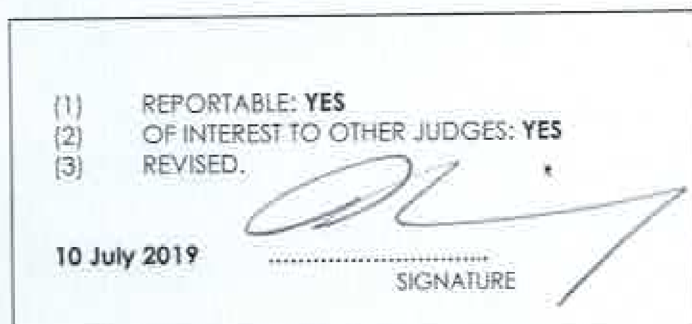
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A03/2017

Dpp Ref No: 374/04/2016



(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

10 July 2019 .... SIGNATURE

In the matter between:

RADEBE, MPHO FREDDY Appellant

And

THE STATE Respondent

JUDGMENT

SPILG J

INTRODUCTION

1. The appellant pleaded guilty to raping a girl who was only 10 years old at the time. He was legally represented at the trial and fully aware that the State

intended to apply the provisions of s 51(1) read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("*CLAA*"). This appears from the charge sheet that was read out when he was required to plead.

2. The effect of s 51(1) is that on conviction the court is obliged to sentence an offender who rapes someone under the age of 16 to life imprisonment unless substantial and compelling circumstances are present.

3. The appellant was convicted on his s 112 (2) plea of guilty statement[1]. Regional Court Magistrate Willemse could find no substantial and compelling circumstances to depart from the minimum sentence for the rape of an under-aged person and sentenced the appellant to life imprisonment. The appellant exercised his right of automatic appeal under s10 of the Judicial Matters Amendment Act. The appeal is against sentence only.

GROUNDS OF APPEAL

4. The appellant raises two main grounds of appeal against sentence:

   a. that the trial court misdirected itself in finding that there were no substantial and compelling circumstances which would allow the imposition of a sentence other than life imprisonment; and

   b. that the sentence induces a sense of shock and is startlingly inappropriate.

5. In regard to the first ground *Adv Masete* for the appellant submitted that the following factors amounted to substantial and compelling circumstances as envisaged by s 51(1);

   a. the appellant was 26 years of age and therefore relatively young at the time the offence was committed;

[1] Section 112(2) of the Criminal Procedure Act 51 of 1977

b. he is a first time offender who has never previously had a brush with the law;

c. he pleaded guilty, thereby sparing the victim more trauma. It was submitted that this also demonstrated that he was remorseful and took responsibility for his actions;

d. there are prospects for his rehabilitation;

e. the degree of violence used during the commission of the offence resulted in the victim "*only*" experiencing trauma with no physical injuries other than to her anus. It was submitted that this "*does not amount to the worst kind of rape for which life imprisonment was intended*".

The appellant relies on the judgment of the Supreme Court of Appeal in *S v Mahomotsa* 2002 (2) SACR 435 at para 18 and a number of other cases where, despite a child of 11 years or younger (in one case as young as 9 years of age) being raped, the appeal court either reduced the sentence from life to 15 years imprisonment or confirmed the trial court's sentence of 15 years.[2]

f. The appellant had spent nine months in custody prior to being sentenced.

6. The appellant also relies on much the same grounds to support the argument that the sentence imposed induces a sense of shock.

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[2] See:

S v Mugridge 2013 JDR 0658 (SCA). In this case the Supreme Court of Appeal did not upset the trial court's sentence of 15 years imprisonment where a pastor had, over a period, sexually groomed and then raped his adopted child.

S v *Mayisela* 2013 JDR 0752 (GNP), where a mentally retarded child of 9 years was raped by a 46 year old man;

S v Gango 2016(1) SACR 600 (WCC) where the appellant had been found guilty of three sexual offences involving young girls, including the rape of an 11 year old

7. In *S v Mabaso* (A372/2014- unreported-8 August 2016) the full court said at para 18:

   "An appellant must either demonstrate that the trial court materially misdirected itself by not exercising its discretion reasonably (eg by overemphasising one element or failing to take into consideration another), in which case the appeal court will consider sentence afresh, or must show that the sentence is so substantially and startlingly excessive or disturbingly inappropriate when compared with the sentence the appeal court seized with the matter would have imposed. See S v Malgas 2001(1) SACR 469 (SCA) at para 12.
   See also S v Salzwedel 1992(2) SACR 586 (SCA) at para 10" [3]

8. In order to determine whether the magistrate misdirected herself or that the sentence induces a sense of shock it is advisable first to consider the sentencing framework in cases where s 51 of the CLAA applies.

SENTENCING

9. The general purpose of imposing a sentence is said to be fourfold; retributive and preventative, rehabilitative (reformative) and to act as a general deterrent. See *S v Rabie* 1975 (4) SA 855 (A). The retributive aspect has a tendency to dominate (*S v Karg* 1961 (1) SA 231(A)) although courts are enjoined to temper the punishment with some degree of mercy. In *Rabie* at 862G-H Holmes JA concluded that: "*Punishment should fit the criminal as well as the crime, be fair to*

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[3] In *Malgas* Marais JA noted at para 12:

> *'Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'*

society, and be blended with a measure of mercy according to the circumstances".

10. The extract from *Rabie* recognises that the imposition of a suitable sentence must have regard to the nature of the crime, must individualise the offender by having regard to his or her personal circumstances and must take into account the interests of society. I would respectfully add that under one of these heads regard must also be given to the impact of the crime on the victim and the victim's family. See *S v Zinn* 1969(2) SA 537 (AD) and *S v Matyityi* 2011 (1) SACR 40 (SCA) at paras 16 and 17.

