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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: A14/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE

SIGNATURE

In the matter between:

MAHLODI SHADRACK MAHWITING

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

Kganyago J

[1] The appellant has been arraigned in the regional court for Senwabarwana on one count of rape of an eleven years' old minor child, and one count of attempted murder. The appellant had pleaded not guilty to both counts, and was found guilty as charged. On the count of rape, the appellant was sentenced to life imprisonment, whilst on the count of attempted murder the appellant was sentenced to 10 years imprisonment. On the count of rape, the appellant is having automatic right to appeal since he has been sentenced to life imprisonment by the regional court. The appellant is appealing against both conviction and

sentence on the count of rape. The appellant is not appealing the conviction and sentence on the count of attempted murder.

[2] The facts of the case are briefly as follows. The State first witness was Dakalo Douglas Mabirisa who is the medical doctor who had examined the complainant (first minor child) who was allegedly raped by the appellant. He testified that on 17th September 2016 he was on duty at Helen Franz Hospital when he examined the first minor child at about 20h45. Thereafter he completed the J88 form. On general examination he found that the clothes which the first minor child was wearing had no bloodstains and were not torn. On clinical findings he found that the first minor child was stable but looked scared. There were no obvious injuries. On the vaginal examination he found the peri-labial abrasion on the left and right side; a fresh tear at seven o'clock and five o'clock; and the hymen and white page material. He then made a sketch of his findings. Based on the evidence he had collected, his conclusion was that the alleged sexual assault could not be ruled out.

[3] The first minor child had not yet started her menstrual period. According to the sister of the first minor child, she was not yet sexually active at the time of the alleged incident. The mons pubis, clitoris, frenulum of the clitoris, urethral orifice, para urethral folds, labial majora and minora were all normal. On the posterior fourchette there was no scarring, no tear and no increased friability. There were abrasions around the perineum area and fresh tears around the hymen area. The vagina was not bleeding, no tear and only one finger could be admitted. He did not do anal examination as there was no anal penetration. After examining the first minor child, he had handed the specimens to constable Molepo.

[4] The witness was cross-examined and he conceded that before the first minor child was brought to hospital for examination, her relatives have already examined her. Since the first minor child was examined by her relatives before she was brought to hospital, at first he was skeptical to examine her as he did not know the skill they have used to examine her. That resulted in him getting a second opinion from his senior colleagues, who advised him to examine the first minor child and record whatever he finds, and that the most important thing to record was that the first minor child was pre-examined. The witness stated that unskilled people might cause serious injuries when they did the examination on

their own. Further that injuries like abrasions can be caused by mere touching depending on the pressure that was applied. The witness stated that the white page material he had recorded on the J88, he could not tell exactly what they were because the white patches secretions in anyone could cause that, more especially in females. Maybe those white patches are from something which was used at home whilst examining her.

[5] The first minor child was the second witness to testify and she testified through the intermediary. She testified that on the date of the incident she was in the company of her friends L[...], M[...], S[...], S[...], K[...] and N[...] when they went to the mountain to pick up some wild fruits. As they were on the mountain they found a cave and decided to sit at the cave. Whilst sitting and throwing stones into the cave, the appellant arrived. On his arrival the appellant greeted them. The appellant asked them to borrow him a cellphone as he wanted to send someone a call back message. S[...] borrowed the appellant his cell phone and he did a call back. After the appellant finished talking on the cell phone, he gave the cell phone back to S[...]. The appellant asked all of them that they must go home with him.

[6] They all left with the appellant. The route that they have taken had a rock that they were supposed to jump to enable them to proceed with their journey. M[...] was unable to jump the rock, and the first minor child asked L[...] to assist her, but L[...] refused. The first minor child who had already jumped the rock went back to assist M[...]. After assisting M[...], the appellant held the first minor child by the hand and told M[...] to go and that she must not look back. From there the appellant held the first minor child by the loop of her trouser, picked up a stone and told first minor child's friends to ran away and not to look back. The first minor child's friends ran away.

[7] After the first minor child's friends have ran away, the appellant told the first minor child to pee on herself. After the first minor child had pee on herself, the appellant told the first minor child to take off her clothes, but she refused. The appellant slapped the first minor child with an open hand three times on her face whilst holding the stone on the other hand. The first minor child realized that should she continue refusing to take off her clothes, the appellant was going to crush her head with that stone. The first minor child complied, but did not take off her panty and high waist. The appellant took off the first minor child's

panty and high waist. After that the appellant stretched the first minor child's hands and put his knees on top of them. The appellant pulled down his trouser until underneath his buttocks and took out his urinating thing and put it into her urinating thing. Thereafter the appellant started doing the up and down movements. The first minor child started feeling pains and she screamed. As the first minor child was screaming, the appellant closed her mouth and continued doing the up and down movements.

