

SOUTH AFRICA / JUDGMENT

NDPP v M and Another (A226/16) [2019] ZAGPPHC 151 (3 May 2019)

[2019] ZAGPPHC 151

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo, Collis

CASE / FILE NUMBER

A226/16

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Source record

IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH

AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE NO: A226/16

3/5/2019

NDPP

RESPONDENT

And

NM

FIRST APPELLANT

FM

SECOND APPELLANT

JUDGMENT

KHUMALO J

- [1] The Appellants, NM and FM, are husband and wife and 1st and 2nd Appellants, respectively. On 14 August 2014 they were both convicted by the Regional Magistrate Court, Middleburg on 2 two counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), and one count of assault perpetrated against their two young daughters, Sand A ("the Complainants"). On 12 March 2015 each was sentenced to 22 years imprisonment on each count of rape, which sentences were to run concurrently and 6 (six) months imprisonment on the count of assault that was wholly suspended for three years.
- [2] NM, who is the Complainant's mother was in addition convicted on a further count for contravention of the provisions of s 54
- (1) of the Act 32 of 2007 for failing to report to the relevant authorities the rape of the children by FM, their father. She was on that count sentenced to twelve months imprisonment wholly suspended for four years.
- [3] The rape charges were read with the provisions of s 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("the Prescribed Minimum Act"), which prescribes upon conviction the imposition of a sentence of life imprisonment, unless there are substantial and compelling circumstances that justifies the deviation from the prescribed minimum sentence.
- [4] With leave of the court a quo, the Appellants are appealing against both conviction and sentence imposed on the two counts of rape. The appeal is opposed by the Respondent, the National Director of Public Prosecutions ("NDPP").
- [5] On the other hand, the NDPP is with leave of this court, cross-appealing in terms of s 310A of the Criminal Procedure Act 51 of 1977 (the Act) against the effective sentence of 22 years imprisonment imposed on each of the Appellants on the 2 counts of rape, pleading for the prescribed minimum sentence of life imprisonment to be imposed. The hearing of the appeals was delayed with several postponement for the purpose of reconstruction of part of the record. The record, transcribed in Afrikaans consists of 2260 pages.
- [6] The Appellants were duly represented throughout the trial. They both pleaded not guilty to all the charges. They neither proffered a statement in plea explanation nor testified, exercising their right to remain silent in terms of s 35 (h) of the Constitution.

Background Facts

- [7] At the time the offences were committed Complainants S and A stayed with both MN and FM, their mother and father. The Complainants S and A were found to have been raped by FM since 2008, from the time when S and A were aged 4 and 8 respectively, the situation enduring for a period of 3 years until on or about 2011 when the rapes were discovered and

their parents arrested and charged. At that time of the arrest A was 7 years old and in grade 1. She had complained to one Ms Serfontein, her Grade 1 teacher about a certain Ounooi, a family member who was hurting her. As a result of that report and the fact that A was also having hygiene problems, struggling to keep up with her school work and frequently absent from school, Serfontein arranged for A to be examined by a certain Dr Geldenhuys. That led to the arrest and bringing of charges against both their parents. The physical examination of the children later revealed that A was without a hymen and S was left only with remnants of the hymen.

[8] The Appellants were convicted in the court a quo following the testimony of the Complainant s who were the key witnesses and that of 5 other state witnesses that included three health professionals, two of whom are a medical doctor and a forensic nursing sister who conducted the physical and medical examination of the Complainant s and completed the J88s. The third health professional is a medical practitioner, who gave expert evidence on the J88 findings. The other witnesses were Serfontein, A's Grade 1 teacher and a police forensic social worker who handled the forensic investigation of the Complainants. No evidence was led on behalf of the Appellants. At the end of the trial the court a quo found the state's evidence to have established the Appellants' guilt beyond reasonable doubt on all the charges.

[9] The Appellants are appealing against their conviction on the ground that the court a quo erred in finding that the State proved the charges against them beyond reasonable doubt, misdirecting itself on the facts and in law, for the reason that:

[9.1] The court failed to attach due weight to the contradictory evidence of both children, and in so doing paid lip service to the cautionary rules that are applicable to the evidence of children. The court should have been mindful to the fact that the children were the only witnesses that gave direct evidence as to the alleged offence of rape and assault. He endeavoured to justify the various contradictions with reference to the evidence of Badenhorst, which is indicative of the extent of the misdirections of fact it committed;

[9.2] The court a quo usurped the functions of an expert by referring to and applying its own research to the facts of the case, whilst that evidence was not given in court to be tested by way of cross examination, thereby misdirecting itself by committing a legal error as to what the law required of the court during the evaluation of the evidence;

[9.3] The court misapplied the legal principle relating to the Appellants' silence to the peculiar facts of the case that was before him when the two children were the only witnesses who gave direct evidence as to all the charges brought against the Appellant s by the State. All the other evidence is circumstantial, except possible the evidence relating to the injuries to their respective hymens;

[9.4] The inference that the injuries caused to the hymens of the children could not have been caused by anything other than penetration is not supported by evidence.

- [10] In respect of the leave granted to the Appellants to appeal against the imposed effective sentence of 22 years imprisonment on the 2 counts of rape, it is the Appellants' respectful submission that notwithstanding leave been granted, should the conviction be confirmed, they concede that the sentence imposed was appropriate with no misdirection committed by the court a quo. In that instance they were not proceeding with their appeal against sentence, however oppose the cross appeal by the Respondent.
- [11] The state in the meanwhile contends that the trial court misdirected itself and vitiated the exercise of its discretion when the prescribed sentence of life imprisonment on rape convictions was not imposed. Alternatively, it alleges that this honourable court is at large to interfere with the sentence imposed as the disparity between the sentence of the trial court and the sentence this court would have imposed is such that it can only be described as "shocking" or "disturbingly inappropriate."

EVIDENCE LED

- [13] The matter was decided on the version of the state, as already pointed out, being the direct evidence emanating from S and A the two child Complainants supported by that of various expert s. At the time their testimony, S was 13 and A's was 7 years old turning 8. The proceedings were for that reason held in camera. They both appeared and testified through an intermediary, following a report on their mental competency prepared by Ms Mara Christina Badenhorst ("Badenhorst"), a forensic social worker attached to the South African Police Service with the rank of Captain, for the purpose of the provisions of s 170A of the Criminal Procedure Act 51 of 1977 ("the Act"). Badenhorst also testified following the testimony of A and S and her report admitted in evidence in terms of s 212 (4) of the Act.
- [14] S, the first to lead evidence testified that she and A were injured between their legs by FM during various incidents. She particularly pointed out that the day it happened for the first time it was on the morning following her 10th birthday. She had woken up and found FM sleeping next to her in her bed. FM purported to have passed out on her bed. At that time MN, came into the room and asked FM what he was doing in S's bed. FM stood up and walked out of the door after telling Sand A not to tell anybody about what had happened. Her vagina was sore. She would occasionally wake up with her vagina sore and could not remember what had exactly happened the previous night, neither could she remember the reason for the pain she was feeling on her vagina or the time she was knocked out to sleep. She told MN about the vaginal pains but MN dismissed her complain s and called her a liar. Following that incident there were numerous others where she would be knocked out to sleep and wake up in the morning with a painful vagina. She could not understand what made her vagina sore. She would go to bed not being sore, fall into a deep sleep throughout the night until the next morning and when she wakes up her vagina will be painful. She however only found FM once in her bed. Every time it happened MN would have given her sleeping or stomach pain pills before going to sleep, she will then not wake up until the next

morning, always with a pain in her vagina. She was never before taken to a doctor and did not know where MN got the pills she was giving her. She told MN about this occurrences but MN just denied and called her a liar.

[15] According to S, A also complained of experiencing pain in her private parts. A has never told her who was responsible for her pain, but she knew that it was FM as she had seen FM on one occasion lying on top of A. At the time they were staying at Jack Hindon Street. She heard A crying in the night so she went to check on A and found FM who was wearing only his pants, on A's bed lying on top of a fully clothed A. FM was busy trying to tie A's hands to the bed post

with cable ties. When she asked FM what he was doing, A answered that FM was busy making her sore. A was crying. There were condoms

next to the bed. MN was also in the bedroom but she could not coherently explain MN's role. She however said MN did not say anything to MF instead she told S to leave the room. She did not report the incident to anybody as she was scared that FM will again make her sore.

[16] Furthermore, S explained the impact of the trauma they suffered as a result of the incidents. She said she was always worried, especially when she went to sleep she thought a lot about these incidents. She experienced some changes suffering from stomach cramps, felt dirty and again started wetting herself. Her baby sister A suffered from nightmares and wet herself at night. MN would make her wash A's soiled bedding and clothes. The whole thing affected them at school. They were behind with their school work and their school attendance was not good. They stayed at home time and again due to the fact that they time and again complained of vaginal pains. MN would sometimes write a letter to school to explain their absence, the contents of which were not the truth.