11. The prevalence of certain crimes is responded to by placing more emphasis on the deterrent and general retributive factors with a commensurate reduced concern for individualising the punishment. Courts accept this as a justification for making an example of the offender. Nonetheless one should be conscious of the fact that increasing punishment above the prevailing norm will result in less weight being given to the individual circumstances of the offender.

    Provided the basis can be supported factually and provided the societal objective is rational, the imposition of a severer sentence does not appear to be objectionable. In practice it occurs daily.

12. In order to determine whether the magistrate misdirected herself or imposed a sentence that was strikingly disproportionate it is advisable to deal with the facts under the three broad classifications mentioned in *Rabie* and *Zinn* and consider whether substantial and compelling reasons exist for not imposing the minimum sentence.

    Unless this methodology is applied, or one which considers the facts by reference to the four purposes recognised in criminology when considering punishment ,there is a risk that sentencing becomes more a reflection of the individual presiding officer's personal views than a proper examination, to paraphrase *Rabie* (cited earlier) , of what sentence will fit the crime, the criminal, will have regard to the impact of the crime on the victim, is fair to society and, to the extent

appropriate, is blended with mercy having regard to any applicable minimum sentence provision contained in s 51 of the CLAA. If this is not done then presiding officers will have difficulty in discerning the principles to be applied or in discerning why significantly divergent sentences are imposed by higher courts on facts that may otherwise appear to be similar.

13. The methodology applied must nonetheless be informed by and is subject to the minimum sentence provisions of s 51 of the CLAA.

In *S v Malgas* 2001(1) SACR 469(SCA) the court considered that the minimum sentence provisions are intended to place greater emphasis on the gravity of the offence and the public's need for effective sanctions. It held that courts cannot depart from the prescribed sentence lightly but indicated that it was not possible to catalogue all factors which might result in the presence of substantial and compelling circumstances.

The SCA also indicated that consideration must be given to the cumulative effect of all relevant circumstances and that as a whole they may render the prescribed sentence disproportionate or otherwise unjust having regard to the accepted triad of factors. See generally at paras 8 to 10, 20 and 22. I have also had regard to the subsequent application of *Malgas* in *S v Vilakazi* 2009(1) SACR 552 (SCA), *S v Kruger* 2012 (1) SACR 369(SCA), *S v Dlamini* 2012 (2) SACR 1 (SCA) and *S v Radebe and another* 2013 (2) SACR 165 (SCA).

14. In accordance with *Malgas* it is appropriate to consider whether substantial and compelling reasons exist by reference to the three broad classifications mentioned earlier.

NATURE OF THE CRIME

General

15. In his s 112(2) plea the appellant admitted to raping the child. It is clear from his statement that she attempted to resist him. According to his statement he saw her playing and asked if he could buy her a yogurt. He then walked with her and a person he described as her friend. Instead of buying a yogurt he took her to a nearby field where he undressed her and raped her by inserting his penis into her anus. He also *"requested her to suck his penis"* but she bit it. He ran away and was later arrested. The appellant admitted that his DNA was found in the aperture of her vagina.

16. The State accepted the appellant's statement.

    The only other evidence introduced was the J88 medical examination and the biology report which confirmed that the DNA swabs taken from the girl's vestibule and that taken from the appellant matched. Both reports were admitted into evidence.

17. The medical examination recorded on the J88 also reveals that the child had blood on both legs. The doctor concluded that the abrasions to her anus were consistent with penetration to that region. No other injuries were observed

18. At sentencing stage the appellant admitted the contents of the two probation officers' reports, one which considered his personal circumstances and the other which was a victim impact report. In doing so and by his legal representative also relying on them in argument two more features of the crime were introduced into evidence. [4]

    The first is that aside from penetrating her anally and trying to have her suck his penis he had also placed his fingers in her vagina. The other is that the person

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[4] A distinction is to be drawn between self-serving statements made to a probation officer which carry little or no weight and those which amount to statements against interest and which therefore have probative value if admitted as having been correctly recorded.

who the appellant admitted was in their company when he raped the child turned out to be her step-brother. He therefore was compelled to be present and witness his sibling being raped.

19. Numerous decisions of the SCA have considered the nature of the offence of rape. In *S v Kwanape* 2014 (1) SACR 405 (SCA) Petse AJA referred to some of these at para 17:

> ""*Rape is undeniably a despicable crime. In N v T it was described as 'a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In S v Chapman this court said it is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. Its gravity in this case is aggravated by the fact that the victim was a 12-year-old child. In S v Jansen rape of a child was said to be 'an appalling and perverse abuse of male power'.*"

20. It is trite that society's cohesiveness is dependent on co-existence; a collaboration between individuals based on an acceptance of value based norms which are intended not only to secure and enrich the society in which each of us live but allow each individual to grow and attain his or her full potential. These are universal values on which society's existence and the individuals within it rely.[5]

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[5] In *S v Makwanyane* 1995(3) SA 391 (CC) Langa J (at the time) when describing ubuntu said at para 224 that:

> *"The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. It is perhaps best illustrated in the following remarks in the judgment of the Court of Appeal of the Republic of Tanzania in DPP v Pete,6*
>
> > *"The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa."*

21. The building blocks of a functioning society are the family unit and in order for it to flourish families must integrate into communities. These are symbiotic relationships that have evolved and continue to evolve with changing demographics.

22. There are a number of clearly understood precepts upon which the fabric of our society and the rationale for communal based co-existence is founded. Without these our society's cohesion is destroyed. One of the most fundamental values within any society is that we rear, nurture and protect our young who by definition are extremely vulnerable; we do not prey on them.

