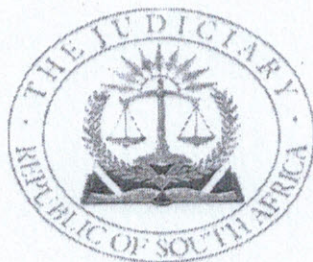
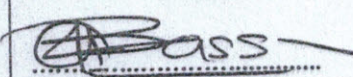


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA****CASE NO: A54/2016**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	<u>11/06/2019</u>
SIGNATURE	DATE

In the matter between:

PAULUS JOHANNES BOTHA

Appellant

and

THE STATE

Respondent

JUDGMENT

AC BASSON, J

[1] The appellant pleaded not guilty in the Regional Court, Secunda to the following charges preferred against him:

- Count 1: Rape (2003) read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997;
- Count 2: Indecent assault read with section 51(2) of Act 105 of 1997;
- Count 3: Indecent assault read with section 51(2) of Act 105 of 1997;
- Count 4: Assault with the intent to cause grievous bodily harm;
- Count 5: Assault with the intent to cause grievous bodily harm;
- Count 6: Assault with the intent to cause grievous bodily harm;
- Count 7: Assault with the intent to cause grievous bodily harm;
- Count 8: Rape (2004) read with section 51(2) of Act 105 of 1997.

[2] Count 9 (child abuse) and count 10 (contravention of section 9(a) of the Sexual Offences Act¹) were only put to accused no. 2. Despite the fact that the appellant was not charged with child abuse, he was nonetheless convicted and sentenced on count 9. The State and counsel on behalf of the appellant were in agreement that the conviction and sentence in respect of this charge should be set aside.

[3] The appellant was convicted on charges 1 – 9 and on 30 January 2015, the following sentences were imposed on him:

- Count 1: Life imprisonment;
- Count 2: 5 years' imprisonment;
- Count 3: 5 years' imprisonment;
- Count 4: 3 years' imprisonment;
- Count 5: 3 years' imprisonment;

¹ Act 23 of 1957.

- Count 6: 3 years' imprisonment;
Count 7: 3 years' imprisonment;
Count 8: Life imprisonment;
Count 9: 3 years' imprisonment.

[4] The appellant has an automatic right of appeal which was noted in respect of both conviction and sentence. The appellant was legally represented throughout the trial and pleaded not guilty to all the charges.

Point *in limine*: Guilty finding on count 9.

[5] Although count 9 was only put to accused no 2, the appellant was nonetheless convicted and sentenced to 3 years' imprisonment on this charge.

[6] The appellant raised a point *in limine* submitting that he ought not to have been convicted and sentence on charge 9. The State conceded that count 9 was only put to accused 2 and that the conviction and sentence in respect of this charge ought to be set aside.

[7] This accords with the record and the conviction and sentence in respect of court 9 is accordingly set aside,

Background

[8] The complainant is the stepdaughter of the appellant. At the time of the commission of the offences the appellant was married to her mother (accused no. 2).

[9] The complainant painted a grim and harrowing picture of how the appellant repeatedly sexually assaulted and raped her. This happened over a lengthy period of time in her bedroom in the family home. The appellant even removed the lock from her bedroom door to allow him unhindered access to his young prey.

[10] Initially the appellant would come to the complainant's bedroom and inappropriately touch her breasts and private parts. The sexual assault progressed to

a point where she was raped approximately three times a week and later on a daily basis. She testified that she told the appellant to stop. When she resisted his unwelcome conduct, he told her in no uncertain terms that she should keep quiet. Sometimes the appellant would also use force when she resisted him: He would hit her with a fist, pick her up and throw her against the wall and would place his hand over her mouth so that she could not scream. He also threatened that he would beat her to death if she told her mother.