[17] The defence cross examined S about a person called Ounooi. She explained that the 20 year old Ounooi once stayed with the family for a few months at their last residence (they have moved residence a couple of times). She was never hurt by him. S explained that MF told her and A to say that it was Ounooi who was hurting them but she did not tell anybody that. However when FM and MN found out that A had in fact told someone that it was Ounooi who was hurting them, the two of them were bitten, kicked and thrown with objects like shoes and whatever else MN and FM could find to punish them and

also hit them by hand by both MN and FM. Prior to that, in the past the punishment like that used to happen when they were naughty. After A reported about Ounooi, their lives continued to be difficult although it was then not so frequent. The incident had intensified

over a period of two years.

[18] S proceeded to tell the court that she was apprehensive when they were moved from the custody of MN and FM, as she was worried about what is going to happen to them in the future. She did not know whether they were going to be taken in by anyone. She however did not want to stay with the Appellants because of what they did to her. She was in a better

position when they were taken out of that situation. They stayed for three days at Granny Liz. Thereafter in November 2011 they went to stay with Ms Lombard for 3 months. Ms Lombard was present when the police came to talk to them about the happenings at their home. Ms Lombard did not treat them well. At the time they did not feel like talking to the police. After the police left, Lombard reprimanded her for not wanting to talk to the police. She had discussed with Lombard certain aspects of the incidents at

their home, including FM burrowing her, making her private parts sore. She had meant that FM wanted to touch her private parts even though she has never seen him do that. She said she based such an allegation on the fact that her private parts were painful. She had also told Lombard that she had seen FM touching her private parts. With that she said she had thought that FM did touch or fondle her private parts. S indicated that she did not make a statement to the police on the day when she and two of her siblings were taken away from the custody of their parents but made her first written statement on what has happened on 8 December 2011. She also explained that the incident happened a long time ago.

- [19] Furthermore S had explained that before 2008 they stayed at her maternal grandparents' home in Hoogstraat. She never experienced any pains there and nothing inappropriate or indecent had happened then, except that if she misbehaved she would receive a slap from her parents and be smacked on her bums. She stayed with her parents in the house whilst her two siblings stayed in a tent in their grandparent's yard. At Jack Hindon Street they suddenly had their own bedrooms each one with her own bed. A's had a headboard and she did not have one, that is the headboard where one time FM tied A's hands on it.
- [20] She confirmed during the cross examination that she was familiar with a certain Danie Smit, a 26 year old neighbour that stayed behind their home at Luttig. Danie was friendly and played with her and her siblings when their parents have gone somewhere. The Appellants would sometimes when they go somewhere, send them away to go and play. Danie's sister, Corne and Corne's son, the 7 year old Bart, would also play with her and her two siblings A and their younger sister. Her parents did not approve of her friendship with Danie and his family. FM sometimes would hit her on the back and head when he fetches her from Danie's place. A suggestion was made through questions asked by Van Rensburg that S had more than a platonic relationship with Danie which S vehemently denied. S also denied that she and Danie had sex or that she had one time got away with Ounooi.
- [21] S also testified that FM once fondled her buttocks and breasts and smacked her on her bums. FM also fastened her hands with a rope basing this allegation on a fact that she had red marks of a rope on her arms around her hands and had also found a trek rope and a tong near her bed when she woke up the next day.
- [22] At the end of her testimony she spontaneously asked the court to speak to her parents and said to them "Mommy I love you and hope you will forgive me, because I had forgiven you."

A's testimony

- [23] A at the beginning of her testimony was reluctant to testify. She seemingly gave vague answers. She however afterwards cooperated. According to A she had seen FM hurting S's private parts and pulling them. The incident happened during the day in S's room. Also other various incidents happened when she was with her sister and both Appellants. Her grandfather at the time stayed away in another house. Her father and her grandfather being two different persons. She did not know what her grandfather's name was. It was FM, her father who made her and S sore. She had seen FM touch S's and her private parts. S one time was lying down naked and FM still dressed on top of her. At the time MN was in the kitchen. Such an incident also happened at another time when MN was watching TV. MN would sometimes leave the house during the incident. When she reported these incidents to MN, MN showed no concern. The last time MN merely trivialised her reporting by saying that "ag toemaar." Whilst FM had hurt her in her bedroom a lot of times. Sometimes FM will pull or squeeze the hair on her wrong place. During that time she would be lying down and FM on top of her. Both will be naked during these incidents. On another incident FM tied her on the bed post. Her mother MN was aware of these happenings since she once passed by the bedroom during that time. Sometimes MN would not be there or she will be in the kitchen or in the sitting room. She informed S of everything but no one else. The reason being that it was not other people's business. She also told S that she has seen FM hurting her. She later told the police what happened after the police came to her school. She was not aware who put them in the care of the police.
- [24] According to A, Ounooi was someone who stayed with them. She denied that Ounooi ever hurt her or that she told anybody that she was hurt by Ounooi. She confirmed that FM threatened to punish her if she told anybody how FM was hurting her. She confirmed that nobody told her what to say.
- [25] Under cross-examination she agreed that she should have told her foster parents, Ouma Liz, Lombard, her teacher in Grade 1 Ms Dalene Serfontein and Me Thalita if somebody had hurt her between her knees. She was confronted with the fact that she said it was her grandfather who made her sore and she responded that she was mistaken. She confirmed that she has not told Ms Lombard with whom she was staying or Uncle Odie the investigating officer, her granny Doty about the happenings at her parent's house. Then again said the only person she told was Uncle Odie. On her relationship with Oom Danie her neighbour she said Danie never came to their place to play. She reiterated that it was not Ounooi who hit or hurt her. She could not remember exactly when the said incident with her was supposed to have happened but had also said that it was also when she was in Grade
1. She said she was hurt by his father and grandfather and could not remember exactly when the molestation took place.
- [26] She also during cross examination said MN and FM had hurt her. MN had tied her arms whilst FM was fondling her private parts. MN also did the same with Sin one incident. When she was confronted with the fact that she has not placed this evidence before court in her evidence in chief, her reaction was that she has forgotten about this information. She had

seen FM hurting S many a times. The instances when FM hurt S was always during the week. In one of the incidents S cried and screamed, whilst MN was holding her down. MN was not in all incidents always in the room but only in one incident. A was lying on the floor when FM did these things to her. It never happened on the bed. Also at the time when S was involved the incident happened on the floor. She could not remember why FM tied them. She also could not remember why FM was still clothed when he was doing the alleged deed to her and did not see him taking off his pants. A could not describe how that happened when she was not naked.

- [27] She admitted that she had at the beginning told the court that nothing funny has happened with S when she was sleeping or with her. It was also her testimony that MF had lain on top of her on his stomach on the floor. It could have been maybe more than ten times when her father had inserted his private parts into her vagina. She stood still and watched how her father made her sore. Her mother held her down whilst the dad penetrated her. Her vagina was at that time very sore. FM had done the same to S, it was very sore to her. She denied that FM was supposed to have tied him and his sister. She said she was punished by FM and MN either by a slashing on her hands or buttocks. When she was naughty FM and MN would hit her with a cane. One time NM slap ped her on the face that she fell over the table. She denied ever been kicked or hit with an object on the head by the Appellants. She objected to the denial by the Appellants to be all lies.
- [28] A had also confirmed in her testimony to have received school clothes from the school. She could not remember if the reason she received the clothes was because her clothes were dirty. She denied that when she was in Grade 1 she soiled or wet her school clothes. She however spontaneously testified that she went to the toilet a lot of time s that year.

P Serfontein

- [29] Petronella Serfontein ("Serfontein") is A's Grade 1 teacher. It was through her vigilance that the rapes were discovered and Appellants arrested. Her evidence is therefore crucial not only for the purpose of conviction dealing with the question of consistency and the symptoms and signs of the alleged rape that were observed from A's conduct and appearance, but also for sentencing as it highlights how A as a child was affected by the rape during her everyday life. The evidence was correctly extensively dealt with by the court a quo. I therefore do not agree that it would not be of any help to this court.
- [30] Serfontein's testimony is that she had, at the beginning of 2011 noticed a learner in her class who had scholastic problems involving her school work. The learner was extremely sensitive, always seeking protection, understanding (rapprochement) and acceptance from her. That learner was A. A also looked anxious, withdrawn (strained disposition) and had a very strong unpleasant body smell. A told her that she felt uncomfortable and uneasy about one Ounooi, who comes into her bedroom at night and make her sore. A also mentioned that she was going to hit Ounooi . As a result of that and A's scholastic problems including her occasional absence from school she referred A to Dr Geldenhuys, the schools

Educational Psychologist after obtaining the Appellants written permission .

