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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE: 24/3/2017

CASE NO: A766/2015

S K P.

APPELLANT

and

STATE

RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Appellant, duly appeals against his conviction and sentence by the Regional Court of Gauteng held in Pretoria for contravening the provision of s 3 read with Section 1, 51,56 (1) 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act, (Sexual offences and Related Matters) 32 of 2007 read with s 256, 257 and s 281 of the Criminal Procedure Act 51 of 1977, ("the Act") together with the provisions of s 1 and 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Prescribed Minimum Sentence Act"), as amended. As well as s 92 (2) and 94 of the Criminal Procedure Act read with s 53 of Act 105 1997 in that:

"On or about October 2009 and at or near Mamelodi he unlawfully and intentionally

committed an act of sexual penetration of a female person to wit L. P., 10 years of age ("the Complainant") by penetrating her genitals with his penis and/or fingers without her consent on more than one occasion"

[2] The appeal is with leave of the court a quo. The Appellant was duly represented during the trial and pleaded not guilty to the charge. He exercised his right to remain silent and chose not to tender an explanation of his plea. At the end of the trial the court returned a guilty verdict reliant on the evidence of the complainant and her mother who were found to be trustworthy as witnesses and their evidence reliable.

[3] Appellant is the complainant's uncle, her mother's brother. They stay together in the same premises. Appellant has a room outside the main house. The complainant, her mother and younger sibling stay with the grandmother and her cousin in the main house.

[4] According to the complainant, on the day of the incident Appellant called her to his room and sent her to buy Simba chips. On her return he raped her, placing his private parts into her vagina. She couldn't remember if Appellant moved up and down or did not make any movements. Her mother saw her leaving her uncle's room and asked her what was happening. She did not say anything because her uncle promised to spank her if she told her mother. At the doctor she explained what happened to her. First that the Appellant started with his finger and she felt pain when his penis was inside her vagina. Her mother took her to the doctor but not on the day she saw her leaving the Appellant's room. She said the Appellant had done that to her a lot of times. He always started first with his finger then with his private parts. He would rape her same way same fashion. He would also fidget with his finger inside her vagina. She could not remember when it all started. She did not tell anybody what her uncle was doing to her because she was afraid he would spank her. He has never done it but had promised to do so if she tells on him.

[5] She confirmed that the doctor examined her and she told the Doctor who told her mother that she was raped. The last rape took place during daytime on the day when she was wearing pink tights and a t-shirt. The police told them to go to the doctor and they went to 2 of them. She told both of them about the incident. One of them her mother's boyfriend. She confirmed she had a discharge going to the doctor and it was sometimes itchy. She scratched herself sometimes with a washing rag. For the first time she was given a cream to smear and it was never itchy. It was after her uncle had raped her. The second doctor asked her what was wrong with her. She told the doctor that a penis and a hand were used to rape her. When the Appellant called her to the room she was sitting with Mpho watching TV and her grandmother was sleeping.

[6] The evidence of the complainant's mother was that her daughter was 10 years old when the incident happened sometimes in October 2009. It was on a Wednesday at about 3 o' clock in the afternoon. She woke up from an afternoon nap and started looking for the complainant around the house and yard, calling her name. Her sister's child Mpho who was in the house did not know where the complainant was. She continued calling her name in the yard and when she turned around to go back into the house, she heard a door being unlocked. The kitchen door that she was going into slightly faces her brother's bedroom door. She then saw Appellant pushing the child out of the room. The complainant came out trying to pull her panty and tights up that were down to her knees. When she asked the complainant what was happening and why she was trying to pull up her pants she started crying. The next day when she was going to work, she asked her mother to ask her brother what was happening with the child who came out of his room trying to pull up her pants and panties. Her mother refused to acknowledge what has happened. She said it was tough for her seeing that it is her brother she could not ask him and when she asked the complainant

she just cried. She did not know what to do. The schools were closed so on that Friday she took the complainant to her boyfriend who is a doctor, Dr Ogbenga, and asked him to ask the child about it. The boyfriend asked the complainant but she kept on crying. He advised her to go to the police and told her that as the stepfather he cannot do anything about this and gave her a cream for the itchiness. They went back home and her mother told her that she has not asked the brother what happened. Her brother was denying that he did anything. So she took the complainant to the police station. The complainant told the police what happened to her. They then went to Mamelodi Hospital where the complainant was examined by a doctor whom she also told what has happened. The complainant said she was afraid to tell them because the Appellant promised to spank her if she told anybody. Before the incident there was no animosity between her and her brother. She confirmed that the complainant said the rape happened many times.