[8] After the appellant had finished doing the up and down movements, he told the first minor child to bring one girl known as I[...]. The first minor child did not respond and the appellant told the first minor child to get dressed. The first minor child dressed up and ran home. As she was running home she met one Mbali but did not tell him what had happened to her. On arrival at home she found her uncle, Mamola, M[...].lo and community members. Later the first minor child's sister arrived in the company of the police. M[...].lo told the first minor child's sister to take the minor child into the room to check if they did something to her. On arrival in the room her sister and M[...].lo told the first minor child to take off her clothes and open her legs. The first minor child did as requested and they both came closer to her, checked her private parts and said it is true. However, both of them did not touch the first minor child's private parts. From there they told the first minor child to dress up.

[9] The police took the cell phone number that the appellant had phoned from S[...]'s cell phone. The first minor child was taken to the police station where she made a police statement. From police station the first minor child was taken to hospital where she was examined by a doctor. That day it was for the first time she saw the appellant, but had seen that his face looked like that of his sister and mother from the Mahwiting family.

[10] The first minor child was cross-examined and she conceded that she did not know the appellant's name, but knew his surname because of his resemblance to the Mahwiting family members. From the appellant's family she knew Mahlodi, the appellant's mother and Charmaine, and the appellant's younger brother. The first minor child stated that the appellant's younger brother is a little bit taller than the appellant. The first minor child stated that the appellant had covered her mouth when he laid her on the ground. The first minor child also stated that she had

undressed herself up until her knees, and the appellant then took off her clothes in full, and put her to the ground. The first minor child further stated that the appellant had unbuttoned his trouser before he opened her legs with his legs. The first minor child stated that when her relatives were examining her in the room, they were standing about one meter from her and none of them have touched her.

[11] The State called S[...] K[...] S[...] as its third witness. She testified that the first minor child is her younger sister. On the 17th September 2016 the first minor child told her that she and her friends were going to pick up wild fruits at the mountain. She went to the saloon in Bochum to go and do her hair. Whilst in Bochum she got a call from her aunt L[...] telling her that the first minor child was raped at the mountain. She laughed at her aunt and told her that she was joking. After some few minutes she got a call from her uncle telling her to come back home as the first minor child has been raped at the mountain. She also did not take her uncle seriously. It was only when she was phoned by her aunt W[...] telling her the same thing that she saw that it was serious, and she left the saloon and proceeded to go home. On the way home, she phoned the police. The police requested her to provide them with the first minor child's birth certificate.

[12] The first minor child was at M[...]’s homestead, and on her arrival at that homestead she found the police who have also arrived and she gave them the first minor child's birth certificate. The police told her that the first minor child looked traumatized and that she must take her and that the first minor child will explain to her what had happened. When the witness looked at the first minor child, she was just crying. The witness took the first minor child to another room at M[...]’s homestead. In that room it was just the two of them. In that room the first minor child told her that a certain person from Mahwiting's family whom she did not know his name had raped her at the mountain after he had chased her friends away.

[13] The first minor child told the witness that when she arrived at that homestead, M[...] asked her to explain what she meant when she said a person had raped her, and she told M[...] that the person had slept with her without her consent. The witness then asked the first minor child to show the same thing that she said the person had

raped her which she had shown M[...], and she also wanted to see that. The first minor child took off her trouser, and the witness told her to open her legs. The witness looked at the first minor child's private parts and could see that somebody had slept with her as her private parts were swollen. The first minor child's panty had some blackish stuff and a little bit of some blood stains. The witness told the first minor child to dress up, and after that the witness went to the police to tell them what he had observed. She did not touch the first minor child's panty and private parts. The first minor child had merely stretched her legs and she looked at her without touching the first minor child. The witness explained to the police that according to her observation, the first minor child has been raped. They were taken to the police station where the police took the statement of the first minor child. Later they were taken to the hospital where the first minor child was examined.

[14] The witness was cross-examined and she stated that at the hospital she had told the doctor that she had already checked the first minor child, but did not take off her clothes. The first minor child took off her clothes on her own and she only observed her from a distance. Further that she told the doctor that at home the first minor child had been examined by two people. She conceded that she was not present when Constance Lebogo (M[...]) examined the first minor child, but that M[...] had told her that she had asked the first minor child to undress so that she can check what actually happened. The witness stated that she was standing one meter from the first minor child when she examined her, and that the clothing of the first minor child also looked dirty as they had sand, water and smelling urine.

