

SOUTH AFRICA / JUDGMENT

Khumalo v S (A111/2018) [2023] ZAFSHC 319; 2023 (2) SACR 323 (FB) (8 August 2023)

[2023] ZAFSHC 319

COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue, S Chesiwe

CASE / FILE NUMBER

A111/2018

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IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case no A111/2018

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

CIRCULATE TO
MAGISTRATES:

YES

In

the matter between:

MEHLO

KHUMALO

Appellant

and

THE

STATE

Respondent

CORUM:

DAFFUE et CHESIWE JJ

JUDGMENT

BY: JP DAFFUE J

HEARD ON: 05 JUNE 2023

DELIVERED ON: 08 AUGUST 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 08 August 2023.

ORDER

On appeal from: The regional court, sitting in Bloemfontein:

1. The appellant's appeal against his conviction is dismissed.
2. The appeal against the sentence is upheld.
3. The sentence of the court a quo is set aside and replaced with the following sentence:
'1. The accused is sentenced to 22 years' imprisonment.
2. The accused's name shall be included in the register for sexual offenders as provided for in s 50(1)(a)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
3. The sentence is ante-dated to 26 September 2016.'

JUDGMENT**Introduction**

[1] On 16 September 2016 the appellant was convicted in the regional court, Bloemfontein (the court a quo) of the rape of a 7-year old girl exactly three years earlier. On 26 September 2016 he was sentenced to life imprisonment based on the conclusion that subsec 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) applied. The court a quo also ordered that the appellant's name be included in the register for sexual offenders. It incorrectly referred to subsec

51(1)(a)(i) instead of s 50(1)(a)(i) of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007. The appellant appealed against his conviction and sentence in accordance with his automatic right of appeal.[1]

The grounds of appeal

[2] The appellant raised the following grounds of appeal:

- a. the two witnesses, Mr Moses Leballo (Mr Leballo) and Mr Tankiso William Mokapane (Mr Mokapane) contradicted each other in material respects;
- b. the first State witness, Mr Mokapane not only contradicted Mr Leballo, but his oral evidence is contradicted by his witness statement;
- c. the court a quo incorrectly accepted that Dr Coetzee, who was called as an expert witness, but who did not examine the complainant, concluded that the offence of rape could have been committed notwithstanding the absence of injuries;
- d. the court erred in not taking into consideration that no DNA evidence linked the appellant with the complainant, rejecting the appellant's version insofar it did not take the totality of evidence into consideration and over-emphasised minor discrepancies in the appellant's version;
- e. pertaining to sentence, it is alleged that the sentence of life imprisonment was shockingly inappropriate, that the court a quo over-emphasised the seriousness of the offence and disregarded the appellant's personal circumstances.

Delay in the court a quo

- [3] It is apposite to quote the Norms and Standards issued by the Chief Justice pertaining to finalisation of criminal cases:

'Finalisation of all matters before a Judicial Officer

All Judicial Officers must strive to finalise all matters, including outstanding judgments, decisions or orders as expeditiously as possible. It is noted that some cases may, due to the complexity and magnitude thereof, take longer to finalise than the norms set out herein.

(i)

(ii) Finalisation of criminal cases

- (a) In order to give effect to an accused person's right to a speedy trial enshrined in the Constitution, every effort shall be made to bring the accused to trial as soon as possible after the accused's arrest and first appearance in court.
- (b) The Judicial Officer must ensure that every accused person pleads to the charge within 3 months from the date of first appearance in the Magistrates' court. To this end Judicial Officers shall strive to finalise criminal matters within 6 months after the accused has pleaded to the charge.
- (c) All Judicial Officers are enjoined to take a pro-active stance to invoke all relevant legislation to avoid lengthy periods of incarceration of accused persons whilst awaiting trial.'

