

SOUTH AFRICA / JUDGMENT

Afrika v S (A693/2019) [2020] ZAGPPHC 517 (17 August 2020)

[2020] ZAGPPHC 517

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, TAN Makhubele

CASE / FILE NUMBER

A693/2019

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: A693/2019

In

the matter between:

T
P
AFRIKA
Appellant
and
THE
STATE
Respondent

JUDGMENT

N V KHUMALO J (MAKHUBELE J concurring)

INTRODUCTION

- [1] The Appellant, is appealing his conviction and sentence of life imprisonment by the Regional Court for the Regional Division of the Northwest held at Schweizer – Renecke on 11 July 2012 and 10 October 2012 for the rape of a 3 year- old girl, RS (“the Complainant”). The charge was read with the provisions of s 51 and/ 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (“the Amendment Act”).

- [2] On 16 January 2013, the court a quo refused the Appellant leave to appeal his conviction and sentence. On petition to this court on 15 June 2015, the appellant was granted leave to appeal both his conviction and sentence. The state is opposing the appeal.
- [3] The Appellant was legally represented during the trial proceedings and pleaded not guilty to the charge. He denies his involvement in the crime. He exercised his right to remain silence and refused to tender an explanation of his plea. At the end of the trial the court found that the state has proven his guilt beyond reasonable doubt.
- [4] The salient facts are that on the early morning of 3 April 2011, the Complainant was sleeping with her mother and grandmother on

a makeshift bed made on the kitchen floor of her home when her mother woke up and noticed a person sleeping next to the Complainant whom the mother and the grandmother alleges to have recognized to be their neighbour, the Appellant. The Appellant is alleged to have run away being chased by the mother and the grandmother and to have disappeared at a passage near his home. The Complainant was taken for medical examination and was found to have bruises in her genitalia that indicated recent trauma confirming that she has been penetrated.

- [5] The court a quo convicted the Appellant on the evidence of the Complainant's mother, ("DES"), the grandmother, ("JKS"), the examining doctor, Dr Uso Frans Nwachkwuu ("Dr Uso") and the Appellant's mother, ("AA").

The court found on their evidence that the state proved the guilt of the Appellant beyond reasonable doubt, having been correctly

identified by the state witnesses as the perpetrator. It also found the prescribed minimum sentence of life imprisonment to be

appropriate, having not found any substantial and compelling circumstances to deviate therefrom.

GROUPS OF APPEAL

- [6] The Appellant is appealing his conviction alleging that the court a quo erred based on the following grounds:

[6.1] in finding that the state witnesses gave evidence in a satisfactory manner, there being no improbabilities and could only be criticized on matters of detail.

[6.2] in accepting their evidence as being true in all material respects when it was contradictory in material respect.

[6.3] when it failed to properly analyse or evaluate the evidence or properly consider the improbabilities inherent in the state's evidence. Particularly that the complainant was undressed and penetrated whilst sleeping with the state witnesses when the state witnessed never witnessed that and the complainant only 3 years old, therefore not their evidence.

[6.4] by rejecting the part evidence of the Appellant as being not reasonably possibly true. Holding against the Appellant contradictions between his own evidence and the facts put to the state witnesses in cross examination. Holding against the Appellant facts that were not put to the witnesses.

[6.5] The grounds were amplified in the heads of argument to refer to specific paragraphs or sentences in the record where the alleged contradictions and or inaccuracies were noted.

ON SENTENCE

[7] On the sentence, the Appellant alleges that the court a quo erred in:

[7.1] not finding that there are substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment prescribed by the Amendment Act.

[7.2] failing to take or adequately take into account the personal circumstances of the Appellant as detailed in the presentence report, particularly his personal circumstances and the circumstances of his offence.

EVIDENCE LED

by the State

[8] The evidence on behalf of the state was first led by Dr Uso, an MBBS and a master's degree holder in a specialist course in

family medicine obtained from the University of Nigeria and of Limpopo Medunsa Campus respectively, practicing in South Africa and registered with the Health Professional Council of South Africa as a medical practitioner since 2005. Dr Uso confirmed having examined the Complainant on 3 April 2011 and completed the J88 whose recorded findings were presented to court as Exhibit "E. In the said report the following findings on his genealogical examination of the Complainant was read into the record:

"most of the things were normal except for the posterior fourchette

where we noted fresh bruises"

He explained that bruises show that there was recent trauma to that area. The bruising is on the inside past or goes beyond the labia majora and minora. He also noted on the fossa navicularis fresh bruises. He confirmed that the bruises are very close and related and point to that there was trauma of recent occurrence severe enough to cause an injury. The severity of the bruises determined by

the extent of the penetration suffered.

