IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A139/2019

In the appeal between:

MOLEFI EDWARD LEKEKA Appellant

and

THE STATE Respondent

CORAM: VAN ZYL, J *et* CHESIWE, J

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 13 MAY 2020

Background:

[1] The appellant was charged in the Regional Court, Bethlehem, on two counts. Count 1 is housebreaking with the intent to commit an offence unknown to the State. In this regard it is alleged that on 1 October 2017 and at Senekal the appellant unlawfully and intentionally broke into the house of Disebo Khontsiwe with the intention to commit an offence unknown to the State. Count 2 is one of attempted contravention of section 3 of Act 32 of 2007 (attempted rape) in that it is alleged that at the aforesaid date and place the appellant unlawfully and intentionally attempted to commit an act of sexual penetration with the 13-year old complainant by smearing Zam-Buk ointment on her vagina and attempting to penetrate her penially.

[2] The appellant pleaded not guilty to both counts. The accused was subsequently convicted of housebreaking with the intention to contravene section 3 of Act 32 of 2007 and contravention of section 55 of Act 32 of 2007. In the judgment the court *a quo* stated as follows:

> "To put it in general terms, it is housebreaking with the intent to rape and attempted rape."

The appellant was sentenced to life imprisonment.

[3] The appeal is directed against the conviction and the sentence in terms of the appellant's automatic right of appeal in terms of section 10 of Act 42 of 2013.

[4] The grounds of appeal are, succinctly stated, the following:

1. The state failed to proof its case beyond reasonable doubt and the version of the appellant should have been accepted as reasonably possibly true.

2. The court *a quo* over-emphasised the seriousness of the offence and the interests of society at the expense of the personal circumstances of the appellant.

3. The court *a quo* erred in failing to warn the appellant of the possibility of life imprisonment in terms of section 51(1) of Act 105 of 1997.

4. The court *a quo* erred by finding no substantial and compelling circumstances which necessitated the deviation from the prescribed sentence of life imprisonment.

5. The sentence of life imprisonment is shocking and inappropriately harsh.

Ad conviction:

[5] In his plea explanation the appellant indicated that on the morning of the incident, at about 3h00, he in fact was at the house where the complainant was. He went there to see his girlfriend, Masipeshlele. When he arrived at the house, the door was closed, but not locked, which was in accordance with the arrangement he had with his girlfriend. He opened the door and entered the house. He found that his girlfriend was not at home. When he entered the house, one of the boys who also resides at the said house, went outside. The boy returned with two older men. The older men were shouting at the appellant. He tried to explain to them why he was at the house. According to the appellant they did not want to listen, but wanted to fight. Because they were shouting at him and wanted to assault him, he left.

[6] The complainant in Count 2, to whom I shall only refer as the complainant in order to protect her identity, testified with the assistance of an intermediary. At the time of the incident she was 13 years old and at the time when she testified in court, she was 14 years old. She testified that at the time she was at her mother's parental home, in Senekal, visiting her aunt, Masipeshele. Her aunt was not at home, because she went to a tavern. It was only the complainant and four other children at home, being Hlompo, one year old, Katleho, five years old, Thabiso, nine years old and Senki, eleven years old. They were all asleep on one bed in one of the two bedrooms of the house. She woke up from the bedroom door been opened.

The kitchen light was on and as the bedroom door was opened, the light from the kitchen shown into the bedroom. She then saw a person, but when she asked him who he was, he did not respond. The said person was unknown to her. The perpetrator grabbed her by her clothes and pressed her against the bed. He then pulled her towards the dining room, whilst she was screaming. He put her on top of the sofa and then he went into the second bedroom, which bedroom, according to the complainant, was where he gained entrance into the house through the window. The perpetrator then returned from the second bedroom after which he pulled her to the very same second bedroom. He put her on the bed and instructed her to undress. When she refused, he strangled her. Whilst he was strangling her, he asked her where her other sister was. When she asked him which sister he was referring to, he did not respond. He took out a knife which he carried on his body and pressed her hard against the bed to the extent that she could not even scream. He put his hands underneath her panty and smeared Zam-Buk ointment “next” to her anus and “next” to her vagina. He then inserted his finger into her vagina, which she found to be painful. This was after he pulled her panty down to her knees. The perpetrator then dropped his trouser, at which time Thabo shouted at her by her nickname “Momo”. Thabo was outside the house. The perpetrator then quickly got dressed and exited the house through the window of the very same bedroom. She testified that she suffered injuries on her neck which looked like as though the perpetrator put his nails on her neck. According to the complainant she told Disebo that there was someone who got into the house. This was whilst

Thabo was still chasing the perpetrator. Disebo enquired from the complainant what the perpetrator did, and the complainant explained to her that he took off her panty and smeared her with Zam-Buk ointment. When she was about to tell Disebo that the perpetrator put his finger into her vagina, she had already called the police. The police arrived and they went to the police station.

