

SOUTH AFRICA / JUDGMENT

## Masuku v S (A261/16) [2018] ZAGPJHC 488; 2019 (1) SACR 276 (GJ) (6 September 2018) [2018] ZAGPJHC 488

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally, Van der Linde, Keightley

CASE / FILE NUMBER

A261/16

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### Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: 08/36380

Case

No.: A261/16

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

6/9/2018

In

the matter between:

Masuku,  
Thato Appellant  
and  
The  
State Respondent

## JUDGMENT

Vally J

### Introduction

- [1] The appellant was arraigned in the Regional Court, Johannesburg, on two charges of rape in contravention of section 3 read with the relevant sections of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, of the Criminal Procedure Act 51 of 1977 (the CPA) with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), as amended, being specifically applicable. On 31 October 2014, the appellant, who was legally represented, pleaded not guilty to both charges. On 28 August 2015 he was convicted on one count of rape and acquitted on the other count. On 10 December 2015 he was sentenced to a period of fifteen
- (15) years of imprisonment, his name was entered into the register of sexual offenders[1] and he was declared unfit to possess a firearm.[2] Subsequently, the appellant successfully applied for and was granted leave to appeal against both conviction and sentence.

### Facts

as established from the evidence in the court a quo

- [2] The case against the appellant was that he raped two children on the evening of 12 October 2013, one BK and one SK. At the time of the incidents BK was seven years old while SK was eight years old. The State's case was presented by five witnesses: one Dr Sibongile Nkobi (Dr Nkobi), BK, SK and their respective mothers. Both BK and SK testified while sitting in a separate room adjacent to the court and both were assisted by an intermediary.

- [3] Their testimonies elicited the following material facts:

[3.1] SK and the appellant lived in one flat. The flat consists of three rooms. SK lived in one room of the flat with her mother and another woman named Ms Thabisile Nzima (Ms Nzima). Ms Nzima testified at the court a quo but that was after the appellant was already convicted and sentenced. The appellant lives together with his father in another room in the same flat. He is the owner of the flat which he inherited from his late mother. He leased the two other rooms; one to SK's mother and the other to another lady.

[3.2] On 12 October 2013 at about 20h00 BK was with SK in the room where SK resided with her mother. They were playing. The appellant came to room to borrow a kettle. SK lent him the kettle. A short while thereafter he re-entered the room. This time, according to BK, he took SK, placed her on the bed, removed her panties and raped her by placing his penis into her vagina. Thereafter, he did the same with BK. Both BK and SK desperately attempted to get him to stop harming them. While he was raping BK, SK was hitting him and both of them were crying. Very soon after he had raped both of them BK's mother knocked on the door of the flat and the

appellant opened it to let her in. She asked him whether BK was there with SK. He replied that she was not. However, he let her into the flat. She went to the room where SK and SK's mom lived. The appellant followed her. She opened the door and found that both BK and SK were only dressed in their panties. She enquired as to why this was so. Both BK and SK were crying. The appellant tried to answer the question, saying that they were playing. Before he could continue further BK's mother cut him off and told him not to answer a question not directed at him. The appellant left the room. BK told her that the appellant placed SK on the bed and undressed her and put his penis into SK's vagina. After that he put BK on the bed, undressed her and did the same with BK. She enquired from SK if what BK had relayed was true. SK confirmed that it was true. The appellant claimed that what the two children were saying was untrue. She told the appellant that she would be taking BK to a doctor who would verify whether she was sexually assaulted or not. All this time both SK and BK continued to cry. She asked BK to dress herself, but BK could not find her T-Shirt. She asked SK to lend BK a T-Shirt. SK obliged. She dressed BK and together with BK left the flat. She left SK behind unattended by any adult. The appellant, who it will be recalled resided in the flat, followed BK and her mother, and staying within earshot of them tried to pry into the conversation they were having at the stairs while leaving the building. BK's mother told him to leave them alone. Once outside the building and away from the appellant, she asked BK again what had occurred. BK once again told her mom that the appellant had removed her and SK's panties and had placed something from inside his pants into her vagina. BK's mom took her to the police station where she opened a case of rape against the appellant. Thereafter, she took BK to the hospital where a Dr Nkobi examined BK and confirmed that BK had been raped. She was only able to examine BK at 03h45 the next morning, 13 October 2013.

[3.3] While Dr Nkobi examined BK, BK refused to discuss her experience at the hands of the appellant the previous evening. The doctor found that there was a white discharge on the fossa navicularis of BK; the fossa navicularis was also "red" indicating that it was bruised; her hymen had swelled and that the entire genital area was red and bruised. The hymen, however, was not broken. As a result, she came to the conclusion BK had been penetrated, though she could not be certain of the instrument used to penetrate BK – she could not say whether it was a "finger" or a "penis" or any other instrument that was used. She took a sample of the whitish substance found and sent it for forensic analysis.

[3.4] BK and her mother left SK to fend for herself in the flat. The appellant was also present. SK was in her room. Ms Nzima arrived. SK told her what had happened to her and to BK. SK then went to bed. The next morning her mother who was working night shift arrived home. She found SK sleeping. She awoke SK, ordered SK to take a bath and together with SK she went to church. They returned from church at about 13h00, when she met Ms Nzima in the flat. Ms Nzima informed her as to what had happened. She went to BK's mother to confirm the information given to her. BK's mother confirmed it. SK's mother took SK for a medical examination.

