

SOUTH AFRICA / JUDGMENT

Lushaba v S (A764/15) [2017] ZAGPPHC 440 (1 August 2017)

[2017] ZAGPPHC 440

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo, M Sello

CASE / FILE NUMBER

A764/15

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: A764/15

REPORTABLE: YES

OF INTEREST TO OTHER

JUDGES: YES

REVISED

DATE:

01.08.17

In

the matter between:

SIMILO

VISION

LUSHABA Appellant

and

THE

STATE Respondent

JUDGMENT

TEFFO, J:

- [1] The appellant was convicted in the Regional Court, Piet Retief on 30 July 2014 of three counts of rape in contravention of s 3 of the Sexual Offences and Related Matters Act, 32 of 2007 read with the provisions of ss 51 and 52 and schedule 2 of the Criminal Law Amendment Act, 105 of 1997 and one count of escaping from lawful custody. The three counts of rape were taken together for the purposes of sentence and the appellant was sentenced to life imprisonment and to two years imprisonment on the escaping count. The sentences were ordered to run concurrently.
- [2] He now appeals against his conviction and sentence in terms of the provisions of s 10 of the Judicial Matters Amendment Act, No 42 of 2013. The section provides that an accused person who has been sentenced to imprisonment for life by the Regional Court under s 51(1) of the Criminal Law Amendment Act, may note an appeal without having to apply for leave in terms of s 3098 of the Criminal Procedure Act, 51 of 1977. The trial court also granted leave to appeal against both conviction and sentence.

The appeal against conviction

- [3] The identity of the appellant as perpetrator was placed in dispute on the basis that no DNA evidence was presented in the trial court despite the fact that the appellant's blood was drawn and the crime kits in respect of the DNA samples were collected. The fact that the form on which the proceedings of the identity parade were recorded was not handed in as an exhibit in the trial court was also criticised in that in the absence of that evidence, it cannot be determined as to how the appellant was identified at the identification parade.
- [4] The State disagreed with the submissions and argued that the appellant was correctly convicted.

The appeal against sentence

- [5] It was contended that the sentence of life imprisonment is shockingly inappropriate and that the learned magistrate failed to get enough evidence to enable him to consider properly whether there were substantial and compelling circumstances to justify a departure from imposing the prescribed minimum sentence.
- [6] The State disagreed and it was submitted on its behalf that the sentence imposed was proportionate to the offences committed.

The evidence

- [7] Ms T N (Ms N) testified that on 18 July 2013 at approximately 15h30 she went to gather firewood in the bush at Mangosuthu, Piet Retief in the company of Z Ng (Ms Ng), Z M (Ms M) and T. The appellant approached them. He grabbed her by her arm and asked whether they

were people who were stealing the firewood from the bush. As they were still talking to him explaining themselves, he suddenly produced a knife and forced all of them to go deeper into the bush. He ordered her to undress her pants and panties and lie down. As she was lying down, he undressed his pants up to his knees and also took out his penis which he inserted in her vagina. He lay

on top of her making up and down movements. At that time he had ordered her friends to sit down facing the other direction and not to look at them. When he finished, he told her to dress up and he called Ms M. Ms M fortunately managed to ran away from him. She and her friends eventually went home where she made a report to Ms Ng's mother who contacted the police. She was later taken to a doctor for examination. At some stage she attended an identification parade where she was able to point out the appellant. She also identified him in court. This evidence was corroborated by Ms Ng and Ms M. Ms Ng also testified that she attended an identification parade and was able to point out the appellant at the identification parade and in court. Ms M did not attend the identification parade. Her evidence was to the effect that they were made to sit on the ground whereafter Ms N was raped. She ran away after the appellant told her that she was next to be raped.

[8] Ms Z Mk (Ms Mk) who testified through an intermediary's evidence was as follows: On 19 August 2013 at approximately 15h00 she went to the bush to gather firewood in the company of Ms N Mk (N), Ms T Ma (Ms Ma), Ms A Nx (Ms Nx) and Ms D Z (Ms Z). As they were busy gathering the firewood, the appellant approached, gathered them, ordered them to put down the firewood they were carrying and sit down. He further ordered them to take off their clothes but they didn't. He eventually covered them with a blanket. He raped all of them except her as he said she was still a child. They ultimately went home where she reported the incident to her

mother, sister and her sister's husband. She pointed

out the appellant in court. This evidence was corroborated by Ms Nx, N, Ms Ma and Ms Z. They all testified that Ms Mk and Ms Ma were not raped among the group as the appellant said they were still children. According to their evidence Ms Nx was the first to be raped and Ms Z and N followed. Ms Nx reported the incident to her mother and she was also taken to the doctor for examination. She also identified the appellant at the identification parade.