23. The Constitution places the highest store upon children and the responsibility of fellow citizens and the State to provide, as far as is sustainable, the best possible future for them. Section 28 of the Constitution sets out in detail the rights specifically enjoyed by children over and above the other rights accorded to all. Among them is the right "*to be protected from maltreatment, ... abuse or degradation*"[6]

24. Rape directly impacts on the victim's right to dignity, equality, bodily integrity, freedom of association and the entitlement to choose with whom to share the most intimate relationship. In the present case the girl would have just reached puberty at the time she was violated. Rape erodes the victim's right to bodily and emotional integrity because the violation cannot be undone. In this manner the victim's constitutional right to freedom of security of person has also been trampled on.[7]

    The right to dignity itself "*compliments the right to life as the most significant of our constitutional values (see generally the individual judgments of the constitutional court justices in S v Makwanyane 1995(3) SA 391 (CC)). The right*

In the same case at para 307 Mokgoro J said in regard to ubuntu:

> *"While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."*

See also Madala J at para 237 and Mohamed J at para 262

[6] S 28(1)(d)

[7] Section 12(2) of the Constitution

to dignity encompasses the entitlement to self-respect, not to be violated or to suffer degradation".[8]

25. Rape therefore is not just the invasion of a right not to be physically harmed. It significantly diminishes a large number of the fundamental bundle of rights which the Bill of Rights either expressly or implicitly secures for each individual. Rape constitutes a gross violation of a person's physical integrity and psyche. It is likely to leave indelible emotional and psychological scars with *sequelae* that can dramatically impact on the enjoyment of the qualities of life. The literature referred to by the probation officer who compiled the victim assessment report speaks to this. Moreover our body of law has no difficulty in recognising general damages in delict for the *sequelae* of psychological trauma through the award of significant amounts.

26. Accordingly to suggest that there are degrees of rape depending on the extent of the physical assault disregards the fact that rape *per se* equates to the most degrading and invasive of assaults on both the physical integrity and the psyche of the individual. Just as a blunt force can fracture bone so too can emotional trauma break a person's spirit. Furthermore at a more subtle but equally debilitating level, opportunities that present themselves for a fulfilling life may be lost due to inordinate fear or apprehension attributable to the consequences of being raped. In the case of children emotional trauma is likely to result in milestones that can be looked forward to in the normal maturation process being forfeited or compromised with potentially life long repercussions.

27. The appellant however contends that the facts of this case do "*not amount to the worst kinds of rape for which life imprisonment was intended*". He relies on *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at para 18 where the court said:

> *"It perhaps requires to be stressed that what emerges clearly from the decisions in Malgas and Dodo is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform*

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[8] In *S v H* [2014] ZAGPJHC 214 at para 71

sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams 2002 (1) SACR 116 (SCA), 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para [29]).

28. There appear to be a number of obstacles standing in the appellant's way.

The first is that the submission disregards the scheme of s 51 of the CLAA in relation to rape offences and in particular the provision of s 51(3) (aA) (ii). Secondly there is no linear correlation between the degree of apparent physical injury to the victim, assuming that one can leave aside the physical assault constituted by the rape itself, and the emotional and psychological trauma or its long term effect on the victim's well-being.

Another is the fact that a person may submit to rape without being physically attacked because of grooming, the position of authority or power enjoyed by the perpetrator or fear on the part of the victim that any resistance may lead to being severely assaulted or killed.

Interpretation of s 51 of CLAA in relation to rape offences

29. It the appellant is to succeed in submitting that this is not the worst kind of rape because there were no apparent physical injuries then, as with cases where the proximity of the relationship between the perpetrator and the victim is relied on as a mitigating factor, the first hurdle to overcome is whether such a ground can be competently raised in light of the exclusionary provisions of s 51(3) (aA).

30. The provisions of s 51 relevant to cases of rape are:

> <u>*Discretionary minimum sentences for certain serious offences.*</u>—
> *(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.*
> *(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—*
>
> *(a) Part II of Schedule 2, in the case of—*
>
> *(i) a first offender, to imprisonment for a period not less than 15 years;*
>
> *(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and*
>
> *(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;*
>
> *(b) Part III of Schedule 2, in the case of—*
>
> *(i) a first offender, to imprisonment for a period not less than 10 years;*
>
> *(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and*
>
> *(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;*

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

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

(i) The complainant's previous sexual history;
(ii) an apparent lack of physical injury to the complainant;
(iii) an accused person's cultural or religious beliefs about rape; or
(iv) any relationship between the accused person and the complainant prior to the offence being committed.

(4) . . . . . .

(5) The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Only the following parts of Schedule 2 are relevant for present purposes:

Schedule 2
(Section 51)
PART I

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—

(a) when committed—

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim—

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

PART III

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.

Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20 (1) or 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

31. For present purposes it is not irrelevant that a person convicted of compelled rape is treated effectively in the same manner, for sentencing purposes, as a rapist and the same s 51(3) exclusions are also applicable. In terms of s 4 of the

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 *("Sexual Offences Act")* a compelled rape is committed by:

> *Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B*

This aspect will be dealt with in more detail under the sub-heading "*Physical v Emotional trauma and Psychological degradation*"

32. It is therefore evident that far from allowing them to constitute substantial and compelling factors, the provisions of ss 51(3)(aA)(ii) and (iv) expressly provide that the apparent absence of physical harm or the existence of a relationship between the offender and the victim cannot be regarded as mitigating factors for purposes of reducing the prescribed sentence.

33. The legislature therefore understood that aside from actual physical injury, or threat of physical injury, rape *per se* is a grievous assault, constitutes a gross violation of bodily integrity, degrades, humiliates and renders the victim vulnerable. The legislature would also have been aware of the overwhelming body of professional literature on both the immediate and long term emotional and psychological trauma and degradation generally experienced by rape victims. The symptoms the victim in this case has continued to experience is well documented in the literature on the subject as appears later from the references to the probation officer's report.

