IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A345/2015

In the matter between:

MALCOLM GANGA Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 18 NOVEMBER 2015

RILEY, AJ

[1] The appellant was charged in the regional court sitting at Parow on one count of rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, a contravention of Section 55 i.e. attempt to

commit a sexual offence and a contravention of Section 5(1) i.e. sexual assault under the same Act.

[2] According to the charge sheet it is alleged:

1. On count 1 - that during October 2013 and at [B…….], [D…..] the appellant wrongfully and intentionally committed an act of sexual penetration with the complainant, [M…..] [M……] ('M…..'), who was eleven years old at the time, by penetrating her vagina with his penis, whilst she was under the age to provide consent.
2. On count 2 - it is alleged that during 2013 at the same place the appellant wrongfully and intentionally attempted to commit a sexual offence with [J……] [d…..] [J…..] ('J……'), an eleven year old girl by lifting up her skirt and attempting to touch her vagina.
3. On count 3 - it is alleged that during 2013 at the same place referred to in counts 1 and 2, the appellant wrongfully and intentionally committed an act of sexual assault in respect of [S……] [D……] ('S……'), a nine year old girl by touching and rubbing her vagina.

[3] The appellant who was legally represented in the court a *quo* pleaded not guilty on all three counts on 1 July 2014.

[4] On 18/02/2015 he was convicted on all three counts and on the same day sentenced to life imprisonment, the court a *quo* having decided to treat all the counts as one for the purpose of sentence.

[5] The matter is before us on appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977. The appellant has noted an appeal against both his conviction and sentence.

[6] According to the accepted evidence all the incidents occurred at the house of the appellant at [B…….], an informal settlement in the [D….] area. It is common cause that the appellant has occupied his house since 2009 and that the complainants are either his neighbours and or lived in close proximity to him. It is not in dispute that all the complainants and other children frequented the appellant's house daily and played inside or outside the house and/or watched television there. It is further not in dispute that the complainants and the other children looked up to the appellant as a father figure and trusted him. There can be no doubt that the complainants knew the appellant very well and fondly referred to him as Uncle [M……]. According to the evidence, the parents of the complainants also knew and trusted the appellant.

[7] The complainant on count 1, [M…..], testified that on the 19th October 2013, she went to the appellant's house looking for her friend, [J……]. On her arrival she found the appellant who told her that [J……] was not there. He then asked her to fetch his cellular phone which was in his room. On her return with the cellular phone, the appellant closed the door to the house. Appellant then took her to the bedroom and pushed her onto the bed. He then closed her mouth with his one hand and then used

his other hand to take off her jeans and panty. Appellant then inserted his penis in her vagina and then proceeded to have sexual intercourse with her. At a stage he stopped, went to the window, looked out and then resumed having intercourse with her. When he finished, she dressed herself and left. The next day she reported the incident to [J…….], who in turn told her sister who then told [M…..'s] father.

[8] She testified that she had no reason to suspect that anything was amiss when he requested her to fetch his cellular phone as she respected him and trusted him. The appellant had told her not to tell anyone and she did not tell her father immediately as she was concerned how her father might react it if she told him.

[9] Sylvia Nomvalo Jaji, a registered nurse and midwife who is also qualified as a forensic examiner, in matters of sexual assault, testified that on 20 October 2013 at 19h40 she examined [M…] at Karl Bremmer Hospital. With reference to the J88 which she completed at the time of her examination of [M…..'s] vagina, she testified that she found that the para uretheral folds, the labia minora and the posteria fourchette were bruised. The fossa navicularis was torn and that there was a 5cm tear of the perinium, which is the area between the general orifice and the rectum. As a result of her findings she concluded that the injuries were consistent with penetration or interference to the vulva of the vagina with a hard object. In her view all the injuries she observed was caused within twenty-four hours of her examination.