[9] Dr Usi also confirmed that when they examined the Complainant her hymen was intact. There was nothing like fresh tears, swelling,

bumps or cleft. Besides the bruises as noted, there was nothing else they could have regarded as an injury at that moment. He speculated

that the trauma might have been caused by a blunt object, like a finger or penis.

[10] The next witness was DES, the Complainant's mother, her testimony was that: in the early hours of the morning on 3 April 2011

about 5h00-5h30, whilst she was sleeping on the kitchen floor of their home with the Complainant and her mother JKS, she felt somebody

touching her. She was sleeping in the middle, between JKS and the Complainant when she saw the person in their blankets sleeping next to the Complainant. She woke JKS up and told her that there was an intruder in their blankets whom she recognised to be the Appellant. The Appellant then ran away. She noticed that the Complainant's panties were pulled down to her legs. JKS woke up and chased the Appellant down the passage, got hold of him but Appellant got loose and managed to run away.

[11] DES said she could see the intruder whom she recognized to be the Appellant as there was a bit of sunlight in the house, coming through the single big window as it was almost morning. She recognized the Appellant, who is their neighbor, from his dark features and his squint eyes to be actually the intruder whilst he was in the blankets, and called his name. The Appellant was known to her and their neighbor since 2008 and was also used to coming to her home to visit her uncle. Appellant ran from the kitchen to the passage and out of the house through a door at the end of the passage illustrated in a sketch of the house that was handed in as exhibit A.

[12] According to DES she followed the Appellant when he ran out of the gate. She stood outside, called his name and told him that she saw him. The Appellant kept on running. They phoned the police. Whilst the police were there the Appellant brought himself back to their place and denied that he was there or he raped the Complainant. JKS

asked the police to undress the Appellant and check if he is wearing red underpants. After that they were taken to Dr Uso where the Complainant was medically examined.

[13] Under cross examination DES explained that they were sleeping next to a wall that has a big window from which the sunlight was coming through. The incident happened at 5:30, the sun was already up, and she recognised the Appellant when she saw him in the blankets. Appellant's home is opposite their house across the street. The Appellant ran past his home into a passage. She confirmed that the passage is next to Appellant's house. DES confirmed that JKS also chased the Appellant down the passage in the house and out.

- [14] It was put to DES that the Appellant was going to testify that it was 4:00 AM when he heard people screaming outside, thereafter his mother calling him. He woke up and went outside. He did not go to his mother but went to the toilet. His mother followed him to the toilet and asked him what he has done. He was told that there are people who were saying they are going to call the police. His father at that time advised him to go to the Complainant's place to go and investigate. When he arrived he was told that he is the person who broke into their house and raped the Complainant, which he denied.
- [15] The next state witness was JKS, the grandmother. Her testimony was that on that day in the early hours of the morning whilst they were sleeping on the floor in the kitchen DES told her that there was somebody in their blankets whom she thinks it is their neighbor T, meaning the Appellant. She woke up and looked at the intruder whom she recognized indeed to be the Appellant their neighbour's son T. She chased the Appellant who was running to the door at the back. She managed to grab him by the red t-shirt he was wearing with his red underpants. She had tried to grab the Appellant in the kitchen but he broke loose and ran out of the house, through the back door. At the door when he grabbed the Appellant, he hit her with his elbow and ran out. She and DES chased the Appellant but he got out of the gate, ran and disappeared into a nearby passage. They called the police. Whilst the police were there the Appellant came back and told them that it was not him. She told the police to check if the Appellant was wearing red trunks and they indeed found him to be wearing red trunks. She is not sure what kind of pants the Appellant was wearing at the time but he was wearing a red t-shirt. They had a good relationship with the Appellant as their neighbor.
- [16] Under cross examination it was put to JKS that according to DES she did not immediately tell JKS the name of the intruder. JKS confirmed that DES actually said she suspected that it was the Appellant and JKS saw that it was indeed the Appellant when she got hold of him. JKS confirmed that they were sleeping in the kitchen beneath a large window with curtains, sunlight shone through the curtains. Also that when she was chasing the Appellant, DES was following them up to when the Appellant managed to get loose and ran out of the door. DES then went out through the other door. They followed the Appellant until he ran into the passage. As they were walking back, the Appellant's father and mother came out and asked them what was happening. They told them that the Appellant had raped the Complainant. Appellant's mother went to check on the Appellant. She came back and confirmed that he was not in his shack. The mother went to the toilet it is then she saw the Appellant jumping the fence of his neighbor into his yard wearing the red t- shirt and trunk still. When he came to their house he was wearing long pants. It was put to her that the Appellant was going to say he was wearing short denim pants with his red trunks. She denied that the pants were short jeans but that they were cut short but not short pants. This was never properly cleared up. JKS also confirmed that there were 4 other children who were sleeping on a makeshift bed on the floor in the same room behind the trio.
- [17] During the proceedings a Forensic Science Laboratory report on the outcome of the DNA test was handed in as Exhibit "D".

with a result that ‘not enough male DNA could be obtained from the exhibits 10D7AB5576XX. No further DNA analysis would be carried out in the above mentioned case.’

[18] The last state witness was AA, the Appellant’s mother. She confirmed that they are neighbors of the Complainant’s family. Her evidence was that in the early hours of the 3 April 2011, whilst they were sleeping she heard somebody screaming outside and she woke her husband. They both went outside to investigate and came upon DES

and JSK who told them about the Appellant. She went to the Appellant’s room to check if he was there. She found that the

Appellant was not in his shack. She then went back to the house. She was in the house for a while when the Appellant showed up. She asked him where he has been and what he has done. She told him about their neighbours’ complaint. The Appellant proceeded to the neighbours’ house to go and tell them that he did nothing. She saw the police arrive but did not witness what happened thereafter. The Appellant was arrested in the street. He was wearing a checked shirt and a black long trouser.

[19] AA confirmed under cross examination that she did not look for the Appellant in the toilet. It was put to her that the Appellant is going to testify that he was in the toilet when she went to look for him in his room. She said she did not know where Plaintiff was coming from. She asked him what he has done and he said nothing, which she did not believe.

[20] That was the state’s case. by the Defence

[21] For the defence, only the Appellant testified. According to him he was sleeping in his shack in the early hours of the morning when he heard people saying it is you Taelo, we have seen you, where were you? He, at that time came out of his shack and went to the toilet, when he came out of the toilet he met up with his mother. His mother

asked him what he has done. He told his mother that he did nothing. At the time he was wearing a shirt and short black trousers. He agreed that his mother was mistaken to say he was wearing long black pants. He confirmed that he was wearing red under trunks. He said the state witnesses saw his trunks because his trousers were hanging down a little bit and his shirt did not have buttons. He denied that he was out of his shack before 4:00 AM or that he committed the crime he was being accused of. He confirmed that he has been to the Complainant’s home prior the day of the incident to visit DES’s uncle. He also confirmed that he knew the Complainant very well he would see her every time he visits the uncle.

[22] On his arrest, he testified that the police arrived whilst he was still at the Complainant’s house. JSK told them that they

must check if his wearing red underwear and red t-shirt. His father was home in the yard when he was arrested. He said he did not make anything of it when he heard the people shouting his name because there are two Taelo’s near his home. Under cross examination he said after the toilet he went inside the house because his mother called out his name from the house whilst he

was still in the toilet. He said he did not tell his lawyer that his mother called out his name. He then said his mother did come to the toilet and call out his name and when he was with her coming out of the toilet she asked him what he has done. They also made a mistake about what was put to DES about his father telling him to go to the Complainant's home to find out what was happening. Because that is what his father told him. He could not explain why it was put to the witnesses that the pants he was wearing were short black pants when they were denim pants.

[23] The Appellant closed his case.

APPEAL: AD CONVICTION

[24] If an appeal is directed against a court a quo's findings of fact, the court of appeal must be mindful that the court a quo was in a better placed position than itself to form a judgment. When inferences from proven facts are in issue, the court a quo may also be in a better placed position than the court of appeal, because it is better able to judge what is probable in the light of its observation of witnesses who have testified before it. Therefore, where there have been no misdirections of fact a court of appeal must assume that the court a quo's findings are correct and will accept these findings, unless it is convinced that they are wrong; see *S v Dlumayo* 1948

(2) SA 677 (A) at 705-706.

[25A] 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 circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony; see *Dlumayo supra*.

[25] Furthermore, 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.

[26] It is not the duty of this court to re-evaluate the evidence afresh as if it is the trial court, but to decide whether patently wrong findings and or misdirection by a magistrate led to a failure of justice.

[27] The court a quo correctly found that the Complainant's genitalia were found to exhibit recent trauma which confirms recent

penetration and as a result rape of the child proven and undisputed and therefore common cause.

- [28] It was also the evidence of the state witnesses that the Complainant was found with her panties lowered to her knees after the Appellant was discovered sleeping next to her and the Appellant ran away. Consequently, by circumstantial evidence proven/shown, being the only inference that can be drawn, that the Appellant was the perpetrator, the person who raped the Complainant).
- [29] Following on Plaintiff's denial that he was the intruder, the issue is whether it was proven beyond reasonable doubt that the Appellant indeed was the rapist intruder.
- [30] The meaning of the criminal standard of proof, that is proof beyond reasonable doubt, is articulated by the courts in a number of different ways.

Nugent J and Schwartzman J in *S v Sithole* 1999(1) SACR 585 (W) stated that:

"There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true..."

- [31] In *S v Van der Meyden* 1999(1) SACR 44 (W), 448 Nugent J elaborated on the above mentioned test by stating that:

"In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are

inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon

consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine

whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

- [32] The contention raised about the court having assessed the facts incorrectly regarding the state's witnesses' testimony on the Complainant's panties having been lowered to her legs and penetration, has no merit and inconsequential to the findings, as the penetration was concluded from the findings of the medical examination done and presented to court by Dr Usi. The findings corroborated the allegation by DES of rape, which DES presumed to have taken place when she saw the Complainant's panties lowered down to her legs after encountering the Appellant in their blankets sleeping next to the Complainant. The conclusion that she was indeed raped was made from the medical findings, and they were not challenged. None of the witnesses alleged to have witnessed the penetration.

[33] The major issue therefore remaining, as was correctly identified by the court a quo, is that of identity. The question arising being whether the state proved beyond reasonable doubt that the intruder who was seen by the state witnesses sleeping next to the Complainant was the Appellant.

[34] It is accepted that incorrect identification is always a dangerous possibility and can result in serious cases of injustice. The courts are therefore implored to approach the evidence of identification with caution to limit unintended outcomes that would

result in the failure of justice. In that regard S v Mthethwa 1972

(3) SA 766 (A) is instructive, the following approach at 768A being put forward:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.”

[35] In Charzen and Another v S [2006] 2 All SA 371 (SCA) par [11] it was stated that honesty, sincerity and subjective assurance are not enough. There must in addition, be certainty beyond reasonable doubt that the identification is reliable. Confidence in the first report of a witness shortly after the observation by the witness carries more weight than the witness’ confidence in court, often several months later, after the witness’

observations have been confirmed by conversation with other witnesses.³ Hiemstra’s Criminal Procedure, Issue 11, May 1998 on 3-8.

[36] In casu being guided by the precautionary measures identified in Mthethwa it must also be recognized that at the time when the intruder was found it was dawn there was sunlight in the room coming through the big window, according to the state witnesses they as a result were able to recognize the Appellant. They also had an interaction with the Appellant when JSK managed to grab him even though he broke loose and also followed him when he was running out of the gate to the street where it was already light, and into the passage.

[37] Most of all, the Complainant’s family and of the Appellant are well known to each other, being neighbours, a fact confirmed by all of them. Their acquaintance extends to the Appellant being a frequent visitor to the Complainant’s home as he is friends with DES’s uncle. The Appellant has also confirmed that he knows the Complainant very well. The fact that the witnesses knew the suspect increased the value of their identification; see R v Dladla 1962 (1) SA 307 (A) at 310C. A fact that was rightly and seriously considered by the court a quo.

[38] Under those circumstances they were able also to refer to the main features of the Appellant that they recognized due to the proximity of their interaction on that day, that offered them an opportunity to look at him. They were also able to take note of the red underwear that the Appellant was wearing when he was running away from them and later proven to be right. The issue of what Appellant

was wearing on top of the red underwear after he went back to the Complainant's home is immaterial. The question is whether the Appellant was indeed afterwards found to be wearing the red underwear as alleged by the witnesses.

[39] Co-incidentally the Appellant whom the witnesses were alleging to have been at their house on that morning, and to have ran past his home into a passage, was found at that time not to be in his shack by his mother. It is the evidence of his mother and the witnesses that his mother did go to look for him in his shack and he was not there. The Appellant has not denied that he was not in his shack but has alleged in his evidence in chief that when he heard the noise he woke up and went to the toilet. Afterwards he met up with his mother who was coming to the toilet to look for him. It would have been the end of it on Appellant's alibi, however in her sincere testimony his mother denied going to look for Appellant in the toilet as alleged by him or DES. But that the Appellant came to the house after a while she has been to his shack to look for him. The alibi was therefore not sustainable also for the reason that the Appellant under cross examination changed his story and alleged that his mother came to the toilet and called out his name and when he was with her coming out of the toilet she asked him what he has done. Finally, he said after being to the toilet he went inside the house to his mother because she called out his name from the house whilst he was still in the toilet. If he is to be believed which of these versions is his alibi.

[40] On the other hand Appellant's version that was put to DES was that he heard his mother calling him. He woke up and went outside. He did not go to his mother but went to the toilet. His mother followed him to the toilet and asked him what he has done. Whilst according to his mother's unwavering evidence when there was noise outside she and her husband came out and spoke to DES and

JKS who complained about the Appellant. The Appellant was not there in his shack and came after a while to the house. She denies going to the toilet, whilst Complainant says he was there all that time, and contradicting himself on where she encountered his mother when she asked him what he had done. He did not even mention his father. The mother was correctly found to be a credible witness, being consistent and candid.

[41] Taking into consideration the whole evidence that was led, the Appellant's versions were so self-contradictory and far from

being an innocent explanation. The court was obliged to assess his evidence against his testimony in chief and what was put to the witnesses to be his version and under cross examination to assess the credibility of his alibi, which was far fetched to say the least. Whereas the evidence led by the state witnesses had established his guilt beyond a reasonable doubt.

[42] The Appellant has consequently failed to prove the allegation that there was a discrepancy in a material respect or on any material aspect of the state's evidence that entitles the court of appeal to consider an acquittal of the Appellant. Also given the totality of the evidence presented, we could find no misdirection with the evaluation of the evidence by the court a quo. The issue of whether there was an erroneous reference to a pole light is not of a material aspect. The judgment was sufficiently motivated given the totality of the evidence presented on behalf of the State. Accordingly, the appeal on the conviction must fail.

AD SENTENCE

[43] On the sentence, the Appellant contends that the court a quo ought to have found that there are substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment prescribed by the Amendment Act, taking into account the personal circumstances of the Appellant as detailed in the presentence report, particularly his personal circumstances and the circumstances of his offence

[44] The personal circumstances referred to were:

[44.1] The fact that he was born in 1980, therefore 32 years old at the date of commission of the crime and arguing that because of his tender age there is a possibility of a rehabilitation; Reference being made to *S v Nkomo* 2007 (2) SACR 198 (SCA) were the court deviated from the imposing the prescribed minimum sentence of life for rape on the basis that there was a chance of rehabilitation even though there was no evidence led to that effect on substantial and compelling circumstances. The Complainant was raped 5 times and forced also to perform oral sex by a 29 years old accused.

[44.2] His mother is still alive and married to Mr Africa who is not his biological father and both unemployed, surviving on a Government grant which the step father receives for old age.

[44.3] He never attended school because of his family's hardship. The issue of no intellect. At the time of sentence/arrest he was doing piece jobs.

[44.4] He has one minor child aged 11.

[45] In respect of circumstances of the offence that:

[45.1] the Complainant did not sustain any physical injuries as a result of this offence except for fresh bruises on the posterior fourchette and fossa navicularis and everything appeared normal on examination, and there was no evidence submitted that suggested that the Complainant suffered any psychological or emotional trauma as a result of this incident.

[45.2] The offence was not premeditated.

- [46] Sentencing is inherently a matter pre-eminently within the discretion of the sentencing court. The powers of an appeal court to interfere with the sentencing courts discretion in imposing sentence are limited unless the sentencing court's discretion was exercised improperly. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the sentencing court exercised its discretion properly and judicially. If the discretion was exercised improperly, the appeal court will interfere with the sentenced imposed; see *S v Malgas* 2001 (1) SACR 469 (SCA); *S v De Jager and Another* 1965 (2) SA 616 (A) at 628H-629B.
- [47] In order to ascertain that an appropriate sentence is imposed, the courts are guided by the Zinn triad (*S v Zinn* 1969 (2) SA 537 (A)) that refers to the offender, the offence committed and the interest of society being the factors to be considered in determining a proper sentence. The court looks at the circumstances surrounding the nature and extent or degree of each of these three factors, keeping in mind the purpose for sentencing that is retribution deterrence, prevention and rehabilitation
- [48] In casu the minimum sentence set by the Legislature in respect of rape in circumstance such as that of a victim like the Complainant is life imprisonment. The trial court in exercising its discretion considered it very serious that the Complainant was a baby only 3 years old and in respect of the circumstances of the crime the fact that the Appellant broke into the home of the Complainant at night where the child was supposed to be safe in order to commit the offence. Both factors aggravating. In addition, the court considered the fact that the appellant was not a first offender, he had a previous conviction of housebreaking and on reflecting on all that was noted in the pre-sentencing report on Appellant's personal circumstances, was not persuaded, rightly so, that there were any substantial and compelling circumstances for it to exercise its discretion in favour of deviation from the maximum sentence.
- [49] In respect of the previous convictions of housebreaking with intent to steal and theft the appellant received a suspended sentence. Even though the crimes were committed a long time ago, the boldness in which he committed the rape, breaking into his neighbour's home when they were there and sleeping next to the toddler, in the shared blankets, whilst proceeding to rape the toddler in their presence is the extreme of evil. The Appellant deserves no less a sentence than the prescribed minimum sentence as imposed by the court a quo. The suspension of the sentence for the previous house breaking failed to serve as a deterrent. He was therefore justly considered not to be a candidate for rehabilitation.
- [50] Furthermore the question of low intellect was not exhibited when he led evidence. He was able to challenge the evidence of the witnesses and to dispute certain facts and able to proffer explanations about his behavior. Therefore, although reported upon not to have had a formal education, that does not seem to have influenced his behavior

except being driven by absolute criminality.

[51] This court having considered the court a quo's judgment on sentence, we could not find that the sentencing court's discretion was not exercised properly and judicially.

[52] In relation to the presence of substantial and compelling circumstances, the Supreme Court of Appeal in the words of Ponnai AJ in *S v Matyityi* 2011

(1) SACR 40 SCA at par 23 states as follows:

"[23] Despite certain limited successes there has been no real let up in the crime pandemic that engulfs our country. The situation continues to be alarming. It flows that, to borrow from Malgas, it still no longer business as usual." And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentence prescribed by the Legislature for the flimsiest of reasons – reasons as here that do not survive scrutiny. As Malgas makes plain, courts have a duty despite any personal doubts about efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of the State, owe their fealty to it. Our Constitution can hardly survive, if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here Parliament has spoken, it has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officers' personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our Constitutional order."

[53] In *S v Vilakazi* 2009 (1) SACR 552 at p 554 f-g it was stated that:

"Once clear that substantial jail term appropriate, questions of whether or not accused married, or employed or of how many children he had, largely immaterial. However, they remain relevant in assessing whether the accused was likely to offend again."

[54] The legislature has also ousted in the offence of rape under the prescribed minimum sentence the consideration of the nature and

extent of injuries inflicted during the rape as substantial and compelling circumstances. It is so that the complainant did not

suffer physical injuries other than those which follow upon the act of rape. Section 51(3)(aA) of the Amendment Act states that the apparent lack of physical injury shall not constitute substantial and compelling circumstances for the purpose of the Act in the case of the rape of a girl under the age of 16 years. It therefore cannot be a mitigating factor that could be considered in deciding whether or not to impose life imprisonment. The assault on a child not only under the age of 16 but a toddler, aggravating in itself.

[55] Having regard to the transcribed record, the sentencing court did not over-emphasised one part of the triad over another. The court

had regard to the object of punishment, namely; retribution, rehabilitation and deterrence and that a balance ought to be found

when imposing an appropriate sentence.

[56] For the reasons alluded to above, we conclude that the appeal on sentence must also fail.

[57] Under the circumstances, it is therefore ordered that:

1. The appeal against conviction and sentence is dismissed;

N V KHUMALO JUDGE OF THE HIGH COURT

I agree

TAN MAKHUBELE JUDGE OF THE HIGH COURT

And it is so ordered

Appearances:

For the Appellant: Adv J L Kgokane Instructed by:

Legal Aid South Africa

Pretoria Justice Centre LetauK@legal-aid.co.za

For the Respondent: Adv. Broughton

Instructed by: Director of Public Prosecutions Pretoria

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/afrika-v-s-unknown-topic-agpphc-2020--6a3ea50e3b1caa9129807571>

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