[11] Often when they were alone in his car on their way to the shops he would inappropriately touch her by placing his hand in her panty. He would also insert his fingers into her private parts. The complainant testified that on one occasion her mother walked into the room whilst he was on top of her. Her mother pushed him from the bed and stormed out of the room. The complainant then tried to tell her mother that the sexual assault had been going on for years but it appeared to her that her mother did not believe her. After this particular incident the appellant stopped coming to her bedroom only to resume raping her after a while.

[12] The complainant testified that the sexual assault and rape commenced in 2003 when she was still 15 and ended when she turned 17. The turning point came about when she was informed that the appellant had turned his attention to her sister and that he started to sexually assault her too. The victim explained that up until then she did not report the incidents to anybody as she was too afraid to do so.

[13] In 2004 the complainant met her husband (Shane). This, however, did not deter the appellant and he continued raping her until she told Shane and the matter was reported to the police.

Grounds for appeal

[14] The appellant relied on the following 8 grounds of appeal in the Notice of Appeal:

1. That the State did not prove its case beyond a reasonable doubt;

2. The trial court did not properly evaluate the evidence by not taking into account improbabilities and contradictions;
3. The failure of the trial court to consider that a medical doctor was not called to testify in respect of forceful penetration;
4. No DNA evidence was presented;
5. The failure of the State to call certain witnesses;
6. The failure of the trial court to properly consider the possible motive which the complainant and accused may have had to falsely implicate him;
7. Rejecting the version of the appellant and his defence witness;
8. All evidence was hearsay evidence.

[15] The appellant has now conceded the points raised in paragraphs 3, 4, 5 and 8 as well as the point taken that the complainant delayed reporting the matter.

[16] The only points that remained ad conviction are: (i) whether the evidence was properly evaluated; and (ii) whether there was a motive to falsely implicate the appellant.

Proper evaluation of the evidence

[17] The trial court was alive to the fact that the complainant was a single witness in respect of sexual offence and duly applied the cautionary rule in evaluating the evidence of the complainant. The learned Magistrate also took into account the demeanour of the complainant: He took into consideration that the complainant was calm when giving evidence and that she did not contradict herself. More importantly, the learned Magistrate took into account that there was corroboration for the evidence of the complainant in that of accused 2 (her mother) as well as in the report made to Mrs Nel (Clinical Psychologist).

[18] I can find no reason to interfere with the assessment of the evidence of the complainant. Although it is accepted that a trial court must approach the evidence of

a single witness with caution², the Appellate Division in *S v Sauls and Others*³ pointed out that "the exercise of caution must not be allowed to displace the exercise of common sense".

[19] I can also find no reason to interfere with the trial court's credibility findings. A Court of Appeal⁴ will only interfere with the credibility findings of a trial court where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned. I can find no such misdirection in the present matter. Moreover, the trial court had the advantage of seeing and hearing the witnesses.

[20] I can also find no reason to interfere with the trial court's finding that the complainant, her husband and accused no. 2 deliberately fabricated a story to implicate the appellant. The complainant never deviated from her version of the events. She gave a detailed statement to the police which is consistent with her evidence in court. Lastly, the evidence of Mrs Nel – the Clinical Psychologist – are

² *S v Miggel* 2007 (1) SACR 675 (C) at 678A – C: "It is settled law that the evidence of a single witness must be approached with caution. In the normal course of events, the evidence of a single witness will only be accepted if it is in every important respect satisfactory or if there is corroboration for that evidence. (See *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G; *S v Letsedi* 1963 (2) SA 471 (A) at 473F; *R v Mokoena* 1956 (3) SA 81 (A) at 85 – 6.) The corroboration that is required is confirmatory evidential material outside the evidence that is being corroborated. (*S v Khumalo en Andere* 1991 (4) SA 310 (A) at 328A – B.) The corroboration does not necessarily need to link the accused with the crime. The evidence of a single witness, as Holmes JA said in *S v Artman and Another* 1968 (3) SA 339 (A) at 341A – B, 'does not require the existence of implicative corroboration; indeed in that event she would not be a single witness'."

