IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE.
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED

CASE NO: A565/2016

9/6/2017

In the matter between:

E. F Appellant

and

THE STATE Respondent

DATE OF HEARING : 24 APRIL 2017
DATE OF JUDGMENT : 09 JUNE 2017

JUDGMENT

MANAMELA, AJ

Introduction

[1] The appellant is currently serving a sentence of life imprisonment, after his

conviction by the Regional Court for the Regional Division of Mpumalanga, Nelspruit (the Trial Court), on 16 July 2013. He was convicted on a count of statutory rape (as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) of a 12- year-old girl.[1] He now submits, in terms of this appeal, that the Trial Court erred, in respect of both his conviction and sentence.

[2] The appellant entered a plea of not guilty to the charge; testified in his own defence and had the benefit of legal representation throughout the proceedings. As stated above, the Trial Court found him guilty and sentenced him to life imprisonment. The Trial Court found existence of no substantial and compelling circumstances to deviate from the minimum sentence prescribed by the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). The appellant was 37 years of age, at the time of his conviction and sentencing on 16 July 2013.

[3] This matter came before us, on appeal, on 24 April 2017, whereat Mr R Kriel, appeared on behalf of the appellant, and Mr JJ Jacobs, appeared for the State or respondent. This judgment was reserved, after oral submissions by counsel. We are also grateful to counsel for the written heads of argument.

Grounds of appeal (in summary)

[4] As already indicated, the appellant challenges, in terms of this appeal, both his conviction and sentence by the Trial Court.

[5] The grounds of appeal with regard to conviction are as follows. Generally, that the Trial Court made an error in accepting that the State proved the appellant's guilt beyond reasonable doubt. Specifically, that the Trial Court erred in accepting the complainant's testimony, as a single witness, without applying the necessary cautionary rules and finding her testimony good and reliable; accepting the clinical finding of sexual penetration in terms of the medico-legal examination report (i.e. J88 Form) as proof that the appellant raped the complainant; not finding the fact that the rape was only reported to the police after three days suspicious; not finding that the complainant, who is a minor child,

[1] The birth certificate reflects the date of birth of the complainant as 11 July 1999, whereas the J88 Form or

may have been unduly influenced in implicating the appellant in the commission of the rape, and not considering that there were material contradictions amongst the State witnesses.

[6] With regard to the sentence imposed by the Trial Court, the appellant contends that the Trial Court did not take sufficient consideration of his personal circumstances; the fact that he was a first offender at the age of 40 years; he had been imprisoned for two and half years awaiting trial, and his prospects of rehabilitation. He adds that, the sentence of life imprisonment took away any prospect or possibility of his rehabilitation and the Trial Court overemphasised the seriousness and prevalence of the offence, in this regard.

[7] As appearing above, the State is opposing the appeal with regard to both conviction and sentence, and supports the judgment of the Trial Court. Next, I deal with the evidence adduced at the Trial Court and the submissions made on behalf of both parties, to the extent relevant to the grounds of appeal.

Evidence at the Trial Court (selected)

The State's Case

[8] The State called three witnesses. The first witness for the State was the medical practitioner who conducted the medico-legal examination of the complainant. He was followed by the complainant herself. The third and final witness for the State was the complainant's uncle. I deal with the material parts of their testimonies below.

[9] Dr Raty Joseph Nkosi, a medical practitioner, who examined the complainant after the rape, testified as follows before the Trial Court. He examined the complainant on 05 February 2011 and completed the medico-legal examination report (i.e. the J88 Form).[2] The complainant reported to him that she has been sexually assaulted on 31 January 201 l. On general examination (in terms whereof he examined the general physical appearance), the complainant had no bruises, no lacerations, no haematoma or general signs of physical abuse.[3] He explained that he made these observations from examination of the

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medico-legal examination states the date as 01 January 2000. See indexed pp 19 and 21 of the record.

[2] See indexed pp 19 and 21.

[3] See lines 9- 12 on indexed p 35.

face, chest, abdomen, hands, arms and upper and lower limbs of the complainant. Further, in terms of his examination , the mental health and emotional status of the complainant was good, even though the absence of signs of trauma does not exclude the possibility of the complainant having been sexually assaulted.[4] Although the posterior fourchette of the complainant had no scarring, there were fresh lacerations or tears. On examination of the vagina, there was no active bleeding, but increased friability, which meant that the wound was still fresh and therefore, if touched, it would easily bleed. The complainant's hymen was not intact and the vagina could admit two fingers, instead of one, which is indicative of vaginal penetration.[5] The opening diameter or opening to the vagina could not be measured , due to swelling. Dr Nkosi's clinical findings confirmed vaginal penetration of the complainant.