- [4] It may be argued that the Norms and Standards are overly ambitious as the time frames do not accord with reality. However, this is yet again one of those cases where the finalisation of a criminal case with relatively simple facts was delayed for nearly 3 years. This is not an isolated case as it is often experienced in appeals that cases in the lower courts are clearly not properly case-managed. I am of the view that it is apposite to set out the following obtained from the court a quo's minutes:
- a. 28 October 2013 – appellant's first appearance in the magistrate's court.
 - b. 11 November 2013 – the matter was postponed to 13 January 2014 for appellant's appearance in the regional court.
 - c. 13 January 2014 – first appearance in the regional court when annexure B to which I shall refer later herein was completed.
 - d. 19 May 2014 – no State witnesses attended the court proceedings; the matter was postponed for plea and trial; a s 342A warning was recorded.
 - e. 09 June 2014 – the charge was put to the appellant who pleaded not guilty; as will be pointed out later, exhibits A and B were handed in by agreement; the matter was postponed and the one State witness present, Ms Katriena Mfazwe, was warned to appear at the next hearing.
 - f. 08 July 2014 – Adv Diba on behalf of the appellant could not proceed as he was awaiting further particulars.
 - g. 04 August 2014 – further particulars still outstanding.
 - h. 11 August 2014 – further particulars received; matter postponed for trial.
 - i. 17 November 2014 – the State's first witness, Mr Tankiso William Mokapane testified.
 - j. 09 March 2015 – State witnesses absent and the matter was postponed.
 - k. 29 May 2015 – the court a quo convened just after 12h00 as it had to conduct the civil roll; the 9-year old complainant was present, but a postponement was requested by the State and granted without objection. At this stage 15 months have lapsed since the appellant's first appearance in the regional court. By then the appellant who stayed in Botshabello, 60 km from Bloemfontein and worked in the Eastern Free State, had to travel to Bloemfontein nine times, in all probability having to take leave each day and travelling hundreds of kilometres in total.
 - l. 13 July 2015 – the appellant was absent and a warrant of arrest was issued.
 - m. 27 July 2015 – the appellant was still absent and his bail was finally forfeited.
 - n. 28 July 2015 – the appellant turned-up at court and the matter was adjourned by another presiding officer.

- o. 03 August 2015 – the appellant appeared and indicated that he would apply for Legal Aid again; he was warned to appear on the next date.
- p. 14 August 2015 – the appellant represented by his previous legal representative appeared; the matter was merely postponed.
- q. 28 August 2015 – the appellant appeared, but the case could not proceed as it was pushed out; it was also recorded that the court record had to be transcribed.
- r. 29 September 2015 – the matter was again postponed by a different presiding officer and from this date onwards, Mr Rwaxa was on record as the legal representative of the appellant.
- s. 05 October 2015 – on this date it was recorded that there was a problem with the transcription in court 18.
- t. 28 October 2015 – the matter was again postponed because the court record was still not available.
- u. 09 November 2015 – it was recorded that problems were still experienced with the court record.
- v. 23 November 2015 – the court record was obtained and the matter was postponed for trial to 17 and 19 February 2016.
- w. 17 February 2016 – the Digital Court Recording System (DCRS-machine) was out of order and the State prosecutor indicated that he was not available on the next day, to wit 19 February 2016; the defence did not have objection with the postponement, although by then more than 2 years have lapsed from the first appearance in the regional court.
- x. 15 April 2016 – the appellant was absent and a warrant of arrest was issued.
- y. 20 April 2016 – the appellant appeared and notwithstanding his explanation, the matter was postponed whilst he remained in custody.
- z. 04 May 2016 – the appellant indicated that he would apply for bail.
- aa. 11 May, 17 May and 24 May 2016 – the bail proceedings continued before a different magistrate and bail was refused.
- bb. 03 June 2016 – the appellant appeared whilst still in custody. The State prosecutor could not proceed due to illness.
- cc. 10 June 2016 – the matter was postponed as a priority case to 15 June 2016.
- dd. 15 June 2016 – the complainant – a little girl not yet 10-years old – testified; after her examination in chief and before 11h30 that day, the appellant's legal representative asked for a postponement in order to cross-examine which application was granted without any objection from the prosecutor and without any enquiry from the court a quo.

ee. 20 June 2016 – the complainant’s cross-examination was finalised where after Mr Moses Leballo was called to testify as the State’s third witness.

ff. 27 June 2016 – Dr JM Coetzee testified on behalf of the State where after the State’s case was closed and the appellant was called to testify.

gg. 29 June 2016 – the appellant’s cross-examination continued on this day for a relatively short period ex facie the record; the presiding magistrate greeted the appellant with the words ‘Good afternoon, Sir’ before his cross-examination

continued, this being indicative that the case proceeded during the afternoon only.

hh. 01 July 2016 – the appellant was further cross-examined on this day, when a view questions were put to him, where after the defence closed its case.

ii. 13 July 2016 – although the matter was postponed to this day for argument, the prosecutor did not attend due to illness.

jj. 20, 22 and 25 July 2016 – the transcribed record is not in line with the minutes of the court a quo, but it is apparent that the matter was postponed to these three dates for argument.

kk. 29 July 2016 – the court a quo was not ready with its judgment and the matter was postponed.

ll. 26 August 2016 – the court a quo was not ready with its judgment.

mm. 02 September 2016 – the court a quo was not ready with its judgment.

nn. 05 September 2016 – the court a quo was not ready with its judgment.

oo. 07 September 2016 – the DCRS machine was out of order.

pp. 09 September 2016 – judgment was not delivered as the court a quo was involved in a part-heard matter.

qq. 16 September 2016 – judgment was delivered.

rr. 19 September 2016 – submissions delivered in respect of mitigating and aggravating circumstances.

ss. 21 September 2016 – the DCRS machine was out of order.

tt. 23 September 2016 – the presiding magistrate was not available and the matter was postponed by a different magistrate to 26 September 2016.

uu. 26 September 2016 – sentence imposed.