[9] It is noted that even though the court a quo did not find the appellant guilty on the rape of N, the state's evidence is to the effect that she was also able to point him out at an identification parade. Ms Ma did not attend the identification parade. Ms Z was also able to point out the appellant in court and at the identification parade.

[10] The appellant was not found guilty on the two counts of kidnapping, four counts of attempted rape and one count of rape.

[11] The principles applicable to an appeal on the merits and the approach to be followed by the court of appeal were articulated in *S v Francis* 1991

(1) SACR 198 (A) at pages 198J-199A where the following remarks were made:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore

convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence - a reasonable doubt will not suffice to interfere with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

[12] The crux of this appeal revolves around the identification of the appellant as the perpetrator of the offences committed. It was argued that in the absence of DNA evidence and the form on which the proceedings of the identification parade were recorded, it cannot be determined as to how the identity of the appellant as perpetrator was arrived at.

[13] In *R v Shekelele and Another* 1953 (1) SA 636 (T) at 638F-G the court remarked that honest but mistaken identification caused gross injustices. To avoid such injustices the

court remarked that in all cases that turn on identification of an alleged offender by a witness, the greatest care should be taken to test the evidence. A bold statement that the accused was the one who committed the crime, is not enough. Answers to relevant questions about the culprit's physique, complexion, peculiar features and wearing apparels, if not properly interrogated, just like untested and unexplored bold statement which have not been inquisitively investigated, can leave the door wide open for the reasonable possibility of a big mistake.

[14] In *S v Mthetwa* 1972 (3) SA 766 (A) at 768A the court said the following:

"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 the time and the 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 the identification parade, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of these that 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."

[15] With regard to the incident of rape that took place on 18 July 2013 the evidence of Ms N, the complainant in that count, and Ms Ng, is very crucial in relation to the identity of the appellant as the perpetrator. They both testified that they were able to point him out at the identification parade. The incident happened in brought daylight. It was around 15:30 when

they went to the bushes. From their evidence it appears that they spent some time with the appellant from the time he approached them while they were on their way out after picking up the firewood, the time he grabbed Ms N with her arm and ordered her to call the others to follow them as he was dragging her to go deeper into the bushes, the time they spent walking, him ordering them to sit down and face the other direction while he was busy raping Ms N, the time he had a conversation with them asking them if they knew him, ordering them to leave and threatening them not to tell anyone about what happened. In her evidence-in-chief when she was asked how long did the incident take from the time they met the appellant until they left the scene, Ms N testified that it took a while although she did not record the time. Under cross-examination she was asked how long did she have an opportunity to look at the appellant's face and she said it was long. Upon further cross-examination she estimated 10 minutes. This in my view was sufficient time although no evidence was presented regarding any distinguishing features that they indicated enabled them to identify them.

[16] Further to this evidence Ms Ng testified that a week after the incident, she also had an opportunity of seeing the appellant at the river where she was washing clothes. He walked past her and called her but she did not pay attention to him. This happened prior to them going to the identification parade. Her further evidence was that after the appellant had approached them and subsequent to him telling Ms N to call her and Ms Mk, they were standing next to Ms N. As he was talking to them accusing them of stealing the firewood, they were looking at him in the eyes and he even asked them as to why they were looking at him like that and swore at them not to look at him. Their further evidence was that they were seeing him for the first time at the time of the incident.

[17] As regards the incident of 19 August 2013 Ms Z's evidence is important in the following respects: Two months after the incident, she saw the appellant in the forest again and called the police. This led to the arrest of the appellant. In her evidence about what happened on the day of the incident, she testified that as they were gathering the firewood in two groups, she did not know what the appellant said to the other group which was on the other side but she just saw them dropping the firewood on the ground and running towards her group. The appellant followed the group as it was coming to them. He asked her group as to why were they stealing the firewood in the bush. As they were responding, he swore at them and said he was going to teach them lesson. He ordered

them to sit down. They attempted to run away but could not and they went to sit down. He covered them with the towels they used to carry the wood. They could see him. His face was not disguised. She was able to look at him.

[18] Ms Ma's evidence under cross-examination was that the appellant did not cover their whole faces with the towels, he only covered the side. This evidence corroborated that of Ms Z.