- [31] Following on the report that was received by Serfontein from Geldenhuys, Serfontein opened a criminal case against Ounooi. In the meanwhile on or about February to March 2011, a Social Worker, one Ms Lynette Du Preeze filed her application to pay a visit to A's previous home. FM visited the school, very infuriated about that. He blamed Serfontein of accusing him of molesting A. He threatened to open a case of crimen injuria against Serfontein. At the time only Ounooi had been identified by Serfontein as the suspected molester.
- [32] A's scholastic problems did not subside but got worse. For the rest of 2011 she was absent from school a lot of times. According to the register handed to the court by Serfontein she was absent for 21 days for the school period starting from January to September 2011. The school only received a letter explaining the absence of A from school less than half of the times A was not at school. A's hygiene also got worse, Serfontein would weekly send her to the second hand clothing table to get clean clothes. Her school dress always had brown stains at the back, apparently from a discharge. Serfontein, as a result sent A to be examined by Sister Khumalo, a visiting school nurse.
- [33] During 2012 Serfontein once also noticed marks like lacerations on A's forehead. The other time there was also a mark on A's face. It however did not happen a lot. A failed Grade 1 in the year 2011 and had to repeat the grade in 2012. She then was in Ms Davel's class. Serfontein kept daily contact with her. She said A was noticeably less stressed, better taken care of and had gained self-confidence again. Her school work got so much better which Serfontein considered to be a remarkable improvement.
- [34] Under cross examination Serfontein admitted that A was not the only learner that was sensitive but she stood out more than the others in her sensitivity in the light of her need to be attended and taken care of, as well as her physical bodily smell. She indicated that she took A's disclosure regarding Ounooi to be an urgent cry of a child and in the light of this communication she thought that A might be a victim of rape or molestation. At the time A did not show any visible scars on her face. She therefore reported the incident to the Department and to Dr Geldenhuys with the permission of MN. She requested Geldenhuys to investigate and assess A's emotional and scholastic strength and also the situation around the allegations that A had made with regard to Ounooi and given the signs that indicates possible abuse or molestation. She later forwarded Geldenhuys' assessment report to Du Preeze. And on or about August to September 2011 Odendaal and Captain Badenhorst became involved.
- [35] Serfontein believed A's allegations that she has been hurt. She was also aware that some children may have a very fertile imagination but did not believe they can imagine being hurt or injured. Besides she did not regard A to be known to have a fertile imagination. When she was confronted with A's statement that Ounooi did not hurt her, she responded that either pressure or tension could have led to the contradiction. According to her a child's

mind/ psychic can also suppress such happenings. She agreed that A was not the only learner who had to repeat a school year but in A's case it was exacerbated by A's constant absence from school and also her lack of stability and emotional vulnerability . It looked like A was the only learner with scholastic problems that need ed rapprochement/more understanding .

- [36] In the light of A' s clot h es and type of stains, Serfontein testified that it was obvious that her discharge was what caused the stains. A's smell according to her was also from the, discharge which was not the only smell, she also had rather a very strange smell which she could not describe. Serfontein refers to it as a "bitter unpleasant smell." Serfontein said she was not aware of A having had a bladder problem. If A did, she said she would have expected FM / M N to have mention ed it to her. They also did not give her any medication for A. When sister Khumalo assessed A' in Serfontein's absence, she forwarded A's clothes that were stinking with wet urine to Serfontein to take them to the laundry to be washed.
- [37] Late in 2011, Serfontein said she during the visit of the social worker noticed that A' had a wound on the head. On enquiring from A about it, A told her that she fell over the table. She says she found the answer suspicious.

Captain Badenhorst

- [38] Mara Christina Badenhorst is a forensic social worker who also holds the rank of Captain in the South African Police Service. She prepared the mental competency report after conducting a forensic investigation on the Complainants. The matter was referred to her for a forensic investigation by Warrant Odendaal. She had as well, after a couple of interviews with A and S prepared an assessment report in respect of A and compiled what she referred to as a timeline {periodical) report in respect of S. The reports were admitted in evidence in terms of s 212 (4) of the Act. The defence did not object thereto. She confirmed that none of the 2 children were known to her prior the reports. The report was handed as Exhibit C and D. The focus of the report was to dig out the triggers in the memory mechanism so that the child can remember the incidents. After that she continued with the assessment which involved assessing the child's cognitive development with specific emphasis on the chronologic al order that a child can remember. Also concerned with the child' s memory, the recalling of information in the child's development especially in instances of children who cannot spontaneously volunteer the information. Whilst the timeline report ' s focus was on the happenings and attempt to lay them in a chronological order. She indicated that the age of the child plays a very significant role in this instance seeing that the age phases of the child are connected with the state of their intelligence to narrate it again.
- [39] Badenhorst conducted five interviews with A with the goal of obtaining a statement from her in a developmentally sensitive unbiased and truth seeking manner. Which will support accurate and fair decision making in the criminal justice system. She alleges to have not received any inform at ion regarding the alleged offence before she assessed A. The assessment was done when A was 7 years and 4 months. She identified that the actual

manner how a child operates, that a child is able to see events from another person's perspective. The child understands that disclosure of abuse can lead to serious consequences for the perpetrator and be more concerned about the consequences for the perpetrator than for the consequences for herself if the abuse should continue. She said at this stage thoughts are egocentric and therefore children in this stage are susceptible to remember in a disorderly way. This leading to a child giving different statements in different situations.

- [40] She noted that she received information from Geldenhuys the Educational Psychologist, stating that A was functioning on a younger level than her age. Her verbal and language ability was 2 years behind her chronological age. Her numerical ability was also a year behind her chronological age. She also functions cognitively at a younger level than her peers. She, during the forensic interviews was able to disclose basic details regarding her alleged abusive experiences. A was also after she was asked to differentiate between wrong and right able to show a basic understanding and she committed herself to telling the truth.
- [41] Furthermore A was not able to give an account of how many times she was allegedly molested and sexually abused, due to lack of understanding of the numbers. However she was able to describe her alleged experiences in an age appropriate way and able to identify incidents where she was allegedly abused. She struggled with chronology but she was able to communicate her abusive experiences under her parents.
- [42] Badenhorst also highlighted in respect of endurance under cross examination that due to her age, A will find certain linguistic problems like the handling of abstract concepts during questioning, processing complex questions and complex verb phrases. Make errors with passives, the difference between ask and tell with pronoun references. A will easily get confused with complex contradictions, for example multiple negatives in a sentence. Organising in an adult satisfactory way the details of narratives. Still believes that adults in general speak the truth and unequipped to deal with adult insincerity such as sarcasm, irony and so on.
- [43] Serfontein testimony was also considered by Badenhorst specifically with regard to the terrible odour that came from A's clothes and her body offensive smell. And A's inability to control her bowel and or bladder and she would have faeces on the back of her school dress. The fact that she was withdrawn always seeking acceptance and love. She looked up to Serfontein for physical contact and love. She also referred to Serfontein's reporting that A attended classes in 2011 with bruises on her face and forehead. She said during investigation A expressed her wish that her parents remain in jail and that she never wants to see her parents again.

- [44] It was also Badenhorst's submission as in the report that A experienced herself as powerless against her parents' abuses. She asked for MN's help but she was ignored. After she experienced her mother siding with her father in the abuse, she felt that there was no sense in disclosing her abusive situation, as both her parents would physically abuse her even more if she dared to talk about what they were doing to her.
- [45] Badenhorst's findings were that during the investigation A was able to disclose basic details about her alleged abusive experiences. From the information obtained during the investigation, it seems likely that A was exposed to physical, emotional as well as a sexually abusive acts by both her parents. From the investigation it seems the impact of what had happened to A has caused her severe emotional trauma. Due to A's emotional and cognitive development as well as her fears towards the perpetrators she was/will be exposed to undue mental stress and suffering if she was to testify in open court. It was therefore recommended that she testifies through an intermediary appointed in terms of s 170 A of the Criminal Procedure Act 51 of 1977.
- [46] In respect of S, Badenhorst prepared by a timeline of events report. Badenhorst indicated to have prepared it having made sure that S received clear information about the social worker's job and the ground rules for assessment. She built a rapport in a way that encourages S to disclose information by using the least directive, questioning format. She had asked S during the investigation if she could differentiate between the concepts of truth and lies and found S to have shown an understanding of the concepts. S committed herself to telling the truth.
- [47] According to Badenhorst S recalled her first alleged abusive experience to have happened in 2007. S was in Grade 3 at the time at CR Swart Primary School and staying with her parents at Verdoon Street in Middelburg. S was awoken up by FM one morning who told her to come and sit with him in the living room. FM started touching S above her clothes and private parts. FM continued that behaviour throughout 2007.
- [48] When S was almost 10 years old she woke up one day and found FM sleeping in her bed next to her, her private parts were hurting. When S reported MN this, MN told S she was lying and thereafter MN refused to believe her when she complained to MN about her private parts that were hurting. During 2008 S said she woke up about 3 to 4 times feeling sore in her private parts for no apparent reason. S told Badenhorst that one night whilst she was sleeping in the living room she woke up from crying sounds coming from where A was sleeping. She went into the bedroom, FM and MN were in the room, FM was performing a sexual act on A, who was crying. According to S, MN was standing next to FM. S had told her that since she was in Grade 5 she has been taking medication for her upset stomach at night. S said she did not know what type of tablets she had to drink as her mother told her to drink it and she trusted her mother. According to S the tablets made her fall into a very deep sleep. She never woke up at night or know what happened to her during night time.