[5] I whole-heartedly accept that our lower courts are overloaded, especially with matters dealing with sexual offences. The court a quo’s factual exposition[2] cannot be disregarded. However, much more can and should be done to improve case management. All relevant role players should play their part in ensuring finalisation of cases sooner than later. This is a typical case that could have been finalised much earlier. The three State witnesses are

from Dewetsdorp and the expert called by the State is from Bloemfontein. There is no explanation why all the witnesses could not have testified in 2014. The presiding magistrate should have investigated the delays at an early stage in accordance with s 342A to enable him to issue an appropriate order. I accept that the appellant is also to be blamed for the delays from the middle of 2015.

Delay in prosecution of the appeal

- [6] I investigated the reasons for the delay pertaining to the finalisation of the appeal. The following has been established. On 29 September 2016 Mr Rwaxa, an attorney in the employ of Legal Aid South Africa, filed the appellant's notice of appeal. On 07 March 2018 the court a quo certified the appeal record as true and correct. The court a quo's minutes, including the J15 and annexures thereto, together with the transcribed record were filed with the registrar of the high court on 18 June 2018. Appeal number A111/2018 was allocated to the appeal.
- [7] The appeal was initially allocated to Jordaan and Molitsoane JJ for hearing on 22 October 2018. On that day the appeal was removed from the roll due to an incomplete record. The accused's cross-examination on 01 July 2016 did not form part of the record. On 29 October 2018 the appeal clerk of the high court directed the clerk of the lower court to ensure that a complete record is supplied. On 13 December 2022 - four years later - a supplementary record was received by the high court. On 22 February 2023 this appeal was placed on the roll for argument on 05 June 2023, where after it was allocated to my colleague Chesiwe J and me.

Evaluation of the evidence and the court a quo's judgment

- [8] On 9 June 2014 the appellant pleaded not guilty. He did not make any plea explanation, save to deny that he committed the offence as alleged in the charge sheet. Thereupon the following documents were handed in by agreement: the birth certificate of the complainant[3] and the J88 medical report as exhibit B[4]. These documents were admitted in terms of the provisions of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA). At that stage, Adv Diba, the appellant's legal representative, placed on record that the medical examination documented in the J88 report confirmed the appellant's version that rape did not take place as no penetration was reflected.
- [9] The court a quo accepted that there were contradictions in the State's case, but made the point that due to the late hour of the day it was not deemed necessary to deal with these in any detail. It is therefore required of me to consider the evidence in order to establish whether the State has proven its case beyond reasonable doubt in order for the appeal against conviction to be dismissed.
- [10] The complainant testified through an intermediary on 15 June 2016 and on 20 June 2016. She was the State's second witness and not the first witness as the court a quo incorrectly indicated. Ex facie exhibit A, she was born on 24 August 2006 which means that she was two months shy of 10 years at the time when she testified. The court a quo was satisfied with the

evidence of the complainant. It regarded her as a good witness who had made an 'excellent impression'. The complainant testified how it came about that she met the appellant. The prosecutor did not lead the complainant's evidence coherently. A much more coherent version is found during the cross-examination of the complainant. However, she explained during examination in chief how she met the appellant near a shop and that he promised to buy her a cold drink. The appellant pulled her by her hand and dragged her towards the hill (referred to by her as the mountain). There the appellant took off her as well as his own trousers. He let her lay down on her back where after he spat on her private parts as well as his penis. Instead of allowing the complainant to testify viva voce about the incident, she was requested to make use of a male and female doll in order to explain what has occurred to her. Whilst demonstrating by making use of the two dolls what the appellant had done to her, the court a quo recorded the demonstration with the consent of the parties. There can be no doubt the witness demonstrated that she had been raped. She initially felt pain which subsided. After a while two male persons appeared whilst she was still not dressed. The appellant informed the two male persons that her sister had taken his money, but she denied that. Her mother and her employer also arrived at the scene, but at that time she was already dressed. Her brother, who was also called to the scene, assaulted the appellant by hitting him with 'bushes' (apparently tree branches) referred to by the complainant as 'bossies' in Afrikaans. Her mother called the police. They were taken away by the police and the appellant was locked up. When asked how she felt, she said the following 'I am not feeling okay your Worship ... Because they did bad things to me ...'.

