Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

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

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA01/2023

CASE NUMBER *A QUO:* RC90/2014

In the matter between:-

SHADRACK SERAPANE Appellant

and

THE STATE Respondent

CORUM: REID J *et* LAUBSCHER AJ

FMM REID J

[1] This matter is heard in terms of section 19(a) of the **Superior Court Act** 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument. The State filed heads of argument and the appellant did not.

[2] On 26 January 2022 the appellant was sentenced to life imprisonment for rape of a minor child in the Regional Court, Taung, Regional Division of the North West. The charge of rape was in terms of Section 3 of the **Sexual Offences and Related Matters Amendment Act** 32 of 2007 read with the provisions of Section 51(1) and Part 1 of Schedule 2 of the **Criminal Law Amendment Act** 105 of 1997. Section 51(1) and Part 1 of Schedule 2 is applicable as the appellant was charged and found guilty of rape of a 5 year old girl herein referred to as NSM to protect her identity. In addition, the appellant was charged with kidnapping NSM and was sentenced to 4 years' direct imprisonment for kidnapping, to run concurrent with the life sentence.

[3] The appellant is exercising his automatic right of appeal in terms of the provisions of Section 309(1)(a) of the **Criminal Procedure Act** 51 of 1977 (CPA). The appeal is against both his conviction and sentence of life imprisonment.

[4] At the onset of the trial *a quo* the appellant pleaded guilty to

the charge of kidnapping and not guilty on the charge of rape of a minor. The matter was adjourned for the appellant's legal representative to draft a section 112 statement in terms of the CPA. When the matter reconvened, the appellant changed his plea of guilty on kidnapping to not guilty. A plea of not guilty was entered on both charges.

[5] The charge sheet reads as follows:

> ***"Count No:*** *One*
> ***RAPE***
> *THAT the accused is guilty of the crime of contravening the provisions of Section 3 read with the provisions of Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the* ***Criminal Law (Sexual Offences and Related Matters) Amendment Act*** *32 of 2007 as amended read with Sections 256, 257 and 261 of the* ***Criminal Procedure Act*** *51 of 1977, as amended. Further read with the provisions of Sections 51(1) and Schedule 2 Part 1 of the* ***Criminal Law Amendment Act*** *105 of 1997 as amended, as well as Section 92(2) and 94 of the Criminal Procedure Act 51 of 1977.*
>
> *THAT on or about* ***29 June 2013*** *and at or near* ***Dryharts*** *in the Regional Division of the North West, the said accused did unlawfully and intentionally*

commit an act of sexual penetration with a female person to wit, ***NSM*** *(05 years) by* ***penetrating his penis into her vagina*** *without her consent.*

Count No *Two*
KIDNAPPING
THAT the accused is guilty of the crime of kidnapping
IN THAT upon the ***29th June 2013*** *and at or near* ***Dryharts*** *in the Regional Division of* ***North West*** *the accused did unlawfully and intentionally deprive* ***NSM (NM) a 5 year old girl*** *of her freedom of movement by means of* ***force and taking her without the consent of her parents or guardians****."*

[6] After the prosecutor put the charges to the accused, but prior to the appellant's pleas, the Magistrate confirmed that the appellant is aware of the meaning of the legislatively imposed minimum sentence on conviction of charge 1. The record reflects the following:

"COURT: Do you understand the charges against you?
ACCUSED: I understand the charges.
COURT: In respect of count 1 the court will explain to you that the victim is below 16 years of age therefore the minimum sentence of life imprisonment is applicable. This means if the court convicts you of this

offence the court is obliged to impose life imprisonment. However, if there are substantial and compelling circumstances the court then can impose a lesser sentence. Do you understand?
ACCUSED: Understood."

[7] The appellant was legally represented by Legal Aid for the duration of the trial proceedings. He pleaded not guilty and exercised his right to remain silent and closed his case without calling any witnesses. After being convicted, the appellant similarly elected to not testify in mitigation of sentencing.

[8] After the pleas of not guilty were entered, but prior to any evidence being lead, the presiding officer was transferred and the State successfully applied for the matter to proceed before another presiding officer in terms of Section 118 of the CPA. The presiding Magistrate informed the appellant of the following rights that the appellant has, in addition to being legally represented, and the following procedure that will take place in the trial. The record reflects the following:

"COURT: Mr Serepane, you must listen carefully to the following explanation that the court is going to provide to you. The State has now indicated that they are ready to proceed to the trial stage of these proceedings. You have already entered your plea on record in this matter.

The court wishes to advise you Sir, of your right to remain silent and not incriminate yourself in terms of the Constitution.