[10] [J……], the complainant in count 2, confirmed that they frequented the appellant's house. She testified that on an occasion when she and other girls was at the appellant's house in his bedroom they played a game called '*hopie lê'.* In this game the participants would lay on top of each other. The game was played on the appellant's bed and she testified that appellant laid on top of her. On that occasion whilst they were still in the appellant's room, he was sitting next to her and he then started touching her body. He placed his hand on her thigh and was moving it up her leg towards her vagina. She told him to stop and told him that she would tell her mother. She reported the incident to her mother who told her not to play there anymore and that if it happened again she would report it to the police. She confirmed that on the Sunday which is the day after [M……] was raped, that [M….] had made a report to her that appellant had raped her the previous day. She had told her sister, who in turn told [M…..'s] father.

[11] [S……], the complainant in count 3, testified that when she was nine years old and in grade 3, she was playing outside the appellant's house with her other girlfriends when it rained and they ran into his house for shelter. When they were inside, appellant suggested they play '*poppehuis*'. One of her girlfriends played the role of the mother, appellant was the father and she was the child. At a stage and whilst they were in the room, the appellant placed his hand on her vagina over her clothes. He then went to her friend and placed her on a chair and also touched her private parts. She made it clear to appellant that he should not do this to her. She also testified about related

incidents where the appellant had showed her and her friend his private parts and an incident where he had lifted her up and held her body against his private part.

[12] [J……..], the biological mother of [J……], confirmed that in 2013 [J……] had told her that appellant wanted to put his hand on her vagina. She had told [J……] that she should not play at appellant's house any longer and that if any such incident happened again, she would report the matter to the police.

[13] [S…..'s] mother testified that prior to them coming to live at [B……], they lived in the same area as appellant at [S…… W…... D……]. She had never had problems with the appellant. She testified that when she came from work on a Monday, she heard people talking about the rape of [M….]. Because [S…..'s] name was also mentioned, she asked [S……] whether appellant had done anything to her. [S……] denied that appellant had done anything to her. After making further inquiries, she confronted [S……] again and asked her why she was not telling her the truth. She conceded that she had asked her daughter twice or thrice before [S……..] told her what the appellant had done to her. She also admitted that she threatened [S……] with a hiding if she did not come out with the truth. She testified that [S……] had told her that she was scared to tell her as the appellant had threatened her.

[14] The appellant testified in his own defence and called a defence witness. On count 1 he testified that he had gone to Wynberg on the morning of 19 October 2013 with regard to his identity documents. He returned home about at 11h00. His '*wife and*

son' were not home as they had attended a funeral and arrived home at about 18h00. He testified that his defence witness, [S…..] [C……] ('C……') and two other females had been with him at his house the whole day. According to him [M……] and [J……] had played in front of his door in the afternoon of that day but were not inside his house. They left at about 16h00. [C……] was the last of the adults who left his house at about 17h00 and his wife arrived at 18h00. The next day [M….] and [J……] arrived at his house at about 11h00 and ate there. When he and his wife were resting after one in the afternoon, he heard [M…..] and [J…..] shouting that he was a rapist. When [M….] and her father came to his house later the same day, her father told him that [M…..] alleged that he, appellant, had raped her. He denied the allegation.

[15] Appellant's defence witness, [C……], testified that she arrived at appellant's house at 11h00 and confirmed that the other women were there. She confirmed that they had been drinking beer. She was not well on that day and confirmed that she left at about 17h00. She could not say what happened at appellant's house between 17h00 and 18h00.

[16] The issue to be determined in this appeal, is whether or not the state has proved the guilt of the appellant beyond a reasonable doubt and in particular whether the trial magistrate had erred and misdirected herself in her evaluation of the evidence of the child witnesses.

[17] Ms [d…. J….] contended on behalf of the appellant that the evidence of [M…..] was not satisfactory in all respects if regard is had to her version of the events and how it came about that she had reported the rape. She was critical about the fact that [M…..] had only shared what had happened to her after [J…… d…..] had told her what appellant had done to her. In addition she contended that an adverse finding should be made as [M……] had failed to tell her father immediately what appellant had done to her and because she had gone to appellant's house the day after he had raped her.