- [11] During cross-examination she testified that she was on her way from school to her home when the appellant called her and said that they should go to the shop as he was going to buy her a cold drink. At a stage the appellant took her hand and pulled her towards the hill, notwithstanding the fact that she was resisting and crying. There he undressed her as well as himself by taken off their trousers. She explained the spitting again, where after the appellant inserted his penis inside her vagina whilst making 'funny

things' to her and also referring to it as 'bad things'. Although she felt pain initially, she did not suffer any injuries or feel pain afterwards.

- [12] During her cross-examination the appellant put himself on the scene as is apparent from the statements made to the complainant. It was initially put to her that the appellant bought her chips, but when she denied this, the statement was changed whereupon it was stated to the complainant that the appellant actually gave her R7 which she admitted. On the appellant's version, he walked away whilst the complainant followed him. She denied this. It was stated on the appellant's behalf that he went to the hill and sat in the shade next to a bush in order to mix his chemicals and that the complainant was sitting in the veld in

close proximity to him. She denied this. It was also put to the witness that people came to assault him, which she admitted. Although

the appellant denied ever touching the complainant, she was adamant that he inserted his penis into her vagina. She also denied that she voluntarily followed him from the shop to the hill.

[13] Mr Mokapane was called as the State's first witness and not the second witness as the court a quo incorrectly remarked. He testified already on 17 November 2014. When crossing the hill from the one township to the other, he noticed a man and a child who were both undressed. He pointed out the appellant in the witness box as the male person witnessed by him. Both the appellant and the girl's trousers and her panty were pulled down to their knees. The appellant, was lying on top of the little girl, making up and down movements. Being afraid, he did not intervene, but went to fetch a friend. He met this friend, the third State witness, Mr Moses Leballo, who was on his way up the hill and reported to him what he had witnessed. They went to the scene. Upon their arrival the appellant stood up from his position on top of the girl and pulled up his pants. The witness explained that the appellant and the girl were on the other side of the tree which made it difficult for them to observe at that stage. His viva voce version differs from the witness statement made to the police on the same day that the rape allegedly occurred. In that statement he did not mention the events as described in court when he came on the scene the first time. According to his witness statement the alleged rape incident occurred when he came to the scene the second time. Obviously, this is not only an internal contradiction, but also in contradiction of the version of Mr Leballo to which I shall return later. The witness statement was proven and handed in as exhibit C. The witness asked the complainant where she was staying and when she explained, he went to fetch her older brother who upon his arrival started to assault the appellant where after other bystanders joined in as well. Notwithstanding severe cross-examination the witness was adamant that he found the appellant on top of the complainant.

[14] Mr Leballo confirmed that his friend, Mr Mokapane, met him and told him that he should come and assist him as there was something that he did not understand. He took him to a place which was not far from where they met. When they came to the place pointed out by Mr Mokapane, he saw a male person appearing from behind a tree. This person said to them, 'Guys how much do you want? Can I give you money?'. This evidence is in line with the version of Mr Mokapane. The appellant appeared to be confused and in shock. Hereafter the witness realised that there was a little girl standing next to the appellant. The girl was half naked from the waist downwards. Her trousers were pulled down although not completely taken off. He confirmed that the girl that he saw on the hill was the same one that came with him with the police from Dewetsdorp to Bloemfontein for the trial. He also confirmed that the appellant was assaulted by members of the public using tree branches as he was trying to run away. In cross-examination he stated that Mr Mokapane merely told him that he saw a man and a little girl at the tree and nothing more. The appellant was fully dressed when they arrived at the scene. He did not see the appellant on top of the girl. A strange statement was made to Mr Leballo on behalf of the appellant to the effect that Mr Leballo was the one that took the appellant's phone and ran away. This was obviously denied. Mr Leballo testified earlier that he used his phone to call the police. The differences in the versions of the two

gentlemen can be explained. Mr Mokapane knew where he had last seen the appellant and the complainant, whilst Mr Leballo would not know exactly where to look. Clearly shrubs and/or trees would have hampered proper observation. If nothing untoward occurred initially, Mr Mokapane's would have no reason to look for help. Mr Mokapane's version was correctly accepted by the court a quo insofar as the versions of these two witnesses differed.