[10] Dr Nkosi's cross-examination only related to date on which he examined the complainant, being 05 February 2011. The defence contrasted this date with the date on which the rape was committed, being 31 January 2011. The defence attempted to cast doubt on the rape having been committed by the appellant on the alleged date, due the doctor's testimony was that the wounds were fresh and could still bleed on examination, five days later. But, Dr Nkosi maintained his position that, when he examined the complainant there was no bleeding, although he could see that the wound was fresh and would bleed, if touched. He further explained that the swelling and freshness of the wound and the healing thereof, depend on the location of the wound. For example, when the wound is exposed to air, it will heal quicker and dryness thereof is also quicker, but when the wound is in a protected area, like the mouth or in the vagina, one will not be able to tell how Jong the wound has been there, even though one will be able to see that there is a definite wound there. He further explained on a question from the Trial Court that, this does not suggest that in concealed areas wounds take longer to heal, but that no scarring takes place and therefore a cut in the mouth may, the next day, seem like it was the same day cut, although it is from the previous day.

[11] The complainant was the second witness for the State. She told the Trial

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[4] See lines 20-22 on indexed p 35.
[5] See lines 4-8 on indexed p38.

Court that she was 14 years old at the time of her testimony. Due to her age, she had to testify through an intermediary.[6] Her evidence before the Trial Court, to the extent that is material for current purposes, was as follows. She told the Trial Court that on the day in question, she had accompanied her brother-in-law, the appellant, to the station to go and call an ambulance for her sick aunt. Her aunt is married to the appellant. She and her sister[7] lived with her aunt and the appellant. Whilst at the station, they were approached by two social workers, who expressed concern, why the appellant was there with her at that time of the night. They returned home without an ambulance. When they arrived back home, the appellant said that they should enter the house and sleep in the same room. The appellant slept on the bed, whilst she slept on the floor. The door to the house was locked, presumably by the appellant, and that it was only her and the appellant in the house. Whilst asleep, the appellant moved from his bed to the floor where the complainant was sleeping; started touching her; removed her skirt and panties ; closed her mouth with his hand and inserted his private part into her private part and made up and down movement. When the complainant wanted to scream, the appellant said to her she shouldn't scream and if she did, he was going to kill her. She also told the Trial Court that she screamed when the appellant made the up and down movement, but the appellant closed her mouth and told her not to talk. She felt pain in her vagina and bled. The appellant, after raping her, told her to take a bath, which she did. He warned her not to tell anyone about the incident.

[12] However, she told her cousin, H, the State's third and final witness] about the rape. She could not remember the date on which she told him. She explained the reason for waiting a few days before telling someone, to be the appellant's threats to kill her if she told about the rape. She only told H about the rape, after he observed her crying while taking a bath behind the house. H asked her why she was crying and she narrated the events of the incident to him. She went to the doctor three days after she was raped. When she was asked what she would say if the appellant were to tell the Trial Court that he never put his private part

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[6] See section 170A of the Criminal Procedure Act 61 of 1977.

[7] The complainant firstly mentioned a brother and later sister whilst testifying before the Trial Court. See lines 24 and 17 on indexed pp 48 and 53, respectively.

into hers, she said that he would not be telling the truth.

[13] Under cross-examination the material part of the complainant's testimony was as follows. Although she has been sharing a house with the appellant and her aunt for a year, she had never been alone in the house with the appellant. On the night of the rape, her sister was not around, as she had left the house when her aunt left for work, presumably in the morning. On the day she was raped, her aunt ran away because the ambulance was called when she was not ill. It later turned out, from the appellant's testimony, that the aunt ran away because she felt embarrassed to be fetched by an ambulance[8]. The complainant confirmed that she was accompanied by her aunt when she reported the rape to the police. She told the police what had happened to her and that she had already told H what happened. The person who took the statement from her at the police station did not read it back to her, but she acknowledged the signature on the statement as hers, when it was shown to her at the Trial Court. She admitted the content of the written statement that after the appellant raped her, he said to her that he wanted her to be his wife and he wanted to pay lobolo (i.e. bride price). She had omitted this from her evidence-in-chief. She also told the Trial Court that after raping her, the appellant took a bath and left for work. She did not recall mentioning in the statement that the appellant slept next to her, after he had raped her.