[3.5] The same doctor, Dr Nkobi, examined SK later that day (13 October 2013). However, as SK had bathed and urinated after she was allegedly penetrated there was no evidence of injuries in her vaginal area, but this, in itself, did not allow her to conclude that SK had not been penetrated.

[3.6] BK was able to identify the appellant as the perpetrator of the rape while he sat in the dock. Similarly with SK: she, too, identified him as the perpetrator while he sat in the dock.

[4] The appellant testified in response to the evidence of the aforementioned witnesses called by the State. His testimony was that he was being falsely accused. However, he could not proffer any reason why the two children would falsely incriminate him. His version was that on 12 October 2013 he was in his room in the flat when, at about 13h00, his cousin visited him. Together with his cousin he left and went to Rosebank. He returned at 22h00. Upon his return he was falsely accused of raping the two children. He was adamant that he was not present in the flat when the rapes occurred.

[5] After being convicted and sentenced the appellant successfully applied, in terms of s 309B(5) (b) of the CPA, to lead new evidence in support of his version that he was not present at the flat at the time that BK was being raped. The evidence came in the form of oral testimony from Ms Nzima. At this stage the appellant had changed his attorney. His previous attorney was Mr Mabunda, who appeared together with a Mr Mabuza. Mr du Plessis, his new attorney, commenced representing the appellant from the moment the court a quo considered the question of appropriate sentence.

[6] Ms Nzima testimony, which came after conviction and sentence was passed, was that on the day of the incident, 12 October 2013, she arrived at the flat from work at about 18h20. She met the children BK and SK and asked SK where her mother was. SK informed her that her mother would only be back the next day as she was on night shift duty that evening. She left the flat at around 19h00 to purchase food. She returned at or about 19h30. The children were in the room rented by her and SK's mother. The children were with her in the room until BK's mother arrived, which was around 23h00. BK's mother found that BK and SK were naked. On seeing that the children were naked BK's mother became upset and began shouting at BK. The appellant came out of his room and told her to tell BK's mother that she (BK's mother) was disturbing the peace. BK's mother left with BK. About twenty minutes later BK's mother returned with BK and accused the appellant of raping BK. Upon hearing the accusation, the appellant began sobbing. She told the appellant to go and wake his

father who was sleeping. BK's mother left with BK. Ms Nzima did not witness the rapes of the two children nor did she hear BK or SK make an accusation of being raped when BK's mother first arrived to collect BK.

The proceedings in the court a quo

- [7] There are two aspects of the way that the court a quo dealt with the matter that require comment. They concern firstly the naming of the two children who were the complainants, i.e. BK and SK, and their respective mothers, and secondly, allowing the appellant's attorney to ask certain questions of the two children during cross-examination.

The first matter of concern

- [8] The decision of the court a quo to allow for the naming of BK, SK and their respective mothers resulted in a failure on the part of the court a quo to protect their wellbeing and dignity. It is a central tenet of our law that in everything that affects a child, the best

interests of the child are paramount. This has always been a principle of our common law. The principle is now affirmed by s 28(2)

of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).[3] The principle applies to any litigation concerning the child.[4]

- [9] The principle is extended to civil proceedings: section 5 of the General Amendment Act, 68 of 1957 criminalises the publication of the child's identity in any civil proceedings where the child testifies or where the child is a party to the proceedings: It provides:

5 Information concerning identity of children involved in legal proceedings not to be published

- (1) No person shall publish or make known in any manner the name, address, school, place of employment or any other information likely to reveal the identity of any person under the age of eighteen years who is or has been a party to any civil proceedings or a witness in any legal proceedings of whatever nature, unless the judge, magistrate or other officer who presides or presided at such proceedings, after having consulted any parent or guardian, if any, of such person, consents in writing to such publication or making known.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

- [10] In criminal proceedings dealing with a sexual offence against a child the court is obliged to protect the child complainant in every

possible way without, of course, undermining the rights of an accused person to a fair trial.[5]

This protection must surely mean that the identity of the child should be protected, for that would serve the best interests of the child. Identifying the child compromises the future of the child and places him/her at risk of being ridiculed or pitied and this diminishes the dignity of the child as well as that of his/her parents. The harm suffered by the child is unnecessary and avoidable by simply protecting the identity of the child. Thus, to avoid this unnecessary harm from ensuing it is incumbent on courts to never reveal the identity of the child.

The second matter of concern

[11] The focus here is on the cross-examination of the two children. The appellant's case was that he was not there when the two

children were raped. Accordingly, he did not and could not have perpetrated the offences he stood accused of. The appellant did not, and given his stance could not, dispute that they were raped. He did not challenge the state's version that the two children were penetrated on the evening of 12 October 2013. Despite this his attorney, Mr Mabunda, was allowed to put the following question to BK:

*"Mr Mabunda (appellant's attorney): Did this man who allegedly raped you use a penis by any chance to rape you."*

The prosecutor objected to this question:

*"Prosecutor: Your worship the state will object that this is an unfair question if she has never seen one and does not know one, and she clearly said in her evidence-in-chief that he took something out of his pants she did not look."*

The magistrate ruled that Mr Mabunda should rephrase his question, which he did as follows:

Mr Mabunda: You said that now the person who allegedly raped you removed something from his pants, whatever he removed from his pants was it part of his body?

BK: Yes

At which point, the magistrate intervened:

Court: Do we have anatomically correct dolls in the TV room? Ms Boikanyo are there any anatomically correct dolls there?