[7] Under cross examination she indicated that it was after she had asked her mother to talk to the brother and as her mother could not believe that her brother could do such a thing, she took the complainant to her boyfriend. She was shocked when she saw what Appellant had done. It was put to her that the Complainant did not mention that she was there in the yard when she counted the people who were there. Her reply was that the Complainant was aware that she is in the house she did not go to work. She confirmed that she works as an officer at the funeral parlour and was also a sangoma. She went to the police because she saw complainant pulling up her pants.

[8] She furthermore testified that Dr Ogbenga examined the complainant and told her that he does not want to be involved in her family **affairs she must take the complainant to the police who will send the child to their own doctor for examination.** She was worried when she saw the complainant coming out of the appellant's room semi-naked and

wanted to know what was going on. She suspected that Appellant might have raped her.

When she eventually went to the police the child had explained to her that she was raped by the Appellant. It bothered her very much as this was his brother whom she loves dearly that is why she went to her mother. It was put to her that she called him a witch and tried to accuse him of stealing her healing powers. So the Appellant went to report her to the tribal authority before the incident of the child. She confirmed receiving summons. It was put to her that she said she will get him jailed. She said Appellant ran to the traditional court as soon as he heard that she was going to open a case.

[9] Dr Ogbenga in his testimony confirmed that he examined the complainant after the mother told him that complainant was experiencing vaginal pains. The complainant indeed complained of pains when he touched her private parts, particularly the clitoris. He therefore could not continue with the examination. He gave the complainant a cream and told the mother to take her to the police station. He admitted talking to the complainant but denied that she told him anything. Complainant cried when he touched her clitoris. She felt other doctors might be able to examine her properly. He knew the appellant very well who is the complainant's mother's brother. The complainant complained about vaginal pains. She might have had vaginal infection but he did not go further with the examination. Appellant was sitting in his car when he was arrested. He does not know if the complainant and the mother were at home at the time. The complainant complained of severe pains that is why he could not continue with the examination.

[10] The J88 report was accepted into evidence by agreement between the parties, the accused having admitted the findings in the report. As a result the admitted findings were read into the record as follows:

Conclusion: History is in keeping with the finding

3: Negative gynaecological findings, **negative findings does not exclude the alleged assault**
examination reveals signs of lubrication swab taken.

Gynaecological Examination: Mons pubis: Normal **Posterior fourchette: Swollen and bruised Hymen Configuration: Swelling Present**

Bumps: not present

Fresh tears: Not present

Synechiae: Not present

Clefts: Not present

Bruising: Not present

Vagina number of fingers admitted: Not done

Cervix: Not seen

Discharge: Whitish discharge, foul smell.

Conclusion: **Negative gynae findings, negative findings does not exclude the alleged assault**, examinations reveals signs of swab taken. Then it proceeds to clinical finding.

Client visualises that the known man since Saturday 4 October 2009 using his fingers, putting them in the vagina till Wednesday 7 October 2009, no history of physical assault, **no physical injuries.**

Mental health and emotional status: Calm

Clinical evidence of drugs and alcohol: Nil

Conclusion: History is in keeping of finding

[11] The Appellant's testimony was a bare denial to the incident. His evidence had little to do

with the allegations levelled against him. He alleged that he introduced the complainant's mother to Kobela, the lady who trained her to be a traditional healer. At the end of the training the complainant's mother was supposed to buy Kobela a blanket. She did not buy it. As a result Kobela did not complete certain rituals. **She then had problems with Kobela and expected him to be also funny towards Kobela.** The complainant's mother, their elder sister and their sister in law once went to where their brother in law and cousin Salome stay and took Salome away, claiming that the brother in law poses an immediate danger to her. They brought her to stay with them and again took off to Nelspruit to see an inyanga that specialises in witchcraft. They were told at a Lekgetla that he is the one that is obstructing the process of seeing their brother in law dead. Thereafter complainant's mother started accusing him of being a witch.

[12] He went to Zionist Christian Church to look for the traditional court and lay a charge against the complainant's mother for accusing him of being witch. On Sunday he asked the other sisters except the complainant's mother if they knew who was alleged to be the witch. He was avoiding a confrontation with the complainant's mother who jumped in anyway and said she was the one who caught a witch and he was the witch. He then handed her the summons it was about 14h00 - 15h30. She grabbed the summons and the complainant and took off. He was arrested the same day. Later he was in his room when the complainant and one of her elder sister's son came to call him telling him Dr Ogbenga was at the gate. He went and sat in the Dr Ogbenga's car that is when the police car with Inspector Mafa arrived and he was arrested. The complainant and her mother were in the house.