[7] With regard to the window through which the perpetrator allegedly entered the house, the complainant testified that it was the window of the second bedroom. She testified that the said window has been broken for a long time, but the hole in the window was closed with a piece of corrugated iron. However, after the incident it was a different part of the window which she then saw was broken. According to her the perpetrator could only have gained entry through that window, because the kitchen door was still locked, with the key in the door. She personally locked the door before they went to sleep. She further testified that when she returned from the police station, she saw the broken window pieces lying on the ground outside the window, as well as a container with Zam-Buk ointment, which container was open. There was also a two-plate electrical stove.

[8] During cross-examination the complainant testified that there were two doors which lead to the outside, the kitchen door and a door from the lounge or dining-room area. The door from the lounge, however, was never being used and always kept locked.

[9] In further cross-examination the complainant testified that the lounge and the kitchen were in fact one room, which was divided by a cupboard which does not stretch right up to the roof. There is an electrical light in the kitchen part of the room, but which light is also being used as the source of light in the lounge. The complainant denied the version of the appellant in so far as it differed from her own version. She furthermore testified that that night was the first time she ever saw the perpetrator.

[10] Mpho Sophia Molefe, also known as Masipeshlele, the 26-year old aunt of the complainant in Count 2, confirmed in her evidence that during the night of the incident, she was at a tavern. She denied having any relationship with the appellant. She only returned to the house at around 6h00. According to her the appellant is a person she sees in the street from time to time. They usually greeted one another.

[11] The cousin of the complainant, Ms Khontsiwe, testified that she was at church during the night of the incident. She explained that it was a “cross-over”, which means that they go to church through the night up until the following day. She testified that at about 4h00 the morning of the incident, the 11-year old Senki fetched her from church. He told her that somebody came into the house and that that person was raping the complainant. She immediately ran with her uncle, Thabo Molefe, to the house where the incident occurred. When Mr Molefe arrived at the house he called out the complainant`s name, whereupon

she saw someone exiting via a window. She did not see the person's face. Mr Molefe chased this person. She then met with the complainant at the door. Ms Khontsiwe asked her what happened, whereafter she narrated to her that the person who was in the house wanted to rape her, but that he did not in fact rape her. Thereafter the police arrived. She went with the complainant to the police station. When they returned from the police station, she went through the house with one of the detectives. They found a broken window. Outside near to the window, there was a two-plate stove and a Zam-Buk container. According to her there was also a base of a bed in the vicinity of the window.

When asked during cross-examination what the complainant told her Ms Khontsiwe testified that the said perpetrator took her from the bedroom, saying that they are making a noise and that the other kids would wake up. He took her to the sitting room and from there to the bedroom where there were no people. He then told her to undress. When she was reluctant in undressing, the perpetrator slapped the complainant with an open hand. The complainant then undressed and the perpetrator took Zam-Buk ointment and applied it on her private part. Thereafter Mr Molefe knocked at the outside of the house and the perpetrator could not continue anymore. According to Ms Khontsiwe, the complainant told her that is a person who is dark in complexion and has a scratch above his eye. It was put to the witness that it is the appellant's version that the reason why he ended up running away, was because there was a male person and a lady who arrived and who were very aggressive,

wanting to fight him. Although he kept on explaining why he was there, they did not want to listen but still wanted to fight him. This was denied by the witness.

[12] Constable Mokone received a report as a result of which he and other colleagues went to the house of the incident. He found the kitchen door locked. They went to the other door which also grants access to the house, which was also locked. They knocked and a child opened the door for them. He noticed that a window of one of the bedrooms was broken and slightly open. Outside there were broken window pieces on the ground, as well as a Zam-Buk container.

[13] Mr Thabo Molefe confirmed in his evidence that they were at church at the time of the incident when Senki arrived and informed them that someone got into the house where they were. When Mr Molefe arrived at the house, he knocked at the kitchen door, but there was no response. The next moment somebody exited the house through a window and ran away. They chased him, but he outran them. Mr Molefe could not see his face. In cross-examination it was put to Mr Molefe that the appellant knows him well, whereupon Mr Molefe confirmed that he knows the appellant. He disputed that he saw the appellant that night coming out of the house through the door, as was put to him on behalf of the appellant. He reiterated that the only person who exited the house, was the one who went through the window. According to him, if the appellant had come through the door and they had spoken to one another, as

alleged by the appellant, he would have recognised the appellant, because they are known to one another.

[14] Senki testified that he is 12 years old and in Grade 5. He confirmed that the perpetrator opened the door of the bedroom in which he and the other four children were sleeping and thereafter entered the bedroom and came to their bed. According to him the light was switched on. He testified that he identified the perpetrator as Nthoempe. He explained that he knows Nthoempe because he used to be with his aunt. At a later stage during his evidence Senki was requested to enter the court and he was asked whether he sees Nthoempe. He then pointed out the appellant as being Nthoempe.

[15] He further testified that the appellant took his sibling, the complainant, also known as Momo, into the dining room. He testified from where he was still on the bed, he saw that the appellant took out a Zumbuk container and smeared the Zam-Buk “in front”. Senki testified that the appellant wanted to rape the complainant. He then went out the window and went to the church where he fetched his sister, his aunt and his uncle. He told them that someone broke in and that that person wanted to rape them. They all went to the house and Mr Molefe knocked at the door. Senki testified that the appellant exited the house through a window and ran away. In cross-examination he testified that he asked the appellant what he wants when he entered the door, whereupon the appellant responded that he should keep quiet. He also testified that the appellant pulled the complainant to the dining room and told her that he wanted

to take her to the dining room in order to rape her. In the dining room on the couch he undressed the complainant, whereupon the witness started crying and went out the window to get help from his family members at the church. He further explained that at that time the appellant only undressed her dress. He then conceded that he did not personally see that the Zum-Buk ointment was applied to the complainant. He explained that he only once saw the appellant before the night of the incident, together with his aunt going to the tavern. He, however, explained that he did not permanently reside in Senekal and therefore he would not have often seen the appellant. He, however, confirmed that to his knowledge the appellant is the boyfriend of his aunt. He explained that his aunt told him so much.

[16] The last state witness was Thabiso Molefe. He also testified with the assistance of an intermediary. At the time when he testified he was 11 years old and in Grade 4. He testified that whilst they were asleep in the bedroom, Nthoempe entered through the bedroom door. He explained that he knew Nthoempe because he saw him the previous afternoon whilst Thabiso was in his mother's company. He explained that there was an old scratch on the forehead of Nthoempe. Thabiso heard Ouma crying and she lit her phone, which was when he managed to see Nthoempe's face. Nthoempe asked Ouma where Ouma's sister was. According to Thabiso Nthoempe then pulled Ouma to the couch near the room-divider between the sitting room and the kitchen. He did not see anything further, as he went through the window with the intention to

obtain help. He ran to Senki's parental home and he reported to the young man who was looking after the children that somebody broke into their house. Thabiso was also called into court whereupon he pointed the appellant out as being Nthoempe.

[17] The appellant testified in his own defence. He repeated the version of events as set out in his plea explanation. He explained that during the day, at approximately 12 midday, he met with his girlfriend, Masipeshlele, at the house where the incident took place. According to him they had an agreement that he will go to her house during the early morning hours, should she not turn up at the tavern where he was. He found the kitchen door closed, but not locked, in accordance with the arrangement he had with his girlfriend. He went to one bedroom, where he found no people and in the other bedroom, he found the children sleeping. He explained that he knows the house and knows where his girlfriend's bedroom was, being the very same one in which the children slept. He asked Senki where their sister was, but Senki did not respond. Instead the complainant responded, saying that their sister had not yet arrived after she left the previous day. As he left the bedroom through the bedroom door, he noticed Senki going out the window of the bedroom where they were sleeping. According to the appellant he thought that Senki was going to call the parents and therefore he remained in the house so that he could explain to them the reason for him being there. According to him they did not know about their relationship, but he was known to them. He was seated in the lounge waiting

for them to arrive. He heard a knock at the door and he heard Thabo calling the complainant's name. He recognised Thabo by his voice. According to the appellant the door was closed, but it was not locked. He therefore opened the door and went outside, where he found three people. It was Thabo, Malefu and a third male person who was unknown to him. He tried to explain to them that he came to see Masipeshlele, but they would not listen to him as they were in a fighting mood and making a lot of noise. They accused him of having broken into the house. He then went out the gate and left. The appellant testified that although the lights in the bedroom were off, the complainant used her cell phone to provide light.

[18] During cross-examination the appellant confirmed that he has a mark on the left side of his eye. He testified in cross-examination, more than once, that he asked the complainant where her sister was, contrary to his evidence in chief when he testified that he asked Senki the question, but that the complainant responded. He denied the version of the state witnesses in so far as it differed from his own version.

[19] A photo album and a sketch plan depicting the house and the bedrooms where the incident took place was handed in as Exhibit B. The J88 Medico-Legal Report pertaining to the complainant, was handed in as Exhibit C.

[20] It is trite that the evidence of children should be approached with caution. See **Rex v Manda** 1951 (3) SA 158 (A) at 163. In

S v V 2000 (1) SACR 453 (SCA) at para [2] it was stated as follows:

"In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there if no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. …"

[21] The complainant is a single witness pertaining to the alleged sexual violation. Although section 208 of the Criminal Procedure Act, 51 of 1977, provides that an accused may be convicted of an offence on the single evidence of any competent witness, the evidence of a single witness should be approached with caution. In **Principles of Evidence**, PJ Schwikkard *et al,* Fourth edition, at p. 594 the following is stated in this regard:

"In **S v Sauls** 1981 (3) SA 172 (A) at 180, it was said that there is not rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence."

[22] The court *a quo* not only referred to the aforesaid rules of caution, but in my view, duly applied them.

[23] As correctly pointed out by the court *a quo,* the following aspects are common cause:

1. The appellant was in the particular house the night of the incident and he went into the room where all the children were sleeping.

2. He spoke to one of them (be it the complainant or Senki), enquiring as to where Masipeshlele was. This is also confirmed by Senki and Thabiso, both of whom identified the appellant and in circumstances where the appellant was known to them and he also knew the two witnesses.

3. There must have been enough light in the room considering that the last two witnesses were able to identify the appellant and from his side, the appellant was able to see and identify Senki when he exited the house through the window. It is consequently irrelevant exactly how the necessary light was provided.

4. Senki jumped through the window and ran to the church in order to call his family members to come and assist the children at home.

5. There is no evidence, not even a suggestion from the side of the appellant, that any other intruder was in the house during the relevant events.

[24] The complainant testified that she personally locked the kitchen door before they went to sleep and left the key in the door on the inside. Mr Molefe testified that when he arrived there after

having been called by Senki from the church, he also found the kitchen door to be locked. The relevant state witnesses testified that although a part of the window in the second bedroom was broken before the incident, another, different part of the window was broken during the incident. Not only did the impartial witness, the constable, confirmed that they found broken window pieces on the ground outside the window, but those are also depicted on photo 7 of Exhibit B. All the relevant state witnesses also testified that the appellant exited the house through the relevant window. Considering that all the other windows of the house were still intact after the incident and the two doors which lead to the outside of the house were both still locked after the incident, it is in my view the only reasonable inference that the appellant must have entered the house through the window, which he broke for purposes of entering the house.

[25] I have already mentioned that it is common cause that Senki exited the house through the window in the bedroom where they were sleeping. The evidence of Thabiso to the effect that he also exited the house through that very same window after Senki did, was also not disputed. It was also not disputed that Senki ran to the church to call his family members to come and assist them at home; in fact, the appellant confirms that the relevant family members arrived at the house. The court *a quo* found that "…*The only reason why Senki found it necessary to leave and to summon help was because of what happened whilst the accused was inside that room*", which finding, in my view, cannot be faulted in the circumstances.

[26] The evidence of the complainant that she was strangled by the person who entered the room (who, on his own version, was the appellant), is corroborated by the clinical findings noted in the J88, Exhibit C. It was noted that there were "multiple ecchymosis on both sides of the neck". "Ecchymosis" is defined as "discoloration of the skin resulting from bleeding underneath, typically caused by bruising". It was further noted that the said multiple ecchymosis of the neck suggests strangulation by a foreign object (not a rope). This clinical observation therefore corroborates the complainant's version to the effect that the perpetrator (the appellant) strangled her.

[27] The abovementioned J88, Exhibit C, reflects that a normal gynaecological examination was done, excluding vaginal penetration. The clinical findings in this regard were all normal. However, the complainant testified that the perpetrator (the appellant) smeared Zam-Buk ointment "next to" her vagina and her anus. In my view the opened Zam-Buk container which was found directly outside the broken window through which the appellant entered and exited the house, corroborates the complainant's version in this regard. The said open tin is also reflected on photo 7 of Exhibit B, where it was on the ground among the broken window pieces.

[28] In the circumstances the finding by the court *a quo* that the version of the appellant was to be rejected in so far as it differs from the version of the state, cannot be faulted. Ms Kruger,

who appeared on behalf of the appellant, by implication also conceded this during hearing of the oral argument.

[29] There are however two further aspects that need to be addressed.

[30] Firstly, count 2 describes the attempted rape, *inter alia,* as having attempted to penetrate the complainant penially. However, on the accepted version of the complainant, the appellant attempted to penetrate her vagina with his finger. The charge sheet is therefore amended to read accordingly.

[31] Secondly, the appellant was charged on two separate counts, each of which constitutes a separate and distinct offence. There is no basis upon which the court *a quo* could have "combined" the two counts to form only one count. A judgment or verdict needs to be pronounced on each of the counts.

[32] With regard to count 1, a competent verdict in terms of section 262(2) of the Criminal Procedure Act, 51 of 1977, is one of housebreaking to commit a specific offence. In my view the court *a quo* therefore should have found the appellant guilty on count 1 on the competent verdict of housebreaking with the intent to rape, as well as and guilty on count 2.

Ad Sentence:

[33] Keeping in mind that the court *a quo* (wrongly) convicted the appellant on one "combined" count, the appellant was sentenced to life imprisonment.

[34] In considering an appropriate sentence, the point of departure of the court *a quo* was that the General Law Amendment Act, 105 of 1997, is applicable with life imprisonment being the relevant prescribed minimum sentence.

[35] Considering the findings I have already made pertaining to the counts on which the appellant should have been convicted, it will, in my view, be appropriate to approach the appeal on sentence on the basis that the court *a quo* was apparently under the impression that life imprisonment is the prescribed minimum sentence on Count 2, being attempted rape.

[36] In terms of section 51(1) of Act 105 of 1997, read with Part I of Schedule 2 thereto, life imprisonment is, *inter alia,* the prescribed minimum sentence in the following circumstances:

> "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –
>
> …
>
> (b) Where the victim –
>
> (i) is a person under the age of 16 years. …"

[37] Section 55 of Act 32 of 2007, reads as follows:

"Any person who –

(a) attempts;

…

to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[38] The reasoning by the court *a quo* to have concluded that life imprisonment is also to be considered the prescribed minimum sentence for a contravention of section 55 of Act 32 of 2007, appears from its judgment to have been the following:

"Now Act 32 of 2007 says the same sentence that may be imposed for contravention of section 3 of the Act may be imposed for contravention of section 55 of the Act."

[39] The court *a quo* did not refer to any case law in this regard. However, in my research I came across the judgment in **S v Silo** 2016 (2) SACR 259 (WCC). In the said judgment Henney, J found as follows in paras [27] – [31]:

"[27] On a plain reading and interpretation of parts I – IV of sch 2 to the Criminal Law (Sentencing) Amendment Act 105 of 1997 (the Minimum Sentencing Act), no provision is made for the imposition of a prescribed sentence for attempted rape in contravention of s 55 of SORMA. This issue was raised by the parties in argument and the court was initially also under such impression. It was further argued that the regional magistrate may have misdirected herself in applying and considering the provisions of the Minimum Sentencing Act. Section 55 of SORMA, however, states that any person who —

'attempts . . . conspires . . . or . . . aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

> to commit a sexual offence in terms of this Act, is guilty of an offence and *may be liable* on conviction to the punishment to which *a person convicted of actually committing that offence would be liable*.' [Emphasis added.]

In this particular case the offence the appellant had been convicted of was an attempt to commit a rape in terms of s 3 of SORMA.

[28] On a basic understanding of the provisions of s 55 relating to sentence, it seeks to give power to a court to impose the same punishment, on a person convicted of attempting to commit any of the offences as mentioned in SORMA, as would be imposed on a person convicted of actually committing that offence.

[29] …

[30] The Minimum Sentencing Act does not make express provision for the imposition of a prescribed sentence in any of parts I – IV of sch 2 in the sentencing of an attempt to commit any of the listed offences. However, SORMA prescribes that an offender may be liable, upon conviction of an attempt to commit rape in terms of s 3 or s 4, to a punishment which such offender would have been subjected to if such offender had actually committed such an offence. In this particular case the prosecution revealed in the charge-sheet that it would be relying on the provisions of the Minimum Sentencing Act, and in particular the provisions of part III of sch 2, which prescribes a sentence of 10 years' imprisonment, unless of course the court finds that there are substantial and compelling circumstances to deviate from such a prescribed sentence.

[31] There is no doubt in my mind that the regional magistrate was correct in applying the provisions of the Minimum Sentencing Act. …"

I respectfully disagree with the **Silo**-judgment. Initially, before the amendment thereto by Act 38 of 2007, Part IV to Schedule

2 of Act 105 of 1997 made provision for the attempt to commit certain crimes in that it included offences referred to in Schedule 1 to the Criminal Procedure Act. Before the said amendment it used to read as follows:

"Any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977) other than an offence referred to in Part I, II or III of this Schedule if the accused had with him/her at the time a firearm, which was intended for use as such, in the commission of such offence.

Schedule I to the Criminal Procedure Act lists a number of crimes and then also provides for "any conspiracy, incitement or attempt to commit any offence referred to in this Schedule".

The reference in Part IV to offences referred to in Schedule 1 of the Criminal Procedure Act was removed by means of the amendment by Act 38 of 2007. In doing so, the legislature, in my view, removed any inclusion of the attempt to commit any crime. The references to rape in Schedules I and III was amended to that in in Act 32 of 2007, because rape is now a statutory offence defined in our law by means of the provisions of Act 32 of 2007. In doing so, it could not have been the legislature's intention to create harsher sentences for attempted rape by the amendment of the definition of rape in Act 32 of 2007. Had that been the intention, the legislature would surely have included a reference to attempted crimes in Act 105 of 1997. Similarly, one would have expected a reference to minimum legislation in Act 32 of 2007, which is absent. The mere fact that section 55 of Act 32 of 2007 provides that a person who attempts to commit a sexual offence in terms of the

Act may be liable to the punishment to which a person convicted of actually committing that offence would be liable, can therefore, in my view, not be interpreted to mean that the prescribed minimum sentences in Act 105 of 1997 are applicable in such an instance.

[40] I consequently find that the court *a quo* misdirected itself in this regard which entitles this court, as a court of appeal, to consider sentencing afresh. This is also necessitated by the fact that the court *a quo* imposed a sentence on only one "combined" count whilst the appellant had been charged on two separate counts.

[41] In considering an appropriate sentence it is necessary to consider the elements of sentencing, being the personal circumstances of the appellant, the nature and seriousness of the offences of which he was convicted and the interests of society.

[42] The appellant was 30 years of age at the time of the commission of the offences. At the time of his arrest he was self-employed as a builder and was earning approximately R3 500.00 per month. He is not married, but has two children, aged 8 years and 1 year old respectively, which children stay with their mother.

The appellant spent approximately one year and six months in custody awaiting trial.

The appellant also shows a complete lack of remorse.

[43] The appellant is not a first offender.

1. On 4 January 2008 he was convicted of assault and sentenced to R200 or 30 days imprisonment which was wholly suspended for three years on certain conditions.

2. On 3 August 2010 he was convicted on two counts of housebreaking with the intent to steal and theft and was sentenced to 18 months imprisonment on each of the counts.