- [19] Further to this evidence all the complainants were able to point him out at the identification parade. They all testified that they were seeing him for the first time on the day of the incident. The incident happened during the day. They spoke to the appellant. They had sufficient opportunity to look at him in order to make a proper identification. As he was busy doing what he was doing, the scene was not moving, they had a better chance of watching him more so that what he was doing at the time, he was not doing it to them. Even though they were ordered to face the other direction while he was busy raping one of them, their evidence was that they kept on looking at him and they could see his face. Ms Nx testified under cross-examination that it took her less than an hour to observe the appellant during the incident.
- [20] The appellant testified that on the day of his arrest a person alighted from the police van in which he was also a passenger. That person did not testify but was the one who pointed him out at an identification parade. He also raised the issue that he was denied legal representation at the identification parade.
- [21] His version was further that on the days of the two incidents he was at work the whole day. He worked from Monday to Saturday from 04:00 to 20:00 and he was arrested on a Sunday.
- [22] In rejecting his evidence and accepting the State's evidence relating to his identification, the trial court accepted the evidence that he was seen by Ms Ng, one of the state witnesses at the river a week after the first incident, which evidence was not contested and the evidence of Ms Z that two months after the incident she saw him at the forest and this led to his arrest. The trial court also accepted that when he testified under cross-examination he was shown the identification parade form completed by Captain Engelbrecht where he stated that the appellant did not want to have a legal representative at the identification parade. The issue about him being denied legal representation at the identification parade only emerged when the appellant testified. It never featured when the state witnesses were testifying. Together with the above evidence the trial court asked itself as to why two groups of witnesses who were allegedly raped by the appellant on different dates, a month after another, could identify him the same way after what he did to them and their evidence as to what happened be the same. The trial court took into account that the witnesses did not know each other. There was no evidence that they spoke to each other after the incidents. The same *modus operandi* was used to gather them to the one place where they were ordered to sit down and look to the other direction while he was raping one of them. They were all raped in the bushes during the day while they were going to fetch firewood and the towels and/or blankets they used to carry the firewood, were used to cover their faces while he did what he was doing. After one of them saw him in the forest, police were called and they all identified him as the perpetrator at the identification parade.

[23] I am satisfied under the circumstances with the trial court's reasoning in this regard and in my view there is no reason to fault its findings as I cannot find any misdirection. In my view the identity of the appellant as the perpetrator was proved beyond a reasonable doubt and the absence of the DNA evidence will not take the case against the appellant any further.

[24]

The following personal circumstances of the appellant were placed on record in mitigation of sentence: He was 26 years old at the time of sentence which means that he was 24 years old at the time of the commission of the offences in 2013. He was single and had one child who was nine (9) years old at the time. He did not have any previous convictions. He pleaded guilty on the count of escaping from lawful custody. It was submitted on his behalf that by pleading guilty on that count he showed remorse, all the

complainants in the rape cases seemed to be doing well after the incidents, they did not sustain injuries as a result of the incidents

and no victim impact reports were presented in court. The trial court misdirected itself by failing to consider the following factors in deciding whether or not substantial and compelling circumstances existed to justify a deviation from imposing the prescribed minimum sentence:

the degree of violence used during the incidents, the lack of serious injuries to the private parts of the complainants, the period of almost 2 years which the appellant spent in custody while awaiting the finalisation of the trial.

[25] It was further submitted that the trial court failed to ensure that all available facts were properly enquired into before a decision was made that the ultimate sentence of life imprisonment could be imposed. Counsel for the appellant also argued that it is not known from the given facts whether the appellant attended school or not, whether he was employed at the time of his arrest or not and whether he earned an income, where the child resided and whether it was being cared for, whether the appellant could be rehabilitated and what his background was.

[26] The following factors were placed on record on behalf of the State in aggravation of sentence: That the two incidents of rape happened on different dates in less than a month. They all took place in the bushes. On both occasions the appellant was armed with a knife which he used to threaten the complainants and on the second occasion, he was also armed with a knobkierie. On the incident which took place on 19 August 2013, the two complainants were raped one after another. They were threatened not to run away and a towel was thrown over their heads while the appellant was busy raping one of them. The offence of rape is serious and prevalent. The appellant did not show any remorse nor did he regret his actions. He cannot be regarded as a candidate for rehabilitation.

[27] The basic approach in every appeal against sentence was set out in *S v Rabie* 1975

(4) SA 455 (A) at 857D-F to be the following: the court hearing the appeal-

"(a) should be guided by the principle that punishment is 'pre- eminently a matter for the discretion of the trial court', and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been Judicially and properly exercised.”