[18] In so far as the evidence of [J……] was concerned, Ms [d…….J…] submitted in her heads of argument that on [J……'s] evidence, the appellant does not appear to have touched any specific part of her body whilst playing the game and that it was questionable whether appellant had the intent to commit a sexual offence. During argument she did not pursue this submission with any force.

[19] As far as count 3 is concerned, she contended that the evidence of [S…….] was not reliable as she only implicated the appellant after her mother threatened her and that her report about the sexual assault was therefore not made voluntarily.

[20] On the whole, Ms [d…. J…..] contended that the court a *quo* had erred in rejecting the appellant's version as untruthful as he had called a witness to corroborate his version and that he should have been given the benefit of the doubt. Mr Burke who appeared on behalf of the respondent contended that the trial magistrate had not

misdirected herself in evaluating the evidence of the witnesses and that the appellant had been correctly convicted.

[21] After summarising the evidence of the child witnesses and referring to the relevant authorities, the trial magistrate in evaluating the evidence, found as follows in respect of [M…..]:

> '*Die klaagster het 'n sinvolle kronologiese weergawe gegee van die gebeure wat plaasgevind het op 19 Oktober 2013. Sy was uiters intelligent. As die hof kyk na die manier hoe sy die vrae beantwoord het in haar kruisondervraging asook in haar getuienis in hoof, het sy dit uiters goed beantwoord. Daar was geen weersprekings in die getuienis van haar nie*.'
>
> *'By die toepassing van die versigtigheidsreël [by] 'n enkel getuie moet die hof ten spyte van enige tekortkominge of weersprekings steeds die getuienis van 'n enkel getuie oorweeg en dan besluit of hierdie getuienis betroubaar is al dan nie.*' The trial magistrate found guarantees for the reliability of M…..'s evidence in the medical evidence and the fact that she had told J…… about the rape.

[22] In respect of the evidence of Jolene, the trial magistrate found that she was a good witness. The trial magistrate placed reliance on the fact that she had made the report to her mother about the appellant touching her in 2013, long before the story of the rape of M….. surfaced. The trial magistrate further found that even though S….. was only nine years old when the incident took place, that she was a good witness who could remember specific detail about events, like for example that it rained on the day of

the incident, that appellant played '*poppehuis*' with them and that she testified that there were other similar incidents of sexual nature that had occurred between herself, the appellant and other young children at the appellant's house.

[23] It is common cause that the complainants who testified in regard to counts 1 to 3, are children and that they are respectively single witnesses in regard to the incidents that they testified about. It is trite law that the evidence of a single state witness is always treated with caution and in a criminal matter a conviction will normally follow only if the evidence is substantially satisfactory in every respect or if there is corroboration. See **Stevens v S** [2005] 1 All SA (SCA) para 17. Our courts have held that evidence can be satisfactory even if it is open to criticism. See **S v Sauls** 1981 (3) SA 172(A) 180G – H. In **S v V** 2000(1) SACR 453 at 454 para 2 Zulman JA cautioned that '*whilst there is no statutory requirement that a child's evidence must be corroborated, it has long since been accepted that the evidence of young children should be treated with caution …, and that the evidence in a particular case involving sexual conduct may call for a cautionary approach*.' In **S v Hanekom** 2011 (1) SACR 430 (WCC) at para 10, Saner AJ similarly expressed caution in regard to the '*uncritical acceptance of the evidence both of a single and child witness*'. The learned Acting Judge stated further at para 13 that '*Indeed a court should be particularly alert to an application of cautionary rules where factors such as evasiveness on the part of the witness, the lapse of significant period of time between the incident complained of and the trial; the fact that a witness had a grudge …or a motive to falsely implicate him and the fact that a witness*

may generally have had some difficulty in separating reality from fantasy have to be considered.' See also **S v J** 1998 (4) BCLR 424(A); [1998] 1 SACR 470 (SCA).