[14] Still under cross-examination, the complainant mentioned that she told her aunt about what happened. This was after she had told H. She was afraid of her aunt, because the appellant had threatened to kill her. She did not remember telling the police that she told her other aunt E about the rape incident and not H. She also did not remember telling the police that it was her aunt who called R and informed her about the rape. However, immediately upon a question of the Trial Court, the complainant confirmed that it was H who told E. She confirmed, on questions from the defence, that it was her cousin, H, who told her aunt, E, and that her aunt was not told by her. She forgot to tell the police that it was H who told her aunt and forgot to alert the prosecutor and the ladies who assisted her with the reading of her statement that morning at Court that her statement

[8] See par 18 below.

was incorrect in that respect. But, she was adamant that she has not forgotten who raped her. She insisted that if anyone was to suggest that she has forgotten who actually raped her, that person would be lying.

[15] The complainant told the Trial Court that the appellant when threatening her, told her that he was going to cut off her head. When, it was put to her that her brother-in-Law, the appellant, would say he did not rape, she said the appellant would be lying. When, it was further put to her that, the reason she does not recall most of the things she said in her statement to the police was because she was told by her aunt to make a statement against the appellant, she denied being influenced by anyone. And she said the appellant would not be telling the truth when he says that her aunt actually influenced her to tell [presumably Jay false charges with] the police. She maintained that the appellant would be telling untruths by denying that he threatened to kill her or cut off her head, as he did rape her and told her how he is going to do it [presumably, the killing or cutting-off of her head]. She also denied as untruths that it was not the first time she was home alone with the appellant. Ultimately, the complainant was brought into the open Court to identify, from amongst the people sitting in Court, the person who raped her, which she did by identifying the appellant.

[16] The third State witness was Mr H. He told the Trial Court that he was 28 years old at the time of his testimony. He confirmed that he is related to the complainant , as her cousin. Their mothers are sisters. Regarding the rape incident, he told the Trial Court that, when he came back home work after performing night shift duties, he found the complainant home, whilst other children were at school. When he enquired from her, she did not answer and started crying. When he subsequently enquired from E, his mother, she suggested he ask the complainant herself, as she (i.e. E) could not get her to tell. Thereafter, he sat down with the complainant, " pleaded with her to tell" him what the problem was. She told him that her brother-in-law "danced on top of her" and had severely injured her in the process. He understood this to mean that the appellant had raped her. H went back and told his mother, E, what the complainant had told him. E called in his aunt, R, and presumably told her the story. H also told the Trial Court that he knows the appellant very well. He

considered him his uncle, due to the appellant's Jove relationship with R, his aunt. He did not have any personal issues with the appellant and, as far as he knew, his mother and the appellant didn't have any problems.

[17] Under cross-examination, H confirmed that the complainant told him about the appellant taking off her panties and dancing on top of her and that he relayed the very same story to his mother, E, who called R in. He thinks R was called to assist by taking the complainant to the doctor. He confirmed that the complainant told him that she was injured by the appellant and that the appellant had danced on top of her, which he [i.e. H] understood to mean she was raped. He admitted making a statement to the police, after initially struggling to remember whether he had made one or not. The statement was read back to him. When asked about the discrepancy between his testimony that the complainant told him the appellant had danced on top of her and the written statement wherein he simply stated the complainant told him she had been raped by the appellant, he conceded that he may have told the police that the complainant had been raped by the appellant, even though by that time the complainant had not yet been examined by a doctor. He denied that all was not well between the appellant and him because of the appellant's alleged refusal to swop shifts with him. He said this was not true as the appellant worked underground , whilst he worked at the plant. He denied that his family had sided with him in the alleged dispute about shifts and that the rape was a retaliation against the appellant. When asked about the discrepancy between the complainant's version that she was taking a bath behind the house, when he asked her why she was crying, he conceded that he could not remember exactly what she was doing, as he was angry about why she was not at school. He was also confronted about the versions, one in his statement to the police that it was a Saturday when E told him about the complainant's crying and another version, from his testimony, that it was a week day and that he told E about the complainant's crying. He maintained that it was not a Saturday, but during the week. He told the Court that on the day in question "we implored the child to go and tell the police it was her brother-in-law who raped her".[9] The latter statement or the word " implore" in the statement, was to

[9] See lines 13 - 15 on indexed p 69.

later occupy a critical position in argument on appeal, by counsel for the appellant. Counsel's view was that implore means influence the complainant to lay false charges against the appellant. I will deal with this at an appropriate stage later, below.