[13] As regards the complainant he said her chores were to look after her half- sister every day when she comes back from school. She does not go and play with the other kids. He, (the Appellant) always has access to the house except for the security gate that is locked he

has to ask someone to open the security gate to go outside the yard. He sees the complainant daily since they live in the same home. Complainant did not come to his room because she is always locked up in the house. Her mother is afraid of a witch within the yard. He denied sending the complainant to buy chips and insisting that she sits down and eat the chips. At that time he was collecting data forms from different government organs, he was going to complete the information for a job or tender. He does not know anything about inserting his fingers or penis in the complainant's vagina. The time that he is being accused of having pushed out the complainant from his room is the time when the mother was going hysterical about the witch putting burglars and security doors everywhere where she felt it is necessary to guard her kids and herself against the witch. That was the end of the Appellant's case.

[14] Due to the J88 not being lucid, the court could not make sense of the information therein. As a result instead of just making negative innuendos about the quality of the report and the state's failure to call the medical expert, the court a quo caused the state to subpoena the medical expert who conducted the examination and completed the incomprehensive form; (see s 18G of the Act.) seeing that it might be decisive of the material aspect of the offence, being essential to the just decision of the case, even though the parties had agreed that the J88 can be admitted into evidence,

[15] Dr Shibopha qualified as a medical practitioner at Medunsa in 2003 and was employed at Sinaxas Clinically Research Centre since 2011 where she does research work. On 12 October 2009 she was a district surgeon at Mamelodi Crisis Centre when she encountered the complainant. She confirmed the history she recorded on the J88, specifically that "the complainant verbalised a known man since Saturday 4 October 2009 **using his fingers putting it the finger into the vagina** till Wednesday of 7 October

2009." There was **no** history *or symptoms of physical assault*. The history on sexual assault was not done because the complainant was a minor. On examination everything was normal except that the hymen was bruised and swollen and she had a foul smelling discharge. **A pregnancy test done was negative so drawing a conclusion of negative findings that does not exclude alleged assault. The swelling and the discharge was due to an infection** and swab was taken.

[16] Upon being asked by the court to explain the bruising, swelling and the discharge, Dr Shibopha said it was normal for girls of the complainant's age as they play on the sand which gets into their vaginas and cause the irritation which will give such an infection, but it is easily treated. She confirmed that a swab was sent to the laboratory and they would have excluded whatever they suspect to be the actual cause. The result would actually tell them that, if that was a sexual assault. She had not seen the results and without the results she would exclude sexual assault. On further explanation she spoke about gonorrhoea which she said is a sexually infected disease, she could not explain what the relevance of gonorrhoea was.

[17] She further testified under cross examination that a child raped with a penis inserted in her vagina was not what she is testifying about, if so they will see the injuries as minors are still sensitive. They would usually look for the hymen which would confirm the sexual bleeding that actually happens. He said in this instance there were no bumps nothing to suggest that a penis, that is a bigger object, especially the Accused being big as well. She could not explain her clinical finding she recorded that no physical injuries when the hymen as shown in the schematic drawing of findings was bruised and swollen.

[18] The evidence of the medical expert was shockingly unprofessional, and evokes a sense of incompetency and lack of appreciation of the role that the medical expert plays in making sure that justice prevails. She could not offer an understandable rationale for the exclusion of

sexual assault or physical injuries and to eloquently explain her findings.

[19] The fundamental principle of our law is that the state or prosecution has a duty to prove the guilt of the accused beyond reasonable doubt for the court to return a guilty verdict.

[20] The Appellant argues that the court *a quo* in accepting the evidence of the state as proof beyond reasonable doubt and rejecting that of the Appellant as being not reasonably possible true erred, having failed to consider the following contradictions by the state witnesses:

[20.1] the complainant testified that the Appellant called her to his room, inserted a finger and later raped her. Whereas according to the general history as completed by the doctor the Appellant inserted only his fingers on the private parts of the complainant.

[20.2] the complainant testified that the reason she was taken to the doctor is because she was feeling itchy in her private parts and did not tell her mother, whereas according to her mother she saw the child exiting the Appellant's room and she wanted to find out what happened to the child as the child was half naked.

[20.3] the complainant testified that she was seen by her mother exiting the Appellant's room, but she did not testify about her being half naked. That we saying it is in contrast to the testimony of the mother on that aspect.