- [49] S claimed to her that A also told her that she also experienced her private parts hurting in the mornings and that FM was doing the same thing (having sexual intercourse with S) to her as well when she was asleep. S told her she stopped telling her mother about any pain she felt on her private parts. Her wrists were some mornings red and bruised but she was not able to recall what happened to her. S reported that she always saw condoms and condom wrappers, plastic cables and an instrument to cut it, in her parents' bedroom. She said she believed FM used them to fasten her hands when FM was abusing her at night. Whilst her mother gave her alcohol and when she refused MN would force her to drink it .
- [50] S also recalled that A start ed to wet her blankets at night when she was approximately 4 years old and continued up until when they were removed from the parents' custody . S admitted that after A start ed seeing the Educational Psychologist her father became more abusive towards A. She alleged to have witnessed her parents hurting A for no apparent reason. As a result A could not attend school due to blue and red marks on her body. S said FM would often hit her and A on their buttocks, head and back, with his fist or open hand. According to S, MN would witness this and laugh at them. She recalled that FM would also touch her on her breast s, buttocks as well as private parts. FM also allegedly told her that she was not allowed to have boy friends as he would kill her if she gets involved with other men.
- [51] She reported that S t old her that she witnessed FM hitting MN in the face as well as calling her insulting names like "slut ", fat and "damn bad." According to S, FM would also degrade her by calling her names like damn " bad stupid" and so forth.
- [52] She report ed that S was abused within the familial context as well. During the investigation it was found that S experienced herself as powerless against the abuses, MN ignored S when she asked for help. S's experience is that of MN siding with FM in the abuse. S said she was scared to disclose her abusive situation, as she was not able to recall what happened to her during night time. S, now believes that the tablets she had to drink caused her to be in deep sleep at night and therefore she did not know what happened to her. S stated she felt severe pain in the morning when she woke up. S also said NM had said to her FM would often tell her that he will give her and her sisters away as he was getting tired of them. S experienced both her parents as physically emotionally and sexually abusive and she believed that they would abuse her even more than A if she dared spoke about what was happening at home.
- [53] Badenhorst reported that S was able to report during the forensic investigation about the alleged abusive experiences. From the information obtained she concluded that it seems likely that S was exposed to physical, emotional as well as sexually abusive acts by both her parents. She was able to give a basic time line of her alleged abusive experiences. Due to the time that has lapsed since the alleged incidents as well as the number of events. S was not able to recall the exact dates and times. S also believed she was drugged in order for her not to be able to recall what happened to her during the nights.

- [54] She reported that from the investigation it seems the impact of what allegedly happened to S has caused an emotional trauma . Due to S 'e motiona l development as well as the fear towards her perpetrators she will be exposed to undue mental stress and suffering if she had to testify in open court. It is therefore recommended that she testified through an intermediary appointed in terms of s 170A of the Criminal Procedure Act.
- [55] Dr Ehima Erhabor is a medical practitioner who completed the J88 on 17 November 2011 on the physical examination of A. She testified that she on found bruises on the left of A' s forehead. The gynaecological examination showed that she had no abnormalities, with the exception that the hymen was not present at the opening of the vagina. The anal examination also had no abnormaliti es. She explained that by abnormalities she meant, bruises, swelling, bleeding, vagina or anal tears, scarring or semen. She indicated that in the 12 years she has been conducting such examination on children she had found abnormalities in a very few cases.
- [56] She explained that top of the list as the cause of the absent hymen is penetration, therefore there was a strong possibility of penetration being responsible. Also that 151 time penetration can cause the tearing of the hymen. However she said she could not say what kind of objects caused it and when such penetration could have happened.
- [57] Under cross examination she confirmed that she has never conducted any study or research on absence of hymen or any abnormalities relating thereto. She indicated that child genitalia is a special field. She could not comment on what was put to her that research on young girls' hymens although very rare indicates that girls could possibly be born without a hymen. It was not indicated which literature or research conducted by who and when. Her response was that "in medicine anything is possible "although she personally has never heard of that phenomenon, she did not rule it out. When it was argued that she cannot base her conclusion on condition of hymen as being caused by sexual inter course she indicated that it was top of the list therefore could not rule out penetration although infection, physical trauma or bike riding, masturbation or finger can cause tearing of the hymen. Recent penetration will leave remnants of hymen. If there are no remnants there it is possibility that the child might have been born without a hymen. She said however in this case it was not strange that there were no remnants of hymen especially with repeated instances of sexual assault, birth and more sex.
- [58] She confirmed that she took into consideration the child's history as she was told by the caregiver that the child has been sexually assaulted a number of times. She explained that the standard of practice is to start with recording the history, then examination followed by the findings that are objective. They don' t base their findings on history but if history is true it might explain the absent hymen. She confirmed that she was told that the child was sexually molested by an adult and that they were dealing with chronic sexual abuse.

[59] With regard to a recent attack she confirmed having been told that there was a sexual assault that took place on A before the exams. She confirmed that old bruises and scars can be expected and on the other hand might not find them due to healing. She agreed that with chronic and recent sexual assault she would expect an enlarged vagina which she admitted was not the case in this instance but on the other hand she could not confirm that it happens in each and every case. She could not say with certainty that the child has been molested but as she could not find the hymen she wouldn't know what caused it and will have to speculate as she cannot

say with certainty that she was sexually assaulted. She admitted that there is a possibility as well that the child might not have been sexually molested based on the fact that there are no scars or abnormalities. Therefore there is no clear cut case, even with recent sexual assault there could be physiological changes which will not show abnormalities if it happened over a long time as opposed to 1st time the day before. She also indicated that sleeping pills do not cause amnesia but may cause a deep sleep and on waking up the memory will still be there. She did not say that you will have memory of the things that happened during sleep.

F Mahlangu

[60] The forensic nurse, Fortunate Mahlangu ("Mahlangu") confirmed to have, been involved with victims of sexual crimes since 2005. She holds a diploma in forensic nursing obtained from the University of the Free State and is registered with the South African Forensic Nursing Association since 2006. She completed the J88 in respect of S. She found pieces of remnant s of the hymen that fits with vaginal penetration. She could not say when and how many times penetration occurred and with what. According to her apart from penetration there is no other cause for these injurie

s. She has never heard that hymeneal injuries can be caused by something else other than penetration. She confirmed having used the colposcopy to examine S and taken photos that she saved in the computer. She said they did not print the photos because prosecutors say that the photos cannot replace the J88'. However what she found

on the colposcopy is written on the J88.

[61] According to Mahlangu if an adult male rapes a child of 5-7 years there will not always be serious injurie s and she said she has never seen any gross injurie s since she start ed examining victims of child sexual abuse. She personally has never come across a case where a f e male is born without a hymen , never read about it during her years of study. It is also not true that cycling, horse riding and exercise can cause hymen to tear as it is an internal organ that is not visible as it is covered by labia minora and majora. She also denied that a child that has been repeatedly raped will necessarily have an enlarged vagina. She personally has never seen an enlarged vagina.

[62] Under cross examination she contradicted Erhabor's testimony saying that no woman can be born without a hymen. She said with chronic sexual assault the vagina stretches and with chronic penetration they turn up not to have these injuries. Absence of injuries does not exclude sexual assault. Penetration is always possible as the vagina expands and would expect a tear. She said there were no clinical findings since she found no injuries and as the rape was not reported within the 72 hours, therefore the injuries would have already healed when the child was brought to her. She said only penetration can

cause scarring. She registered a white discharge and said it was normal and she mentioned it because it was there. No injuries on labia or vulva also on the anus.

[63] She confirmed that she concluded that S was sexually assaulted on the basis of the remnants and that the remnants confirm penetration. She said she cannot say how many times as the wounds could have healed and not every sexual assault leaves a scar. She said a vagina stretches during sex and shrinks after sex. The remnants found were white + thick hymen and which indicates a high oestrogen. She said men with small penis are there which might not cause any injuries. And if penetration is not violent she does not expect injuries. Even when it is not consensual she still expects lubrication and said

some victims of rape do climax during rape because it is a physiological response.

Dr Efrat Names Barnes

[64] Dr Barnes was the state's final witness. She is a qualified medical practitioner with surgery expertise and has been working as a volunteer at the Teddy Bear Clinic, a child abuse clinic, since 2008. Her work entails the examining and conducting of forensic assessments. She teaches the Pharma Year Medical Students on signs and symptoms that one looks for in child abuse. She also trains Registrars who are in the process of becoming paediatricians in child abuse. She is very involved in the subject of child abuse in that she also conducts seminars and congresses with her colleagues where they train nurses and doctors and specialist paediatricians who just want to revive this examination. She said her last engagement was at the University of Pretoria where she lectured about 50 Doctors and nurses on child abuse and the injuries that are found with child abuse be it

physical or sexual. She confirmed that the state subpoenaed her to come and testify about specific aspects in this trial. One of the aspects was "possible research and knowledge about injuries of the genitalia of children involved in rape cases or sexual abuse cases."