The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see

also *S v Giannoulis* 1975 (4) SA 869 (A); *S v Barnard* 2004

(1) SACR 191 (SCA) at 194C-D, *S v Ma*

2013

(2) SACR 129 GNP at [131].

[28] In *S v Ncheche*

[2005] ZAGPHC 21; 2005 (2) SACR 386 (W) the Full Court also held that sentencing fell primarily within the discretion of the trial court and that an appeal court may only interfere where the trial court has not properly and reasonably exercised its discretion when imposing sentence. It further held that where that sentencing discretion was properly and reasonably exercised, the appeal court has no power to interfere. Within this context, the Full Court pointed out that a trial court in imposing sentence is not bound by sentences imposed by other courts, including higher courts, as long as it exercises its sentencing discretion reasonably. See *S v Holder* 1979 (2) SA 70 (A) at 80D and *R v Karg* 1961 (1) SA 231 (A) at 236H where the following was stated:

"Fourthly and finally, it was contended for the appellant that SNYMAN, A.J., paid no, or no sufficient regard to the trend of judicial decisions quoted to him. It may be accepted that sometimes a succession of punishments imposed for a particular type of crime provides a useful guidance to a court dealing with such a crime. But each case should be dealt with upon its own facts connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for a court to depart from."

[29] The court in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and sentence that the appellate court would have imposed had it been the trial court, is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate' (see also *Madiba v S* [2015] JOL 33686 SCA).

[30] In *S v Radebe and Another* 2013 (2) SACR 165 (SCA) it was held that the period of pre-sentence detention becomes part of the totality of factors which must be weighed in order to determine whether substantial and compelling circumstances exist to reduce the sentence from the prescribed minimum. At para (13) it was held that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by the accused awaiting trial (see also *S v Seboko* 2009

(2) SACR 573 NCK at para (22)). The court further stated the circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. It further held that the test is not whether on its own that period of detention constituted a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime(s) committed: Whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing is a just one.

[31] In support of his submissions, counsel for the appellant referred us to the cases of *S v GN* 2010 (1) SACR 93 (T) and *S v Mokgara* 2015 (1) SACR 634 (GP) where the following was held:

S v GN

"A court must bear in mind that life imprisonment is the ultimate penalty that the courts in this country can impose. As such it must not be imposed lightly, even when it is a prescribed minimum sentence. It is axiomatic that, in order for it to arrive at a just sentence, a court must have a balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interest of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed."

S v Mokgara

"When an accused's legal representative failed to prove substantial and compelling circumstances, whether it was due to the accused's refusal to give proper instructions as it might jeopardise his chance on appeal on the merits, and/or a lack of taking proper instructions, and/or a lack of experience, or for various other reasons, the law was clear that in such instances the legal duty remained on the presiding officer to ensure that all available facts were properly enquired into before a decision was made that the ultimate sentence of life imprisonment could be imposed.

Held, further, that in the present case there was simply not enough evidence placed before the magistrate to make an informed decision.

In such instances there was a duty on the presiding officer to put pertinent questions to the appellant's legal representation in order to determine facts that might be relevant to the issue. The presiding officer should also consider obtaining a probation officer's report and/or a victim impact report if necessary. In the present case there was a specific lack of evidence regarding the injuries caused, the level of violence perpetrated, and the emotional trauma caused. Nothing was known about the appellant's background, his marital status, whether he was employed and

whether he could be rehabilitated. In the circumstances the sentence had to be set aside."

[32] In the *Malgas* matter and endorsed in *S v Dodo* 2001 (2) SACR 594 (CC) at 602-603 it was held that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the offence in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If the court is satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence then the court is bound to impose that lesser sentence.

[33] The J88 medical reports completed in respect of Ms N, Ms Nx and Ms Z were handed in by agreement and formed part of the record. The clinical findings made in respect of Ms N were that there was an alleged sexual assault. It is stated that a condom was used. The gynaecological examination revealed that the urethral orifice was erythematous, the para-urethral folds was pinkish and there were no scars, tears, bleeding and increased friability in the posterior fourchette. The labia majora and minora were normal and there was no configuration, swelling and fresh tears in the

hymen. There was no bleeding and tears in the vagina while the cervix and the perineum was moist. She was 22 years old at the time of the incident.