[20.4] the complainant said she was wearing a pink panty on the day of the incident of rape, whereas her mother said she was wearing a red panty. It was only during the court clarifying questions that the mother changed to say that she was wearing a pink panty with mix colours, including red. The mother changes her testimony to suit her needs

[20.5] the mother testified that the first doctor they saw suggested that they go to the police whereas the doctor denies that, but she suggested that the child be taken to another doctor as he was in a love relationship with the mother.

[21] In deciding the issues raised by the Appellant, we were consciously guided by the established principles governing the hearing of appeals against finding of fact. In brief, that in the absence of **demonstrable and material misdirection** by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.; see *S v Hadebe and Others* 1997 (2) SACR 641 (SCA). The Appellate Division went further in *S v Dhlumayo* 1948 (2) SA 677 (A) to indicate that a court of appeal will only reject the trial court's assessment of evidence if it is convinced that the assessment is wrong. Even if the court is in doubt, the trial court's judgment must remain in place.

[22] The court a quo recognised that the state relied solely upon the evidence of the complainant as to the incident itself, therefore her evidence, as a single witness was to be viewed with caution. It would therefore have to be clear and satisfactory on all material aspects; see s 208 of the Act". Evidence can be rendered satisfactory in all material aspects due to different factors. What is important is that the trier of fact determines if the proven facts supports the conclusion that the Accused committed the offence he has been charged with. **On the complainant's instance the caution was a double jeopardy since she was also young.**

[23] However, the evidence of the complainant was found by the court to have been direct and satisfactory on what actually happened. She was undeniably clear as to the details and explained sufficiently her failure to inform her mother when she was coming out of Appellant's room. She has been warned that if she tells her mother what happened, she was

going to be spanked. At her age, it is understandable under those circumstances that she would be reluctant to tell. It was also correct for the court to find the evidence of her mother corroborative of what complainant alleged to have happened. Her mother saw her being pushed out of Appellant's room half naked with her panties and tights on her knees. Both testify to the mother asking complainant what was happening and that she did not tell her anything but she was crying. The only inference to be drawn from those circumstances is that Appellant did rape the complainant.

[24] The complainant's mother was troubled by what she saw as she says this was her brother that she loves so very much, how does she process such an observation. She reasonably asked the assistance of their mother and also took the child to her doctor friend to ascertain as to what exactly was happening to the child and to address the child's complain about itchiness. On the advise of her doctor friend she took the child to the police station, acting like any reasonable, concerned and responsible person would do. I fail to see any mala fides from her conduct. The complainant similarly confirmed that she was not aware of any bad blood between Appellant and her mother. The court was therefore correct to find her evidence to be satisfactory as well. The fact that the complainant omitted to mention that when her mother saw her coming out of Appellant's room she had her panties and pants on her knees does not mean there is a contradiction. Unless the allegation is that the complainant denied that she came out of the Appellant's room semi naked. Similarly, the allegation of a contradiction on the evidence about the colour of her panties and tights whether they were red or pink is insignificant as it is not a material aspect of the evidence. The allegation of a contradiction in that regard is unmerited.

[25] On the other hand the fact that there was something happening with the child was established from her complains of pain every time Dr Ogbenga tried to touch her. It is not

surprising that he suggested an independent doctor saying he does not want to be involved in their family matter. It does say a lot about what he regards as a family matter and his suggestion that the matter be reported to the police. Why would he regard the complainant's itchiness and pain on her private parts to be a family matter in which he would not want to be involved? The complainant said she told the doctor about her uncle.

[26] With regard to the evidence of the second doctor. A message that was conveyed by Kotze J (as he then was) in *S v Gouws* 1967 (4) SA 527 (EC) at 5280, was that:

"the prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however displace that of the tribunal which has to determine the issue of the trial."

[27] Erasmus J in *S v Armstrong e n Ander* 1998 (10 SACR 698(SEC) said we cannot allow the expert to become the eyes of the court. The court must be satisfied from its own observation that the conclusions are correct with the aid and guidance, as may be appropriate of the expert.