³ 1981 (3) SA 172 (A) at 643: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPF JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

(Per SCHREINER JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

⁴ *S v Francis* 1991 (1) SACR 198 (A) at 198J – 199A: "The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

also instructive in that she explains the psychological trauma and impact sexual assault has on a victim particularly at the hands of someone who was in the position of a father/stepfather to the complainant: The appellant abused the complainant from a very young age. She was only 15 when the abuse started. The abuse gradually culminated in her being systematically raped over an extensive period of time. The sexual assault was also often accompanied by violence and threats. All of this had a traumatic impact on the complainant.

[21] The fact that the complainant later had a relationship with a married man (who later became her husband) and the fact that the appellant did not approve of the relationship, does not cast doubt on her version of the facts. The fact that the complainant did not fall pregnant during the time the appellant raped her also does not cast doubt on her version.

[22] I am accordingly in agreement with the finding by the trial court that no motive to implicate the appellant falsely was established.

Ad sentence

[23] Counsel on behalf the appellant only took issue with the fact that, although the appellant was charged with two counts of rape as contemplated in section 51(2) of the Criminal Law Amendment,⁵ the State did not allege or specify the circumstances that triggered the applicability of this section. More in particular, neither of the two charges inform the appellant that (i) the complainant was 15 at the time when the rapes started and; (ii) that the complainant was raped multiple times over the course of at least two years.

[24] It was accordingly submitted that the court *a quo* misdirected itself in imposing a sentence of life imprisonment in respect of the two counts of rape (counts 1 and 8) in the absence of this information having been provided to the appellant in the charge sheet.

⁵Act 105 of 1997.

[25] In support of this contention, the Court was referred to the decision of the Constitutional Court in *Ndlovu v S*⁶ where the pertinent issue was whether the appellant's right to a fair trial was infringed in circumstances when, after he (Ndlovu) had been charged with rape read with one minimum sentencing provision, but was sentenced pursuant to a different, harsher, minimum sentencing provision.⁷ In the *Ndlovu*-matter, the appellant was only charged with rape in that he unlawfully and intentionally had sexual intercourse with a female without her consent read with the provisions of section 51(2) of the Criminal Law Amendment Act.⁸ Yet, the Magistrate's Court in that matter imposed a sentence of life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act despite Ndlovu having been charged in terms of section 51(2). In concluding that the Magistrate did not have the necessary jurisdiction to convict the appellant in terms of section 51(1) in circumstances where he was charged with an offence as contemplated by section 51(2) of the Criminal Law Amendment Act, the Court said the following:

"[45] The Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51(2)" and specifically found Mr Ndlovu "guilty as charged". This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(1). Nor does the evidence of the complainant's injuries automatically cure the charge in terms of section 51(1), as posited by the state. A defective, or incomplete, charge may be remedied by evidence in some instances by section 88 of the Criminal Procedure Act. However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.

[46] In the light of this, I can do nought but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51(2); accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was

⁶ 2017 (2) SACR 305 (CC).

⁷ *Ibid* ad para [1].

⁸ Act 105 of 1997.

treated as a first offender). The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years."

[47] In the result, because the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51(1), his application must succeed."

[26] In the present matter, similar to the matter in *Ndlovu*, the appellant was only charged with rape in that he "*wederregtelik en opsetlik met 'n vrouenspersoon, te wete Alcia Danielle Lewis vleeslike gemeenskap gehad het sonder haar toestemming ... gelees met die bepalings van Art 51(2) van die Strafreghwysigingswet 105 van 1997*". However, and similar to the *Ndlovu*-case, the Magistrate imposed a sentence of life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act in respect of both counts 1 and 8 despite the fact that he was charged in terms of section 51(2) and not in terms of section 51(1). Moreover, the circumstances which may have given rise to the jurisdiction to sentence the appellant to life imprisonment in terms of section 51(1) of the Minimum Sentencing Act are also not referred to in counts 1 and 8.