The appellant's case

[18] The appellant testified in his own defence. The essential part of his evidence, for current purposes, is as follows. The complainant is the daughter of his brother-in-law . The relationship was good before the incident, presumably with the complainant. They (i.e. him and his wife) had been staying with the complainant since 2009. He was not home, but at work on the day the complainant was raped. However, when asked about calling of the ambulance for his sick wife on 31 January 2011, he mentioned that it was in fact on 02 February 2011. He confirmed going with the complainant to call for the ambulance. The ambulance did not come, as his wife felt that it will embarrass her to be fetched by an ambulance. However, when he arrived home from calling for the ambulance, he found his wife not home and the house locked. He had his own keys to his room and after trying to knock on the door to the other room, where his "wife's other daughter"[10] was sleeping, she refused to open the door. The complainant slept in his room on the floor, whereas he slept on the bed. He denied , as untrue, that, whilst the complainant was sleeping on the floor, he went down and raped her. He was not in good terms with his wife's family. He suspected this to be the reason why they implicate him in the commission of the rape. His wife, her sister and a certain Mr G, in fact, told him that they are going to lay charges of rape against him. The whole incident was sparked by his refusal to swop his day shift for night shift with one of the family members.

[19] Under cross-examination, the appellant's testimony was as follows. He was in a customary marriage relationship with his wife since 2005. His wife asked him to allow the two children to stay together with them, as they were not taken care of where they were previously staying. They both contributed financially to the children's upbringing. The rest of the family did not have a problem in the

[10] See lines 4 - 5 on indexed p 74. This possibly is the same person as the one the complainant, in her

children staying with them. He maintained that he went to call for the ambulance with the complainant on Wednesday, 2 February 2011 and not on 31 January 2011, as alleged. On why he took the complainant with, he responded that it was the complainant who asked her aunt to accompany him. He confirmed that this suggested that the complainant enjoyed being in his company. He told the Trial Court that the dispute about swapping of shifts was in September 2010, five months before he was arrested for the rape of the appellant. When he was asked for an explanation as to how he thinks the complainant had gotten her injuries, he had no explanation. He maintained that he did not touch or rape the complainant. He then mentioned that the threat by his wife, her sister and the uncle to go and lay false rape charge against him was before the incident, presumably the rape incident. This, he explained, was in December towards January 2011. He confirmed that this meant despite the threats he still cared enough about his wife that he went to get an ambulance for her, and even allowed the child to accompany him.

The Trial Court's judgment and the grounds of appeal (an analysis)

Complainant as a single witness

[20] As indicated above, one of the grounds on which the appellant challenges his conviction is on the basis that the Trial Court did not apply cautionary rules to the complainant's evidence as a single witness.

[21] The Trial Court had actually confirmed its mindfulness of the fact that, in the evidence of the complainant, it dealt with a single witness, whose evidence was disputed by the appellant, and had to treat her evidence with caution. It remarked that the complainant, at 14 years of age when she testified, gave a comprehensive version of what transpired and carefully marshalled her memory, which served her well, as to how she was raped.[11]The Trial Court found the complainant to have been consistent in her testimony that she reported the rape to H.[12] It accepted that, although the complainant reported the rape only three

testimony, referred to as her sister. See also footnote 7 above

[11] See lines 22- 25 on indexed p 87

[12] See lines 2 - 4 on indexed p 88.

days later, this was due to the death threat made to her by the appellant. The complainant stayed in the same house as the complainant and this made the threat real, "not far-fetched".[13] Her testimony that the appellant danced on top of her, is corroborated by Dr Nkosi, the medical practitioner who examined her and concluded that she had been raped. She had fresh tears to her vagina and the opening to her vagina was also swollen.[14]

[22] In terms of section 208 of the Criminal Procedure Act an accused person " may be convicted of any offence on the single evidence of any competent witness". The following *dicta* from the Supreme Court of Appeal decision in *Modiga v The State*[15] present a useful guide in dealing with evidence of a single witness:

> "[32] I am mindful of the salutary warning expressed in *S v Snyman* 1968 (2) SA 582 (A) at 585G [also reported at [1968] 3 All SA 18 (A)- Ed] that even when dealing with the evidence of a single witness. courts should never allow the exercise of caution to displace the exercise of common sense. Equally important is what this Court stated in *S v Sauls (supra)* at 180C-H that:
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> > "In *R v T* 1958 (2) SA 676 (A) at 678 OGILVIE THOMPSON AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s208 of the Criminal Procedure Act 51 of 1977.This section no longer refers to 'the single evidence of any competent and credible witness'; it provides merely that: ' an accused may be convicted on the single evidence of any competent witness'.
> >
> > The absence of the word 'credible' is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out, 'indefinite degrees in this character we call credibility' . (*Wigmore on Evidence* vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration

[13] See lines 4 - 8; 20 - 22 on indexed p88.
[14] See lines 13 - 17 on indexed p 88.
[15] [2015] 4 All SA 13 (SCA).

of the credibility of the single witness (see the remarks of Rumpff JA in *S* v *Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean:

'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" *(per* Schreiner JA in *R* v *Nhlapo* (AD 10 November 1952) quoted in *R* v *Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

The question then is not whether there were flaws in Lennox' s evidence - it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in argument."

[33] This is how the trial court approached and assessed Nxuma's evidence. Based on this. I am unable to say that the trial court erred in its accepting Nxuma's evidence as truthful and reliable as it was corroborated by the damning circumstantial evidence. As this Court held in *S* v *Reddy (supra)* at 8h with reference to *Best on Evidence* (10ed) § 297 at 261:

"The elements, or links , which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish

. . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a

> feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone . . . "
>
> I am satisfied that the evidence of Nxuma together with the circumstantial evidence regarding the appellant's arrest at Nxuma's home constituted proof of his complicity in the robbery beyond reasonable doubt. Accordingly, I can find no fault with his conviction on the two counts of robbery. It follows that this Court sitting as a court of appeal cannot interfere with the findings by the trial judge."[16]

[underlining added for emphasis]

[23] The Trial Court assessed the evidence of the complainant against the circumstances of the matter and other issues, including her age and the inherent inability for retention of complete memory due to lapse in time. It concluded that she was reliable and credible, and therefore a competent witness as contemplated in section 208 of the Criminal Procedure Act. In *S v Teixeira*[17], it was emphatically held that in evaluating the evidence of the single witness, "a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities".[18] The complainant' s evidence was indeed in line with the circumstantial evidence and probabilities in the matter. Even though there were some minor flaws here and there, this was expected, as it would indeed be remarkable if there were none in a testimony of a witness of the kind of the complainant.[19] Therefore, I do not see anything justifying this part of the appellant's grounds of appeal.

Undue influence of the complainant in implicating the appellant

[24] The appellant also contends that the Trial Court erred in not finding that the complainant, as a child, was unduly influenced by her family members in

[16] See *Modiga v The State* at pars [32] - [33].
[17] 1980 (3) SA 755 (A).
[18] See S *v Teixeira* at 761.

implicating him in the commission of the rape. As indicated above, counsel for the appellant, in both written and oral argument, found support for this contention in the statement by H that "we [i.e. H and his family] implored the child to go and tell the police it was her brother-in- law who raped her".[20] It was submitted that by imploring the complainant, H and his family, meant to influence the complainant to falsely implicate the appellant.

[25] The appellant has testified that the source of his disharmony with his wife's family was his refusal to switch his day shift in favour of H, who worked a night shift. H pointed out that he worked at the plant, above ground, whereas the appellant worked below ground, in the mine. I understood this to mean that swapping of shifts between the two of them was impossible. But, assuming for a moment that there was in fact bad blood between the two of them or, even more, between the appellant and H's extended family, there are other problems with this contention. The shift dispute was on the appellant's version in September 2010. This was almost 5 months before the rape incident, which occurred at the end of January 2011. This would mean that the family waited that long for their revenge or avenge. However, the other aspect of the appellant's testimony creates even more problems for his contention. He testified that his wife E and a certain Mr G had told him in December, presumably in 2010 or towards January 2011, before the rape incident that they are going to lay false charges against him. For this to be possible, the family had to either have had to stage a rape incident or to have somehow psychically known that the complainant would be raped in the future. But there is uncontradicted evidence by the medical practitioner that the complainant was indeed raped, which put paid to the " staged rape" scenario. The second supposition is not only outrageous, but defies logic. It is inconceivable that the family would have known in advance that the complainant would be raped and even so due their resentment of the appellant on an employment issue let the real criminal go unpunished in order to implicate the appellant, the very person who was helping with the upbringing of the very same child . The Trial Court correctly rejected this meritless contention and

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[19] *S v Sauls* 1981 (3) SA 172 at 180H.
[20] See lines 1 3 - 15 on indexed p 69.

labelled the appellant's version to be "pregnant with improbabilities".[21] In the Trial Court's view, if credence was to be given to the charge of false im plication , the witnesses would not have been able to corroborate each other in Court and give a detailed version of what happened. This would have been impossible, "if they merely sucked it from their thumbs", the Trial Court remarked.[22]