[28] **The court a quo in dealing with the expert's evidence which is the main evidence that the state is also relying upon to prove their allegation of rape, has to differentiate between the evidence of the expert on the results of the examination it conducted that is admissible as real evidence and their opinion.** The results of the examination admissible as real evidence are that the **Posterior fourchette was swollen and bruised and the hymen swollen. Hymen Configuration: Swelling Present and a Discharge: Whitish discharge, foul smell.** The assessment of the probative value of the real evidence is done by taking into account the evidence of the witnesses that is relevant to the material aspects of that evidence. From the proven facts, whether there is a likelihood of the complainant having sustained the injuries found to be existent at the time

of examination. The evidence of the complainant and her mother indicate such possibility. The trial court was right this was not scientific evidence per se.

[29] **The court correctly came to a conclusion that the only inference that is logical that can be drawn from the proven facts is that** the bruises and the swelling of the hymen were caused by the fingers and the penetration of the complainant's vagina by the penis. Having taken into consideration what have been established, that is, the complainant's direct evidence of penetration by the Appellant. The complainant was with the Appellant in his room. She was seen pushed out of the room by the Appellant with her panties and tights on her knees and was emotional and crying when her mother wanted to know what was happening. Her reaction to her mother's boyfriend when he tried to examine her private parts. The stance taken by her mother's boyfriend after seeing her reaction to his examination, that he does not want to be involved in their family affair and suggesting an independent Dr. The probative value of the corroboration considered in the light of evidence which has been presented as a whole is remarkable. Whilst there is no evidence before the court that might indicate the possibility of sand or any other thing having caused an infection which would have in turn caused bruises or the swelling of the hymen. It defies logic that an infection can cause bruises.

[30] In such a case the opinion of the experts cannot be a decisive factor when considering a conviction. It also indicates how dangerous it can be to depend on the opinion evidence of the experts without scrutinizing the tests conducted and the results of their examination to see if their opinion stands up to logic. The court a quo was regrettably right to reject the opinion of Dr Shibopha which weirdly ruled out any physical assault or injuries; see Du Tait *et al's* Commentary on the Criminal Procedure Act " on p24 - 30 making reference to an excerpt from *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) that:

"In assessing expert evidence, the court has to be satisfied that the conclusion has a proper factual foundation."

[31] Even though it is accepted that an Accused person need not put up a version that is more than reasonably possibly true and the version need not even be believed. However where there is a prima facie case, the question that is asked is whether there is a likelihood that the Appellant could be telling the truth, there being a likelihood of his explanation happening. An explanation that is above suspicion is required. So the Appellant's inference that it needed the court to draw, was to be consistent with all the proven facts. In other words was the Appellant's explanation a possibility since if the explanation cannot be ruled out as a possibility, when it is judged against the principles of logic of the well-known dicta of Watermeyer JA in *R v Blom* 1939 AD 188, the Appellant must be given the benefit of doubt.

[32] The court measured the proven facts against Appellant's improbable allegation that there was such bad blood between him and the complainant's mother that the mother would use the child in such a way to get back at him, an allegation refuted by the complainant and her mother. Moreover that the mother did not send the complainant to his room, but he is the one who called the complainant to his room. Had she had the motive to get him arrested she could have just ran to the police station and reported him when the complainant came out of his room half naked. She would have known by then that the examination is going to show that her hymen is bruised and swollen. However due to the shock, and not wanting to register what the mind might have realised was happening, she sought help first from her mother then her boyfriend. Accordingly, the Appellant's evidence that was intended to disturb the only inference that was to be drawn from the proven facts, was not only unconvincing but also far-fetched. The court a quo was right to reject his version.

[33] In consideration of all the proven facts the state indeed proved beyond reasonable

doubt that the only inference that can be drawn from all the proven facts was that the Appellants raped the complainant as she alleges, on the day that she was seen coming out of his room with her pants and panties on her knees, having penetrated her with his penis and finger as well.

[34] The Appellant has therefore failed to show that the learned magistrate erred in convicting them.

AD SENTENCE

[35] The trial court sentenced the Appellant to 15 years imprisonment having found substantial and compelling circumstances that justifies a deviation from the Prescribed Minimum Sentence of life imprisonment; see s 51 (1) of the Criminal Law Amendment Act 105 of 1997. The Appellant was not represented during sentencing but the court considered it to be in the interest of justice to proceed with the Appellant representing himself in the proceedings.

[36] The Appellant challenges his sentence on the basis that the court a quo erred by not taking other sentencing options into account and or adequately into account. It was argued on his behalf that the court a quo only took into consideration the seriousness of the offence, its degrading nature to women and the interest of society that was overemphasised to the detriment of Appellant's personal circumstances. As a result it erred by imposing a sentence that is shockingly harsh and induces a sense of shock. It was further argued that the sentence is too severe and not in the interest of society or the Appellant.