34. In my view there is a consistency in the manner in which rape offences are dealt with in s 51.

    The legislature has drawn a line in the sand between those specific situations where the minimum sentence for the crime of rape is life imprisonment even for a first offender and a graded sentencing regime in all other situations depending on whether the perpetrator is a first, second or third time offender.

35. The legislature expressly amended s 51 to cater for the implementation of the Sexual Offences Act.

This Act consolidated sexual offences into one statute, extended the crime of rape to include all forms of sexual penetration without consent, created the crime of sexual assault for all other forms of sexual violation and repealed the common law crimes of rape and indecent assault. For present purposes anal penetration, which previously fell under the common law crime of indecent assault, now falls into the category of statutory rape offences.[9]

36. As already mentioned s 51 of the CLAA itself identified certain circumstances in which the commission of the crime of rape warrants severer punishment.

Absent substantial and compelling circumstances, ordinarily a convicted rapist will receive a minimum sentence of 10 years imprisonment for a first offender, 15 years if a second offender and 20 years if a third or subsequent offender. This is in terms of s 51 read with Schedule 2 Part III of the CLAA which provides:

"Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I."

37. A minimum sentence of life imprisonment is to be imposed if the rape or compelled rape was committed in the circumstances mentioned under Part I of Schedule 2. For ease of reference it is convenient to repeat Part 1:

"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—

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[9] In terms of the Act sexual penetration ' includes any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person,

(a) when committed—

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim—

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

38. It is also significant that the infliction of grievous bodily harm to the victim is a self-standing ground, quite distinct from a case where the victim is under-age. So too the fact that compelled rape in similar circumstances is also visited with life imprisonment despite the fact that there is no apparent physical injury to the victim, only the threat of harm.

39. These factors and the clear delineation between what Parliament considers to be more egregious instances of rape, albeit that the victim does not appear to have suffered any physical injury, gives a clear indication regarding the gravity with

which the legislature considers that the rape of a child will impact on his or her general well-being and development as well as on the interests of society and its revulsion towards such a crime.

40. Unless a constitutional challenge is raised to these exclusions, and none has, then the appellant cannot rely on the absence of physical injuries (other than to her anus) as constituting substantial and compelling circumstances.

41. Insofar as the appellant may have contended that, aside from the absence of other injuries, anal penetration, in comparison to vaginal penetration, would *per se* fall short of the so called *"worst kind of rape"* it is necessary to first consider the commentary by Prof Snyman in *Criminal Law* (6th ed 2016) at 345.

The author criticised the Sexual Offences Act for *"obviously"* not having *"given much recognition to the "principle of fair labelling", and lumped together under one single heading a number of dissimilar acts which differ substantially from one another in character"*. The distinction drawn by the author is that there is good reason for treating non-consensual penile penetration of a woman's vagina differently to penetrating her anus or penetrating the anus of a male based on anatomical differences between the sexes, the degree to which the vagina is the most personal of all parts of a woman and that the risk of pregnancy distinguishes the violation of a woman's vagina as opposed to her anus. The author adds that:

> *"Although it is not disputed that non-consensual anal intercourse is traumatic, abhorrent and demeaning for the woman (as well as, for that matter, for the male who is penetrated through his anus), non-consensual penile penetration of the vagina violates the most personal of all the parts of a woman's body. It infringes her whole being and identity as a woman, as opposed to a man. Accordingly vaginal and anal penetration deserve to be treated separately. The Constitutional Court in Masiya v Director of Public Prosecutions was completely correct in refusing to agree with the decision of the Transvaal Court in the same case (as well as with the regional magistrate who initially heard the case) that the common-law definition of rape was unconstitutional."*

42. Aside from overlooking that HIV infection may occur in both situations, the author fails to contextualise *Masiya v Director of Public Prosecutions 2007* (2) SA 435 (CC). The Constitutional Court held that the common law definition of rape was not unconstitutional precisely because it could be adapted so as not to fall short of the spirit, purport and objects of the Bill of Rights[10]. It then expressly extended, but only prospectively, the common law crime of rape to include the penetration of a female's anus[11]. While the majority of the court considered that the facts before it did not enable it to consider expanding the definition beyond that, two of the justices were prepared to extend common law rape to also include male victims.[12]

43. The rationale of the Constitutional Court's decision extending common law rape is consistent with the enormity of such a violation irrespective of whether the anus or vagina was penetrated. Nkabinde J, who delivered the majority judgment in *Masiya*, when referring the matter back to the magistrate for sentencing said the following:

> *"Having substituted the conviction of rape with that of indecent assault, it is necessary to remit the matter to the regional court to impose appropriate punishment. It needs be said that the offence of indecent assault is egregious. Mr Masiya assaulted a nine-year-old child. The offence arouses public indignation. The regional court is obliged, when considering an appropriate punishment, to apply its mind to the nature and gravity of the offence of which Mr Masiya has been convicted and not merely look at the legal definition thereof. The fact that he has been convicted of indecent assault does not automatically mean that the sentence to be imposed upon him should be more lenient than if he had been convicted of rape."*

Physical v Emotional trauma and Psychological degradation

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[10] *Masiya* at paras 27, 30-32 and 70.

[11] *Ib* at paras 61 and 70

[12] *Ib* at para 29 and 93

44. Vally J in the full court decision of *S v Masuku* 2019 (1) SACR 276 (GJ) collected together a number of cases where both the SCA and this court grappled with the notion that the absence of physical harm (presumably aside from the assault which constitutes the rape) can as an objective consideration minimise the impact of a rape on the subjective suffering of the victim and the victim's family. They are *S v Matyityi* 2011 (1) SACR 40 (SCA) per Ponan JA esp. at para 23; *S v Nkunkuma and Others* 2014 (2) SACR 168 (SCA); *S v Bogaards* 2013 (1) SACR 1 (CC) at paras 58 – 72; *S v Chapman* 1997 (2) SACR 3 (SCA) per Mohamed CJ at 5*b* – *e*; *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) per Bosielo JA at para 22; and *S v GK* 2013 (2) SACR 505 (WCC) .