[15] The State called S[...] (second minor child) who testified through an intermediary as its fourth witness. He testified that on 17th September 2016 he and his friends including the first minor child went to the mountain, and at the mountain they rested at a certain place. As they were resting, the appellant came and greeted them and asked them to borrow him a cell phone. The second minor child borrowed the appellant his cell phone. The appellant went aside and talked on the cell phone. When he was finished talking on the cell phone he came back and gave the second minor child his cell phone back.

[16] Later they left the appellant and took another direction. As they were walking the appellant reappeared and grabbed the first minor child and held her by the loop of her trouser with one hand, and on other hand the appellant was holding a big stick. The appellant told the second minor child and his friends to ran away. The appellant was also in possession of a stone and they decided to ran away as he was threatening to pelt them with that stone. The stone which the appellant was in possession of was the size of a small ball.

[17] When he arrived home he told the community members that someone had apprehended the first minor child at the mountain, but did not tell them the name of that person. The community members went to the mountain to go and look for the first minor child but could not find her. Later the first minor child arrived, and some community members asked her to take them to mountain and show them where she was apprehended. They took the community members to where the first minor child was apprehended. When they came back from the mountain they found the policemen waiting for them. The police took their statements. He had known the appellant for long time before the incident. He used to see the appellant playing snooker game. The appellant had got a dark mark or scar on his face underneath the right eye.

[18] The witness was cross-examined and he conceded that when they parted ways with the appellant where he found them resting, they took different directions. The witness could not tell whether the appellant was following them, but that he suddenly emerged coming from another direction. The witness stated that the appellant emerged as they were assisting another minor child to cross the donga. The witness stated that from the mountain the first person that he reported the incident to was one Sinkie, who told them to go and report the matter at the first minor child's homestead. The witness further stated that the report that he gave to the first minor child's family was that she was held by a certain boy from Mahwiting's family whom he had forgotten his name. The witness conceded that he was able to mention the name of the appellant as it was the name that was suggested him when he was asked by community members whether he was referring to Nchate. The witness stated that the community members suggested the name of the appellant after he

had told them that the boy who held the first minor child usually plays snooker and he stays at Mahwiting's family.

[19] The State called Mokgadi Constance Lebogo as its fifth witness. She testified that on 17th September 2016 she did see the first and second minor children. On that day she was at home busy doing laundry when a passerby told her that a certain man had apprehended two children up in the mountain. She stopped doing her laundry and went to G[...]’s homestead. On arrival she found three children seated being surrounded by a lot of people. The first minor child was not there. The second minor child and other children told her that the first minor child had been apprehended by the appellant who comes from Mahwiting’s family. The they were still discussing how they were going to rescue the first minor child, when the first minor child arrived and started crying.

[20] The witness asked the first minor child if she knew the person she was with her at the mountain, and she said she knew him and he is residing downwards. The witness took the first minor child into M[...]’s homestead and continued questioning her if she knew that person, and the first minor child said the person was from Mahwiting’s family and he is also residing in Talane village. The first minor child told her that the person she was with at the mountain had assaulted her with open hands and ended up raping her. She asked the first minor child what she meant when she said he had raped her. Then the first minor child took off her trouser and panty, and on her private parts the witness could observe some dirt which were unusual. She did not touch the first minor child’s private parts or check her panty. The first minor child looked scared, and she did not continue asking her any further questions. When they went outside, they found the police and S[...] the first minor child’s sister having arrived. The police took the first minor child and her sister to hospital.

[21] The witness was cross-examined and she stated that the first minor child is a niece to her sister-in-law. The witness stated that the first minor child started crying when she saw a lot of people having gathered. The witness stated that when the first minor child arrived to where the community have gathered, she was walking properly. The witness stated that she did not tell the first minor child to undress, but that she did so out of her own free will when she was questioning her. The witness stated that when she was observing

the colour of the substance on the first minor child's private parts, she concluded that they were sperms. The witness stated that she was seated about 2 meters from the first minor child when she out of her own free will undressed herself, and she did not order her to open her legs. The witness further stated that the first minor child had told her that the person who had raped her had scar on his jaw. The witness confirmed that her other name is Mamalate. The witness also stated that after S[...] arrived, she also took the first minor child into the house and after that they left with the police.