- [15] Dr JM Coetzee was called as an expert in order to try and explain why no injuries were detected on the body of the complainant notwithstanding the allegations of rape. It is interesting to note that the court a quo alleged in the judgment that the court a quo called the witness and after she testified, he requested the parties whether they wanted to reopen their cases to lead further evidence which they declined. This is a serious factual misdirection. Clearly, the record shows that this witness was called by the State and after she was cross-examined and also questioned by the court a quo the State closed its case. This witness explained why it might be possible for even a complainant of 7 years not to have sustained

injuries during rape. Her version was correctly accepted by the court a quo. The appellant's ground of appeal in this regard is without any merit.

- [16] The appellant testified that he gave cash to the complainant whom he did not know at that stage as he felt sorry for her as, except for the complainant, all the other children in the area were busy eating sweets or chips. On his version he went to the hill to mix his chemicals. He was selling pesticides to the public by going from door to door. At a stage the complainant also came up the hill and sat a distance away from him, whilst playing in the sand. They were not in contact with each other, and most definitely, no sexual offence was committed by him. He contradicted himself in various respects and adapted his version throughout the trial. Initially it was stated on his behalf that he bought chips for the complainant, but later the statement was changed to say that he gave her money. The court a quo heard for the first time at the end of the appellant's cross-examination that the complainant was in the company of another

lady whilst on the hill. Just thereafter, he changed his version and denied his previous allegation. Contrary to his evidence during his examination in chief, it was never put to anyone that the complainant was walking with difficulty at the stage when the State witnesses and other members of the public arrived at the scene. He could also not explain his initial statement to the complainant, which she denied, that she was actually the one that protected him when her brother and others were busy assaulting him. The appellant's version is so improbable that it could be rejected as false, bearing in mind the totality of the evidence. Inherent probabilities and improbabilities may be considered in evaluating the evidence in totality.[5] Although it is permissible to test the appellant's version against the inherent probabilities, it cannot be rejected merely

because it is improbable. His version can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[6]

[17] Section 208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits, and having done so, decide whether it is satisfied that the truth has been told despite any shortcomings or defects in the evidence.[7] Where the evidence of a single witness is corroborated in any way, the caution enjoined may be overcome and acceptance facilitated, but corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.

[18] In *S v Viveiro* the Supreme Court of Appeal stated that the need for caution cannot be ignored in considering the evidence of young children and

continued that ‘whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach.’

[19] A court of appeal should be hesitant to interfere with the factual findings and evaluation of the evidence by the trial court. In the absence of demonstrable and material misdirection by the trial court, its factual findings should be presumed to be correct, unless the recorded evidence indicates to the contrary.[8] The complainant was to an extent a single witness and furthermore, she was a mere seven years old when the offence of rape was allegedly committed. There is no reason to conclude that the court a quo misdirected itself to accept that she was raped as demonstrated (by using dolls) and testified by her. Although there are contradictions

in the versions of the two witnesses, Messrs Leballo and Mokapane, their versions corroborate the complainant’s version. Mr Mokapane was the first person on the scene. He testified having seen the appellant on top of the complainant, that they were half naked and that the appellant was making up and down movements at that stage. Although Mr Leballo did not testify about an incident that can be described as rape, he testified that the complainant was half-naked from the waist downwards when he noticed her for the first time next to the appellant who was fully dressed at that stage. The appellant confirmed being in Dewetsdorp that specific day, that he handed cash to the complainant whilst she was in the vicinity of the shop as she indicated and that she was even in close proximity of him whilst he was allegedly mixing chemicals on the hill. His identity as the only male person next to the complainant when the aforesaid two State witnesses appeared is not in dispute. The absence of evidence of recent penetration as recorded in the J88 was satisfactorily explained by Dr Coetzee. Consequently, I am satisfied that the court a quo came to the correct conclusion that the appellant had raped the complainant. However, I do not agree with the following two aspects,

but to the extent that the court a quo misdirected itself, the misdirection is not sufficiently material to acquit the appellant:

- a. First, there was absolutely no evidence of digital vaginal penetration. I have perused the record several times in the belief that I could have made a mistake. The closes one gets to digital vaginal penetration is to make an assumption (incorrectly so) that the appellant would have used his fingers to spread his saliva on the complainant's private parts. The court a quo questioned Dr Coetzee in this regard whereupon the expert accepted without any factual basis that the appellant had used his finger to apply saliva to the complainant's private parts. Based on this doubtful suggestion, the court a quo incorrectly relied on circumstantial evidence in order to find digital vaginal penetration. Such finding could not be made as being

the only reasonable inference based on the accepted facts.

- b. Secondly, the court a quo held that the appellant was 'guilty as charged and this is a part 1 Schedule 2 offence in terms of Act 105/97'. It was totally unnecessary to deal with the last part of the quotation as the Minimum Sentences Act is applicable to sentence and not conviction. The Supreme Court of Appeal emphasised in *S v Kekana*[9] that the provisions of the Minimum Sentences Act do not create different or new offences, but are relevant to sentence only. The

purpose of reading a particular charge with the provisions of the Minimum Sentences Act is twofold, first, to alert an accused of the applicability of the prescribed minimum sentence and second, to afford the accused an opportunity to place facts before the trial court to justify a deviation from the prescribed sentence.[10]

The imposition of life imprisonment

[20] Although not a ground of appeal, it is not reflected in the charge sheet and the transcribed plea proceedings that the appellant was alerted at the outset of the trial of the applicable provisions of the Minimum Sentences Act. Adv Komane who argued the appeal on behalf of the State conceded that the transcribed record does not indicate that the appellant had been warned that he might be sentenced to life imprisonment upon conviction. Bearing in mind the seriousness of the matter and this court's responsibility to ensure that the appellant's right to a fair trial was not infringed, the legal representatives of the parties were directed during oral argument to what appears to be a failure. I say this whilst keeping in mind the following:

- a. Annexure B of the minutes kept by the court a quo is a document apparently completed during the appellant's first appearance in the court a quo on 13 January 2014. It is signed by the presiding magistrate. This document evidences that Adv Diba appeared for the appellant, but notwithstanding this, the presiding magistrate filled out the form as follows:

'1. Court explains the following to the accused:

- (a) You are informed that you are entitled to legal representation;

- (b) If you cannot afford private legal representation you may apply to the Legal Aid Officer for legal aid.

Question: Begryp u dit? (Do you understand?) Yes.

Question: Verlang u regshulp? (Do you require legal aid?) Yes.'

Thereafter the various sentencing options pertaining to minimum sentences were deleted by the magistrate, leaving the only option available, being a sentence of life imprisonment in respect of Part 1 of Schedule 2. It amazes me that the presiding magistrate would ask the accused in the presence of his legal representative whether he wanted legal representation, and if so, that legal aid could be made available if required.

- b. Annexure C of the minutes of the court a quo (the so-called trial-readiness minutes) was ticked off by someone, apparently Adv York, the State prosecutor and not the presiding magistrate. Paragraph 16 of this document appears to indicate that the minimum sentences' regime or competent verdicts, if applicable, were explained to the accused. Although the form is dated 09 June 2014, the same day when the appellant pleaded, it was not signed by his attorney in the space provided.

These two documents create much uncertainty, especially bearing in mind that the transcribed record does not indicate whether the minimum sentences' legislation was explained before the appellant was asked to plead. Adv Diba was substituted during the trial by Mr Rwaxa. Mr Rwaxa drafted the notice of appeal without mentioning a possible failure to alert the appellant of the Minimum Sentences Act. My approach might have been different if such a ground of appeal was raised.

[21] The relevant portion of the charge sheet reads as follows:

'read with the provisions of Sections 51(1)* _ 51(2)(b) __ of the Criminal Law Amendment Act 105 of 1997, as amended'.

Unlike as one would expect, the prosecutor failed to delete the inappropriate subsection. Further down the charge sheet, the printed document incorrectly refers on two occasions to Act 105 of 1977. There is no such Act. The correct number of the Minimum Sentences Act is 105 of 1997. Hopefully, the prosecuting authority will ensure that the necessary amendments are made to prevent possible future embarrassment.

[22] This is indeed a borderline case in which the appeal against sentence could have been dealt with on the basis that the appellant was not appropriately alerted of the applicability of the prescribed minimum sentence of life imprisonment. There is insufficient indication that the appellant was not informed accordingly. However, it is worthwhile bearing in mind the judgment of the Supreme Court of Appeal in *S v Khoza and Another (Khoza)*.^[11] The following dictum of Van der Merwe JA in *Khoza* is apposite:

[9] As I have said, the issue in this appeal has been considered by this court on a number of occasions. The same applies to the closely related issue of the effect of an incorrect reference to the Minimum Sentences Act in the indictment on fair-trial rights.

[10] The following principles can be distilled from these judgments. As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) that the state intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge-sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial. This is of particular importance when the accused person has no legal representation. This, however, is not an absolute rule. Each case must be determined on its own particular facts and circumstances, bearing in mind the oft-quoted dictum in *S v Jaipal* 2005

(1) SACR 215 (CC) [2005] ZACC 1; (2005

(4) SA 581; 2005 (5) BCLR 423) para 29. There it was stated that the right to a fair trial also requires fairness to the public as represented by the state and this has to in still public confidence in the criminal justice system. Substance must prevail over form. In the final analysis, the determination of whether fair trial rights were infringed in these circumstances turns on the question of prejudice to the accused.

[11] The question of prejudice is determined by an objective fact-based inquiry. In my view the test should be similar to that applicable to the question whether an accused person has been prejudiced by a defective charge, which also directly implicates s 35(3)(a) of the Constitution. In *Moloi and Others v Minister for Justice and Constitutional Development and Others* 2010

(2) SACR 78 (CC) (2010

(5) BCLR 497; [2010] ZACC 2) para 88a the pre-constitutional position was summarised as follows:

'Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist, unless it can be established that the defence or response of the accused person would have remained exactly the same had the State amended the charge.'

In my judgment the same applies to the determination of this question under the Constitution. This signifies that prejudice will exist if there is a reasonable possibility that the defence or response of the accused person may not have been the same had there been an amendment.'

[23] On 19 September 2016 the prosecutor tendered a victim impact statement from the little complainant, a 10-year old girl at the time, during the sentencing proceedings. On 26 September 2016 the court a quo rejected this document as well as a translation thereof. It is necessary to quote the ruling verbatim in order to assess the issue appropriately:

‘Judgment with regard to the victim impact statement. Statement from M[...] M[...], 10 year old kid, was handed in. It was A translated version was also handed in as an exhibit on the 19th of September 2016. There is no indication whatsoever who is the person who has made the statement. It was not made under oath.

It is possible at this stage just to entertain it and to say I am going to allow it. On the other hand I am of the opinion that it will be better and in the broader interest of justice not to allow it.

I do not think it is the most important document at this stage, especially with the contents as well. So if the State wants to prove the contents of this they will have to follow proper procedure, at least to make it a statement under oath, otherwise it is not possible and permissible to be handed in in this current state.’

I do not understand why the court a quo mentioned that there was no indication who made the statement as it was apparently a statement of the complainant, the little girl that was raped. It is difficult to understand why the court a quo rejected the statement. There is no indication that the appellant’s legal representative objected thereto, and even so, why the prosecutor could not be allowed an opportunity to ensure that the statement is properly deposed to before a commissioner of oath and/or to tender the evidence of either a social worker, teacher, or the little complainant’s mother.

[24] Life imprisonment is the ultimate penalty that courts can impose and should not be imposed lightly. In saying this, I am fully aware of and acquainted with the judgments in S v PB[12] and S v Matyityi[13] wherein the Supreme Court of Appeal in both judgments warned courts not to depart from prescribed minimum sentences for flimsy

reasons.

Having said this, it is also important to consider the responsibility of defence counsel, prosecutors and trial courts during the sentencing stage.

[25] In S v EN[14] the Supreme Court of Appeal expressed itself as follows:

‘... Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence.’

[26] The complainant suffered no physical injuries. The question as to the effect of the incident on her emotional and psychological wellbeing could have been answered if the court a quo allowed the victim impact statement that the prosecutor intended to hand in, and/or if it was prepared to obtain evidence from either the mother, a teacher or social worker. Regrettably, the court a quo imposed sentence without having been provided with sufficient information. Acting as it did, the court a quo disregarded the dictum of the Supreme Court of Appeal in *S v EN supra*.

[27] In respect of the absence of serious physical injuries, the Supreme Court of Appeal in *S v SMM*[15] put its stamp of approval on the interpretation of s 51(3) of the Minimum Sentences Act by the trial judge in *S v Nakawu*[16] in the following words:

‘He [Plasket J] correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing

for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.’

[28] I have no doubt that life imprisonment should be called for in by far the majority of cases involving rape of minor children. Notwithstanding this, it is important to consider some reported cases, again accepting that no responsible person can hold the view that the complainant in *casu* could survive the rape incident without suffering some emotional trauma.

[29] In *S v Kearns*[17] the appellant’s sentence of life imprisonment in respect of rape of a 9-year old girl, causing her serious psychological and physical injuries, was dismissed by the full court. That court commented as follows:[18]

‘... Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical

body of his victim; a rapist degrades the very soul of the helpless female. The physical scar may heal, but the mental scar will always remain. ...’

The complainant in *Kearns* sustained serious psychological and physical injuries, whilst in *casu* there is clearly no proof of physical injuries and there is also a lack of evidence pertaining to psychological injuries.