45. The difficulty of distinguishing, whether qualitatively or quantitatively, a rape on the basis of visible external injuries or otherwise is expressed by Satchwell J in *S v M* 2007 (2) SACR 60 (W) at paras 99 and 101:

> *"'. . . Furthermore, the responses of rape survivors are surely as complex and multi-layered as are the individuals who experience rape. We must therefore expect the manifestation of the impact of rape to be varied in every respect. Some responses will be publicly displayed and others privately endured. Some rape survivors will collapse while other will bravely soldier on.*
>
> . . .
>
> *It would seem that sentencing courts are expected to view rape as "more serious" where a rape survivor cannot sleep, fears men and sex, is unable to concentrate and cannot complete school, or has a career or relationship destroyed. If this is so, then other rape survivors may question why their rapes are viewed as "less serious" because they may have been fortunate or privileged enough to receive professional assistance, be endowed with different personalities and psyches, exhibit fewer post-traumatic effects and so on. The Legislature does not seem to have intended the rapist to be less morally and legally blameworthy because the rape survivor appears to or actually does survive, or continues life with less apparent trauma."*

46. Leaving aside the exclusionary provision of s51 (3) (aA), at its most basic level support for the proposition that a lack of physical injuries will result in a "*less serious*" rape ought to fail firstly because rape constitutes the invasion of a bundle of rights impacting on the bodily integrity and psyche of the victim and secondly because the mere absence of physical injury cannot automatically equate with a lesser degree of degradation or emotional and psychological trauma.

    Moreover it would mean that the yardstick by which society is to determine the appropriate punishment for rape requires the presence of some undefined degree of physical or psychological injury; not that the sanction of life imprisonment is directed to the rape of a child under the age of 16 precisely because it *per se* is such a perverse assault on the core values of a functioning society for the reasons I attempted to outline earlier.

47. Even if one were to argue that some discount should be afforded to the rapist who does not otherwise physically assault the victim then it would ignore the emotional and psychological damage to the victim which may include exhibiting (or being at risk of suffering) personality disorders or feelings of worthlessness to the point of displaying suicidal tendencies.

    It also ignores that submitting without resistance is in itself an act of desperation or conditioning based on factors ranging from fear to grooming or positions of authority held by the rapist. It is difficult to appreciate why this should inure to the benefit of the perpetrator or somehow minimises the emotional trauma of the degradation or long term *sequelae* suffered by the victim; particularly where the act of submission itself may among other consequences engender or exacerbate self-loathing, guilt and feelings of inadequacy.

48. One should therefore not draw the conclusion that the absence of physical injuries will mean that the rape victim's suffering will be any lesser or that the offence, where the victim is under-aged, should be treated less seriously for purposes of sentence. Emotional and psychological trauma and their long term *sequelae* comprise a self-contained enquiry which may or may not be influenced

by the presence of physical injury, but is not *ipso facto* diminished by the latter's absence.

49. Nkabinde J, in the context of developing the common law of rape, said in *Masiya* at paras 36 to 39;

> "*... historically, rape has been and continues to be a crime of which females are its systematic target. It is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor. It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females.* (para 36)
>
> *The Declaration on the Elimination of Violence against Women specifically enjoins member States to pursue policies to eliminate violence against women. Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights - a cornerstone of our democracy.* (para 37)
>
> *... One of the social contexts of rape is the alarming high incidences of HIV-infection. Anal penetration also results in the spread of HIV.* (para 38)
>
> *The consequences caused by non-consensual anal penetration might be different to those caused by non-consensual penetration of the vagina but the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter.*" (para 39)

50. An appreciation that rape impacts on the psychological and emotional well-being of the victim with potentially life-changing consequences, even if not immediately apparent, as well as having regard to the purpose of taking the rape of under-aged children as seriously as the world community and our own legislature does,

because of its debilitating impact as identified by Nkabinde J in *Masiya*, renders it insensitive to grade rape as being more or less serious.

51. In my respectful view Vally J gave voice to the concerns regarding how a judicial officer is to deal with the reliance that defence practitioners place on the "*degrees of rape*" passages to be found in a number of judgments, while at the same time acknowledging that each case must be treated on its own merits. I refer to the following passages in *Masuku*:

> "*The appellant had committed a heinous crime. He raped a minor child. Rape in general, we know, ranks as a very serious offence. Our courts have repeatedly said this and so has our legislature by enacting s 51 of the CLAA. Courts have a duty to ensure that the offence is dealt with in a manner that respects the rights of rape victims* (at para 33)
>
> "*I am mindful of the fact that s 51 of the CLAA has not removed the discretion of the court to impose a sentence it deems fair and appropriate, and that there has been a fair number of judgments where it has been held that the minimum sentence preferred by the legislature ought to be departed from in certain cases where the rape had not resulted in significant physical harm to the victim. Some of those judgments are referred to in the judgment of my colleague Van der Linde J, but those cases, in my view, do not set a bench mark of what an appropriate sentence for the rape of a child should be.* "

52. Vally J at para 39 also referred to the statement made by Ponan JA, in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 23, that Parliament;

> "*has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer,*

[are] foundational to the rule of law which lies at the heart of our constitutional order."

53. If substantial and compelling reasons are present in cases of the rape of an under-aged child then it cannot be found only in the absence of physical injury. If regard is had to the triad of factors (which must also accommodate the impact on the victim) then I would venture that something sufficiently extraordinary would have to be demonstrated by an accused in respect of his reduced moral blameworthiness, other personal circumstances, the circumstances surrounding the rape or, as unlikely as it may seem, possibly even the victim's circumstances in order to displace the opprobrium and moral turpitude which informs the interests of society to punish in the manner reflected in the legislation in cases involving the rape of an under-aged child.