[22] The State called Jeanine Cocks as its sixth witness. She testified that she is a warrant officer in SAPS attached to the biology section of the forensic science laboratory in Pretoria. She is a forensic analyst and a reporting officer and she is in the employment of the State. On 20th December 2016 during her official duties she received the case file pertaining to Senwabarwana cas 131/09/2016 from the administration component of the Forensic Science Laboratory (FSL) containing the exhibit. She subjected the samples from the exhibit to the DNA analysis system by a process requiring skill in biology. Her findings were that no DNA were obtained from the exhibits. The reasons for that it might be amongst others that the victim had washed herself after the sexual encounter, the perpetrator might have used a condom or was having a low sperm count.

[23] The State called Mathumi James Kwenabagolo as its seventh witness. He testified that he is the police officer stationed at Senwabarwana Police Station. On 18th September 2016 he was on duty when he got information that the community members have apprehended a person at Buffelshoek, Gamalebogo. He went to that place and found community members surrounding a person who was tied with a rope. That person looked as if he had been assaulted as his clothes were having some blood stains. When checked that person further he saw that the said person looked like he had been injured underneath his left eye.

[24] As the witness was still observing the said person, one of the community members came to the witness and introduced herself as the victim's sister. The victim's sister pointed that she knows the person who was tied with a rope and that his name was Ntwake Mahwiting the appellant in this matter. The victim's sister told the witness that a case of

rape has already been opened against the appellant. The witness introduced himself to the appellant and told him that he was under arrest for rape. From there the witness explained to the appellant his constitutional rights. The witness was not cross-examined.

[25] On count 2 the appellant had made some formal admissions which were recorded in terms of section 220 of the CPA. In his admissions, the appellant had admitted that he had poured petrol on the body of the complainant and set her alight. He admitted that the complainant had sustained some injuries on her which was as result of his actions of setting her alight. He admitted that prior to his actions, the complainant did not have any injuries. His actions were as result of jealousy as he had an intimate relationship with the complainant as he had information that the complainant was unfaithful to him, and he just wanted to punish her. He had unlawfully and intentionally attempted to kill the complainant. Based on these admissions, the prosecution decided not lead any evidence on this count and proceeded to close its case.

[26] The appellant took the witness stand and testified under oath. He testified that on 17th September 2016 he had met the complainant and her friends at the mountain. After greeting them he asked them to borrow him their cell phone as the battery of his cell phone was flat. They borrowed him the cell phone and he phoned his aunt. When he was done talking to his aunt, he handed the cell phone back to them. He saw that the minor children were pushing the stones into the cave and he warned them that the stone might hook the clothing of one them and he/she will fell into the cave with that stone. The minor children stopped pushing the stones and they left going different directions. He never met the minor children again and dispute raping the first minor child. The appellant stated that he knows the first minor child by sight and does not know her names. The appellant further stated that he had two other brothers and the three of them looks alike even though they are not of the same height. The appellant conceded that he is having a scar on his cheek.

[27] The appellant was cross-examined and he stated that on 17th September 2016 he went to the mountain as he was nervous about what he did to the complainant in count 2. Whilst on the mountain he was busy phoning his relatives seeking advice of how to deal with the matter as he was afraid to go home. The appellant stated that on 17th September

2016 he had spent less 10 minutes with the minor children on the mountain. The appellant conceded that the first minor child was correct when she testified that she looks like the people from Mahwiting's family as he is from that family. The appellant stated that he was apprehended by community members. That concluded the evidence of the appellant and he closed his case.

[28] The appellant's appeal is directed against both conviction and sentence on the count of rape only. However, in the heads of argument and during the appeal hearing the appellant's counsel has also addressed the appeal court on sentence on count 2. The notice to appeal was at no stage amended to include the appeal on sentence on count 2. The appellant must stand and fall by his papers, and this court will therefore not entertain count 2 which was never appealed by the appellant. What this court must determine is whether in the light of the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt on count 1. If it is found that the appellant was properly convicted, this court must determine whether the sentence meted to the appellant was appropriate.

[29] The test in a criminal trial is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused person is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests but rather the statement of test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which had been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken. (See *S v Sithole*¹).

[30] A court in a criminal case does not have to be convinced that every detail in an accused version is true. If the accused version is reasonably possibly true in substance, the

¹ 1999 (1) SACR 585 (W) at 590f-j

court must decide the matter on the acceptance of that version. An accused person is not compelled to testify, but if he elects to testify, what the court must determine is whether the version presented by the accused is reasonably possibly true.