[24] Our courts have however long since held the view that '*while there is always the need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, … the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer having anxiously scrutinised such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence … may … be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears.*'. See **R v J** 1966 (1) SA 88 S.R., A.D. at 90 D – F; **S v Snyman** 1968 (2) SA 582 (A) 585 G – H and **S v Artman** 1968 (3) SA 339(A) 340.

[25] What is clear is that a general, immutable cautionary rule does not have to be applied to the evidence of a complainant in a sexual case and that it will depend on the facts and circumstances of each case as to whether such an approach is necessary or not. See S v J (*supra*) and **S v Gentle** 2005 (1) SACR 420 (SCA) para 17. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now clearly provides that '*a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence … with caution on account of the nature of the offence.*'

[26] According to common law, evidence that the victim of a sexual offence complained about it shortly after the incident as well as evidence of the particulars of the complainant, may be given by the person to whom the victim complained provided that the complainant herself gives evidence. Section 58 and 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (*supra*) now govern the use of evidence relating to previous consistent statements made by complainants in proceedings involving sexual offences.

[27] S 58 provides that "*Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence. Provided that the court may not draw any inference only from the absence of such previous consistent statement.*'

[28] S 59 provides that '*In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof*.'

[29] It is accordingly clear that the proviso to ss 58 and 59 of Act 32 of 2007 (*supra*) provide that a court may not draw any inference from only the absence of previous consistent statements and any delay between the alleged commission of the offence and the reporting thereof.

[30] It is further necessary to remind ourselves that the fact that a complaint of a sexual offence has been made does not prove the content of the complaint, nor is it corroboration of the complainants evidence. The SCA has clearly stated that the terms of the complaint made by the complainant in a sexual offence is admissible for two purposes, namely, to show the consistency of the complainant's evidence, and to a negative consent. See **S v Hammond** 2004 (2) SACR at 307 para 12.

[31] It is also accepted law that the complainant must complain voluntarily. The authorities are clear that a complaint will not be admissible if it is made as a result of intimidation, suggestion or conduct towards the complainant which negates the element of voluntariness at the time that the complaint is made. In **S v T** 1963 (1) SA 484(A) the complainants' mother threatened to hit her with a stick when she refused to tell her what the accused had done to her. On appeal the statement forced from her in this manner was found to be inadmissible.

[32] I now turn to deal with the criticism levelled at the evidence of the complainants with reference to the aforestated principles. Considering the proviso to ss 58 and 59 of Act 32 of 2007, I am not persuaded that an adverse inference should be drawn against M…..'s evidence because she did not report the rape to her father at the first opportunity she had. There is no rule of law that requires that she was obliged to first report to her father or mother. In any event there was no undue delay in her reporting the rape, albeit to her friend, [J……]. She gave a plausible explanation as to why she did not report the rape to her father i.e. she was concerned that he would confront the

appellant and do him harm. The fact that she reported the rape to [J……] the day after it occurred is neither unusual or suspicious. [J…..] was her friend and it is to be expected that she would confide in her.

[33] On the evidence both [M…….] and [J…..] had intended to tell appellants '*wife*' what he had done to them the day after [M……'s] rape, but they did not have the courage to do so. There is no further evidence that [M……] held a grudge against the appellant or that she had a motive to falsely implicate him.

[34] The evidence rather points to the fact that [M……] and the appellant had maintained good relations with each other prior to the rape, that [M…..] trusted the appellant and regarded him as a father figure. Corroboration for [M…..'s] evidence that she had been raped is to be found in the medical evidence that there were bruises and tears to her vagina, consistent with forced penetration. The criticism of [M…..'s] evidence is accordingly without foundation.