[65] Barnes testimony was that the conclusion or idea that a girl's hymen can be torn from riding a bicycle, or a horse or such activities is altogether unfounded. She herself has never in her years of experience come across such thing nor is there any literature that supports such allegation with proof. She contended that a direct tearing of the hymen itself occurs when the hymen is injured. She also has never come across a child who was born without a hymen. Instead she has come across those that are born with a solid or a completely closed hymen referred to in literature as an imperforate hymen, which is some kind of a

gynaecological problem. According to Barnes what can cause a hymen to be absent, torn or injured in a girl is a direct injury to the hymen. She says the reason being that the hymen is tucked inside the body and protected by the labia minora,

labia majora, subcutaneous tissue which makes up fat and muscle and folded inwards.

[66] In cases of small children younger than 13 who are raped over a period of time by an adult male, Barnes explained that physical injuries in the sense of tears, bruises, lacerations and something like that would be expected immediately afterwards. Once the hymen is torn it cannot be repaired. The tissue surrounding the hymen is a mucosa similar to the ones in our mouths. The injuries surrounding the hymen may not be present at the time of examination. She said the nature of the injury depends on the mechanism of the injury, the penetration comes in from behind then the posterior fourchette and navicularis would be injured. In respect of Oestrogen she said it depends on the amount there is, the hymen becomes either very thin or friable which means it becomes thin like a tissue or it becomes thicker. On the examination of a baby girl, because the child still has got its mom's oestrogen circulating in its body the hymen would then be found swollen and that is normally found in the first year of life as the child grows older before they reach puberty the hymen becomes very thin so it looks like a very fine tissue. Once the child

reaches puberty the Oestrogen levels go up and the tissue thickens.

[67] The recovery rate or the healing of the injuries sustained depends on the number of exposures there has been, so first of all it depends on the type of injury that is sustained which would determine the extent of the injury, but if the same tissue is injured repetitively, for example, a woman who is sexually active, every time she is sexually engaged she is not going to sustain injuries and that would be the case in a child as well. The recovery time after an injury is probably weeks.

[68] Barnes confirmed to having never seen or examined the Complainants although she was briefed of the matter. She also had not seen the J88 containing the actual injuries until the morning of her testimony. She was not informed about the contradictions between the two experts. The prosecutor however explained to her that it is a case of child abuse where there is a discrepancy in the testimony provided with regard to these issues, pertaining to injury to the genitalia and her opinion required in that regard. The prosecutor did not go into detail. The state prosecutor never mentioned that it was about the hymen.

[69] She was asked as to what causes a wide angular round hymen or its widening. She indicated that as a child grows older it increases by a millimetre per year so the opening in a 1 year old child would be expected to be a millimetre wide in diameter. In a child that is 10 years old they will expect it to be 10 millimetre wide. She said she has seen a smaller opening in a child of 10 with an opening of 7 millimetres and that is not considered pathological but the moment the diameter is larger than they expect it to be, it is considered problematic and they try and find the cause. This has been documented and found in medical books. If one has a vaginal ride that is bigger that extends towards the hymen, it can give an appearance

of the hymen looking bigger but the rest of the hymen would be present. So the diameter of a hymen is important in the case of an injured hymen. Once it is injured the diameter is going to be large. He said it does not get wider by age. Ask if it is possible for a child to have a wide opening, she said not possible in a small child to find an enlarged opening of for example 13 millimetres in a three year old child . That is not normal. If it so try to see what has caused that widening.

- [70] Dr Barnes agreed that an inexperienced observer may mistake a wide hymen and refer to it as having no hymen. He emphasised that there is no shred of research that indicates the possibility of a phenomenon of being born without a hymen. She said she has never seen such research and in all the years that she has examined children she has never seen an absent hymen in a child that has not been interfered with. It was put to her that there is a possibility of research indicating the possibility of a girl being born without a hymen as confirmed by Dr Arbohr even though he pointed out that it is possible but very uncommon or a remote extreme if it does occur.
- [71] She refuted that the hymen can be said to be an external organ as according to her it is found in the external area but folded inwards. It is an external part of the cervix, found deep within the body and exposed to the exterior where it is easily injured. Barnes also vehemently disagreed that it is considered an external part because if you paddle a bicycle the hymen comes into contact with the bicycle and may rupture as part of the exterior genitalia. She indicated that there is enough tissue around the hymen to protect that area and it is deeper in the body. She said in examinations of a lot of children that have not been sexually abused who are very active and do all sorts of activities including riding a bicycle she has not found injuries to the hymen which if it was so they would be seeing it more frequently. She was not sure why those experts would make such a conclusion. She thinks there can be an injury if a child that is riding a bicycle falls at the bars in such a way that the labia majora labia minora split apart then there will be a direct injury that would cause a loss of hymenal tissue. But not just by mere riding. If the child is hit in between the legs over the hymen area there is a possibility of that resulting in a fractured or ruptured hymen. She admitted that penetration is not the only manner of tearing the hymen.
- [72] She highlighted that the most important area that they focus on if there are allegations of rape is the hymen. The overall examination of the posterior fourchette and fossa navicularis not important than hymen in rape allegations. Although part and parcel of the examination of the genitalia, so it is not mentioned if nothing is found. She regards that to be a bad practice. Also if notes do not indicate that there was no injury the assumption is that there was none as it is a small area.
- [73] Barnes was referred to one of the J88's referral to a whitish fluid emanating from the examination of the genitalia of the Complainants as to what does that relate to. She explained that it refers to a discharge that comes out of a vagina the source of the infection being the inside of the vagina or even further out. Under normal circumstances a child would not have a discharge at all. In rare cases you may get a child under the influence of its

mother's oestrogen level who will produce a discharge. She submitted that they had seen extreme cases of babies menstruating. A white discharge is not normally found and indicates some form of infection, possibly a sexually transmitted infection especially in children. The cause and kind of the infection could be various. For example all females have a discharge, depending on the level of puberty, that is, completely normal if it is clear and depending on the time of the cycle it can become more fluid or more elastic in nature but still translucent.

- [74] In terms of a white discharge found in a child she said each situation has to be assessed individually depending on the history of the child. If the child displays other signs and symptoms of infection, as an examiner she may want to investigate that discharge further which would mean she would take a swab and send it for what they call an MCNS which is Microscopy Culture Sensitivity looking specifically for sexually transmitted diseases. Very often in small children it might be poor hygiene like if they do not wipe properly, wiping their bums from back to front will contaminate that area with stool s and that can give a child thrush. The call is for the examiner to make a decision whether or not actually a swab need to be done or treat the child just for thrush. She said the white fluid is also relevant to a rape case, if found during examination of the genitalia. It is for the doctor to send it for further investigation. If the examiner has worked in the STD clinic he will know how a discharge smells like when it is caused

by an STD or it is just caused by a thrush. She admitted that in a rape case a swab should be done, although the examiner may decide to treat the child without a swab.

Repeated rape

- [75] In respect of injuries resulting from repeated rape, Barnes pointed out that with repeated injuries the entire hymen will eventually be obliterated which would be possible to pick up with visual examination. If a child was raped over a long time consistently (3 years in this case) she confirmed that the hymen would be destroyed to such an extent that it is not going to be found. So there would not be any hymen left. Alternatively remnants may also be found depending on the type of injury that was inflicted. Where there was partial penetration, say for example, of a little child, since full penetration might not be possible completely, if done so the catastrophic injuries would be caused to the child , even with incomplete penetration which constitutes rape as well. The rape of a small child over a period of time would have expected devastating consequences leading to possible serious injuries to the genitalia, especially a young child of age four.
- [76] She said in an instance where an adult has raped a small child of approximately 4 years old over a period of 3 years and especially if the child has also been raped a day before the examination, there is going to be some type of injury but before it is a new injury and you examine the child, the examiner will be able to see that there was more trauma. If the hymen has been traumatised again and again even if it happened a day before, the examiner might not pick it up. It was put to her that the child was raped from the age of two until the

age of 4 constantly for a period of three years (which is rather from the age 4 until she was 7), so can it be possible that the recent rape or rape will not be picked up. She responded that she did not imply that the injuries are impossible at the beginning when the rape first started, as they were talking about the period of time. When the rape started the injuries would have probably been a lot and more severe than they were after three years. She further explained that if a child has been penetrated when she was two years old you may see something but by the time she is four years old she is being groomed to such an extent that the child knows that this is what is coming then there is less injuries, maybe because the child becomes less inclined to protect herself so when the child is examined, the examiner may not find the injuries that would have been found when she was raped two years ago as a two year old. An injury to a hymen permanent injury. An area that has been repeatedly injured eventually it is not going to show fresh injuries like the one you would get with an acute rape that was done for the first time.

[77] It was put to her that the injuries referred to are those of the whole vagina. Barnes repeated that she thinks repetitive injuries to that area may not result to the same extent of trauma than that it would if the child was seen after an initial injury. What has to be looked at is the time period, the amount of healing and the degree of rape that occurred the day before. Was it with a finger, or was it just fondling or penetration. She said since there was a full penetration to a 1 year old or two year old the penetration would be catastrophic. In a four year old there would still be severe injuries but depending on the depth of the penetration. In full penetration one would expect the child to present with very serious injuries if not it might be because there was partial penetration. She said if the child is repeatedly penetrated over a period of three years there would be extensive injuries and that would be in keeping with what is probably in the documents which suggest that the hymen is partially obliterated.

[78] Barnes considered the use of a culposcope important during an examination of the genitalia of the rape victims, especially in acute rape, for collection of data but she was of the opinion that if one is not available then the use of a good normal light and a camera in order to document whatever pictures often is sufficient. With regard to the state's evidence about the result of the examination that there was no hymen present, she reckoned a photographic correlation was a necessity during such examination, however it was also important to take cognisance of the reality of South Africa that often there is no access to cameras rather important to treat the child than to turn them away to come back when a photograph can be taken. She however did not deny the benefit of photographic material to the court in helping the process. She however also believed that a doctor and a specially trained nurse

in forensics is trained well enough to be able to document findings in the J88 that can be trusted. She agreed that if photos were taken they should have been presented in court to substantiate the findings that the doctor has written down in the JBS. Barnes indicated that when Doctors speak of injuries of the hymen they are talking of extreme situations.

- [79] Before the state closed its case, which was immediately thereafter, it applied for the admissibility of the Affidavits filed by the Appellants in support of their bail Application. The admission of the documents was not opposed and therefore accepted in evidence.
- [80] A witness from the Department of Home Affairs subpoenaed by the court appeared afterwards to present the birth certificates of the two Complainants A and S that indicated that they were born on 2 June 2004 and 13 July 1998, respectively. It therefore confirms that when the rape and molestations started in 2008, A was only 3 years old and S was nearly 10 years old.

AD CONVICTION

- [81] The Appellants are challenging the court a quo's reliance on the testimony of the Complainants in finding that their guilt has been proven beyond reasonable doubt alleging that the court failed to attach due weight to the contradictory evidence of both children, and in so doing paid lip service to the cautionary rule that is applicable to the evidence of children. The court should have been mindful to the fact that the children were the only witnesses that gave direct evidence as to the alleged offence of rape and assault. It endeavoured to justify the various contradictions with reference to the evidence of Badenhorst, which is indicative of the extent of the misdirection of fact it committed.

Analysis

- [82] It is certainly of general acceptance that prosecutorial proceedings involving charges of sexual misconduct that involves young children require extra caution and attentiveness. It is therefore well to be mindful at the outset that, whilst there is no requirement that a child's evidence must be corroborated, a cautionary approach may be required. The evidence, especially on a charge of this nature has to be clear and satisfactory in every material respect to return a guilty verdict; see *S v J* 1998 (2) SA 984 (SCA) at 100. A weighty onus is put on the state and a broader responsibility on the trial judicial officers to fully comprehend the process and the extent of responsibility that is conferred upon them to treat with utmost care the child witness's evidence. At the end of it all it should be a fair trial.
- [83] In *Rex v L* (DO) 18 CRR (2d) 257 sec (1993) 276-277 a fair trial in relation to the rules of evidence applicable in child witnesses, was described as follows:

"A fair trial must encompass a recognition of society's interests. One must recognise that the rules of evidence have not been constitutionalised into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat the purpose for seeking truth and justice. In the case at hand, in determination of what is fair, one must bear in mind the rights and capabilities of children. As McLachlin J recognised in *R v W*[®] [1992] 2 SCR 122 at 133. It may be wrong to apply adult tests for credibility to the evidence of children." Wilson J expressed a similar view in *R v B* (G) (1990) 2 SCR 30 at 54-55, in reference to the Appeal Judge's treatment of the child witness's evidence: "... it seems to me that he was simply suggesting that the Judiciary should take a common-sense approach when dealing with

the testimony of young children and not impose the same exacting standards on them as it does on adults. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying. (my emphasis)

[84] The context of the application of the *R v L* approach in rape cases is enunciated in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at par [22] and [23] referred to by the Appellants in their heads of argument and the learned magistrate in his decision, as follows:

"the prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patience and sensitive presentation of all the available evidence, and meticulous

attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important...[22] ...The complainant's evidence was presented with little care for completeness or accuracy." (my emphasis)

[85] In this matter the crimes that the Complainants were testifying about commenced when A was at a tender age of 4 and S 10. It is indescribable or hard to imagine how much anxiety they suffered for having to testify about this horrific crime being small children, especially when the perpetrators are their own parents. For the court to appreciate that situation, the prosecution had made the best effort of presenting all the relevant evidence that could assist the court in contextualising the Complainants' evidence from the outlook of their ages. It presented Badenhorst's testimony, which outlines from the perspective of an expert how their ages and circumstances would affect the presentation and content of their testimony so that the court is able to assess all the evidence fairly. Therefore the court's reference to Badenhorst's evidence in understanding the shortcomings in the Complainants' evidence and during its analysis was sensible and logical. The learned magistrate was very mindful of its restrictive value as far as verifying the credibility of the Complainants' testimony.

[86] The prosecution also presented the testimony of the examining doctor and the forensic nurse that found the physical evidence to be corroborative of the Complainant's allegations of rape as well as that of an independent medical expert to assist the court to establish if the conclusion that (the condition of the Complainants' sexual organs as revealed by the medical examination due to the alleged rape) the physical evidence consistent with the allegation of rape, was reliable.

[87] The learned magistrate in evaluating the evidence was very cautious in his approach, appreciating the challenge posed by the age of the Complainants and the fact that their testimony was the only direct evidence that was before the court that relate to the charges. He carefully dealt with all the aspects of the Complainant's evidence addressing the contradictions, inconsistencies and or shortcomings. He indicated his understanding that the exercise of caution must not be allowed to displace the exercise of common sense. Also that it is not meant to say that there should not be contradictions or inconsistencies as the test that needs to be fulfilled is prove of the Appellants 'guilt beyond reasonable doubt and not beyond any shadow of doubt as stated by Malan JA in R v Mlambo 1957 (4) SA 727 (A) at 738A-B that:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case. "

[88] The learned magistrate indeed referred and consulted a lot of authorities that are mentioned in his judgment to affirm the manner required to deal with the Complainant's evidence in relation to the evidence in toto , which came down to the same conclusion that it is necessary to apply such caution and attentiveness as the situation demands. Which still , should not amount to stringent considerations and over the top application of the rules, that may stifle the rights and capabilities of children to be afforded justice. Instead this is a call to understand that a child has suddenly found himself/ herself on a big stage of adults. It would be a difficult and petrifying terrain for children to traverse, especially very young children. A child might therefore find it difficult to process the trial proceedings, or to understand how to respond to cross examination (they are only warned to tell the truth) , finding a way of giving clear answers, knowing how to react to confusing questions, where they are unsure of the question asked or of the answer sought . How to counter the examiner's statement or conclusions put to them. All this, exacerbated by the stress of the likelihood of being punished or ridiculed, can be intimidating, overwhelming and exhausting and one does not need to be a psychologists to appreciate this sensitivities. Hence in Rex v H (T304/95) 13 CRNZ 648 at 653 it was held that:

"Evidence if given by an adult may have had a deficiency so grave as to require rejection of it as incredible... may in the case of a child be explicable as due to the limitation of a child's immaturity than lack of rationality."

[89] In that situation to be sure, a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it support s any of the evidence tendered; see *S v Trainor* 2003 (1) SASV (HHA) further that:

In considering whether the evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety." (my emphasis)

[90] The Complainants' testimony was essentially that they have seen each other being molested or raped by FM and had both testified to the presence of MN during these rapes who did nothing to assist them. In addition if though it was not so clear from S's testimony if she had seen FM molesting or penetrating her, A had also later testified that she also at one point saw FM on top of S. At one time FM was pulling and touching S's private parts. Whilst S in turn has testified to having seen FM on top of A. It became obvious that it could not have been Ounooi as suggested during cross examination or their grandfather as A had mentioned at one stage during her testimony. A contradiction from which the criticism of the Complainants' evidence emanates. They have only stayed with their grandparents for a very short period and the identified rapes were from 2008 continually and regularly until 2011. The grandfather

or Ounooi will have to have followed them to their last home and been there until 2011 when the rapes were discovered.

[91] All the same, Ounooi was alleged by S to have been suggest ed to the Complainants by FM, and when A reported about Ounooi making her sore as recent as a few days before they were taken for medical examination neither Ounooi nor their grandfather was staying at their home. So Ounooi could not have done this things that A and S alleged were happening to them at night. When Serfontein reported Ounooi to the police, FM reproached Serfontein for accusing him of raping the children, in doing so FM identified himself with Ounooi, when he was expected to become angry, want to know and protect the Complainants (his children) from Ounooi. His reaction to the news was very suspicious. Interestingly A had also reported that Ounooi was a family member. FM has unfortunately refused to testify in rebuttal of the Complainants' evidence that directly implicates him as well as the one that indicates a likelihood of him being the perpetrator. He chose to leave the evidence unchallenged. To which his legal representation has conceded to have been a gaffe.

[92] The frequency of these incidents is also borne by S and Serfontein's evidence about the number of times that the Complainants had failed to report to school which S has alleged was due to them having pains in their private parts whereupon they would skip school, and if they do report to school Serfontein has testified to the unhygienic condition of A's clothes and overall wellbeing that raised suspicion of sexual violation of the child.

- [93] Significantly, no other factual evidence was presented to the court that can contradict the allegations of the Complainant s that FM was the perpetrator. S's testimony that in each of the incidents where she would deeply fall asleep and wake up the next day feeling sore on her private parts, MN would have given her the pills, was also part of the material evidence that was not refuted by MN or in any way did MN try to distance herself from the allegations. The allegations that MN one time was seen assisting FM to restrain A by tying her on the bedpost or being there or around the house whilst FM was raping A was also left unchallenged.
- [94] In addition the Complainant s' allegation of chronic or repeated sexual violation by FM was sturdily corroborated by the physical medical evidence that confirmed that A has been left without a hymen and a bad discharge of unbearable smell as attested to by Serfontein whilst S was left with remnants of a hymen. The medical expert, Barnes, testified to the credibility of the conclusion that was reached by the medical officers that the physical evidence was consistent with repeated acts of sexual violation over a long period of time, amongst other things. Barnes confirmed that such repeated acts would be catastrophic to a small child (with devastating effect). Her shocking exact words were that "with repeated injuries resulting from repeated penetration the entire hymen will eventually be obliterated." "If a child was rap ed over a long time consistently (3 years in this case) the hymen would be destroyed to such an extent that it is not going to be found. So there would not be any hymen left."
- [95] The learned magistrate was therefore correct when taking into account the total evidence of the witnesses to find that there is clear and reliable evidence that A and S were penetrated by FM with the co-operation and assistance of MN, who has also helped him to cover up what was happening. Further that notwithstanding the contradictions and inconsistencies in the Complainants' testimony their evidence was clear and satisfactory in all material respect s when consider ed cumulatively with all the other evidence and to, without reasonable doubt, point to FM and MN being the perpetrators of the alleged charges. The Appellants allegation that the learned magistrate endeavoured to justify the various contradict ions with reference to the evidence of Badenhorst has no merit. Such evidence might prove consistency but does not carry any weight as far as credibility is concerned.
- [96] In respect of the allegations that the court a quo usurped the functions of an expert by referring to and applying its own research to the facts of the case, whilst that evidence was not given in court to be tested by way of cross examination, thereby misdirecting itself by committing a legal error as to what the law required of the court during the evaluation of the evidence.
- [97] In 5 v SM 2013 (2) SACR 111 (SCA) Erasmus AJA in the evaluation of the evidence on consent in a child rape case, referred to case law plus his own researched literature including an unpublished dissertation to illustrate his perspective. He also recognised other courts' referral to such research work. He had come to the conclusion that he is entitled to do his own research. In 5 v Vilakazi 2009 (1) SACR 552 (SCA) Nugent JA in (28) referred to literature

on medical matters to indicate his frustration on the inadequacy of the medical information that was presented to the court which he was called to decide upon.

[98] In casu the learned magistrate mentioned and consulted articles, literature and authorities on "child witnesses in a rape case" that were referred to during the trial, mostly in the course of Badenhorst's testimony since she was testifying on the subject. It was whilst analysing and considering the unchallenged approaches proposed and discussed therein to safeguard the proper and fair assessment of the child witness evidence that the learned magistrate further mentioned other writings and authorities which

emphasise and support the proposed approaches. Such an occurrence is not new or prohibited. What is prohibited is the use or reading of passages from the referred books or articles that contradicts the views expressed by an expert witness that have not been put to him in cross examination; see *R v Mofokeng* 1928 AD 132; *5 v Harris* 1965 (2) SA 340 (A). This will include the introduction of literature that is contradictory that has not been mentioned in evidence.

[99] In *S v Mabuza* 2018

(2) SACR 54, the court on its own for the first time on appeal referred to Muller's "in Judicial Officer and the Child Witness (2002) 35 which emphasised that "context in which evidence is given by a child witness is important." The literature was not

mentioned during trial or during submissions made on appeal. The learned magistrate conduct did not amount to an irregularity.

[100] The final complaint is that the court misapplied the legal principle relating to the Appellants' silence to the peculiar facts of the case that was before him when the two children were the only witnesses who gave direct evidence as to all the charges brought against the Appellants by the State. All the other evidence being circumstantial, except possible the evidence relating to the injuries to their respective hymens.

[101] Where the state has *prima facie* discharged the onus resting on it, failure to testify may be a factor in deciding upon guilt in appropriate circumstances, more so if the Appellants could easily have refuted the *prima facie* case by their evidence. The fact that the direct evidence implicating the Appellants is that of children cannot justify downplaying the effect of the Appellants failure to answer to it, and the fact that together with the supportive circumstantial evidence and irrefutable physical evidence, cumulatively, make out a *prima facie* case which leads to the case being proved beyond reasonable doubt; see *S v Letsoko & Others* 1964 (4) SA 768 (A); *S v Khamo & Others* 1975 (1) SA 344 (D).

[102] The court *a quo* had concluded by stating that "the accused's silence in the circumstances of this case tends to give more impetus to the undisputed testimony of the state". Meaning that it weighs heavily against him. The learned magistrate was correct since not only is the evidence not disputed, but *prima facie* points at the guilt of the Appellants; see *S v Francis* 1991 (1) SACR 1 98 (A).

[103] The Appellants in their heads have also repeatedly referred to the evidence of the Complainants to be that of a single witness which it is not, as illustrated in the evidence dealing with what each Complainant also observed happening to the other. That is direct evidence certainly not emanating from a single witness.

[104] The mere criticism of the complainant's evidence is not enough and does not affect the probity of their evidence. The court must however in the circumstances be convinced beyond reasonable doubt of the guilt of the accused. Therefore on appeal, the court considers the trial court's finding of fact inclusive of credibility findings from the point of view that unless any misdirection can be identified it is accepted that the trial court's conclusions are correct; see *s v Dlumayo* 1948 (2) SACR 677 A 696-699; *Mhlumbi and Others v 1991* (1) SACR 235 (A) 247 (g). In *S v Manyane and Others* 2008 (1) SACR 543 (SCA) the court held that:

"This court's powers to interference on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[105] The Appellants have failed to justify a finding of any demonstrable or material misdirection by the court a quo.

AD SENTENCE

[106] The NDPP appeals under s 310A against the effective sentence of 22 years imprisonment imposed on each of the 2 counts of rape, alleging that the trial court misdirected itself and vitiated the exercise of its discretion when the statutory prescribed minimum sentence of life imprisonment on rape convictions was not imposed. Alternatively, that this honourable court is at large to interfere with the sentence imposed as the disparity between the sentence of the trial court and the sentence this court would have imposed is such that it can only be described as "shocking" or "disturbingly

inappropriate."

[107] It is trite that sentencing is within the trial court's province and the appeal court may only interfere with such discretion if it is not exercised properly and judiciously. The trial court would have failed to exercise its discretion as prescribed if it committed an irregularity or misdirected it self, or has imposed a sentence that is shockingly inappropriate or out of proportion to the magnitude of the offence (see *S v De Jager and Another* 1965

(2) SA 616 (A) at 628H-6298) .

[108] In terms of s 310A, the NDPP is required to show that the trial court exercised its discretion in regard to sentence irregularly, unreasonably, improperly or in an unbalanced way, vitiating the exercise of the discretion. A mere difference between the sentence imposed by the trial court and the sentence the court of appeal would have imposed is not a sufficient ground for interference. The difference between

the two must be of such a nature and degree that it appears that the trial court exercised its penal discretion unreasonably.

[109] The Appellants as indicated were convicted of rape read with the provisions of s 51 (1) that compels the imposition of the prescribed minimum sentence of life imprisonment on such a conviction unless there are substantial and compelling circumstances found, justifying the deviation and the imposition of a lesser sentence. The prescribed minimum sentences provided in the Act also apply to accomplices; S v HB 2015 (1) SACR 502 (W).

[110] In its judgment on sentence, the sentencing court is required to consider the applicable minimum sentence legislation and determine the presence or absence of the substantial and compelling circumstances. Such circumstances shall be entered on the record of proceedings. This would constitute the traditional approach of weighing of aggravating circumstances against what is considered to be mitigating circumstances to determine whether the end result constitute circumstances that are substantial and compelling for the imposition of a sentence other than the prescribed minimum sentence.