...

Court: Let us use those dolls please place them next to the child so that we can then. ...

Following this direction from the court, Mr Mabunda continued:

Mr Mabunda: Thank you. So this thing that he removed from his pants do you know where about in his body was this particular item?

BK: Yes

Mr Mabunda: Can you please tell us or show us where in his body that is?

Before BK could answer the magistrate instructed the intermediary to utilise the dolls:

Court: Wait, Ms Boikanyo just take off the clothes of the male doll so that she can show us.

Court: The top and the bottom thanks, everything from there. Right show us then which part of the body? Where [indistinct] okay the doll that is placed in front of the child and this doll is anatomically correct it is organs of a male, as well as the child has pointed out on the doll an organ that depicts a penis of a male.

Mr Mabunda: Thank you. The very same part that you have just shown now is it the same part of his body that he put or inserted into your vagina?

Court: Are you using, okay Ms Boikanyo can you use a child appropriate language remember the child's description of a vagina is koekoe.

Ms Boikanyo: Okay your worship.

Court: Please use that language please. Are you embarrassed to tell us?

At this point there is silence as BK does not answer:

Court: Yes or no.

What was the answer?

BK: I do not know

Court: What is the answer?

Ms Boikanyo: Though according to the one seeing her it seems like it is hard for her to answer because she is...

Court: We will determine that okay.

Ms Boikanyo Yes your worship.

Court: Proceed Mr Mabunda. Are you still well [BK] do you want to continue?

Ms Boikanyo: She is crying Your Worship.

Court: She is crying?

MS Boikanyo: Yes your worship

Court: Okay we will stand the matter down and see, let us do some other postponements let us see whether she can continue or not.

[12] It is clear from this exchange that BK found the cross-examination as well as the intervention from the magistrate very distressing. She continued to cry during the adjournment and informed her parents that she did not want to continue any longer. This was conveyed to the court and the matter had to be adjourned for about two months.

[13] On resumption of the proceedings, the cross-examination of BK continued. Once again, the theme of how she was raped was pursued. It seems none of the main role players – Mr Mabunda for the appellant, the prosecutor or the magistrate – had reflected on the experience of the child at the previous sitting. They merely continued as if nothing significant had occurred. And so the cross-examination went along the following lines:

Mr Mabunda: Tell me when this alleged rape took place did the person who raped you use a condom?

Prosecutor: Your worship the state is going to object maybe the defence should first determine whether this child knows what a condom actually is. I am just worried about the language and the use of that.

At which point the Court intervened:

Court: Let us find out first from the child whether the child knows because if she does not, let her answer she will tell us if she knows or not.

Mr Mabunda: As the court pleases. Do you have an answer to that?

Court: Can you repeat that question again?

BK: No

Court: Do you know what a condom is?

Court: Did he use an object that is formed in a plastic like it is a balloon but it is a plastic like on his penis?

Then Mr Mabunda takes over:

Mr Mabunda: So no object was used during the alleged rape like in a form of plastic?

But before BK could answer the Court asked:

Court: It may be like it is a rubber like substance, rubber like object?

BK: I did not see that.

Mr Mabunda resumed his questioning:

*“Mr Mabunda: So he inserted his penis on your vagina the way it is?”*

Mr Mabunda: What did he do then?”

At which point the magistrate realises that the question could be confusing and sought clarity from Mr Mabunda:

Court: What is the question, what is your question Mr Mabunda? What did he do what is the question?

Mr Mabunda: What did he do yes?

Court: He do?

Mr Mabunda: Yes, he undressed his trousers the first time and his penis.

Court: Demonstrate to us. ... All right show us what he did what did he do with those dolls? There are now two dolls which are anatomically

correct placed in front of the witness. ...

The one is dressed in a female doll [indistinct] the witness now demonstrating first by removing the pants of the male doll. Then she takes, she took then the female doll, wait, wait, wait and the witness....

BK: Firstly, he undressed, he undressed his trousers and then he took me and he undressed me.

Court: The witness firstly now they are taking the male doll removing the pants of the male doll, take the female doll remove the panty of the female doll, on the female doll proceed. And the witness now takes the male doll place it on top of the female doll and the female doll is facing up lying on its back, the male doll is facing down on top of the female doll and then the witness demonstrate with her hands on top of the buttocks of the male doll making a jerking movement moving up and down up and down.

Mr Mabunda: As he was busy making those up and down movements had he penetrated you by then?

BK: Yes.

Mr Mabunda Do you know how big was his penis?

Mr Mabunda Can you depict or show us how big it was?

Court: ... the witness is now demonstrating she is taking two, her hands both hands and she is taking the index finger of both hands and showing how big it is, in other words she is making a circle like on both her fingers showing how big that is the size of both her hands touching together the left and the right hand, the right finger or the left finger and the right index finger as well as the thumb, both thumb left hand and the right hand and the index finger of the left hand and right hand touching together in a form of a circle.

Mr Mabunda: Thank you Your Worship. Are you sure it was that big?

Mr Mabunda At that stage your vagina was it dry was it wet or not?

Prosecutor: Your worship the state is going to object.

Court: Why do you ask this question how will a child know about that?

Mr Mabunda: Thank you Your Worship I will rephrase my question I withdraw that question. ... Did you feel or suffer any injuries when he penetrated you?

Mr Mabunda What kind of pains did you feel?