[27] When the charges were put to the applicant, no mention was made of the fact that the complainant was only 15 at the time nor of the fact that she was repeatedly raped. After the charges were put to the appellant the Magistrate advised him that a minimum sentence of between 10 and life imprisonment may be imposed but again without setting out the circumstances under which a sentence of imprisonment for life would have been applicable.⁹

⁹ Section 51(2) of the Criminal Law Amendment Act provides:

"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*

[28] Moreover, counts 1 and count 8 read exactly the same and despite no difference in the two charges (apart from the dates on which the rapes took place namely in 2003 and 2004), the appellant received two life sentences.

[29] In terms of section 51(1) of the Criminal Law Amendment Act a minimum sentence is prescribed in respect of certain offences:

“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.”¹⁰

-
- (iii) *a third or subsequent offender of any such offence, to imprisonment for a period of not less than 20 years;*
 - (c) *Part IV of Schedule 2, in the case of—*
 - (i) *a first offender, to imprisonment for a period not less than 5 years;*
 - (ii) *a second offender of any such offence, to imprisonment for a period not less than 7 years; and*
 - (iii) *a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and*
 - (d) *Part V of Schedule 2, in the case of—*
 - (i) *a first offender, to imprisonment for a period not less than 3 years;*
 - (ii) *a second offender of any such offence, to imprisonment for a period not less than 5 years; and*
 - (iii) *a third or subsequent offender of any such offence, to imprisonment for a period not less than 7 years.*

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.”

¹⁰ Part I of Schedule II reads as follows in respect of rape: “**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;
- (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.

[30] Part I of Schedule 2 includes rape in circumstances where the victim was (i) raped more than once by one or more than one person and; (ii) rape where the victim is a person under the age of 16 years.

[31] Had the appellant been charged with an offence falling within the ambit of Part 1 of Schedule 2, the court *a quo* would have been able to sentence the appellant to life imprisonment provided that the appellant had been convicted of an offence referred to in Part I of Schedule 2.

[32] The minimum sentence that can be imposed on a person found guilty in terms of section 51(2) of the Criminal Law Amendment Act (such as rape read with read with section 51(2) of the Criminal Law Amendment Act) is 10 years' imprisonment (in the case of a first offender). In terms of the section 51(2) the maximum term of imprisonment that a Regional Court could impose under section 51(2) is the applicable minimum sentence (10 years) plus five years (15 years).¹¹

Compelled rape as contemplated in section 4 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 by one or more than one person;
- (ii) 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
- (iii) under circumstances where the accused knows that the person committing the rape 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;
- (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.

Any offence referred to in section 2, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, when it is proved that the offence has-

- (a) endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons;
- (b) caused serious risk to the health or safety of the public or any segment of the public; or
- (c) created a serious public emergency situation or a general insurrection.

Trafficking in persons for sexual purposes by a person contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

¹¹ Section 52(2) provides that "the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

[33] During the trial, evidence was led by the complainant that she was 15 at the time when she was first raped. This evidence was corroborated by accused no 2. Evidence was also led to the effect that the complainant was repeatedly raped during 2003 and 2004.

[34] Despite this evidence having been led, scant reference was made during the submissions on behalf of the State in respect of sentencing regarding the fact that evidence revealed that the complainant was 15 when she was first raped and that she was repeatedly raped thereafter.

[35] The Magistrate did not have the jurisdiction to impose life imprisonment in terms of section 51(1) in circumstances where the appellant was charged in terms of section 52(2) of the Criminal Law Amendment Act. The fact that evidence was led to the effect that the complainant was 15 at the time when she was first rape and that she was raped repeatedly thereafter does not, in the words of the Constitutional Court in *Ndlovu* "automatically cure the charge in terms of section 51(1)".

