. I am in alignment with this principle. However, as it was held in the Chetty-judgment, in this instance there was in my view no need for a probation officer's report. There was sufficient information placed before the trial court which enabled it to impose a properly informed sentence. The facts provided by the appellant's legal representative, in this instance, were adequate for the trial court to exercise a proper judicial sentencing discretion. I cannot think of other facts which a probation officer would have brought to the attention of the trial court which were not already before it. The appellant's counsel was also unable to can say what other information a probation officer's report would have revealed to the trial court.

[13] The trial court was correct to have found no substantial and compelling circumstances to depart from the prescribed minimum sentence.

[14] I find the argument by the respondent痴 counsel on the question of the proportionality of the sentence to be unfounded. Firstly, in terms of s 51 (3) *(a A)* (ii) of the Criminal Law Amendment Act, No. 105 of 1997, the apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when imposing a sentence in respect of the offence of rape. This does not preclude a court sentencing for rape to take into consideration, along with other relevant factors, the fact that a rape victim has not suffered serious or permanent physical injuries to arrive at a just and proportionate sentence.[3]

[15] The respondent's counsel, in argument before us, wanted us to believe that the complainant suffered serious injuries to her vagina because she said she bled for a couple of days and she had several tears to her hymen. I beg to differ with this submission. From the perusal of the J88 it is clear that the injuries sustained by the complainant are those inherent in the commission of the offence. These injuries, however, taken together with any other relevant factors, do not in any way make the sentence disproportionate to the nature and seriousness of the offence and the interest of society.

[16] Secondly, the submission by the respondent痴 counsel that there is no evidence pertaining to the detrimental effect of the trauma on the complainant is misplaced. My view is that, even though such evidence was not specifically dealt with during trial, it can be inferred from the available evidence.[4]

[17] In S v *Matyityi* above,[5] the court did not regard the lack of specific evidence addressing the emotional consequences of the ordeal for the complainant, as constituting a substantial and compelling factor justifying a sentence other than life imprisonment for the rape. The court was willing to infer the likely impact on the rape of the complainant from the other available evidence.

[18] It is thus fair, in the circumstances of this case, to infer the consequences of the trauma suffered by the complainant from the fact that at the time of the commission of the offence she was only 12 years old, she was raped twice, she was raped by a person who was known to her and who was a family member and a neighbour and the fact that she was threatened by the appellant. Although not explored during trial, it is evident that, the ordeal must have impacted negatively on her.

[19] Lastly, I disagree with counsel for the appellant痴 contention that the court erred in not finding the appellant suitable for rehabilitation. This is so because the appellant did not show any signs of being remorseful - the trial court made such a finding as well. The presence of remorse has been said to be an indication of the prospect of the rehabilitation of the offender. And as argued by the appellant痴 counsel, correctly so, remorse is not the only factor to consider. However, genuine contrition or remorse, as an indicator that the offence will not be committed again, is an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused and the possibility of rehabilitation are considered.[6]

[20] As I have already stated, in this instance, the appellant does not show any remorse. His conduct in raping the complainant twice and brazenly approaching the complainant's grandmother under the false pretext of a rumour about the rape and even threatening the complainant, is not indicative of a remorseful person. This lack of contrition is an indication to me that he is not a candidate for rehabilitation.

[21] The trial court was correct to sentence the appellant to life imprisonment on each of the convictions. The

sentences were ordered to run together, though it was not necessary because the sentences would in any event do so automatically. The sentence is appropriate and just in the circumstances of this case. There is no reason for this court to interfere with it.

[22] I would therefore propose that the appeal be dismissed

**E. M. KUBUSHI**

**JUDGE OF THE HIGH COURT**

I concur and it is so ordered

**F. G. PRELLER**

**JUDGE OF THE HIGH COURT**

**Appearances:**

On behalf of the appellant: Mr van Zyl Nel

Instructed by:

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On behalf of the respondent:Adv van Vuuren

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footnote1