54. There are two further approaches that appear to be adopted by some courts which should be addressed.

Effect of the abolition of the death penalty

55. There are certain *obiter* views that in doing away with the death penalty life imprisonment becomes qualitatively a more egregious sentence. With respect, the death penalty was abolished because it is cruel and inhuman and because we recognise the inherent fallibility of the system. We therefore did not downgrade the nature of offences, including rape, or their impact on society or on the individual when we did away with the death penalty.

Sparse victim impact reports

56. Another approach is that unless the State provides graphic details of the extent of the trauma suffered by the victim as a consequence of the rape and its impact on the family then the apparent lack of post traumatic *sequelae* would in itself be a

factor demonstrating substantial and compelling circumstances sufficient to justify a deviation from the minimum prescribed sentence.

Firstly one cannot read that into the CLAA. On the contrary the legislation leans towards the offender having to satisfy the court that the *sequelae* experienced by a rape victim were absent in the case before it and cannot reasonably be expected to surface or be triggered by some event in the future.
Such an approach also fails to take into account the enormous workload of probation officers, the possible reticence of the victim, the difficulty in verbalising to a stranger, the personality of the victim and how he or she processes trauma. I believe that this was adequately addressed by Satchwell J in *S v M*, as appears from the extract already cited.

Circumstances concerning the offence in issue

57. The appellant's legal representative admitted the contents of the probation officer's report. In it the girl gave a far more detailed account of events than those contained in the s 112 statement which the State had accepted.

58. On the day of the incident the appellant approached her while she was playing in the park with friends. He asked her and her step-brother to accompany him to the tuck shop. He however took them passed the tuckshop. While the child described the events far more explicitly, I believe that it is safe to take the following into account having regard to the admissions made: The appellant in fact took them to two localities. At the first place he threatened the child to do his bidding.

    At some stage a passer-by approached them and asked the appellant whose children were with him. He replied that they were his and then proceeded to take them to another open area where he continued to sexually molest the girl.

59. The girl did not mention that the appellant had penetrated her anally. This was however admitted by the appellant in his s 112 statement as was her mention of

biting his penis when he had put it in her mouth. The probation officer considered that blocking the anal penetration from her memory was not unusual.

The girl however told the probation officer that at some stage the appellant started putting his fingers in her vagina.

60. From the facts disclosed in the appellant's s 112 statement and those related by the child to the probation officer, to the limited extent that they can be safely accepted, it is evident that he had formed an intention to prey on children who frequented the park and that in order to achieve his purpose he lured the girl and her step-brother and also deceived a passer-by who clearly was concerned by something that was occurring between the appellant and the children.

    The rape for which the appellant was convicted was committed in the open and in the presence of the victim's older step-brother.

    The offence was therefore planned and together with the other circumstances I have mentioned all constitute aggravating factors in relation to the commission of the offence.

61. Nor was the offence without physical injury and pain to the victim. It is evident from the J88 medical report that there were anal abrasions which were consistent with forcible penetration. She therefore would have been in pain when he penetrated her. Consistent with these findings is that the girl was also bleeding between her legs when she came back home immediately after the incident.

62. There are therefore no ameliorating factors in relation to the nature of the offence in question; rather there are a number of aggravating features.

INTERESTS OF SOCIETY AND THE EFFECT ON THE VICTIM AND HER FAMILY

63. The interests of society in cases of the anal rape of an underage girl have already been dealt with under the heading "*General nature of the offence*" and in the several cited extracts from the judgment of Nkabinde J in *Masiya*.

64. With regard to the impact of the offence on the victim, Ms Mbanjwa who is the probation officer completed a psycho-social report on the impact of the rape on the girl. She referred to a number of recognised authorities in the field both local and overseas. They included EM Furey, Sharon Lewis (*An adult's Guide to Childhood Trauma- Understanding Traumatised Children in South Africa*) and BO Rothbaum (*A prospective examination of posttraumatic stress disorder in rape victims*).[13]

    I have already mentioned that her report was admitted into evidence.

65. The appellant raped the child in April 2016. She was 10 years old at the time (she was born in July 2005). Ms Mbanjwa interviewed her and family members some eight months later in December. The report reveals the dramatic effect the rape has had on the girl's life.

66. The girl is the only child born of the relationship between her mother and father. She lives in Orange Farm with her mother, grandmother and older step-brother. Her father's whereabouts are unknown. The family composition already renders them vulnerable.

67. Prior to the rape she was sociable, and enjoyed interacting with other children.

68. Shortly after being raped she experienced flashbacks to the incident and became emotional as it brought back horrific memories.

69. Since the incident she began isolating herself, displays anger and is short tempered.

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[13] (2005) *Journal of Traumatic Stress*

70. There was an immediate impact within the school environment when rumours spread about the incident. Even the class teacher insensitively told the whole class that since the incident the girl's performance in mathematics had declined. Although rumours stopped circulating, after the girl's grandmother spoke to the school directly, she has developed a low self-esteem, no longer socialises with her peers and claims to have no friends.

71. Moreover the child's overall school performance has dropped and she failed not only mathematics but other subjects as well.

72. She is afraid of associating with boys and has lost trust in them. She claimed to be in constant fear for her life and when she hears about rape incidents in the media or within the community she is reminded of what she had to endure and becomes afraid.

    Because of the girl's fear, she has to be accompanied by her grandmother (since her mother works) almost everywhere she goes.

    In a profound way, therefore, the girl's freedom of movement and association has also been severely curtailed as a consequence of the rape.