[36] I should also mention that in convicting the appellant the learned Magistrate convicted the appellant "soos aangekla". If regard is had to the charge sheet, the appellant was charged with rape read with the provisions of section 51(2) of the Criminal Law Amendment Act. The conviction in respect of charges 1 and 8 was therefore in terms of section 51(2) of the Criminal Law Amendment. However, notwithstanding this conviction, the learned Magistrate sentenced the appellant in terms of section 51(1) of the Criminal Law Amendment Act.

[37] In the result the appeal must succeed and the sentences of life imprisonment imposed in respect of the conviction on both counts 1 and 8 be set aside.

Should this court impose a sentence?

[38] Although it is preferable that the trial court imposes a new sentence in terms of section 51(2) of the Criminal Law Amendment Act, I am of the view that, in this

particular matter, it is in the interests of justice to determine the matter finally particularly in light of the fact that the trial took years to complete: The trial commenced in December 2006 and was only finalised on 30 January 2015 when sentence was handed down.

[39] In terms of section 51(2) of the Criminal Law Amendment Act, the minimum sentence that could have been imposed on the appellant, having been a first offender, could have been 10 years' imprisonment and the maximum 15 years' imprisonment.

[40] What cannot be ignored in considering an appropriate sentence is the fact that the appellant had been convicted of heinous crimes. The facts in this matter speak for themselves. I can put it no better than the court in *S v C*:¹²

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes."

[41] See also *S v Chapman*¹³ where the Court likewise verbalised the devastating effects of this terrible offence on the victim as follows:

"This in our view is a correct approach. Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

¹² 1996 (2) SACT 181 at 186 par [1].

¹³ 1997 (2) SACR 3 (SCA) at 344J – 345B.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[42] The court *a quo* has already taken into account all relevant factors in deciding on an appropriate sanction albeit in the context of section 51(1) of the Act. Those same considerations apply in considering an appropriate sanction in terms of section 51(2) of the Criminal Law Amendment Act.

[43] The offence with which the appellant was convicted of induces a sense of shock and horror and I am, in particular in agreement with the learned Magistrate's labelling of the appellant as a "seksuele roofdier" ("sexual predator"):

"Die getuienis voor die hof toon baie duidelik aan dat voor die hof daar n seksuele roofdier stand wat sy situasie misbruik het om onskuldige mense uit te buit vir sy seksuele bevrediging en dit is die bevinding van hierdie hof dat hierdie hof geen ander keuse het as om die belange van die gemeenskap, die erns van hierdie misdryf, die veelvuldige voorkoms daarvan te sien as faktore wat in hierdie geval beklemtoon moet word."

[44] What makes matters even more repulsive is the fact that the appellant abused his position as a stepfather to violate a vulnerable young woman: He even removed the lock from her bedroom door so that he could have easy access to his vulnerable prey. Although the appellant is not the complainant's biological father, he was married to her mother for many years and as such stepped into the shoes of a father. She was entitled to his protection. Instead he repeatedly violated her trust and exerted his physical and emotional power over her for his own satisfaction. The Court in *S v M*¹⁴ explains why rape with this context is particularly horrendous:

¹⁴ 2007 (2) SACR 60 (W).

"[39] The accused occupied a position of power in relation to his stepdaughter. She was vulnerable to his seniority in age and familial standing, his affinity with her mother who was the only other adult in the home, his role as *paterfamilias* in the home and family. This was appreciated in *S v Jansen* 1999 (2) SACR 368 (C) where it was said at 378g - h that '(r)ape of a child is an appalling and perverse abuse of male power'; in *S v Swart* 2000 (2) SACR 566 (SCA) where reference is made to how the rapist 'exploited to the full the position of power which he held over them'; in *S v G* 2004 (2) SACR 296 (W) where the Court commented at 301c - d, 'She was raped in the safety of her own home by a person towards whom she was affectionate, and from whom she was entitled to expect protection. The accused has violated the trust which the complainant and her mother placed in him'; in *S v P* 2000 (2) SA 656 (SCA) at 660G where the Court commented how a grandfather had 'violated that love and abused that position of trust'.