[34] Ms Nx was only 16 years old at the time of the incident. According to her J88 medical report, she did not sustain any physical injuries. She was crying when she was examined. She was not active at the time and no condom was used in the process. There were tears in the posterior fourchette and the fossa navicularis and in the hymen the configuration was anular and there was some swelling. A white discharge was seen in the vagina while there were no injuries in the perineum. No injuries were noted when the anal examination was done.

[35] Ms Z was 20 years old at the time of the incident. The J88 medical report stated that she did not sustain any physical injuries. A condom was not used. There were no injuries in the urethral orifice, labia majora and minora, the posterior fourchette and fossa navicularis. The configuration in the hymen was remiscent. There was a white discharge in the vagina and there were no injuries in the vagina, cervix and the perineum. The doctor noted that the absence of injuries does not exclude penetration. No injuries were noted upon anal examination.

[36] In *S v Chapman*

[1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 58-C, rape was described as follows:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible, civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[37] At para [35] of the Ncheche judgment the crime of rape was described as follows:

"Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and the vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our legislature, and the community at large, correctly expects our courts to punish rapists very severely."

[38] It is clear from the J88 medical report completed in respect of Ms Nx that she was not active at the time of the incident. The appellant broke her virginity. This is, in my view, aggravating (see *S v R* 1996

(2) SACR 341 (T), *S v Boer* 2000

(2) SACR 114 (NC). It is more aggravating that Ms Z and Ms Nx were raped one after another and a condom was not used in the process (see *S v P* 2011

(1) SACR 448 (SCA)). The fact that the appellant did not wear a condom exposed the victims to the risk of sexually transmitted diseases and/or infection from Aids (see *Mavundla v S* 2011 Justice on line 27972 (GNP)).

[39] In arriving at the conclusion that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence, the trial court took into account that the rapes the appellant was convicted of were committed at the same place, they arose from two different instances where the same modus operandi was used, he raped four different women who were young, he used a knife to threaten them and did not show any remorse.

[40] The magistrate erred by sentencing the appellant on four counts of rape while he only convicted him of three counts of rape. It appears that the appellant was sentenced in terms of the provisions of s 51(1) of Act 105 of 1997 read with Part I of Schedule

2. The section provides that a person who has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions, faces a sentence of imprisonment for life unless the court sentencing him finds that there are substantial

and compelling circumstances justifying a deviation from the imposition of the prescribed minimum sentence.

[42] It must be accepted that the rapes committed were not the most severe forms of rape, apart from what I mentioned above at para 34 of the judgment in relation to what was stated in the J88 medical report of Ms Nx. From the J88 medical reports of Ms N and Ms Z the doctor did not find any physical and vaginal injuries. Even on the J88 medical report of Ms Nx no physical injuries were found. There was no evidence of violence except that the complainants were threatened with a knife and a knobkierie during the second rape. There was also no evidence that the victims were negatively affected as a result of the rapes except that Ms Nx was

crying when the doctor who completed the J88 medical report was examining her after the incident.

[43] In *S v Nkawu* 2009 (2) SACR 407 (ECG) the complainant did not suffer any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances exist justifying a departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(aA)(ii) of the Criminal Law Amendment Act, 105 of 1997 as far as the absence of serious physical injuries to the complainant was concerned. The subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J correctly held that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences. He correctly 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 appropriate sentence (see also *Mudau v The State* 2012 ZASCA 56).

[44] Having considered the factors in mitigation and aggravation of sentence, I am of the view that the submissions made on behalf of the appellant have merit. In my view there was no sufficient evidence before the trial court to enable it to determine whether there were substantial and compelling circumstances justifying it to deviate from the imposition of the prescribed minimum sentence of life. The trial court had a duty to call for more information to enable it to exercise its sentencing discretion judicially and properly to avoid imposing an unjust sentence. In my view the trial court erred in not calling for such evidence and failure to do so affected its sentencing discretion. I am persuaded under the circumstances after weighing the mitigating and aggravating

factors that the sentence imposed by the trial court is disturbingly and shockingly disproportionate to the offences committed. It therefore falls to be set aside.

[44] I therefore make the following order:

44.1 The appeal against conviction is dismissed.

44.2 The appeal against sentence is upheld and the sentence of the court a quo is set aside and replaced with the following sentence:

"The accused is sentenced to 20 years imprisonment".

44.3 In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substituted sentence is antedated to 11 September 2015, being the date on which the appellant was sentenced.

M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree:

M SELLO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT LA VAN WYK

INSTRUCTED BY PRETORIA JUSTICE CENTRE

FOR THE RESPONDENT S SCHEEPERS

INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF JUDGMENT 1 AUGUST 2017

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