Medical evidence as proof of guilt

[26] The appellant's challenge of his conviction is also on the basis that the Trial Court erred in accepting the medical evidence as proof that the appellant raped the complainant. The source of the medical evidence was Dr Nkosi, the medical practitioner who examined the complainant and completed the J88 Form. His evidence is uncontradicted and was accepted as the truth by the Trial Court.[23] As for the link between the medical evidence and the appellant, the Trial Court found that it was improbable under the circumstances that someone, other than the appellant, could have raped the complainant. It also, as indicated under another ground of appeal appearing above, found in incredible that the appellant's wife and her family would implicate the appellant in the commission of the rape, simply because he refused to change shifts with H. All these at the backbone of the direct evidence of the complainant found by the Trial Court credible and reliable. The Trial Court also rejected the appellant's version as improbable and not reasonably possibly true.[24] It accepted the evidence that the appellant raped the complainant.

Adverse inference from the late reporting of the rape

[27] Regarding an adverse inference to be drawn from the late reporting of the matter to the police, the Trial Court accepted the reason for the delay. There was a threat of physical harm when the complainant was raped, exacerbated by the fact that the complaint shared house with the appellant. She was only able to disclose the rape to members of her family after H noticed that all was not well

[21] See lines 16- 18 on indexed p 90.
[22] See lines 19 - 21 on indexed p 90.
[23] See lines 14 - 15 on indexed p 90.
[24] See lines I - 12 on indexed p 91.

with her. There was no inordinate delay and the Trial Court was correct in not drawing any adverse inferences in this regard.

Contradictions amongst State witnesses

[28] Another challenge to his conviction by the Trial Court is on the ground that it did not consider the effect of contradictions amongst the State witnesses, including complainant's narration of the chain of events. In the latter regard, the Trial Court accepted that the complainant told H about the rape, after the latter had been told by his mother, E, to enquire from the complainant why she wasn't at school. Further, the Trial Court accepted due to her age and the lapse of time between the incident and her testimony, the complainant was likely to forget some of the events, including what is in her statement to the police. She will not remember everything and her contradictions did not "disturb the high quality of her evidence". She, nevertheless knew her rapist. According to the Trial Court, she was an intelligent witness, *bona fide* and reliable in her testimony.

[29] The Trial Court also found H to have been an impressive and forceful witness. He did not stoop down low to lie to the Trial Court in order to falsely implicate the appellant. He was honest, despite the discrepancy with regard to whether the incident happened during the week or not and whether he met the complainant behind the house or elsewhere. The Trial Court found that the flaws in his evidence not to disturb "the high quality of his evidence" and accepted his evidence as the truth.[25]

[30] Above all, the Trial Court went through the evidence of the witnesses and accepted that on the material issues there was no contradiction. It had done this through consideration of totality of the facts and consequently rejected the appellant's version as improbable and not reasonably possibly true. This approach is borne out by the authorities and the following *dicta* by Nugent J in S *v Van der Meyden*[26] is instructive in this regard:

> "It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and

[25] See lines 2 - 14 on indexed p 90.
[26] 1999 (1) SACR 447 (W)

unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of.the evidence. The conclusion which it arrives at must account for all the evidence....

I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none ofit may simply be ignored." [27]

[31] As indicated in the quoted passage from S *v Van der Meyden* above, the Court ought not to consider the evidence in separate compartments. For the Court to conclude whether to convict or acquit it must account for II the evidence, some of which it may find to be false, some unreliable, whilst some only possibly false or unreliable.[28] Based on the evidence of the medical practitioner and the complainant, viewed against the circumstantial evidence of the matter, the Trial Court was able to conclude that the complainant was raped and that the appellant raped her. I find no misdirection in this regard and therefore the appeal against conviction must fail.

Sentencing

General

[27] See *S* v *Van der Meyden* at 449f - 450b.
[28] See *S* v *Van der Meyden* at 449h - 450b.

[32] It is contended that the Trial Court erred in imposing the life imprisonment sentence and thereby not deviating from the minimum sentence prescribed in terms of the Minimum Sentences Act. As grounds for the aforesaid contention, it is submitted that the Trial Court did not sufficiently consider the personal circumstances of the appellant, [29] his prospects of rehabilitation, and overemphasised the seriousness and prevalence of the offence committed. I deal with the contentions individually below.