73. Ms Mbanjwa observed that the girl's responses were also consistent with the observation set out by Lewis (3200:32) "*who stated that one must realise that being raped changes the way a survivor sees herself and life. She may not simply get over the experience as it can never be forgotten*"

74. The rape also negatively impacted on the girl's mother and grandmother. The mother blames herself for not being there to protect her child. The grandmother was also traumatised by the ordeal of seeing the girl come home with blood running down her legs.

75. The girl received medical assistance and was placed on medication immediately after the rape.

Both her and her mother attended counselling and, at the time the report was compiled, they were still struggling to cope with the situation. It was envisaged that further counselling was required[14]. Ms Mbanjwa observed that the girl was still struggling to come to terms with the ordeal and that further psychological intervention would assist in dealing with and managing her emotions. The child however still lived in constant fear of re-victimisation.

Ms Mbanjwa added that: "*Matsakis (1996) reflects that whilst the wounds of rape tend to be psychological wounds rather than physical wounds, they exert great power over a person's life*".[15]

It should also be borne in mind that the appellant was a friend of the child's uncle, and therefore someone the child and the family would believe they could trust when that association was mentioned. Ms Mbanjwa considered that this factor resulted in the trust of the child being manipulated and in the destruction of her perception that adults should be respected.

76. In the evaluation Ms Mbanjwa confirmed that "*it was not strange that the victim experienced startling behaviour, isolation and feeling unsafe*". She also noted that one cannot judge a victim based on her stated responses to violence as, irrespective of the replies, "*it should not be assumed she is unaffected by the rape*". This echoes the observation of Satchwell J in *S v M* (*supra*) and reflects the way that some victims may attempt to immunise themselves and supress their emotions.
77. Magistrate Willemse therefore cannot be faulted in her summing up to the appellant: "*Your deed ... changed the life of little .. (X).. forever. She will never be the free child. You stole her innocence.*"

78. Accordingly there is no mitigating factor to be found either in the impact of the rape on the victim or her family. On the contrary not only was a 10 year old deeply traumatised by the sexual molestations including the rape but her step-

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[14] Citing Furey, (1994) she noted that: '*It is widely acknowledged that all people who experience sexual violence are affected and do require counselling even if they are non verbal*"

[15] A Matsakis (1996) *I can't get over it: A handbook for trauma survivors* (2nd ed)

brother was compelled to witness what occurred and her mother and grandmother have also been affected by the events. These are aggravating factors as is the likelihood that the presence of her step-brother witnessing her being raped may exacerbate her sense of degradation as she matures.

CIRCUMSTANCES OF THE OFFENDER

79. The appellant is a first time offender.

80. A pre-sentence report was prepared by Mr Buthelezi who is a probation officer. His report was also admitted into evidence.

81. The appellant is the fourth child of a family of six children. He was raised in Orange Farm by his mother as his parents were separated when he was a child. His father never played an active role in his life. The appellant believed that not living with a father negatively impacted on him. He however considers that he was raised in a positive environment where good morals and values were instilled in him. He was never exposed to any form of violence or abuse while growing up. Prior to his arrest he was still living with his mother and siblings.

82. Furthermore at the time of the offence he had been in a relationship for over a year. According to his siblings the relationship with his partner remains a positive one. They and the appellant's mother describe him as responsible and hardworking, playing a vital role at home. They expressed shock when hearing of the offence.

83. The appellant had dropped out of school in 2009 when still in grade 10. He claimed that this was because he was a slow learner and was associating with a group who had a negative influence on him. Since then he never secured permanent employment but had been working on a part-time basis since 2005 for various construction companies. Since 2014 until the arrest he had been working at a funeral parlour setting up tents and doing cleaning work. During this period

he earned R400 a week which he used to support himself and his siblings. The appellant's employer also expressed shock when told of the offence. He regarded the appellant as a hard worker committed to his job.

84. Mr Buthelezi observed that the appellant was able to engage freely in discussion and showed no sign of mental abnormality. The accused admitted to losing his temper, becoming aggressive and confrontational when under the influence of alcohol.

85. The appellant informed the probation officer that he was uncertain as to what led him to act as he did and sexually molest the girl. He verbalised remorse and regretted his behaviour. The appellant added that he deserved to be punished and could not imagine the impact the offence has had on the victim or how she would react if she saw him in the street.

86. Mr Buthelezi concluded that there was nothing in the appellant's upbringing which could have contributed to the commission of the offence. He appeared to accept that the accused took responsibility for his actions.

87. It cannot be said that being a first offender is a factor to be taken into account on its own. It cannot be, since the CLAA differentiates the sentence to be imposed on a first offender in cases involving rape other than in the specified circumstances set out in Part II of the Second Schedule, of which the rape of a minor is one.

88. Although the probation officer referred to the appellant expressing contrition the decision is ultimately that of the court. The presiding officer did not deal with it specifically in sentencing but considered that the enormity of the offence, its impact on the child and taking her and her step-brother to two different places to rape and otherwise sexually abuse and maltreat a defenceless child as well as subjecting her to physically excruciating injuries required the court, in the exercise of its discretion, to impose life imprisonment.

89. The appellant was 26 years of age at the time of the offence. He was therefore well able to understand the consequences of his act. Nothing can turn on his age, nor does the fact that he had spent 9 months in custody prior to being sentenced constitute, in terms of our current case law, a ground on its own for finding substantial and compelling circumstances. As appears elsewhere there are an overwhelming number of aggravating features.

90. To the extent that the magistrate did not deal specifically with the appellant's claim of being remorseful, it is evident that he failed to disclose all the facts in his s 112 statement. He exposed as little of the detail of the events as possible bearing in mind that he had little choice but to admit guilt because of the DNA results.

He failed to disclose that it was the girl's own step-brother who had witnessed her being raped. He did not disclose that there was more than one incident of penetration at different places, knowing that if he did so then his version that he had lured them to a tuck shop could not account for how he was able to force them to the second location. He made no mention of threatening anyone. Moreover he did not explain why he went to the park where young children were playing nor why he selected the girl bearing in mind that her step-brother was with her and as a fact would accompany her when lured by the appellant.