Court: How would let me just find out wait, wait, wait. I do not understand your question pain is pain the difference between pains, are you talking about the severity of the pain or was just not that severe is that what you want to find out.

Mr Mabunda: Thank you Your Worship I will rephrase my question. What kind of injuries you said that you suffered injuries am I correct?

Mr Mabunda: What kind of injuries did you suffer?

BK: I was injured severely.

Mr Mabunda: Did you bleed in the process?

BK: No.

Mr Mabunda: Do you know if ever the person who raped you ejaculated on you?

Mr Mabunda: Did you see the doctor about this?

Mr Mabunda: Do you know why you did not go to see the doctor?

BK: No” (Emphasis added)

[14] SK was subjected to the same intense and crude questioning, though it was not for as long as BK was forced to endure. Her reactions, too, demonstrated that she was, like BK, extremely traumatised by the cross-examination.

[15] Bearing in mind that BK was a nine year old child (who was seven years old at the time of the rape) that the attorney Mr Mabunda was questioning, it has to be said that he certainly crossed the line of common decency and conducted himself in a manner contrary to his ethical duty as an officer of the court. To ask a child questions about the details of a man's anatomy, or to query her knowledge about intricate sexual matters is to show grave disrespect to the child. In my judgment it is generally wrong for a child to be subjected to such crude cross-examination. There was nothing to be gained by asking the child questions which only made the child re-live her ordeal: there was no probative value to the questions as none of them addressed any matter that was in issue: the size of the appellant's penis or whether BK's vagina was wet or not were not in issue. As a result, the questions elicited nothing of substance. They only served to embarrass BK and her parents. They were prejudicial to the dignity

of BK and BK's parents who had to silently and helplessly endure watching their child being forced to suffer the attack on her dignity and the pain she was experiencing while testifying. Apart from damaging BK's dignity they caused BK significant mental stress, anguish and long-term psychological harm.

- [16] The questions as well as the tone used by Mr Mabunda demeaned the court and its processes. It is important that legal representatives avoid becoming overzealous in the pursuit of their client's case and lose all sense of proportion. The court is not a venue for the kind of gratuitous conduct that Mr Mabunda engaged in, nor is the process of cross-examination availed for such conduct. The questions quoted above should never have been allowed or asked. It is this kind of questioning that deters many rape victims from reporting their ordeal to the authorities and from seeking justice. The result is an undermining of the public interest in seeing all sexual assaults reported and prosecuted. The magistrate should not have allowed them: it is the duty of presiding officers to vigilantly guard against allowing such pointless questions being raised whose only effect is to cause embarrassment and psychological harm to the victims of these brutal assaults. Presiding officers should remind legal representatives of their duty not to disrespect the child (and even an adult for that matter) they are cross-examining and not to demean the court and its processes.
- [17] Immediately after focussing on the anatomy of a male and the nature and details of sexual activities, Mr Mabunda proceeded to accuse BK of being deliberately untruthful to the court. The fact that he had no real basis for this did not deter him at all. His cross-examination proceeded as follows:

*"Mr Mabunda: Thank you. Thank you Your Worship. It is my instructions that you are misleading this court the accused did not rape you*

BK: He raped me

Mr Mabunda: It is further my instructions that he does not dispute having been at the same flat where you were on that particular evening. Do you have anything to say about that?

BK: He was there.

Mr Mabunda: Thank you Your Worship. It is further my instructions that when he got to the flat there was a lady by the name of Thabisile. That lady went out. And then now he went to his room and he went on about his business until there was a knock at the door. There was a person that was busy knocking at the door. I omitted something to say that now on that night it was not long actually before he got in to the house because he was somewhere else, he walked into the house that particular evening and then went straight to the house and then there was that particular knock.

Mr Mabunda: And then as he went to the door a woman was at the door who actually started making accusations that he raped you.

BK: Yes he did rape me.

Mr Mabunda: It was the first time that he saw this particular woman as he did not know her.

BK: Yes she did not know her because my mother never used to go to Sheila's place.

Mr Mabunda: He explained himself to this woman that he does not know anything about these allegations and that he is denying them he did not rape you.

BK: It was him.

Mr Mabunda: He was shocked a few days when he was approached by the police and arrested for this offence.

BK: It was my mother who called the police on him.

Mr Mabunda: And that in the process of their investigations samples were drawn from him for testing and they came out negative.

Prosecutor: Your Worship the state is going to object that is without going into other evidence that is misleading to put to this witness, they did not come out negative they came out inconclusive which is two different aspects.

Court: It is a matter for argument you cannot put to child she cannot respond to that she has no idea how.

Mr Mabunda: Indeed

Court: Samples are analysed at the forensic laboratory.

Mr Mabunda: In a nutshell this confirms his denials that he never raped you and therefore even before this court today he is confirming same that he did not rape you.

Ms Boikanyo: Your Worship she is crying let me reach for toilet paper.

Court: Crying oh just get, we are about to finish now [BK] okay.

Mr Mabunda:: I have no longer questions for her safe to say waiting for the answer.

Court: Okay this the last question okay Mr Mabunda is saying it is the last question okay.

BK: Why are the doctor's saying that I have been raped?

Mr Mabunda: No we know what the doctor's told us what do you say were there? Are you upset?