[35] The criticism which is levelled against [J…. d… J…..] is similarly unfounded. It should be borne in mind that when the appellant touched her in the manner that he did, (which was some time before the rape of M….), she told him that she would tell her mother and then at the first opportunity told her mother. The fact that her mother did not deem it necessary at the time to lay a criminal complaint does not mean that the incident did not occur and or that her version was not truthful. If she did indeed have a grudge against the appellant or if she wanted to falsely implicate him, she could very

easily have said that he in fact touched her private parts as opposed to attempting to do so. The fact that she thereafter went back to the appellant's house also does not mean that her evidence is not truthful and or unreliable. It is clear that when she did go back to the appellants house that she was never alone and that she was guarded.

[36] It is correct that [S……] initially denied that the appellant had done anything to her. It is also common cause that her mother had threatened to give her a hiding if she did not tell the truth. It must be borne in mind that she was nine years old at the time when the incidents relating to her occurred. She testified that the reason why she initially denied that appellant had done anything to her was because she was afraid of what he might do if she spoke out. Notwithstanding the view expressed in S v T (*supra*) it must be borne in mind that in cases of this nature *'because of the sex taboo and the consequent tendency to concealment a measure of persuasion is sometimes necessary before the story is told. Quite often the complainant would prefer to keep quiet, but is forced by circumstances to speak out, for e.g. if she becomes pregnant or is injured or a sexually transmitted disease manifests itself etc. Circumstances such as these do not necessarily mean that the complaint is not made voluntarily, but because of these circumstances the victim is sometimes questioned or threatened, in which case the complaint may be made involuntarily*'. See Law of Evidence, Schmidt and Rademeyer Issue 13 [July 2015] at 14. 14.

[37] I agree with the learned authors that '*it is perfectly conceivable that, in a delicate situation, a mother may have to guide her child to a certain extent, may do so*

rather to reveal the truth rather than to conceal it, and that the ensuing answers will not necessarily be involuntary'. See Law of Evidence (*supra*) at 14.15. Considering the views expressed by the learned authors it seems to me to be prudent, that in dealing with matters of this nature, courts should be cautious in not rushing into a strict application of the approach adopted in S v T (*supra*). In my view a careful examination of the facts and circumstances of the particular case is required before coming to the conclusion that a statement of a victim in a rape or sexual assault was inadmissible because the victim was threatened to make such a statement.

[38] Questioning the victim of a rape or sexual assault does not necessarily mean that the complaint was involuntary particularly where for example, a mother questions her child thoroughly and insists that she speaks the truth. See **R v C** 1955 (4) SA (N). Where questions were leading or intimidating the possibility may arise that the complaint was not made voluntarily. Each case will however have to be judged according to its own particular facts and circumstances. What is clear is that there is no closed number of factors that have to be taken into account in making the determination whether or not a complaint was made voluntarily or not.

[39] In the present matter I am in any event not persuaded that the evidence of Sureida should be excluded, and or that it is inadmissible on the basis that it was coerced and or obtained by intimidation or suggestion. I am satisfied that the answers that she gave to her mother on being confronted in the way that she was, does not have to be considered as proof of her story or of the incidents that she testified about. I find that although her evidence was simplistic, it was clear and absent of fantasy and

suggestion. Moreover her evidence about the kind of games that the appellant played with her and her girlfriends and the manner in which appellant would go about touching them in the course of playing these games gives credence to her evidence. Her evidence about the appellant's *modus operandi* i.e. playing games with the girls before engaging in his sexual conduct with them is substantially corroborated by the evidence of Jolene.

[40] The fact that other victims did not come forward and or the fact that the police did not take statements from them cannot be held against her nor does it make her version of what she experienced less truthful. I can find no evidence that her version is fabricated or that she was influenced to testify in the way that she did. The suggestion or assertion that she fabricated her version to fit in with the version presented by her friends must therefore be dismissed.