"[40] In *S v Abrahams* 2002 (1) SACR 116 (SCA), the Court was concerned with the rape of a pubescent child by her father. The Court stated at 123d - e:

'Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter.'

The Court referred to a number of features applicable to rape within the home.

'First and obviously, a family member is also a member of the wider public and equally obviously as deserving as the rest of the public of protection against rapists, including those within the home. Indeed, where a rapist's victim is within his family, she constitutes the part of the public closest to, and therefore most evidently at risk of, the rapist.

Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. The

present case illustrates them with acute force. The rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused did) he can exercise a proprietary entitlement. Though not the case here, a family victim may moreover for reasons of loyalty or necessity feel she must conceal the crime. A woman or young girl may further internalise the guilt or blame associated with the crime, with lingeringly injurious effects. This is particularly so when the victim is the rapist's own daughter, and the more so when the daughter is of tender years."

[45] In the circumstances of this matter I am therefore of the view that a minimum sentence of 10 years' imprisonment is wholly inappropriate. I conclude that a sentence of 15 years' imprisonment in respect of each of the two convictions of rape (charges 1 and 8) read with section 51(2) of the Criminal Law Amendment Act is appropriate.

[46] Unfortunately, this is the point where the criminal justice system dismally failed this complainant. The evidence presented to the trial court should have alerted the Magistrate and the prosecutor that the appellant ought to have been charged with rape read together with section 51(1) of the Criminal Law Amendment Act in that the victim was 15 at the time when the rapes started and that she was raped multiple times over the period of at least two years. This was not done. It is this kind of oversight that has prompted the Constitutional Court in *Ndlovu*¹⁵ to level the following criticism against those individuals and state entities who reminisced in their duty to correctly charge the appellant:¹⁶

¹⁵ *Supra* note 6.

¹⁶ Section 86 of the Criminal Procedure Act 51 of 1977 provides:

"(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend."

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit."

"[58] When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu. The prosecutor was from the outset in possession of the J88 form in which the injuries sustained by the complainant were fully described. It boggles the mind why the proper charge of rape read with the provisions of section 51(1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter."

Order

[47] The following order is made:

1. The appeal against conviction and sentence imposed by the Regional Court, Secunda in respect of charges 2 – 7 is dismissed.
2. The appeal against conviction and sentence imposed by the Regional Court, Secunda in respect of charge 9 is upheld and the appellant's conviction and sentence are set aside.
3. The appeal against conviction imposed by the Regional Court, Secunda in respect of charges 1 and 8 is dismissed.
4. The appeal against the sentence of life imprisonment imposed by the Regional Court, Secunda in respect of charges 1 and 8 succeeds and is replaced by the following order:
 - 4.1 In respect of charge 1 the appellant is sentenced to 15 years' imprisonment antedated to 30 January 2015.

4.2 In respect of charge 8 the appellant is sentenced to 15 years' imprisonment antedated to 30 January 2015.

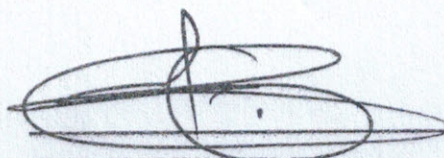
5. The sentences on counts 1- 8 are to run concurrently. The effective sentence will thus be 15 years.



AC BASSON, J

JUDGE OF THE HIGH COURT

I AGREE



TAN MAKHUELE

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPELLANT	:	ADV L A VAN WYK
INSTRUCTED BY	:	LEGAL AID SOUTH AFRICA
FOR THE DEFENDANT	:	ADV M J VAN VUUREN
INSTRUCTED BY	:	DIRECTOR OF PUBLIC PROSECUTIONS