Mr Mabunda: I see she is [indistinct]

Court: Hey man you may please shut up

Mr Mabunda: No further questions thank you Your Worship." (Emphasis added)

[18] This line of questioning, too, was inappropriate. Incidentally, the same line of questioning was directed at SK who, too, was distressed by it. As with the previous line of questioning, these questions should never have been allowed to do this. In this context the following instructive pronouncements of Ngcobo J bear reminding:

*“[1] Until recently, the law did not pay much attention to the stress that child complainants in sexual offence cases suffer when they testify in courts. Child complainants in sexual offence cases were required to relive the horror of the crime in open court. The circumstances under which they gave evidence and the mental stress or suffering they went through while giving evidence did not appear to be the concern of the law. And, at times, they were subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. Regrettably, although there were welcome exceptions, the plight of child complainants was seldom the concern of those who required them to testify or those before whom they testified.*

[2] The advent of our constitutional democracy must change all of that. Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistent with these values, s 28(2) of the Constitution requires that in all matters concerning a child, the child's best interests must be of paramount importance.”[6]

[19] It certainly does not serve the best interests of the child to subject her to gratuitous cross-examination or to allow cross-examination

that accuses her of being untruthful. The duty of the court to vigilantly guard the best interest of the child in cases such as

these was emphasised by the Constitutional Court:

*“... s 28(2) [of the Constitution] is an injunction to courts to apply the principle that the best interests of the child are of paramount*

importance in all matters concerning the child. It is incumbent upon all those who are responsible for the administration of justice to apply the principles of our criminal law and criminal procedure so as to protect child complainants in sexual offence cases from secondary trauma that may arise from testifying in court. Judicial officers are therefore obliged to apply the best-interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of the intermediary.”[7]

Analysis of the merits of the appeal

[20] The first question for this appeal is whether the state had proven beyond reasonable doubt that the appellant had raped BK. As the appellant was acquitted by the court a quo of raping SK, and as the state had failed to appeal this finding, no further attention need be paid to that part of the court a quo's verdict.

- [21] The evidence of BK, SK and the doctor clearly reveal that BK was raped and that the appellant was the perpetrator of the rape. None of the testimonies were contradicted in any material way, nor were any internal inconsistencies identified in their testimonies. In fact, all their testimonies were carefully, coherently and lucidly presented. Both SK and BK withstood brutal and bruising cross-examination. The magistrate in my view correctly accepted their testimonies without more.
- [22] At the same time, the appellant's account of why he was blamed for raping BK is, in my view, not reasonably possibly true. His account was nothing short of a manufactured falsehood. He was unable to deal with the crucial question as to why two young children would falsely incriminate him. Similarly with BK's mother who had no previous encounter with him: she had no reason to falsely accuse him of raping BK. He was vague in his account of his absence at the time the two children were raped and was not able to present any confirmatory evidence supporting his alibi that he was elsewhere at the time. His attempt to produce some confirmatory evidence, which evidence was allowed after he was already convicted, did not succeed in creating any doubt about the conclusion (arrived at by having regard to all the evidence prior to this new testimony being provided) that he was the perpetrator of the rape endured by BK. The evidence of Ms Nzima was not helpful for she was out of the flat for a time and the question of whether that was the time when the rape took place was never explored.
- [23] The appellant attacked the finding of the court a quo, which was that the evidence against him was reliable and trustworthy. His counsel, Mr du Plessis, contended that the evidence of BK and SK could and should not be believed because they were children who were not only prone to being influenced by BK's mother but were actually so influenced. There is absolutely no merit in this submission. Mr du Plessis was asked on numerous occasions to proffer an explanation as to how his submission could be reconciled with the uncontradicted objective evidence that there was a white discharge on the fossa navicularis of BK, the fossa navicularis was bruised, her hymen had swelled and that the entire genital area was bruised, all of which were indicative of her being penetrated.

His answer was she probably suffered "self-inflicted harm". The answer bore no relation to the facts as established by the uncontradicted evidence. What is worse is that the appellant made no effort to present any evidence in the court a quo that could even remotely support such a submission. Yet Mr du Plessis saw no problem in making this submission on appeal. This is unfortunate for it presented BK and SK as liars and vindictive children who had no qualms in implicating an innocent man in a heinous crime, and who had the capacity for being particularly scheming and clever enough to fool BK's mother, SK's

mother and the doctor. The irrationality and unreasonableness of this submission escaped Mr du Plessis. For Mr du Plessis to make such a careless submission on appeal is simply wrong. It is, as he was wont to admit, simply speculative with no basis in fact or in logic.

[24] Further, he contended that the fact that the doctor had failed to find any corroborating scientific evidence giving credence to the evidence of the two children (such as the appellant's DNA on any of the children) was an indication that the children were not honest in their testimonies. The logic propounded by Mr du Plessis is inherently unsound. The non-existence of corroborating scientific evidence is no proof that the viva voce evidence of the two children was false. The veracity of their evidences can and should be tested by its internal consistency and by their individual credibility, which is decided upon after having regard to the scrutiny it was subjected to during cross-examination.

On these scores, there can be no intelligent criticism against their testimonies. The evidence of both BK and SK was trustworthy. Given the testimonies of BK and SK and the findings of the doctor, the probability that BK was raped on 12 October 2013 is so strong that a factual finding to this effect is not just appropriate but unavoidable. It is also an established fact that on this day at the time that the rape occurred she, together with SK, was in the flat belonging to the appellant. It is also an established fact that he was there at some point during that time. There is also no evidence of any other male person ever being in the flat at that time on that day. Unsurprisingly then, when invited by the Court to make submissions on what the Court should do if it comes to the conclusion that BK was raped, Mr du Plessis answered: "in that case, the appellant must be convicted." The concession was correct.