[31] The correct approach to the evaluation of evidence in a criminal case was formulated in *S v Chabalala*² where Heher AJA said:

“The trial court’s approach to the case was, however, holistic and in this was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh heavily in favour of the State as to exclude any reasonable doubt about the accused accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex port facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear”.

[32] The appellant has conceded that on 17th September 2016 he had met the first minor child and her friends on the mountain. They had talked for a few minutes and the minor children even borrowed the appellant their phone to make a quick call. Thereafter the appellant parted ways with the minor children and they took different directions, and they never met again. According to the version of the first minor they never parted ways with appellant, whilst child according to S[...], they have parted ways with appellant who later emerged at the donga where they were crossing. The first minor child refers to this place as stone which they have to cross in order for them to proceed with their journey. There are some contradictions as to how they have parted ways at the mountain, and in my view, these are minor contradictions which are not that material. However, the first minor child and S[...] have corroborated each other as is where the appellant had grabbed the first

² 2003 (1) SACR 134 (SCA) at para 15

minor child. They have testified that the appellant had grabbed the first minor child at this stone or donga. After grabbing the first minor child the appellant chased away her friends and later raped the first minor child. The appellant on the hand dispute meeting the first minor child and her friends for the second time.

[33] On the day of the incident, the first minor child and her friends did not know the name of the appellant but only knew him as coming from the Mahwiting's family. The appellant himself had confirmed that he was from the Mahwiting's family. The report which the second minor child had given to the members of the community on arrival from the mountain was that the first minor child was kidnapped by a certain boy from the Mahwiting family. The appellant gives the impression that there might have been mistaken identity as he had two other brothers whom they are identical even though they are not of the same height. However, these two brothers were not the ones who were with the first minor child and her friends on the mountain. The first minor child was able to differentiate the brothers as he had testified that the appellant's younger brother is a little bit taller than the appellant. The appellant had corroborated the first minor child by testifying that he and his brothers are not of the same height. Constance Lebogo the fifth State witness had testified that the first minor child had told her that the person who had raped her had a scar on his jaw, and the appellant had conceded that he is having a scar on his cheek. The second minor child had also testified that the appellant had a scar or dark mark. The appellant did not testify that any of his brothers had a similar scar as his.

[34] The court is mindful of the evidence of the first State witness who is the doctor who had examined the first minor child. He had testified that he was informed that the first minor child was examined by members of the community, who according to him might have tampered with the evidence and might even have caused some of the injuries to the first minor child's private parts. The first minor child had denied that when the third and fifth State witness were examining her have touch her on her private parts, but that she only took off her clothes and opened her legs, and they observed her vagina from a distance of about a meter. This version was confirmed by both the third and fifth State witnesses. After observing her from a distance they came to their own conclusions. That in view, rules out any suggestion that the third and fifth State witnesses might have tampered with the

evidence or might have in any way caused any injuries on the first minor child's private parts.

[35] The version of the State which was not challenged was that on the date of the incident the first minor child was not yet sexually active. The first State witness on examining the first minor child found abrasion around the perineum area and fresh tears around the hymen area. He therefore concluded that sexual assault could not be ruled out. There is no any other evidence to rebut these findings by the first State witness.

[36] What the first, third and fifth State witnesses have observed on the first minor child might seem to contradict each other. The third State witness has testified that she had observed blackish white stuff and a little bit of blood on the panty of the first minor child. The fifth State witness has testified that she had observed some whitish stuff on the complainant's private parts which she concluded that were the sperms. The first State witness had testified that the clothes which the first minor child was wearing had no bloodstains. Both the first and fifth State witnesses have testified that the first minor child looked scared, whilst the third State witness has testified that she was told by the police that the first minor child looked traumatized. The first minor child can only look scared or traumatized if something terrible had happened to her. The first State witness conclusion did not rule out the possibility of sexual assault which corroborate the version of the first minor child that she had been raped. There is overwhelming evidence that the appellant was the last person to be seen with the first minor child after he had forcefully taken her away from her friends which he thereafter chased them away.

[37] The evidence of the first minor child in relation to the actual rape is that of a single witness and also of a minor child which should treated with caution as minor children have a tendency of imaging things. However, in this case the evidence of the first minor child was clear and satisfactory, and this court find her evidence to be credible and reliable. Even though the evidence of the State might not have been that perfect, it was clear and reliable. Despite these deficiencies, this court finds that the

truth has been told. Therefore, there is nothing to fault the court *a quo* in convicting the appellant.