[41] I am satisfied that the trial magistrate was alive to the fact that she was dealing with the evidence of children, that they were single witnesses and that their evidence should be treated with caution. It is trite law that an appeal court will only be entitled to interfere with a trial courts' evaluation of the oral testimony in exceptional cases. The trial magistrate was steeped in the atmosphere of the trial and had the advantage of seeing, hearing and appraising the witnesses. On a consideration of the record, I cannot find any fault with the trial magistrates' evaluation of the evidence of the child witnesses nor am persuaded that the trial magistrate misdirected herself in respect of the factual findings she made in reaching her conclusion. See **R v Dhlumayo and**

Another [1948] 2 All SA 566 and **S v Francis** 1991 (1) SACR 198(A). In my view the child witnesses corroborated each other substantially and even though the child witnesses may have contradicted each other on particular aspects, it does not follow that the witnesses were untruthful and or that the contradictions should necessarily lead to the rejection of the whole of their evidence. See **S v Oosthuizen** 1982 (3) SA 571 (T) at 576.

[42] Although the appellant raised an alibi as a defence, I am not persuaded that his defence amounts to an alibi in the true sense of the meaning of the word. On the facts before us the appellant was at his house for the better part of the day when the rape in respect of count 1 is alleged to have occurred. Even if it is accepted that the appellant returned home from Wynberg at 10h00 and spent the better of the day with his adult female companions at his house, he is unable to account for what happened, and or what he did, between 17h 00 (i.e. when his defence witness left), and 18h 00 when his wife allegedly arrived home. In respect of counts 2 and 3 he did not dispute that he was at home when the incidents occurred.

[43] His defence in respect of all three counts essentially amounts to a denial that he committed the offences concerned. It is trite law that there is no obligation upon an accused person to convince the court of his innocence where the state bears the onus. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is further not entitled to convict unless it is satisfied, not only that the explanation of the accused is improbable, but that it is also false

beyond any reasonable doubt. The appellant was unable to provide any reasonable explanation why the complainant's had singled him out and or had fabricated lies against him. I am on the whole satisfied that there is no reasonable possibility of conscious or unconscious fabrication of the evidence by the complainants against the appellant. On a careful consideration of the evidence of the complainants, I am satisfied that they were indeed satisfactory, reliable and truthful witnesses and that the overwhelming weight of their evidence establishes the guilt of the appellant beyond a reasonable doubt. The appellant's version was accordingly correctly dismissed as untruthful and false by the trial magistrate. The appeal against the conviction must therefore fail.

[44] I now turn to deal with the appeal against sentence.

[45] It is trite law that an appeal court will generally only interfere with the sentence imposed if the court a *quo* committed an irregularity or misdirected itself in imposing the sentence or has imposed a sentence which is shockingly inappropriate or completely out of proportion to the magnitude of the offence.

[46] The prescribed minimum sentence of life imprisonment applies in respect of count one as the victim is a girl under the age of sixteen (16) years old.

[47] In her judgment on sentence, the trial magistrate found that no substantial and compelling circumstances existed which justified the imposition of a lesser sentence than the minimum prescribed sentence.

[48] It was contended on behalf of the appellant that the trial court misdirected itself by not exercising its discretion with regard to sentence in a fair and just manner and that it had failed to take into account that, appellant was forty-three years old at the time of the offences; he was gainfully employed prior to his arrest; he was a first offender; he had three minor children that he supported and that he had been in custody for one year and six months prior to sentence being imposed. It was further contended that even though the facts referred to above do not individually constitute substantial and compelling circumstances, that if they were assessed cumulatively, that they do amount to such. Mr Burke who appeared on behalf of the respondent was of the view that the life sentence was appropriate in the circumstances of the case.

[49] In **S v Malgas** 2001 (1) SACR 469 (SCA) the court held at para 25 that the prescribed sentence may be departed from '*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.*' In **S v Vilakazi** 2009 (1) SACR 552 at 562 b – c Nugent JA stated that '*whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the*

circumstances of the particular case. It ought to be apparent that when the matter is approached in that way, it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence'.