[25] Hence, I come to the conclusion that the state had proven beyond reasonable doubt that the appellant had raped BK on 12 October 2013 and that his conviction by the court a quo is safe.

Sentence imposed by the court a quo

[26] Sub-sections 51(1) and (3) of the CLAA, read with Schedule 2 of the same Act, make it plain that the court can depart from the minimum sentence of life imprisonment only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a sentence lesser than life imprisonment. The import of ss 51(1) and (3) of the CLAA was best summarised in *S v Malgas*.<sup>[8]</sup> The fundamental lesson procured from *Malgas* is that courts are to take note of the fact that the Legislature in all its wisdom has seen fit to ordain specified minimum sentences in certain specified crimes; that they are not to deviate from these minimum sentences for "flimsy reasons", and that a departure from the minimum sentence can only occur where there are "substantial and compelling grounds" for doing so. Courts have to provide sound reasons for departing from the minimum sentence prescribed in ss 51(1) and (3) of the CLAA. Sentencing courts have been reminded of this many times by the Supreme Court of Appeal. One such unambiguous reminder is to be found in the *Matyityi* where Ponnann JA said:

*“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 follows that, to borrow from Malgas, it still is '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 sentences 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 the 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 State, owe their fealty to it. Our constitutional order 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 hypotheses that appear to fit the particular sentencing officer's 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.”[9] (Emphasis added)

[27] After pronouncing on the guilt of the appellant, a pre-sentence report from a qualified social worker was commissioned and provided. The social worker explored some of the facts relating to the appellant's circumstances. The two most important ones were that he had been affected by the untimely death of his mother, which occurred on 5 April 2013, and that he had become severely depressed since being imprisoned. There was no mention in the report that he was remorseful for his actions. The social worker was not able to make contact with either BK or her mother and was therefore unable to enlighten the court as to how they were coping with the trauma they endured. She discussed various sentencing options but her report on this score was academically oriented and therefore of little practical value.

[28] The appellant did not testify in mitigation of sentence. Nor did he call any of his family members or anyone else to do so.

[29] The appellant was sentenced to a period of 15 years imprisonment. The magistrate was cognisant of the fact that he was enjoined by the Legislature to impose a sentence of life imprisonment on the appellant but found that a departure from this prescribed minimum

sentence was justified as there were compelling and substantial circumstance that redounded to the benefit of the appellant. The

magistrate reasoned this as follows:

*“The [appellant] was 19 years of age at the time the offence was committed. He was a first offender and has been in custody now for 26 months awaiting finalisation of the matter. The time he spent in prison, awaiting trial, being two years and two months certainly does not qualify as flimsy grounds.*

The minimum sentencing regime stipulates the age of the victim as needing to be younger than 16 years for life imprisonment to kick in. Accused is still a young man. The doctor that examined [BK] only found redness on the fossa navicularis and bruises and swelling on the hymen and the hymen was irregular.

When Court decide [sic] on imposing sentence it has to take into account all factors that have been placed before it. This particular crime has undeniable [sic] escalated. But however, while retribution remains a sentencing objective this does not mean that disproportionate sentences may be imposed on offenders.

Whether life imprisonment is an appropriate sentence, particular [sic] in respect of its proportionality to the particular circumstances of the case requires careful consideration. The minimum sentence prescribed by law which in the circumstances of a particular case would be unjustly disproportionately [sic] to the offender and to society would [sic] justify the imposition of a lesser sentence than the one prescribed by law.

In respect of the severity of the rape, it was explained in the medical report that the doctor found redness on the fossa navicularis and swelling and bruises on the hymen and that is all that he [sic] found. There was no further violence in addition to the rape.

Having weighed the mitigating factors against the gravity of the offence, taking into account the age of the accused at the time the offence was committed, the period he was in custody awaiting finalisation of the matter, him being a first offender, all these factors constitute substantial and compelling circumstances.” (Emphasis added)

[30] The crux of the magistrate’s reasoning for departing from the prescribed minimum sentence is that (i) the appellant was young; (ii) he was a first offender; (iii) the rape was not serious because it did not result in serious physical harm to the anatomy of BK; and (iv) the appellant spent twenty-six months in prison awaiting finalisation of his case. The magistrate was simply wrong on the third factor (the rape was not serious). This erroneous conclusion on his part resulted in him actually trivialising the experience of BK and the harm (physical and psychological) that she suffered. Whilst he was allegedly (I say allegedly because he was acquitted of this crime) raping SK they were both crying. In the case of BK the trauma manifested itself during her testimony when she was forced to relive her ordeal. Rape in general is no minor offence. It is a brutal violation of the humanity of the victim. It causes significant permanent harm to the victim. In the case of a child who is incapable of fully grasping the import of sexual activity the wound caused by rape hardly ever heals. Once grown-up and entitled to engage in consensual sexual activity the danger of the wound opening during her most intimate moments and thereby depriving her of engaging in and enjoying what is simply a natural activity for most human beings is real and cannot be underestimated.