- [38] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. At appeal in which interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*³).
- [39] The presentence report and victim impact report were prepared and handed in as evidence. From the presentence report the probation officer had stated both the mitigating and aggravation factors. Regarding the mitigating factors the probation officer had recorded that the appellant was 27 years and a first offender; he acknowledges that he had burned victim no 2, and that he is remorseful for his unacceptable behaviours; he had a history of mental illness and had received medical treatment for the illness; he was the one who was responsible for taking care of his family livestock; and that the appellant is in a bad physical state that he is receiving regular medical treatment; the appellant dropped out of school in grade 11 due to mental illness; and the appellant is unemployed.
- [40] With regard to the aggravating factors the probation officer had recorded that the appellant was convicted of rape and attempted murder; rape is a serious offence which is punishable by the law; the rape victim was an 11 years old girl whose virginity was stolen by the horrendous and despicable act; the appellant did not acknowledge committal of the act/crime of rape; victim no 2 was seriously wounded by the fire, and sustained lifelong scars of such a nature that they will be a sad reminder of the incident; the appellant premeditated the offence involving victim no 2, which is attempted murder; both victims were emotionally, physically and psychologically affected by the incidents such that they are still traumatized; and the

³ 2011 (2) SACR 153 (SCA) at paras 22 and 23

family of victim no 2 also suffered financial losses due to travelling expenses incurred whilst she was receiving medical treatment.

[41] The probation officer had recorded that the appellant had a history of mental illness which led him to drop out of school in grade 11. That led to the court *a quo* referring the appellant for mental observation to determine whether he was fit to stand trial. The findings of the two psychiatrists was that the appellant was not mentally ill, he was fit to stand trial, and did have the capacity to appreciate the wrongfulness of the alleged offence, and his ability to act in accordance with that knowledge was not impaired by the mental illness.

[42] The appellant had been convicted of rape of a child below the age of 16 years which is failing under section 51(1) Part I of Schedule 2 of the Criminal Law Amendment Act. Ordinarily the trial court was compelled to impose life imprisonment unless it finds that substantial and compelling circumstances exists which justify the deviation from the prescribed minimum sentences.

[43] In *DPP, Gauteng v Tsotetsi*⁴ Coppin AJA said:

“As held in *Malgas*, confirmed in *S v Dodo* and explained in *S v Vilakazi*, even though ‘substantial and compelling’ factors need not be exceptional, they must be truly and convincing reasons, or ‘weighty justification’, for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed”.

[44] The appellant history of mental illness had no bearing on the offences which he had committed as the psychiatrists have found that he was not mentally ill and had the capacity to appreciate the wrongfulness of the offences he had committed. What counts in the appellant’s favour is that he is a first offender, was 27 years of age which made him to still be regarded as a youth. However, there is no evidence that youthfulness played role in him committing the offence or that the appellant was of

⁴ 2017 (2) SACR 233 (SCA) at para 27

immature age. There is no evidence that the medical treatment he is currently receiving in prison is inadequate.

[45] The appellant had raped a minor child who was defenseless and vulnerable. 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 courts are under a duty to send a clear message to the accused, to other potential rapists and to the community at large that they are there and determined to protect the equality and freedom of all women and that they will not show any mercy to those who seek to invade those rights. (See *S v Chapman*⁵). The appellant did not show any slightest remorse on the rape charge. After raping the first minor child on the mountain, he had left the minor child to find a way on her own back to the village despite her age, and that shows that the appellant lacks humanity and care.

[46] What the appellant had presented as substantial and compelling reasons whether cumulatively taken or not, are in my view, not truly and convincing reasons, or weighty justification for deviating from the prescribed minimum sentence. The aggravating factors far outweigh the mitigating factors, and the court *a quo* will not be faulted for having found that there were no substantial and compelling reasons for justification to deviate from the prescribed minimum sentences. It follows that the appeal on sentence must also fail.

[47] In the result, the following order is made

47.1 The appeal on both conviction and sentence is dismissed

Kganyago J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

⁵ 1997 (3) SA 341 (SCA)

MAPHELELA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPELLANT	: MP Legodi
INSTRUCTED BY	: Legal Aid of SA Polokwane Office
FOR THE RESPONDENT	: Adv M Mohale
INSTRUCTED BY	: Office of DPP Polokwane
DATE OF HEARING	: 22 nd March 2024
JUDGMENT ELECTRONICALLY CIRCULATED ON: 16 th May 2024	