I therefore do not accept that the appellant displayed true contrition. Even if he had, it is the act of a person who was caught after he had perpetrated a most heinous crime on a defenceless child.

91. A court is left with the distinct concern that had the girl not bitten him he would have continued with his predation and was unconcerned that the step-brother should witness her being raped. As the magistrate commented; this was an appalling and perverse abuse of male power and she could not run the risk of another child having to go through the same ordeal.

92. Finally, this leg of the enquiry has regard to the offender's moral blameworthiness in relation to the crime having regard to his own background, milestones, redeeming qualities or other features.

In the present case the appellant's blameworthiness was aggravated because he went to a park to find a 10 year old girl, with duplicity and therefore premeditation lured her and her step-brother away so that he could rape her. He also would have known that he was hurting her when he raped her anally yet he persisted. Furthermore he had no qualms about her step-brother having to endure watching helplessly while someone closest to him was being degraded and was being forced to suffer and endure pain.

93. The appellant's conduct was morally reprehensible and devoid of any redeeming qualities: He knew the girl's uncle and no doubt expected to talk his way out of any accusation, but for the fact that the child bit him and that her mother and the authorities promptly ensured that a DNA test was done. Moreover he was able to gain the children's trust; he preyed on their vulnerability and then their fear that he would implement his threat if she did not submit; he lied to a passer-by that he was their parent; and he broke the trust that the community is entitled to expect of not violating any child.

CONSIDERING SENTENCE BY REFERENCE TO OBJECTIVES OF PUNISHMENT

94. If regard is had to the personal circumstances of the offender and the desirability of imposing a sentence that encourages rehabilitation against the other relevant considerations (being preventative, to act as a general deterrent and retributive) then, for all the reasons set out earlier, the first two considerations are totally overwhelmed by the others.

APPLYING THE CLAA

95. Unless substantial and compelling circumstances as provided for in section 51 (3) (a) of the CLAA exist which justify the imposition of a lesser sentence then in terms of section 51(1) the presiding magistrate was obliged to impose life imprisonment in respect of the rape conviction.

96. In *Mabaso* at para 27 it was said that:

> *"It appears that the quartet of SCA cases post- Malgas requires a court to weigh all mitigating and extenuating factors and, as suggested in Mqabhi, put a value on the store we may place on the particular circumstance which would determine whether the cumulative impact justifies a departure from the prescribed minimum sentence."*[16]

The quartet of cases are those mentioned earlier of *Vilakazi*, *Kruger*, *Dlamini* and *Radebe*.

97. In applying the test as laid down by our case law, the magistrate was correct to find that having regard to all relevant circumstances there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence for the rape of such a young girl. There was therefore no misdirection nor does the sentence imposed induce a sense of shock or is otherwise disproportionate.

OBSERVATION ON A SECTION 112 PLEA IN RAPE CASES

98. This case highlights the conundrum faced by prosecutors and presiding officers.

99. With a heavy workload it is difficult to resist an accused offering a plea bargain albeit that some facts that would amount to aggravating factors are omitted. More

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[16] *S v Mqabhi* 2015 (1) SACR 508 (GJ)

so where it is uncertain how witnesses will fare when testifying or because they have demonstrated a reluctance or inability to relive the ordeal. Only the prosecutor knows how strong a case can be made before a court and even then there are always inherent risks.

100. The presiding officer is obviously precluded from knowing the contents of witness statements or the strength of the State case. Ss 112 (1) and (2) of the CPA are there principally to protect the accused from admitting to an offence when the facts might not support a conviction.

Accordingly the enquiries which a court is entitled to make concern obtaining clarification as to whether the accused understood what he was admitting to.

101. It is for the prosecutor to therefore decide what facts contained in the s 112 plea should not be accepted. Once accepted they constitute the admitted facts which it is unlikely can be contradicted bearing in mind the risk of jeopardising the accused's fair trial rights[17].

102. However this does not mean that where there are gaps they cannot be filled in by evidence presented to the court at the stage of sentencing.

This is apparent from the right the prosecutor has under s 112(3) to present evidence on sentencing in cases where a plea has been accepted.

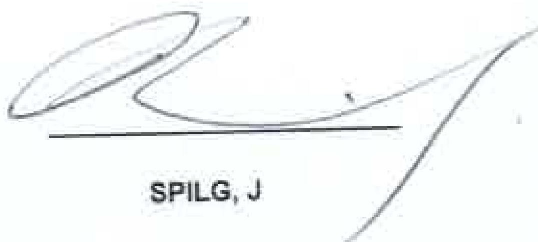
103. Moreover s 274(1) entitles a court "*before passing sentence, to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.*" This allows the court to adopt a more inquisitorial role in order to ensure that the objectives of sentencing can be attained provided it is done so objectively, fairly and impartially. See generally Terblanche (3rd ed 2016) Cap 3 at pp96 to 98 and the cases cited.

[17] This would mean that defence counsel must ensure that they take care with regard to what portions of a probation officer's report they are prepared to admit or what *vive voce* evidence can be received.

104. The seriousness with which rape is viewed, its prevalence, the need to protect society and the risk of repetition of the crime imposes a greater responsibility on prosecutors and the courts to establish the circumstances in which the offence was committed so that a proper sentence can be imposed.

ORDER

105. In the result the appeal is dismissed.



SPILG, J

We agree

RAUTENBACH, AJ

MDALANA MAYISELA, AJ

DATE OF HEARING: 13 December 2018

DATE OF JUDGMENT: 10 July 2019

FOR APPELLANTS: Adv. E MMP Masete

Pretoria Justice Centre

FOR THE STATE: Adv JMB Rangaka

Office of the Director of Public Prosecutions