[50] There can be no doubt that rape is a repulsive crime. In **S v Chapman** 1997 (2) SACR 3 (SCA) it was appropriately referred to as '*a humiliating, degrading and brutal invasion of privacy, the dignity and the person of the victim.*' In **S v SMM** 2013 (2) SACR 292 at 297, para [14] Majiedt JA stated correctly that '*our country is plainly facing a crisis of epidemic proportions in respect of rape of particularly young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage … The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned to exact retribution, and to deter further criminal conduct.*'

[51] The trial magistrate correctly regarded as aggravating the fact that the appellant allowed the complainant's into his house, that they trusted him, regarded him as a father figure, and that he abused this position of trust and the trust that the children's parents and the community had in him. I agree with the view that the unquestionable emotional harm that rape does may vary in gravity, but it generally deserves more emphasis than physical injuries. I have no doubt that the rape had an extremely negative effect on Musa and her family. The other two complainants were also not left unscathed.

[52] It is however regrettable that the state did not present (nor did the trial court request), expert evidence about the emotional and psychological harm that the respective victims suffered. Considering that count 1 attracted a life sentence, the matter called out for what was described by Nugent JA in S v Vilakazi (*supra*) as '… *thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail*', in respect of the impact of the rape on particularly the complainant on count 1. The so-called victim impact reports which were handed in during the sentencing stage falls way short of the kind of evidence that is required to be placed before the court to enable the court to make a proper assessment of the emotional and psychological harm that victims suffer in cases of this nature for the purpose of deciding on an appropriate sentence. Suffices to say that prosecutors should take greater care in the presentation of this kind of evidence to a court at the sentencing stage.

[53] Our courts have however repeatedly held that society demands that persons who make themselves guilty of offences of this nature must be severely dealt with. In cases such as this, the element of retribution and deterrence rather that the interest of the criminal himself comes to the fore when it comes to the assessment of what would be a suitable sentence. At the same time it must be emphasised that we should not lose sight of the fact that life imprisonment is the most severe sentence which a court can impose and that the question whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful

consideration. In the present matter the trial magistrate failed to give proper consideration to the approach adopted by our courts in similar cases such as **S v Abrahams** 2002 (1) SACR 116 (SCA), **S v Mahomotsa** 2002 (2) SACR 435 (SCA), **S v Nkomo** 2007 (2) SACR 198 (SCA), **S v GN** 2010 (1) SACR 93 [TPD] and **S v SMM** 2013 (2) SACR 292 (SCA), which hold the view that 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.

[54] In S v Abrahams (*supra*) the appellant was convicted of raping his fourteen (14) year old daughter and was sentenced in the High Court to seven years imprisonment. On appeal by the state against sentence the SCA increased the sentence to twelve (12) years imprisonment. The court held that the life sentence ordained by the Legislature should be reserved for cases devoid of substantial and compelling factors and that it should only be imposed as a minimum sentence in the most serious cases. In S v Mahomotsa (*supra*) the complainant was fifteen (15) years old and the accused was convicted of two counts of rape in relation to her. On appeal the minimum life sentence imposed by the court a *quo* was substituted with a sentence of eight (8) and twelve (12) years imprisonment on the respective counts. In **S v Nkomo** (*supra*) the accused was convicted of abduction and rape. The accused was sentenced to three (3) years imprisonment for the abduction but referred to the High Court for sentence since he had raped the complainant five (5) times and the prescribed sentence was life imprisonment. The sentence of life imprisonment imposed by the High Court was set aside on appeal and substituted with a sentence of sixteen (16) years imprisonment. In **S v GN** (*supra*)