3. On 25 April 2014 he was convicted of robbery and was sentenced to 6 years imprisonment.

Although it is not evident from the SAP 69, the appellant must have been released on parole before having served the full term of 6 years imprisonment. I base this conclusion on the fact that the current two offences were committed on 1 October 2017; hence before the expiry of 6 years since April 2014. This constitutes a severe aggravating factor.

[44] Both the offences of which the appellant will be convicted in terms of this judgment, are very serious offences. The appellant broke into the very house in which the lady whom he alleges was his girlfriend, which can be accepted in view of the children's evidence, was staying. He also knew most of the children who were present that evening, as well as members of

the rest of the family. However, in circumstances where he ought to have protected that extended family at all costs, he decided to be the perpetrator. He broke into the house, being the very place where the occupants thereof are supposed to have been safe. He found the children fast asleep on one bed, defenceless and vulnerable. After he enquired from them as to where his girlfriend was and found that she was absent, he dragged the 13-year old complainant to the lounge. When he found that his girlfriend was absent, he could have reconsidered his conduct and could have left the house without harming anybody. Instead he attempted to rape the complainant. In this regard the court *a quo* correctly stated the following:

> "The only reason why the accused did not complete what he intended to do was because of Senki who acted swiftly to go and get help."

Had Mr Molefe not arrived at the house when he did and knocked whilst calling out the complainant's name, I shudder to think what he would have done to the complainant. When the complainant tried to fight the appellant off, he applied force to her neck to the extent that those injuries were visible during the medico-legal examination.

[45] The prevalence of sexual offences is very high, not only in this court's jurisdiction, but countrywide. I can take judicial notice of the countrywide campaigns to promulgate awareness of the huge problem in our country regarding violence towards women and children, which violence includes sexual violence. The

type of conduct displayed by the appellant is completely unacceptable within a civilised society. The fact that the appellant committed these offences during the time period when he was still on parole after having been sentenced to 6 years imprisonment, is in my view indicative thereof that the previous periods of time which the appellant served in prison, were not enough to successfully rehabilitate him.

[46] This brings me to the interests of society. An appropriate sentence is one that would serve the public interest, by the prevention of crime through deterrence, but also by protecting society against the currently unrehabilitated appellant by his removal from society. In **DPP, North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA) at para [22]:

> "Our courts have an obligation in imposing sentences … to impose the kind of sentence which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system."

[47] Considering the rather out of the ordinary manner in which the charge sheet was drafted by charging the appellant with two separate counts in the circumstances, it is necessary to approach sentencing in a manner which will not prejudice the appellant as a result of him having been so charged. In this regard the following principles are stated in **Criminal Law**, CR Snyman, 6th Edition, at p. 544:

> "As 'housebreaking with intent to steal' is a crime in its own right, X is charged with two crimes if he is charged with 'housebreaking with intent to

steal and theft.' However, it is still uncertain whether a conviction of 'housebreaking with intent to steal and theft' is a conviction of a single crime or two crimes. In practice this is unimportant, for even if one holds that two crimes have been committed they are treated as one for the purposes of punishment."

[48] Although it is normally not desirable that counts be taken together for purposes of sentence, it can be done in exceptional cases. In **S v Kruger** 2012 (1) SACR 369 (SCA) at para [10], the following *dictum* from **S v Young** 1997 (1) SA 602 (A) at 610E – H was quoted with approval:

"Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful practical way of ensuring that the punishment imposed is not unnecessary duplicated or its cumulative effect is not too harsh on the accused."

[49] After a balanced consideration of all the relevant facts and circumstances in this matter, I deem it appropriate to take the two counts together for purposes of sentence.

Order:

[50] The following order is consequently made:

1. The conviction of the appellant is amended to be the following:

   "Count 1, guilty of housebreaking with the intent to contravene section 3 of Act 32 of 2007 (rape).

   Count 2, guilty of attempted contravention of section 3, read with section 55, of Act 32 of 2007 (attempted rape)."

2. The appeal against the sentence is upheld and the sentence of life imprisonment is set aside and substituted with the following:

   "Counts 1 and 2 are taken together for purposes of sentencing and the accused is sentenced to 10 years imprisonment."

3. The aforesaid sentence is antedated to 3 May 2019.

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C. VAN ZYL, J

I concur:

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S. CHESIWE, J

On behalf of appellant: Ms. S Kruger
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the State: Adv. MMM Moroka
Instructed by:
Director of Public Prosecutions
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