Personal circumstances of the appellant and rehabilitation

[33] The following are some of the issues dealt with by the Trial Court when it discharged its sentencing function. It considered the personal circumstances of the appellant: that he was 40 years of age;[30] he has a 22-year-old child; was employed at Sheba mine and earned R8 700.00 per month , with which he maintained his wife and child; he had been in custody since his arrest on 06 February 2011 and had, as a result, lost his job, and had no previous convictions. The Trial Court considered these personal circumstances of the appellant. However, the Trial Court considered the fact that the appellant has shown no remorse as an aggravating factor.[31] It further frowned upon the fact that the appellant was supposed to take care of the complainant and protect her, but he turned on her, like a wolf.[32] But, the appellant submits, that his prospects of rehabilitating were not considered by the Trial Court. As a first offender at 40 years of age, this indicated that he did not have criminal tendencies and has a great chance of rehabilitation, the submission continues. I will also deal with this below.

Overemphasis of the seriousness and prevalence of the offence

[34] The Trial Court considered the following to also constitute aggravating factors: the appellant had been convicted of a serious offence; the complainant was 12 years of age; the complainant had sustained bad injuries; the

[29] *S v A en 'n Ander* 1994 (I) SACR 602 (A) at 608e.
[30] The charge sheet stated that he was 37 years old, presumably as at the date of first appearance in the Trial Court on 11 March 2011, and he was sentence d on 16 July 2013. See index pp 1 an d 96.
[31] See lines 15 - 17 on indexed p 96 .
[32]32 See lines I - 3 on indexed p 97.

complainant's childhood had been destroyed and her innocent conscience robbed of her, as a result of the rape. She was traumatised by this ordeal and also feared for her life, due to the threat made on her life. As a result, she performed badly at school, as she could not cope, and had to undergo counselling. She would bear the scar left on her conscience for the rest of her life.[33]

[35] Further, the Trial Court remarked that cases of this nature were extremely prevalent and regular in its area of jurisdiction. It held that the personal circumstances of the appellant will not serve as mitigation, due to the prevalence of the offence. It considered itself to have a duty to protect society, particularly young girls, against offences of this nature. The Trial Court had appreciated that it has a discretion to deviate from the prescribed minimum sentence in certain circumstances, [34] but considered and found that life imprisonment was appropriate under the circumstances.

[37] It is appreciated that the Trial Court and the whole criminal justice system has to impose sentences which would deter criminals and prospective criminals from committing crime. The duty also expands to safeguarding and protecting society, including the defenceless, like the complainant in this matter. However, for sentences prescribed by the Minimum Sentences Act, a determination that only considers the crime, the victim of such crime and society only, and leave out the criminal, would not meet the determinative test set out in S *v Malgas.*[35] The test in *Malgas* involves determination by the sentencing court whether or not, when the circumstances of a particular matter are considered, " the prescribed sentence would be rendered unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice will be done by imposing that sentence". [36] Therefore, the criminal and his circumstances are part of the determinative test.

[36] In this matter, the Trial Court dealt with a first offender of 40 years of age; a breadwinner for his other child and co-breadwinner for his family and the complainant; someone who appears to have been a responsible person [i.e.

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[33] See lines 3 - **8** on indexed p 97
[34] 34 See lines 6 - 8 on indexed p 98.
[35] 2001 (1) SACR 469 (SCA).

getting an ambulance for his ailing wife, despite her protestations] and who has spent two and half years in custody awaiting finalisation of his trial. Although, in his quest to distance himself from the crime, he vilified his wife's family, the testimony of both the complainant and H, the son to the appellant's sister-in-law, paints a relatively harmonious relationship between the appellant and his extended family-in-law, before he committed the crime. He had helped bring up the complainant. The social worker's report, although compiled for a different purpose, states that the complainant's mother passed away and the father is staying in Swaziland. [37] The Trial Court did not sufficiently consider the significance of these aspect to the sentence it imposed. As indicated above, it concentrated on the seriousness of the crime, including its prevalence in the jurisdictional area of the Trial Court. This was not necessarily an incorrect approach, but, in my respectful view, it gives an impression of a court which was overly concerned with public opinion or interests of society to the detriment of the other objects of sentencing, including rehabilitation.

[37] In *S v Mahlakaza and another*[38] it was cautioned that the object of sentencing is not to satisfy public opinion, but to serve the public interest and the court has a duty to fearlessly impose an appropriate and fair sentence, even if the sentence does not satisfy the public.[39] It was explained in *R v Karg*[40] that the aforesaid does not mean that it is "wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences the courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands".[41]

[38] In my view the Trial Court did not properly balance the interests of society together with the other objectives of punishment, including rehabilitation.

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[36] See *S* v *MM; S* v *JS; S* v *JV* at par [18]. See further *S* v *Malgas.*
[37] The report was compiled to determine whether the complainant would be able to testify before the Trial Court through the medium of CCTV. See pp 15-18 of the record.
[38] 1997 (1) SACR 515 (SCA).
[39] See *S v Mahlaka::a and another* at 518 and the authorities cited there.
[40] 1961 (1) SA 231 (A).
[41] See *R* v *Karg* at 2368-C.

Although the Trial Court dealt with a heinous crime , which involved a trusted adult preying on a defenceless child, the other circumstances of the matter, on application of the determinative test in *Malgas,* justified deviation from the prescribed sentence of life imprisonment. As a first offender at around 40 years, the appellant has had respect for the law and fellow human beings and has a strong possibility of rehabilitating. The insufficient attention given to these aspects, in my view, constitutes a misdirection. In the premises, this Court is entitled to interfere on appeal and consider the issue of sentence afresh.[42] Then, what is to be determined is what would be an appropriate sentence.

[39] When sentencing, previous decisions of the Court may serve as useful guide, although every matter will turn on its circumstances. In *S v MM; S v JS; S v JV,*[43] the decision of a Full Court of this division, dealt with three matters involving appellants sentenced to life imprisonment sentence. The matter of *S v MM,* had facts similar to those in this matter. Therein, the appellant was convicted of raping his 12-year-old stepdaughter in the family home. The trial court convicted him and referred the matter to the High Court for sentencing. The High Court found no substantial and compelling circumstances and sentenced the appellant to life imprisonment. The Full Court found misdirection due to the appellant not having been informed of the applicability of the section 51 of the Minimum Sentence Act and set aside the life imprisonment sentence. The Full Court imposed a sentence of 12 years' imprisonment. In arriving at that sentence, the Full Court considered that rape under any circumstances is a "serious and heinous crime and perhaps more so when the perpetrator abuses a position of trust and exploits the vulnerability of a young victim" and the " prevalence of rape in South Africa is notorious and society has a vital interest in combating the crime" .[44] The pre-sentence report indicated that the victim had been negatively affected by the rape and her behaviour and performance at school had altered as a result. These factors were found by the Full Court to be aggravating. The facts that the appellant was a first-time offender, who prior to the commission of the crime lived a responsible life, was employed and provided for the needs of his

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[42] See S *v Malgas* 2001 (1) SACR 469 (SCA) 478c-h
[43] 2011 (1) SACR 510 (GNP).
[44] See *S v MM; S v .J S ; S v J V at* par [10] on p 516.

family, and expressed remorse, were ostensibly considered by the Full Court to be non-aggravating factors. Save for the lack of remorse, as found by the Trial Court in this matter, the non- aggravating factors in the S v *MM* case are also present in this case.

[40] In a Full Court decision of S v *MN,*[45] an appellant was convicted for the rape of a 10- year-old girl and sentenced to life imprisonment. The appellant, at the age of 47 years, was found to be capable of rehabilitation. He was a first offender and had made contribution to his community. On appeal the sentence of life imprisonment was set aside and replaced with a sentence for imprisonment for 15 years.

Conclusion

[41] Against the background of what is stated above and appeal against conviction having failed, in my view, an appropriate sentence in this matter wi11 be for imprisonment for 18 years. Therefore, I will propose that the sentence for life imprisonment imposed by the Trial Court be set aside and replaced with a sentence of imprisonment of 18 years, which should be antedated to 16 July 2013.

Order

[42] In the result, I propose that the following order be made:

[42.1] the appeal against conviction is dismissed.

[42.2] the appeal against sentence is upheld;

[42.3] the sentence of the Regional Court for the Regional Division of Mpumalanga, Nelspruit, is set aside and the following is substituted for it:

"a.) The accused is sentenced to imprisonment for a period of 18 years;

b.) The order in a.) hereof is antedated to 16 July 2013.

K. La M. Manamela

Acting Judge of the High Court

09 JUNE 2017

JW LOUW J

Judge of the High Court

I agree and it is so ordered

Appearances:

For the Appellant	:	Adv R Kriel
	:	P.J. Lourens Attorneys , Mbombela
For the Respondent	:	Adv JJ Jacobs
	:	Director of Public Prosecutions
	:	Gauteng Division, Pretoria

[45]2011 (I) SACR 286 (ECG).