[31] To conclude that the rape of BK was not serious because there was no significant physical harm detected on the anatomy of BK was a significant misdirection. The court a quo did not, in my view, accord sufficient weight to the fact that the rape of BK was brutal. The court a quo also did not give any credence to the fact that he remained unremorseful about his actions. In these circumstances, I hold that

the interests of justice require that a misdirection of this proportion has to be rectified by this Court.

[32] The state, however, did not appeal against the sentence imposed by the court a quo although at the commencement of the hearing it submitted that the sentence was too lenient and that this Court should set it aside and impose the one prescribed by the Legislature in ss 51(1) and (3) of the CLAA. The state's conduct is disturbing. If it believed that this Court should amend the sentence it is duty-bound to bring a cross-appeal. Instead it remained silent up until the date of the hearing. This is not the first time this Court sitting in appeal has encountered the state adopting this approach. Fortunately, this was raised at the commencement of the hearing, allowing for it to be postponed so that the appellant could be given an opportunity to present further submissions on this issue. The appellant was specifically put on notice of the possibility that the sentence may be increased should this Court confirm the conviction.[10] He was invited to make submissions on whether the Court is empowered to increase the sentence and if so whether it would be appropriate to do so in the circumstances of this case. Further submissions were received from both parties. There was no debate between them that this Court is empowered to increase the sentence. On the second issue they disagreed: the appellant took the view that the court a quo was correct in finding that there were substantial and compelling circumstances to depart from the prescribed minimum sentence and the state took the view that there were none.

[33] The appellant had committed a heinous crime. He raped a minor child. Rape in general, we know, ranks as a very serious offence. Our courts have repeatedly said this and so has our Legislature by enacting s 51 of the CLAA. Courts have a duty to ensure that the offence is dealt with in a manner that respects the rights of rape victims. During the early years of our constitutional order Mahomed CJ reminded courts of this duty:

*“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.... The Courts are under a duty to send a clear message to the appellant, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. We communicate that message in this case by an order that the appeal of the appellant against his convictions and sentences is*

dismissed.”[11] (Emphasis added)

[34] Noting the afore-quoted dicta found in Chapman, Bosielo JA observed:

*“[17] What is even more disturbing is the emergence of a trend of rapes involving young children which is becoming endemic. A day hardly passes without a report of such egregious incidents. Public demonstrations by concerned members of society condemning such acts have become a common feature of our everyday news through the media.*

[22] ... Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime — particularly where it involves young, innocent, defenceless and vulnerable girls — of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.”[12]

[35] Doubtlessly, the question of an appropriated sentence is always an individualised matter. However, in my view the dicta of Ponnar JA quoted in [26] above is fundamental.

[36] Mr du Plessis urged us not to impose the prescribe minimum sentence because, he said, it would be a disproportionate one. The disproportionality he had in mind is one that focussed on the interests of the appellant. It is disproportionate to his interests as a first offender and as one who was very young at the time he perpetrated the offence. But proportionality has to take into account the interests of society as well as the gravity of the offence. In this sense proportionality and balance are not different: a proportionate sentence and a balanced one are one and the same.

[37] Whilst it is true that there have been some cases in our courts where it has been held that there are degrees of seriousness of rape[13], as Satchwell J points out, an attempt to draw out the degree of seriousness of rapes in general is not without problems. In her

words:

*“... Furthermore, the responses of rape survivors are surely as complex and multi-layered as are the individuals who experience rape. We must therefore expect the manifestation of the impact of rape to be varied in every respect. Some responses will be publicly displayed and others privately endured. Some rape survivors will collapse while other will bravely soldier on.*

It would seem that sentencing courts are expected to view rape as ‘more serious’ where a rape survivor cannot sleep, fears men and sex, is unable to concentrate and cannot complete school, or has a career or relationship destroyed. If this is so, then other rape survivors may question why their rapes are viewed as ‘less serious’ because they may have been fortunate or privileged enough to receive professional assistance, be endowed with different personalities and psyches, exhibit fewer post-traumatic effects and so on. The Legislature does not seem to have intended

the rapist to be less morally and legally blameworthy because the rape survivor appears to or actually does survive, or continues life with less apparent trauma.”[14]

[38] In my view the harm caused to the two children in this case is very serious. They were only seven and eight years old at the time of the incident. To have to undergo the trauma they did at that tender age is no small harm.

[39] I am mindful of the fact that s 51 of the CLAA has not removed the discretion of the court to impose a sentence it deems fair and

appropriate,[15] and that there has been a fair number of judgments where it has been held that the minimum sentence preferred by the Legislature ought to be departed from in certain cases where the rape had not resulted in significant physical harm of the victim. Some of those judgments are referred to in the judgment of my colleague van der Linde J, but those cases, in my view, do not set a benchmark of what an appropriate sentence for the rape of a child should be. In fact, there is a cogent argument to be made that in many of those cases the courts “trivialised the experience of the victims” or “subverted the will of the Legislature” (something that, as Ponnann JA[16] reminds us, has to be avoided). Also, at the same time there are numerous cases where the courts have not deviated from the prescribed

minimum sentences.[17] In any event, what is most common in almost all of the cases cited by my colleague where there was a deviation from the minimum sentence and where the appeal court upheld that sentence is that the appeal court placed great emphasis on the principle that the discretion of the trial court to impose a sentence must not be lightly interfered with. That principle I accept, but in my understanding the principle is not that the discretion should never be interfered with. In a case where the discretion has not been appropriately exercised by a court a quo, the appeal court should interfere whether it be to increase or decrease the sentence. The question of whether the court a quo has appropriately exercised its discretion will depend on the reasoning that supports the outcome. In this case the court a quo imposed a sentence of 15 years imprisonment. This I must say is a significant departure from the suggested mandatory one. In my view this is much too lenient a sentence.