[37] It is trite that sentencing is within the trial court's province and the appeal court can only interfere with such discretion if it is not exercised properly and judiciously. The trial court would have failed to exercise its discretion as prescribed if it committed an irregularity or misdirected itself, or has imposed a sentence that is shockingly inappropriate or out of

proportion to the magnitude of the offence (see *S v De Jager and Another* 1965 (2) SA 616 (A) at 628H-629B) .

[38] In order to ascertain that an appropriate sentence is imposed the courts are guided by the Zinn triad that refers to the relevant factors that are to be considered in determining a proper sentence, which is the offender, the offence committed and the interest of society. The court looks at the nature, circumstances and extent or degree of each of the three factors. The sentence would as a result have to be in proportion to the nature, circumstances under which the crime was committed and the interest of society.

[39] In respect of the offence committed by the Appellant the legislature has already ordained a minimum sentence of life imprisonment to be imposed on a first offender. There are therefore no sentencing options for the trial court to choose from nor does it start on a clean slate. Its starting point is the legislated sentence. The court could deviate from the prescribed minimum sentence only if it finds that there are substantial and compelling circumstances that justifies a lesser sentence.

[40] In determining whether such circumstances exist the court a quo took into account that the Appellant has been in custody for more than a year, nineteen (19) months to be precise, when he was sentenced. Although the delay was caused by the Appellant changing attorneys three times, some of it was caused by their withdrawing as a result of conflict of interest. Two witnesses that he intended to call passed away and the remaining two were reluctant to come and testify due to intimidation.

[41] The court a quo also had the benefit of pre-sentencing reports that were compiled for the court on the personal circumstances of the Appellant and the victim impact report. In respect of the Appellant it was indicated that at the time of the commission of the crime he was 37 years old, married with one child and a first offender. He worked as a computer tutor

in a private business whilst his wife is unemployed. He lost his mother when he was in custody.

[42] The court also took into account that he has been convicted of a very serious crime that is prevalent in our communities and which the legislature intended to curb/deter with the prescribed minimum sentence. The crime was committed against a defenceless and vulnerable young child, 9 years of age, by a person who was supposed to protect her as an uncle and at home where she was supposed to be safe and protected. Such serious crimes committed within the sanctity of a home attract a harsher sentence to deter and discourage like-minded persons who might be contemplating committing the same offence against their own families.

[43] The impact of this offence was also documented in the victim impact report. According to the report the complainant was badly affected by the rape. She could not concentrate at school and exhibits withdrawal syndrome, anxiety and lack of trust towards males. The relationship between Appellant and complainant's mother has been completely ruined by the incident. Also between the complainant's mother and other members of the family. Unfortunately the crime statistics on rape are rapidly on the rise even though there are measures embarked on by the government to educate communities. It is worrisome that notwithstanding this the Appellant has not shown any remorse and persisted to deny that he raped the complainant. All these factors together militates against the granting of a lesser sentence and calls for the imposition of a severe sentence.

[44] Notwithstanding all of the above the court still saw it fit to consider that the Appellant did not cause **any other** physical harm to the complainant. It regarded the offence not to be the worst of its kind. Also that the child seems not to be suffering an on-going trauma. It acknowledged that the offence is not so severe to warrant the harshest sentence and took

into consideration the time the Appellant has already spent in custody. It regarded all of that cumulatively to amount to substantial and compelling circumstances.

[45] I do not agree with the court a quo on its conclusion that the trauma suffered by the child is not ongoing when that has not been alluded to by the social worker who interviewed the child. The courts are also warned against the grading or considering the lack of physical injuries to be a mitigating circumstance and downplaying emotional trauma especially on the rape of a child. I consider these to be one of the flimsy reasons that were referred to in *S v M algas* 2001 (1) SACR 469 (SCA) (2001 (2) ZASCA 30).

[46] Notwithstanding the reservations I have against the trial court's consideration of the absence of physical injuries to be a mitigating factor, I am not persuaded that when the evidence is holistically considered, the sentence is shockingly inappropriate and or disproportionate to the nature of the offence or such that it can be concluded that the court a quo misdirected itself or there was an irregularity.

As a result, it is ordered:

[1] The appeal against conviction and sentence is dismissed.

For the Appellant: MOENG

Instructed by: Legal Aid South Africa
Pretoria

For the Respondent: M M MASHUGA
North Gauteng: Pretoria

N V KHUMALO J

JUDGE OF THE HIGH COURT

I concur

N P MALI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA