Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

EASTERN CAPE LOCAL DIVISION, GRAHAMSTOWN

CASE NO. CA&R 139/14

In the matter between:

Z[…] W[…] **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

STRETCH J:

[1] The appellant was charged in the regional court on two counts of rape. The magistrate found him guilty as charged and sentenced him to life imprisonment.

[2] The appellant has been granted leave to appeal against the convictions and in respect of the sentence imposed.

[3] With respect to the convictions, it is contended on his behalf that the trial Court erred in not accepting the appellant's version that it was the complainant who had initiated sexual intercourse, and that the

appellant had unsuccessfully attempted to stop her from doing so. It is accordingly argued that acceptance of the appellant's version must result in the appellant's acquittal because the scenario which he describes goes even further than that of consensual sexual acts with a child who is 12 years old or older but under the age of 16 years as envisaged in section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act no. 32 of 2007 ("the Sexual Offences Act").

[4] It is common cause that the complainant is the appellant's natural daughter and that he had impregnated her twice, resulting in her giving birth to a female infant on […] 2004 and a boy on […] 2006 (these being the only two rapes with which the appellant was charged when the matter was transferred from the district court to the regional court).

[5] It is also not in dispute that the appellant had had regular vaginal intercourse with the complainant and that she was 13 when she fell pregnant for the first time, and 16 on the occasion of her second pregnancy.

[6] The crisp issue which the trial court was called upon to decide, was whether the complainant not only consented to these acts of incest, but also whether she in fact initiated them.

[7] The complainant testified that the appellant first approached her during December 2002 when she was just on13 years old. He came into her bedroom, commenced to have vaginal sex with her without her consent, and told her that she should get used to this because he was going to do it to her on a daily basis. He repeated the act that night and

again the next day whereafter, as the complainant put it, it “kept on going ever since then”, continuously and practically on a daily basis, “whenever he had that craze”. She said that she never consented and she did not report this to anyone because the appellant did not want her to. She added that he had threatened to kill her if she told anyone. The appellant was the only person who had sex with her.

[8] During this period she lived with the appellant and his mother who was away for most of the time. Her biological mother and the appellant were estranged and her mother lived elsewhere. The appellant paid her school fees and provided her necessities such as clothing and food.

[9] During May 2003 she fell pregnant from the appellant and was constrained to leave school. The appellant wanted her to abort the foetus and gave her a concoction made of aloes to drink but it was ineffective. At some stage she decided to go to her mother. The appellant instructed her to report to her mother that she had been impregnated by a young man by the name of Ntoni. When her mother heard this, she challenged Ntoni who denied the allegation. Her mother thereupon instructed the complainant to go back to the place where she had been impregnated. The complainant returned to Uitenhage with the appellant. The appellant had also instructed her to tell the same story to her grandmother which she did. In due course her grandmother came to realise that her son was the father of her future grandchild. She said that her grandmother knew because she (the complainant) was sleeping with the appellant and with no-one else, even when her grandmother came to visit them.

[10] She testified that at times she told the appellant that she was going to report his conduct to the police whereupon he threatened to assault her.

[11] After their first child was born she stayed with her grandparents at Ntonjeni for a few weeks after which she joined her mother in Pearston where she stayed for about six months until she was forced to leave because her mother (who did not know that the appellant was the father) did not want to take care of this "fatherless" child. During this period that she stayed with her mother she had no contact with the appellant. She sought help from her paternal grandparents as she had nowhere else to go. When she returned to stay with her grandparents the appellant visited them. There were disagreements between the appellant and his great aunt (who did not like the appellant). These fallouts invariably spilled over to the complainant who was then forced to go back to the appellant as once again, she had no other place to go. Her mother had, in the interim, passed away from an HIV-related condition.

[12] Once she was back with the appellant he told her that "things would proceed normally" with respect to their sexual intercourse and that thereafter "it happened whenever he had a desire for that", despite her lack of consent.

[13] In 2005 she returned to school (grade four) and the appellant, and from time to time his mother, would care for their baby. That December the appellant impregnated her for the second time. By then she was 16 years old. Because of her pregnancy, the appellant refused for her to go back to school in 2006, and she gave birth for the second time on […] 2006. Her grandmother also refused to visit her while she was pregnant.

[14] She stayed with the appellant and their two children until 2008 when she had to take her children to her maternal grandmother's home who needed looking after as she was ill. Up until then the appellant had not missed a beat as far as sexual intercourse was concerned.

[15] When she was living with her maternal grandmother at Pearston, the appellant would phone her asking when she was coming back. She told him that she was not. In 2009 he phoned her again on her maternal aunt's phone, threatening to fetch her. She asked him for money as she was struggling to care for his children. He refused, accusing her of having "other boyfriends" and saying that she was going to spend his money on them instead.

[16] In due course, the appellant arrived at Pearston to fetch her and the children as he had threatened. This was in August 2009. She refused to accompany him. He said that he would kill her, that no one would find her, and that he would then leave with the children. Early the next morning he removed her clothes from the cupboards and instructed her to pack, which she did, whereafter he accompanied her and the children back to his home at Gunguzula. This was on a Sunday.

[17] The very next day she went to the police and reported the appellant's conduct. When asked why she did so, her tearful response was the following:

> "I merely decided that I should do that because I felt that I would not be enslaved by him as a sex slave and on top of that I was not his wife."

[18] During cross-examination it was put to the complainant that the appellant had had sexual intercourse with her for a period of six years, from 2003 up until 2008. She agreed. She added that the appellant often assaulted her before raping her, and that he would treat the injuries which she had sustained as a result of this physical abuse, with ointments which he brought from Ntonjeni.

[19] When she was challenged about why she had failed to report the appellant's conduct during this period, she maintained her version that she was afraid because he had threatened to kill her. She testified that every time he wanted to have sexual intercourse with her, she told him that she did not want to, and reminded him that he was her biological father.

[20] It was put to the complainant that the appellant's version of what had transpired between the two of them (all of which the complainant denied), was the following:

> "…you were the one that encouraged the relationship between himself and you because you had a problem with his girlfriend and you chased away his girlfriends… you indicated to him that if he cannot reconcile with your mother he will not have another girlfriend, you would rather be his girlfriend … at no stage did he have intercourse with you without your consent … you would crawl into his bed and … you would play with his penis … when this thing started he told you to stop this attitude of yours but you did not listen to him … although the relations between him and yourself was abnormal he does not know what possessed him to continue with this relationship … after the birth of the first child he did inform the family that the child was his … his girlfriend used to swear at you that you are sleeping with your own father … you even informed him you do not care what the community is saying about this relationship, what people think about this relationship … the relationship between yourself and him is that you were treating him as a boyfriend and as a husband … when he

> would go out and sleep at his girlfriend's place you would go there and make a noise for him to come back and you would shout and swear there … you indicated to him that he will never ever have a girlfriend … he denies that he ever raped you."

[21] The appellant testified in his defence. He described his daughter, the complainant, as a shrewd, manipulative liar with an inclination towards distorting the truth to her own advantage. He described his sexual relationship with his daughter as a "normal" one. It all started he explained, in 2002 when he was 35 and the complainant was just on 13 years old. He said she was a lazy learner, and that she would crawl into his bed instead of going to school. Once in his bed, she would insert her hand beneath his underwear and insist on fondling his penis, despite the appellant's protestations. He said that she would tell him not to pretend that he was not enjoying her advances. At all times, she was the one who instigated the consequential acts of sexual intercourse between the two of them.

[22] He described this relationship as "people staying together … in harmony as a family, … as lovers" and that there was something "extraordinary" between them, conceding however that this was not normal.

[23] The appellant admitted that he was aware that people were talking about them and that what was happening between him and his biological daughter was wrong. He told the trial Court that he did not speak to other family members about this or seek assistance or intervention with respect to his daughter's ostensibly problematic behaviour because he was embarrassed and ashamed. He could not stop, he said, because

his juvenile daughter was a forceful child who was “controlling” him and he had no choice but to “carry out her instructions”, and that it was natural because both of them enjoyed it in any event. Having said that, the appellant nevertheless agreed that he was not an innocent party in the scenario which he had described.

[24] The appellant, for the first time during cross examination suggested that the reason why the complainant put a stop to what was happening between them was because she fell pregnant for the third time.

[25] The trial Court rejected the appellant’s version that the sexual acts were consensual and convicted the appellant on two counts of rape whereupon he was sentenced to life imprisonment, as I have already mentioned.

[26] On appeal, the contention that the appellant was entitled to his acquittal because his version (that his child initiated sexual intercourse which he tried to resist) safely excludes a conviction even on a charge of so-called statutory rape, was not seriously pursued, and correctly so, in my view. The appellant’s version, that he was regularly seduced and groomed by his own daughter from when she was 13 years old, over a period of six to seven years is so improbable that the trial Court correctly rejected it as false beyond a reasonable doubt. That is not however, the end of the matter.

[27] The original charge sheet, referring to the first count of rape during May 2003 and the second during December 2005, sets out that these charges of rape ought to be read together with the provisions of sections

51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act").

[28] The appellant's trial commenced on 1 November 2010. The relevant portion of the transcribed record of the proceedings of that day reads as follows:

> 'PROSECUTOR: The matter is on the roll for the purpose of trial. The State is ready to proceed Your Worship. The defence has had insight into the charge sheet. The charge sheet are two charges of rape, if that can be confirmed.
>
> COURT: Is the defence ready to proceed?
>
> MR TEE: As the Court pleases Your Worship. I confirm my appearance on behalf of the accused Your Worship. I confirm Your Worship we had insight to the said charge sheet. We understand the charges I have explained to my client Your Worship. It is my instruction that Your Worship that he will plead not guilty on both counts of rape Your Worship and at this stage he will exercise his right to remain silent Your Worship.
>
> ACCUSED: I do confirm that.
>
> COURT: How do you plead on the first count of rape?
>
> ACCUSED: Not guilty Your Worship.
>
> COURT: On the second count of rape?
>
> ACCUSED: I also plead not guilty Your Worship on the second count as well.
>
> COURT: Thank you Madam.
>
> PROSECUTOR: Your Worship the State calls Z[…] M[…].'

[29] The following is evident from a reading of the record:

a. Sections 52(2), 52A and 52B of the Minimum Sentences Act were repealed by section 2 of Act 38 of 2007.

b. What remains then is section 51(2) of the Minimum Sentences Act, which, when read in conjunction with part III of schedule 2 dealing with rape matters, prescribes a minimum sentence of ten years' imprisonment for a first offender and 15 years for a second offender.

c. The prosecutor did not put the charges to the appellant.

d. The magistrate too, did not put the charges as set forth in the charge sheet to the appellant.

e. The only person who appears *ex facie* the record to have done anything to enlighten the appellant about the course and scope of his impending trial, was his legal representative, who recorded that he and the appellant had had "insight" into the charge sheet, and that the appellant understood the charges as explained to him by his lawyer. On the assumption then that his lawyer did explain the charge sheet to the appellant, such explanation is unlikely to have traversed the prospect of life imprisonment referred to in section 51(1), for the simple reason that the appellant was not charged with rape under that section, and there is nothing else in the charge sheet to suggest that the prosecution intended relying on that section because the complainant was raped more than once, and/or because the complainant was 13 years old when she was first raped, both of which factual situations, if alleged and proved, would have entitled the prosecution to argue for at least one term of life imprisonment. In *S v Ndlovu* 2003 (1) SACR 331 (SCA) the Supreme Court of Appeal confirmed that where the State intends relying upon the sentencing regime created by the Minimum Sentences Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. If this is not done in the charge sheet, then it must be done in some other form, so that the accused is placed in a position to appreciate properly and in good time the charge that she or he faces as well as the possible consequences. What is at least required is that the

accused is given sufficient notice of the State's intention to enable the accused to conduct his or her defence properly.

[30] With respect to suitable punishment, it was contended on the appellant's behalf at his trial that a partly suspended custodial sentence would be appropriate; alternatively a sentence of correctional supervision, and that substantial and compelling circumstances existed for the sentencing Court to deviate from the minimum sentence provisions. The prosecutor, on the other hand, pressed for direct imprisonment, without any portion thereof being suspended.

[31] It is significant that no mention was made, throughout the record inclusive of argument on sentence before the Court *a quo* as to what the applicable minimum sentence was. The only reference to specific time periods during argument reads as follows:

'COURT: Mr Tee, the accused has been charged in terms of Section 51(2) of the Criminal Law Amendment Act and the penalty provisions that flow from there, this offence being one that falls under part 1.'

And then, some seven pages of argument later:

'COURT: What is the prescribed sentence for such offences, especially incestuous rapes?

MR TEE: Your Worship with the normal rape it is ten years but where there is two Counts of rape Your Worship the sentence is one of life imprisonment Your Worship. The accused has been found guilty in this matter of two Counts of rape Your Worship so the minimum sentence will be life imprisonment or 25 years imprisonment but I submit Your Worship that you can deviate from that Your Worship.'

[32] Mr Tee was of course quite correct. Section 51(1) of the Minimum Sentences Act, referring to offences listed in part one of schedule two, prescribes a sentence of imprisonment for life where the victim has been raped more than once, whether on the same occasion or on two different occasions. See *S v Mahomatsa* 2002 (2) SACR 435 (SCA) 444i; *S v Kimberley & another* 2005 (2) SACR 663 (SCA) 668h-i and 669j-670c; *S v M* 2007 (2) SACR 60 (W) [24-25]. Indeed, in *S v M* Satchwell J likewise sentenced an accused to one term of life imprisonment for raping his stepdaughter twice, once when she was 14 and again when she was 15.

[33] Unfortunately however, the appellant before us was not only charged under a different section, but he was also charged with no more than two rapes separated by a period of at least two years, and not with frequent and regular rapes over a period of six years, which is, in my view, how the charge sheet ought to have read to accurately reflect a factual situation which is, on the face of it, far more aggravating than that which was described in *S v M.*

[34] Section 94 of the Criminal Procedure Act 51 of 1977 (“the Act”) makes specific provision for the charge to allege the commission of an offence on divers occasions. It is particularly suitable for the situation such as the one before us where it is not practicable to individually specify each occasion on which the crime was committed. Reliance on section 94 not only protects fair trial rights, but enures to the benefit of the administration of the criminal justice system in general. In *S v Mponda* 2007 (2) SACR 245 (C) at [15] Binns-Ward AJ said the following:

> ‘The administration of justice is potentially prejudiced because the allegation of only a single count of rape in a charge-sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single-count offender. As mentioned, this is cause for particular concern in matters where the Legislature has determined that offenders convicted on multiple counts should receive prescribed higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal justice into public disrepute.’

[35] I agree. In fact, were it not for the peculiar nature of the defence of the appellant before us, the complainant’s evidence regarding the continuity of the sexual conduct may well have been deemed to have been irrelevant and accordingly inadmissible, resulting in an undue adverse inference having been drawn with respect to her credibility (see *Mpanda* supra at [12]).

[36] It is likewise unfortunate that the provisions of section 86 of the Act were not resorted to. The relevant sub-section reads as follows:

> ‘(1) Where a charge is defective for want of an essential averment therein, or where there appears to be any variance between the averment in the charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is *any other error in the charge* (my emphasis), the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses a defence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in *any other part thereof which it may become necessary to amend* (my emphasis).’

[37] It goes without saying that once judgment has been given, as has happened in this case, the State is bound by the charge. In my view however, section 86 has the potential of covering a multitude of sins. It ought to have been resorted to as soon as it became clear that the acts of sexual intercourse had been ongoing and frequent for a period of at least six years. Indeed, it ought to have been resorted to at the commencement of the trial, which was the time that any prudent prosecutor acting carefully within the ambit of section 105 of the Act, ought to have realised, when the charges were being put to the appellant, that the charge-sheet was defective in at least three respects:

(i) It referred to portions of minimum sentence legislation which had long since been repealed;

(ii) It described a scenario which was not consistent with the facts or at the very least only very small parts of a very long and detailed story (which the prosecutor ought to have been *au fait* with had she precognised the complainant);

(iii) It referred to minimum sentence provisions which did not apply to neither the offences in respect of which the appellant had been charged *ex facie* the charge sheet, nor the offences borne out by the evidence.

[38] Sadly, this did not happen presumably because both the prosecutor and the magistrate elected to leave the putting of the charges to the appellant's legal representative. At the hearing of this appeal, we were informed by both counsel for the appellant and counsel representing the State, that this procedurally irregular conduct has become practice in the lower courts. If this is indeed so, presiding officers are invited not only to be vigilant in discouraging and

reprimanding such sloppy prosecution, but also to resist becoming a part of what can only be described as a series of unfortunate irregularities.

[39] I now return to the case at hand. The magistrate, during judgment on sentence said the following:

> 'The offence that you have committed falls under Sec 41 Part 1 of Schedule 2, that is rape where it occurs more than once; further that the girl be a victim under 16 years. There are several instances where it has been claimed that if a rape occurs under these circumstances therefore it falls under Part 1. In Your circumstances it is not in dispute that you have had sexual relations with the complainant against her will for more than six years or five years and on each and every occasion it has not been only one instance, it has been more than twice during one incident, that is during one night or during one day, whenever it may occur and Sec 51(1), though it provides the Court with a discretion, however provides that the Court shall sentence a person to imprisonment for life if it has convicted a person of an offence referred to in the schedule and if the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence it shall enter those circumstance on the record …'

[40] The magistrate, having made a finding that no substantial and compelling circumstances existed, convicted the appellant to one term of life imprisonment.

[41] In my view a conspectus of what transpired at the appellant's trial exposes a number of irregularities and misdirections on the part of the magistrate with respect to several aspects. I list these as follows:

a. One: the magistrate accepted without further ado that the appellant was alive to the nature of the charges he was facing and the consequences of findings of guilt, on the mere *ipissima*

verba of his representative that they had perused the charge sheet and that the appellant understood the charges as explained to him by his legal representative.

b. Section 105 of the Act reads thus:

> 'The charge *shall* (my emphasis) be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.'

c. The provisions of section 105 are peremptory, not only with respect to the stating of the charges in open court, but particularly with respect to the party seized with the duty to do so, being the prosecutor who after all is the official representative of the State being the accused's accuser. See *S v Mamase & Others* 2010 (1) SACR 121 (SCA) at [7]. Furthermore, an accused person is at the outset of criminal proceedings entitled to be advised of the case which he is called upon to answer to with sufficient particularity so as to instruct his legal representative properly and to plead to the charges in a meaningful way, should he so wish. The accused's right to be informed of the charge with sufficient detail to answer it is a fundamental non-derogable right which enjoys absolute protection in terms of section 35(3)(a) read with section 37(5)(c) of the Constitution.

d. The fact that the frequency of a rape and/or the age of the victim can exacerbate the seriousness of the offence to such an extent that the perpetrator thereof runs the risk of life imprisonment as opposed to a minimum sentence of ten years'

imprisonment, in my view, compels the prosecution and/or the presiding officer to advise the accused of this before he pleads. It is only fair that the charge should in no uncertain terms let the accused know what to expect. See *National Director of Public Prosecutions v Rautenbach and Others* 2005 (1) SACR 530 (SCA); *S v Tuswa* 2013 (2) SACR 269 KZP 271[3] to [6].

e. The prosecutor in the matter before us failed to comply with the mandatory provisions of section 105 of the Act. This is an irregularity which could have been cured by the magistrate's intervention. The magistrate's failure to do so is in my view, a misdirection (see *S v Mseleku* 2006 (2) SACR 574 D&CLD 578h – 579e).

f. Two: In traversing the question of sentence, the magistrate appears to have either confused the provisions of section 51(1) of the Minimum Sentences Act with those of section 51(2), or appears to have assumed that if the facts prove the commission of a specific category or categories of offences the appellant can be sentenced as if he had been charged in respect of these offences. I say so for the following reasons:

   (i) The magistrate expressed an understanding that section 51(2) of the Minimum Sentences Act applies to offences which call for life imprisonment, when in fact, the section in terms of which the appellant had been charged, applies to sentences ranging from a minimum of ten years' imprisonment to a minimum of 20 years.

   (ii) In my view, an accused person cannot be sentenced to the ultimate form of punishment citing legislative compulsion as the reason to do so, when those legislative provisions have not been explained to him, not even if his

conduct would ordinarily be punished by such ultimate form of punishment. Nowhere does the record reflect that the appellant was informed (either directly or indirectly) or that he knew that if he raped his victim more than once or if she was younger than 16 when he raped her, the trial court would be constrained to sentence him to life imprisonment because there is mandatory legislation to this effect. Not only is this not reflected in the record, but the charge sheet (which the appellant's lawyer indicated had been explained to him), says the opposite. The charge sheet tells the appellant that if he is convicted on the charges referred to therein, he runs the risk of being sentenced to a minimum sentence of ten years' imprisonment on each count. See *Mseleku supra* at 579d-i.

(iii) It is so that the charge sheet reflects more than one count of rape. It is also so that the charge sheet refers to the fact that the complainant was 13 years old with respect to the first count. It is furthermore quite correct that cogent evidence was presented to prove these aspects where they had not been admitted. What the charge sheet does not reflect however, is that the State and/or the presiding officer at the end of the day would rely on these very facts to either prove or to rely on drastically increased sentencing jurisdiction.

(iv) In my view the magistrate, in *mero motu* in his judgment on sentence invoking this elevated sentencing jurisdiction for the first time, and not without apparent uncertainty I might add, committed a further misdirection.

g. Three: In traversing the question of sentence the magistrate said the following:

'I have taken note that according to the charge sheet this offence was stated to have occurred between 2003 up until 2005. However, during the testimony you have informed the Court that you have been having sexual relations with your child from 2003 up until 2008.'

h. The magistrate's rendition of what is set forth in the charge sheet is incorrect. The charges refer to two rapes, one in 2003 and one in 2005. They do not refer to ongoing conduct between 2003 and 2005, and they certainly do not traverse the even lengthier period sketched in the evidence and also referred to by the magistrate. The fact that the magistrate stated that he had taken note of something which is not reflected in the charge sheet is, in my view, a further misdirection, particularly in that the perception may well have been created that the magistrate, in taking this into account, then proceeded to punish the appellant for conduct unrelated to the offences preferred in the charge sheet.

i. Four: In traversing the aspect of the presence or absence of substantial and compelling circumstances which would in normal circumstances justify a downward deviation from a prescribed minimum sentence for a specific offence, the magistrate said the following:

'It is not a prevalent offence, therefore the Court has to take into account those factors as compelling and substantial against the imposition of the penalties provided by the Minimum Sentences Act.'

j. What this statement was intended to convey is obscure. If the magistrate intended to express the view that the fact that this

father raped his juvenile daughter more than once in the sanctity of her home, where his primary role ought to have been to act in a position of trust and care, is unusual and accordingly justifies downward deviation from the relevant minimum sentence provisions, such a sentiment is, in my view, based upon a wrong principle and a misconceived perception of why courts from time to time refer to a particular offence as being prevalent when considering the interests of society. In my view, the perception that family rapes are not as common as other rapes, does not mean that those who commit them are less deserving of punishment. On the contrary, the fact that the appellant abused his familial relationship with this child and his paternal position of power over this child in order to reduce her to an easy target who would be less inclined to expose him because she and the other children which he had fathered with her were entirely dependent on him, is an aggravating feature of these offences.

k. Having committed himself to such a finding (however inappropriate) the magistrate then proceeded to sentence the appellant to the maximum penalty available in any event. As I have said, life imprisonment is not the legislatively prescribed minimum sentence for that which the appellant had been charged with and of which he was convicted. But even if it was, to express the view that substantial and compelling circumstances are present for discounting the sentence and then not to do so, is a misdirection.

[42] To sum up, in my view the magistrate did not err or misdirect himself with respect to factual findings and findings on credibility.

Differently stated, I am satisfied that the evidence in the court *a quo* supported a criminal finding that the appellant raped his child during May 2003 and again during December 2005. But for the problems, irregularities and misdirections which I have already referred to, life imprisonment would, in the light of the applicable minimum sentence provisions, in my view have been an appropriate sentence. It is so however, that the interests of justice dictate that the sentence imposed cannot be permitted to stand in the circumstances which I have described. It goes without saying that this court is accordingly at liberty to sentence the appellant afresh.

[43] The ambit of the minimum sentencing provisions reflected in the charge-sheet dictate a minimum sentence of ten years' imprisonment on each of the rape counts. No case has been made out for the existence of substantial or compelling circumstances to dictate otherwise. Indeed, as I have said, if this trial had been conducted properly, interference with the sentence of life imprisonment which the magistrate ultimately imposed is not something which, in my view, would have merited serious consideration. I have already alluded to the aggravating and shocking features of the appellant's conduct. The callousness of the appellant's threats to kill his daughter if she reported these rapes to anyone showed that the appellant had a full appreciation of the nature of his vile deeds. He wanted to ensure that his child remained a silent victim of his cruel conduct. See *S vSM* 2014 (1) SACR 53 (GNP) at [11].

[44] In *S v AM* 2014 (1) SACR 48 (FB) Mocumie J and Sepato AJ stated the following:

> ‘ … [r]ape of a young child such as the complainant [who was 14 years old] is always an extremely serious matter, even in the absence of serious injuries and despite there being no evidence of permanent psychological after-effects. This is all the more so where the man is in a position of trust *vis-à-vis* the complainant.’

[45] In that matter the 40-year old appellant, who was a first offender, had been convicted for raping his juvenile step-daughter once in the family home. The sentence of life imprisonment was confirmed on appeal, despite the fact that the rape was described to have been “not of the worst kind” (see also *S v Snoti* 2007 (1) SACR 660 (E) at 663c).

[46] In the premises I make the following order:

> The sentence imposed by the trial court is set aside and substituted with the following:
>
> On count one: the accused is sentenced to imprisonment for a period of ten years.
>
> On count two: the accused is sentenced to imprisonment for a period of ten years.

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I T STRETCH **18 December 2014**

JUDGE OF THE HIGH COURT

I agree:

_____

NEPGEN J

JUDGE OF THE HIGH COURT

Appeal heard: 27 August 2014

APPEARANCES:

For the appellant: Mr Solani

Instructed by the Grahamstown Justice Centre

For the respondent: Mr Mdolomba

Instructed by Legal Aid South Africa