The court further wishes you to take note of the following:

The state will now start to lead evidence of state witness in an attempt to prove these charges preferred against you. You must (listen) carefully to the evidence of the witnesses that are presented before Court for it might happen that aspects arise from the evidence that are presented that might have not been canvassed between yourself and your legal representative Mr Mogwera when consulting about this matter. Should there arise such an aspect that was not canvassed during your consultation when you need to further instruct you attorney regarding such an aspect please feel free to raise your hand so that the court can see that you need to speak to your attorney so that I can draw his attention to the fact that he need to approach you to get further instructions from you.

…

You must also clearly understand Sir that you have a legal representative that is representing you and speaking on your behalf in this matter.

Your attorney would during the cross examination (ensure) that your version of events would also be put to witnesses for the to comment there upon.

You must listen carefully when these questions are asked on your behalf as it deemed that the version

that is put on your behalf to witnesses is indeed your version as was given to us by yourself. Should your attorney (make) a mistake that he maybe misunderstood you whilst you gave him your instructions, again please feel free to raise your hand so that the court can draw his attention to the fact that you just need to instruct on something and rectify the mistake immediately.

If you fail to do so then ultimately if it happens that you need to come and give evidence yourself and what you testify differs from the version that was put on your behalf by the attorney the prosecution might at the end of the case ask the court to make a negative credibility finding against you due (thereto) that the difference indicating that your later version was only a recent fabrication, for example.

(Do) you understand the explanation up to this stage Sir?

ACCUSED: I understand.

COURT: You must also understand Sir that your legal representative, as the court already indicated, speaks on your behalf so please do not labour under the misunderstanding that at some stage after your attorney has asked questions that you will also get a chance to ask questions. For as long as you are represented your attorney does the questioning on your behalf.

If you notice that your attorney perhaps forgot to ask questions on an aspect or you want him to ask (on) an aspect that you realise now whilst listening to the witnesses' evidence again please feel free to raise your hand so that the court can draw your attorney's attention to the fact that you want to give him further instructions.

ACCUSED: I understood.

COURT: Thank you Sir you may then be seated."

Evidence on conviction

[9] The State lead the following evidence:

9.1. K[…] M[…]:

9.1.1. She is the grandmother of NSM (the 5 year old child).

9.1.2. She knows the accused as he was in a love relationship with her sister's child, A[…] M[…].

9.1.3. M[…], who is her sister's daughter, called her on Saturday 29 June 2013 and informed her that the accused took NSM.

9.1.4. They went to look for the child but could not find her.

9.1.5. On Monday the accused phoned her and informed her that he has the child at his house.

9.1.6. She advised the mother of the child to fetch the child from the accused in the presence of the Police Service.

9.1.7. After fetching the child from the accused's home, they brought the child to her home and she saw that the child is frightened.

9.1.8. The mother of the child and the Police took the child to

a medical practitioner for examination.

9.1.9. In cross examination the witness conceded that the accused and the witnesses daughter are no longer in a love relationship.

9.2. P[…] M[…]:

9.2.1. She and the appellant used to be in a love relationship. They ended the love relationship a year before the incident on 29 June 2013.

9.2.2. She and the appellant have one (1) child.

9.2.3. Her sister is the mother of the child NSM that the appellant kidnapped on 29 June 2013.

9.2.4. Prior to kidnapping the child, the appellant informed the witness that he intends hurting her "*in the same way that I hurt him."*

9.2.5. She was informed by her sister that the appellant took her sister's 5 year old child, NSM.

9.3. K[…] K[…]:

9.3.1. She is the mother of NSM.

9.3.2. Her cousin was in a love relationship with the

appellant.

9.3.3. The child was taken on 29 June 2013 by the appellant, under the promise that the appellant is going to give her child and the other children sweets.

9.3.4. After the appellant phoned her mother, she elicited the assistance of the police to collect the child from the appellant's residence.

9.3.5. The child was terrified and cried the whole time.

9.3.6. She noticed an awkward smell from her child's genitalia.

9.3.7. She then took the child to a doctor for a medical examination.

9.4. Osuyi Kingsly:

9.4.1. He is a medical doctor practicing as such at the Taung District Hospital.

9.4.2. He completed the J88 form that depicts the injuries suffered by the child NSM.

9.4.3. The child was born on […] 2007. At the time of the examination she weighed 19.9 kg. The doctor read the injuries of the girl's genitalia from the J88 as follows:

"Then the gynaecological examination as pertains to the private area. Breast development, they are usually stage 1 to 5 using the tanner. She was 1. Pubic hair tanner stage 1. Obviously there were none. Then on the examination on the clitoris, it was bruised and hyperemic. Bruised reddish, hyperemic means reddish. The frenulum of the clitoris was hyperemic red.

The urethral orifice, this is where you normally pass your urine, was intact but reddish. The para- urethral folds were inflamed. So it was reddish and (a) bit inflamed. The labia majora was intact. The labia minora was bruised. On the posterior fourchette there was a scarring and a tear. There was no bleeding but increased friability.