[111] The courts are guided in their determination of an appropriate sentence by the Zinn triad (S v Zinn 1969 (2) SA 537 (A) that refers to the offender, the offence committed and the interest of society being the factors to be considered in determining

an appropriate sentence. The court looks at the circumstances surrounding the nature and extent or degree of each of these three

factors, keeping in mind the purpose for sentencing, that is retribution, deterrence, prevention and rehabilitation. In S v Olivier 2010 (2) SASV178 (HHA) at par [8] the court stated that:

"It is trite that, during the sentencing phase formalism takes a back seat and a more inquisitorial approach, at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, and the victim's circumstances, including the impact which the commission of the offence had on the victim."

[112] The NDPP alleges that the learned magistrate erred when he found the fact that the Appellant were first offenders and were in custody for more than three years awaiting trial coupled with his opinion that the rapes were not of the worst kind possible, to constitute substantial and compelling circumstances justifying deviation from the prescribed minimum sentence of life imprisonment.

- [113] The Complainants are two little girls, A and S. A was raped from the age of 4, within the sanctity of her home by her own father, continuously for a period of three years until the rape was discovered by her caring and devoted teacher on the year she started elementary school at age 7, who noticed the withdrawn, aloof and self-esteem lacking little A. For this little girl it was too late as she by that time had already been raped to a point where her hymen was obliterated.
- [114] S, A's older sister was also very young when the sexual violations by FM started, being 10 years old at the time. It was also throughout the same period of 3 years and happening under the watchful eye of her mother MN who made it possible for the violations to take place by giving her pills so that she can sleep throughout the whole encounter. S was left with remnants of a hymen.
- [115] This shows the viciousness of the offences perpetrated against these children by their own father. If this is not one of the worst kind of rapes the law advocates for the harshest punishment to be meted, what is? The fact that the learned magistrate disregarded these real circumstances of the Complainant s seeing them as not the worst, whilst giving emphasis to the period the Appellants spent awaiting trial which pails in significance, is earth- shattering and troubling, and the sentence imposed disturbingly inappropriate. This even downplays the nature of the crime the Appellants have committed, which is the rape of a 4 and 10 year year old child, the most vulnerable of society. The fact of the ages of the Complainants having been considered aggravating by the legislature to warrant life imprisonment, the most severe punishment in our law.
- [116] The continuous rape is according to the legislature another aggravating factor that seals life imprisonment sentence as the ultimate penalty. In *S v Kimberley & Another* 2004
- (2) SACR 38 (EC) it was held that item (a) (i) under 'Rape' in part 1 of Schedule 2 to Act 105 of 1997 contemplates a position where the Accused was convicted of rape in circumstances involving multiple rapes and that on a grammatical interpretation of the provision, viewed in context within the Act, the paragraph envisaged three sets of circumstances: where the victim was raped (i) more than once by
- the accused; (ii) or more than once by the co- perpetrator in addition to rape by the accused; (iii) or more than once by any
- accomplice in addition to the rape by the accused.
- [117] In casu, the court was obliged to impose a life sentence as these circumstances of multiple rapes were present at the time of conviction in the sense that they were included on the facts upon which the conviction was based. Consequently where factors of substance do not compel the conclusion that the application of a prescribed sentence would be unjust, that sentence has to be imposed; see *S v Mokazi & Others* 2002 (2) SACR 609 (T). In this matter we are dealing with unrepentant serial rapist.

- [118] Furthermore, A and S had to live a life of fear, and under these unpleasant and unpalatable chronic conditions, for three years not abating. They were also bit ten, kicked and thrown with objects like shoes and whatever else available to punish them and when MN found out that A had in fact told someone that it was Ounooi who was hurting them, the two of them were also hit by hand by both MN and FM even though it was FM who told them to say it was Ounooi who was hurting them. They just could not escape the distressing situation and the continuous hurt.
- [119] Serfontein had eloquently testified on the physical and mental condition of A amongst other children at school. She painted a gloomy picture of a child that was scared, withdrawn, lacking self-esteem, stripped of all dignity and sent to school in smelly stained clothes. No wonder she was also withdrawn. The school tried to restore a little bit of dignity that was left by providing her with clean clothes.
- [120] In *Du Tait, De Jager, Paizes, Skeen and Van der Merwe's Commentary on Criminal Procedure Act* on p 28-18D-12 it is stated that the psychological damage to a rape complainant (and especially one of tender years) calls for special consideration when assessing the appropriate sentence. This seems to have escaped the court a quo that one of the victims was of a very tender age.
- [121] As highlighted by the SCA in *S v SMM 2013 (2) SACR 292 (SCA)* ([2010] ZASCA 56) at 297c, that the legislature considered rape one of the worst crimes and ordained life imprisonment as the sentence to be imposed. The court stated that:
- 'Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate and private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement... free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'
- [122] The legislature also indicted the circumstances that will not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. The apparent lack of physical injuries to the complainant as provided in S 51 (3) (Aa) (ii) was one of them. Zondi J in *S v Uithaler 2015 (1) SACR 174 (WCC)*, held that:
- "the fact that the victim of a sexual assault suffered no physical injury in the course of the assault does not, in my view, render the crime of rape less reprehensible."
- [123] In *S v G 2004 (2) SACR 296 (W)* Borchers J in relation to the issue of absence of violence: stated that
- "A physically immature child...is no match for an adult man and little violence is needed to achieve his purpose."
- [124] Furthermore the learned magistrate downplayed the fact that the Appellants did not show any remorse to what they have done, notwithstanding that they have left the children in a devastating situation where they will have to carry the stigma of their past for the rest of

their lives. Their children now live with strangers because their own parents used them as objects of their own sexual gratification. The Appellants failed to take the court into confidence when they did not testify or respond to the children's allegation. Shad sketched out in her notes the impact of the trauma they suffered as a result of the rape incidents. She said she again started to worry, especially when she went to sleep she thought a lot about these happenings. She experienced some changes suffering from stomach cramps, felt dirty and again started wetting herself. She did not have friends, was very sensitive and quick to cry. A, her baby sister suffered from nightmares and also the indignity of having to wet herself at night. She was affected mentally, her whole being "deurmekaar."

[125] The learned magistrate had apparently acknowledged the gravity of the crime perpetuated against such small children by their own father in the sanctity of their home and that its physical and mental effect are bound to be long term when he referred to the statement in *S v Abrahams* 2002 (1) SACR 116 (SCA) that:

"What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. Its effects may linger for longer than in the case of extra-familial rape." (my emphasis)

[126] Cameron A R explained that kind of rape as follows:

"Rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. The present case illustrates them with acute force. The rapist may think that the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused did) he can exercise a proprietary entitlement. Though not the case here, the family victim may moreover for reasons of loyalty or necessity feel she must conceal the crime. A woman or young girl may further internalise the guilt or blame associated with the crime, with lingeringly injurious effects. This is particularly so when the victim is the rapist's own daughter and the more so when the daughter is of tender years." (my emphasis)

[127] The learned magistrate abrogated his duty to hold the best interest of the child paramount allowing it to be trumped up by the perpetrators' peripheral circumstances that of being first offenders when the life sentence is designated for first offenders anyway. The learned magistrate failed to appreciate the gravity of the circumstances of the rapes of the Complainants and its devastating long term impact that negates any weight the absence of a previous conviction or perceived absence of physical injury and the extent of the awaiting trial period may supposedly carry, individually or cumulatively. The cruelty of having perpetrated this crime for three years on their defenceless children is immeasurably and frighteningly sickening. It is the most gruesome of rapes I have ever come across so far. The Appellants deserve no less than the life sentence.

[128] The court a quo consequently erred in finding that the three factors it referred to were substantial and compelling circumstances justifying the court's deviation from imposing the minimum prescribed sentence of life imprisonment and hence the sentence it imposed shockingly and disturbingly inappropriate.

[129] Under the circumstances, I therefore make the following order:

1. The Appellants appeal against conviction is dismissed.
2. The state's appeal against the sentence imposed in respect of each of the 2 convictions of rape is upheld.
3. The sentence imposed by the court a quo is set aside and substituted by the following:
 - (a) In respect of each of the conviction for rape the Accused are sentenced to imprisonment for life, the sentences to run concurrently.
 - (b) The sentences antedated to 12 March 2015.

KHUMALO NV

JUDGE OF THE HIGH COURT

GAUTENG DIVISION; PRETORIA

I concur

COLLIS C

JUDGE OF THE HIGH COURT

GAUTENG DIVISION; PRETORIA

For the Appellants: Wynand Prinsloo and Ven Eedem Inc

(On conviction) c/o W S Badenhorst Attorneys

Respondent

Rietfontein , Pretoria

(On sentence)

Ref : Mr Van Eedn/lmr/M34/15/J

For the Respondent: THE NDPP

(On conviction) KerkPlein 28

Appellant

PRETORIA

(On conviction) Ref: Adv F W van der Merwe

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