[30] In *Moses Tshoga v The State*[19] the majority found that the sentence of life imprisonment in respect of the rape of a 10-year old girl was in order. Contrary to the facts in *casu*, a report from the counselling psychologist of the Teddy Bear Clinic was presented as evidence by agreement with the appellant. In that case there was proof that the complainant suffered devastating psychological lifelong consequences.

[31] In *S v Tshabalala and Another*[20] Mathopo AJ, writing for a unanimous Constitutional Court Bench, remarked as follows:

‘This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law-enforcement agencies are required to curb this pandemic. This court would be failing in its duty if it does not send out a clear and unequivocal pronouncement

that the South African judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this court and courts around this country in the perpetuation of patriarchy and rape culture.’

[32] No doubt, due to the seriousness of the offence in casu, it is required that the elements of retribution and deterrence should come to the fore and that the rehabilitation of the appellant should be accorded a smaller role as emphasised by the Supreme Court of Appeal in *S v Kekana*[21]. The appellant’s personal circumstances have to bow to the interest of society. His counsel did not seriously contend otherwise.

[33] In *S v De Beer*[22] the Supreme Court of Appeal held as follows:

‘This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved.’

[34] Having said this, I am of the view that the court a quo made a material misdirection in finding that there were no substantial and compelling circumstances in the present case. When he

was sentenced seven years ago in September 2016, the appellant was the owner of immovable property, 35 years old, married with two children aged 15 and 9 years old respectively. He has a grade 12 certificate and worked for Shield Protection Services, whilst also having his own pest control business. He was a first offender. The court a quo made the following comment which should be frowned upon as this does not appear from the record:[23]

‘I think that apart from the fact that you are a clever, informed person, that you are one of the more dangerous persons that stood in that very same place of yours for the past year or what’

Furthermore, the court a quo continued, as follows, but contradicted itself:

‘In this instance I am of the opinion that although it was perhaps on the spur of the moment, you have planned this entire exercise at length and then you were meticulous enough to conclude your planning in the hills.’

Earlier on the court a quo made the following comment in its judgment:[24]

‘I must say the moment when the accused testified and he informed Court that he is actually working with teenagers and pregnancies and all those type of problems in ten different schools a number of red lights went on for me I am not totally sure that I will not bet on this that this is the only matter of its kind.’

Instead of accepting that the appellant was trying to assist his community, the court a quo regarded him as a wolf in sheep clothes without any foundation whatsoever. Although I have made it clear in many judgments that I find rape appalling and a perverse abuse of male power, and especially rape of a child, I am satisfied that the court a quo erred in concluding that there were no substantial and compelling circumstances present in order to deviate from the prescribed minimum sentence of life imprisonment.

Order

[35] The following order is issued:

JP DAFFUE J

I concur

S CHESIWE J

Counsel for the appellant: Miss V Abrahams Legal Aid South Africa BLOEMFONTEIN Counsel for the respondent: Mr Komane (the heads being drafted by Adv LB Mpemvane) Office of the Director of Public Prosecutions BLOEMFONTEIN

[1] Section 309(1)(a) read with s 309B(1)(a) of the Criminal Procedure Act 51 of 1977.

[2] Record: p 230 / 6-18.

[3] Exhibit A: record p 241.

[4] Exhibit B: record p 243 -246. The following conclusions were recorded: ‘Was previously raped. Today no signs of penetration.’

[5] S v Chabalala 2003 (1) SACR 134 (SCA) at para 15.

[6] S v Shackell 2001 (2) SACR 185 (SCA) at para 30.

[7] S v Sauls 1981 (3) SA 172 (AD) at 180E-G and S v Stevens

[2005] 1 All SA 1 (SCA) para 17.

[8] S v Hadebe & Others 1997 (2) SACR 641 (SCA) at 645.

[9] 2019

(1) SACR 1 (SCA) at para 22.

[10] Ibid para 24.

[11] 2019

(1) SACR 251 (SCA) para 9 – 13.

[12] 2013

(2) SACR 533 (SCA) para 20.

[13] 2011

(1) SACR 40 (SCA) para 23.

[14] 2014

(1) SACR 198 (SCA) para 14.

[15] 2013

(2) SACR 292 (SCA) at para 26.

[16] 2009

(2) SACR 402 (ECG) at para 15.

[17] 2009

(2) SACR 684 (GSJ).

[18] Ibid para 15.

[19] (365/2016) [2016] ZASCA 205; 2017 (1) SACR 420 (SCA) (15 December 2016).

[20] 2020

(2) SACR 38 (CC) para 63.

[21] 2019

(1) SACR 1 (SCA) at paras 39 & 40.

[22] 2018

(1) SACR 229 (SCA) at para 17.

[23] Record: p 234.

[24] Record: p 204.

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