[40] In my judgment, the fundamental approach in a case such as this has to be one that accepts that the mandatory sentence of life imprisonment

should only be departed from where there is a weighty justification for doing so. And the extent of the departure must be proportionate.

It cannot be so lenient that it loses altogether the importance of giving effect to the legislature’s concern about the severity

of the crime, and the interests of society to put an end to it by at the very least making it clear to all perpetrators and would be perpetrators that “it is no longer business as usual”.

[41] I accept that the court a quo was correct to find that the appellant was very young when he committed the heinous deed, that it was a once-off event and not a protracted one (as is often found in the case of rapes of children), he had already served two years awaiting trial, and that he was a first offender who should be given a second chance. A sentence of life imprisonment may deny him that second chance. But, as stated above, 15 years imprisonment is too lenient. I would impose a sentence of 20 years imprisonment but would reduce it to 18 years because of the fact that he already served 26 months awaiting the finalisation of his case. Given the substantial difference between the one I would impose and the one imposed by the court a quo it is only appropriate that I propose an alteration in the sentence.

Order

[42] I propose the following order:

1. The appeal against conviction is dismissed.
2. The sentence imposed by the court a quo is set aside and replaced with the following one.
  - 1 The appellant is sentenced to 18 years imprisonment.
  - 2 The appellant's name shall be reflected in the sexual offender's register.

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VALLY J

I agree:

Van der Linde J

Keightley J

- [1] This portion of the sentence resulted by virtue of the operation of s 50(2) of Act 32 of 2007
- [2] This portion of the sentence resulted by virtue of the operation of s 103(1) of Act 60 of 2000
- [3] It provides: "A child's best interests are of paramount importance in every matter concerning the child."
- [4] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008
- (3) SA 232 (CC) at [14] – [26]; Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others 2009
- (4) SA 222 (CC) at [72] and following; Centre for Child Law v Hoërskool Fochville and Another 2016
- (2) SA 121 (SCA) at [24]
- [5] See, Director of Public Prosecutions, Transvaal, n4

- [6] Director of Public Prosecutions, Transvaal, n4, at [1] – [2]
- [7] Director of Public Prosecutions, Transvaal, n4, at [113]
- [8] 2001
- (2) SA 1222 (SCA) at [25]
- [9] S v Matyityi 2011 (1) SACR 40 (SCA) at [23] See also, S v Nkunkuma and others 2014 (2) SACR 168 (SCA)
- [10] S v Bogaards 2013 (1) SACR 1 (CC) at [58] – [72]
- [11] S v Chapman
- [1997] ZASCA 45; 1997 (2) SACR 3 at 5b-e
- [12] Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) at [22]. See also: S v GK 2013 JDR 1607 (WCC)
- [13] See: Rammoko v Director of Public Prosecutions 2003
- (1) SACR 200 (SCA) at [12]; S v Abrahams 2002
- (1) SACR 116 (SCA) at [29] and S v Mahomotsa 2002
- (2) SACR 435 (SCA) at [17].
- [14] S v M 2007 (2) SACR 60 (WLD) at [99] and [101] In the same vein, the learned author, Pumla Dineo Gqola correctly warns us of the dangers inherent in this approach: “... we often pretend that there are ‘mild’ rapes and ‘brutal’ rapes, terrible but ‘understandable’ rapes versus inexplicable and inexcusable rapes. When we do so, we often speak of the rapes of children and old women as the ‘worst’ kinds of rapes. Yet, they form part of the very fabric of rape in the country – they are neither rare nor different in their brutality. All rape is brutal. It is not possible to speak of some rapes as the worst without suggesting at the very least that some rapes are ‘understandable’. But this system of gradation goes to the very heart of the problem. It will never be possible to eliminate the rapes considered most brutal without dismantling what makes rape not just possible but also so permissible in our society.” (Pumla Dineo Gqola, Rape – A South African Nightmare MF Books (2015) at 8
- [14] S v M 2007 (2) SACR 60 (WLD) at [99] and [101] In the same vein, the learned author, Pumla Dineo Gqola correctly warns us of the dangers inherent in this approach:
- “... we often pretend that there are ‘mild’ rapes and ‘brutal’ rapes, terrible but ‘understandable’ rapes versus inexplicable and inexcusable rapes. When we do so, we often speak of the rapes of children and old women as the ‘worst’ kinds of rapes. Yet, they form part of the very fabric of rape in the country – they are neither rare nor different in their brutality. All rape is brutal. It is not possible to speak of some rapes as the worst without suggesting at the very least that some rapes are ‘understandable’. But this system of gradation goes to the very heart of the problem. It will never be possible to eliminate the rapes considered most brutal without dismantling what makes rape not just possible but also so permissible*

*in our society.” (Pumla Dineo Gqola, Rape – A South African Nightmare MF Books (2015) at 8*

[15] S v Malgas, 2001 (1) SACR 469 (SCA) at [25]

[16] See quote in [26] above

[17] A very recent one is Director of Public Prosecutions v Peli 2018

(2) SACR 1 (SCA) where the SCA increased the sentence of 10 years imprisonment of which 4 years was suspended for the rape of a 6 year old boy to life imprisonment

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