the appellant was convicted in the regional court of raping his biological daughter of five (5) years old. He was referred to the High Court for sentence. The High Court confirmed the conviction, found no substantial and compelling circumstances and sentences the appellant to life imprisonment. The life sentence imposed on him was set aside on appeal and the appellant was sentenced to twenty (20) years imprisonment. In S v SMM (*supra*) the appellant was convicted of the rape of his thirteen (13) year old niece who was sent to him so that he could help her with her school admission application form. He was sentenced to life imprisonment by the court a *quo*. On appeal to the SCA the sentence of life imprisonment was set aside and replaced with a sentence of fifteen (15) years imprisonment. The approach and its application in S v Mahomotsa (*supra*) and the other cases referred to above conveys that even where imprisonment for life is prescribed as a minimum sentence that a court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such it must not be imposed lightly, even when it is a prescribed minimum sentence. In order for it to arrive at a just sentence, a court must have balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed. In S v Malgas (*supra*) at para 25 it was pointed out that s 51 of the Act '*has limited but not eliminated the courts' discretion in imposing sentence …*' It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into

account. In the present case the magistrate did not in her judgment on sentence give consideration to the approach adopted by our courts in the cases referred to hereinbefore, nor did she compare the approach adopted in these cases with the circumstances of the present case. The impression that I have is that the trial magistrate had decided to impose the prescribed sentence of life imprisonment as a matter of course unless the personal circumstances of the appellant disclosed it to be exceptional. Such an approach is not permitted. In my view the approach adopted by the trial magistrate amounts to a misdirection, the nature and degree which is sufficient to enable this court to interfere and reconsider sentence.

[55] Even though the rape committed by the appellant on count 1 is very serious and can never be condoned, it does not in my view qualify as falling in the category of one of the worst cases of rape. In my view the trial magistrate also failed and neglected to take into account the cumulative effect of the appellants favourable personal circumstances. He was forty-three (43) years old. Although married, he was separated from his wife since February 2010. He has three (3) children, respectively aged seventeen (17), twelve (12) and seven (7) years old from his marriage. At the time of the incidents he had a stable relationship and lived with a woman who had one child. He was employed and was a first offender. At the time of sentence he had been in custody for eighteen (18) months. Having regard to the cumulative effect of all these factors, I am of the view that substantial and compelling circumstances do indeed exist which allows for a deviation from the prescribed sentence of life imprisonment in respect of count 1.

[56] It is accepted law that where a court has to impose a sentence for multiple offences as in the present matter, the court has to seek an appropriate sentence for all the offences taken together. When dealing with multiple offences, courts must therefore bear in mind that the aggregate sentence imposed must not be unduly severe. The trial magistrate gave no reasons why she ordered that counts 2 and 3 should be taken together with count 1 for the purpose of sentence. Although this is a case where the incidents are closely connected in time, place and circumstances this is not necessarily an appropriate case for them to be taken together for the purpose of sentence and treated as one since they are subject to their own statutory sentencing structure and such an approach would arguably limit the court to the sentence already imposed on count 1. In my view the correct approach would be to impose separate sentences in respect of counts 2 and 3 and rather to order that they run concurrently with the sentence on count 1.

[57] Having said that, the crimes remain very serious and must be severely punished. Taking into account all the factors relevant to sentence, I am satisfied that a term of fifteen (15) years imprisonment on count 1 and terms of two (2) years and three (3) years imprisonment, respectively on counts 2 and 3, is a more reasonable balanced and justifiable sentence in this matter.

[58] In the result I propose the following order:

1. The appeal against conviction is dismissed.

2. The appeal against the sentence succeeds.

3. The sentence of life imprisonment in respect of counts 1 to 3 is set aside and replaced with the following:

   3.1 Count 1 - fifteen (15) years imprisonment.

   3.2 Count 2 - two (2) years imprisonment.

   3.3 Count 3 - three (3) years imprisonment.

   3.4 It is ordered that the sentences imposed on count 2 and 3 will run concurrently with the sentence of fifteen (15) years imprisonment imposed on count 1.

4. The new effective sentence of fifteen (15) years imprisonment is antedated to the date upon which sentence was originally imposed by the trial court, i.e. 18 February 2015.

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RILEY, AJ

I agree and it is so ordered.

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YEKISO, J