On the fossa navicularis there was a fresh tear. The hymen configuration it is annular. Opening diameters not documented here. It was swollen and there was a fresh tear at seven o'clock. Vaginal examination was not done, because had to insert finger beyond the edge. It was not done.

But there were discharges seen. The cervix was not seen, because vaginal examination was not done. The perineum is that are between the

vagina and the anus and it was reddish and hyperemic. On page 3, pregnancy, forensic specimen [indistinct] for pregnancy test, it was not done. She was less than five.

The serial number of the number of evidence kit was recorded which I stated earlier. The specimen was handed to constable. The force number is […]*. The conclusion pertaining to the gynaecological examination. [indistinct] injuries on the vagina are strongly suggestive of forceful vaginal penetration…."*

9.4.4. The injury of the fresh tear on NSM's genitalia happened within approximately 24 to 48 hours prior to the examination.

9.4.5. The type of instrument that could cause the kind of injuries could be blunt object, causing blunt trauma. Such injuries are strongly suggestive of forceful vaginal penetration.

9.5. <u>Tshombetso Nemutanzhela:</u>

9.5.1. She is a social worker stationed at Taung, working as a social worker for 12 years.

9.5.2. She compiled a Section 170 of the CPA report dated

29 July 2014 report which is written in cases of sexual assault.

9.5.3. The relevant part of the Section 170A report reads as follows:

> *"Summary and Conclusion:*
> *In light of the above clinical investigation the following can be concluded:*
>
> *NSM was allegedly raped when she was 5 years old and she currently seems to be repressing the memory of the alleged rape incident. Repressing is a defence mechanism used by individuals to block out anxiety provoking incident out of conscious awareness. The memories of the incident however do not disappear and may have influence on NSM's future behaviour where she may struggle to form close relationships. The defence mechanism of repression is however not deliberate but may be unconscious. NSM using repression as a defence mechanism shows that the alleged rape incident is anxiety provoking and psychological traumatic for her. She therefore feels emotionally uncomfortable when confronted with the idea of having to remember and talk about the alleged rape incident. The repression shows how severely traumatised NSM is about the rape that psychologically she is protecting herself from the pain of the trauma by avoiding to talk about the incident, the details of the incident.*
>
> *NSM instead focusses on superficial and irrelevant details about the alleged rape incident. NSM's discomfort to talk about was allegedly raped was seen when she was fidgety and*

maintained poor eye contact. She also never completed her story of how she (was) allegedly raped but instead she was vague and evasive. The alleged rape incident occurred when NSM was 5 years old and she was old enough to remember what happened and express herself about the incident using age appropriate language even at the current age NSM has concrete but coherent processes appropriate for her age and it is possible that she still remembers what happened of how she was allegedly raped.

NSM can remember how she was taken by (the appellant) but unconsciously blocks out the events where she has to explain what happened in the veld next to the railway station. It is unlikely that NSM will open up about the entire events of the alleged rape incident any time in the future mainly it is too painful and traumatic for her to talk about the incident.

It is therefore in my clinical opinion that NSM is currently incompetent to testify in court because she is vague and evasive and is anxious and uncomfortable to talk about how she was allegedly raped. She is also superficial and talks about irrelevant events leading up to the alleged rape but not about the rape itself.

Recommendations:

Based on the above information the following are recommended:

NSM should not testify in court because she is not competent to give testimony."

[10] In the judgment, the court *a quo* found *inter alia,* as follows:

"The evidence of the State can be summarised as

follows. The (appellant) was contacted by G E M[…] to build her a house. Whilst building the house the (appellant) met PA M[…] and they got involved in a love relationship that lasted for about 8 years and they had a child together. On Saturday 29 May 2013 GE M[…] attended her mother's funeral at Dryharts.

P[…] in the company of her new boyfriend and the (appellant) in the company of one Itumeleng Mokgatla also attended the funeral. G[…] left her 5 year old granddaughter NSM at home under the care of her sister's daughter M[…]. P[…] received repeated phone calls in the afternoon after the funeral from the accused making threats to her.

G[…] later, during the course of the day received a phone call from M[…] who informed her that (the appellant) had taken NSM. Her family members and her neighbours helped to search for the (appellant) and the child in vain. P[…] went to the police to assist with the search for the (appellant) and NSM. On her way, she received further phone calls from the (appellant) saying that he is Lifton and that. she must come and fetch the child as he will kill himself and the child.

After she reached the Police, Pudimoe Police Station she was accompanied by Mr Sedumedi to Lifton to try and find the (appellant) and the child. She spoke telephonically with an emotional (appellant) until his cell phone could no longer be reached. As they did not find the (appellant) and the child they turned back to the Pudimoe Police Station.

Meanwhile K[…] N[…] the mother of NSM was alerted about the situation and she came home to Dryharts from her place of employment at Gauteng. The (appellant's) girlfriend K[…] M[…] was sleeping at his parental home when she received a text message from him around 02h00 informing her that he is bringing a

child to her to take care of.
When he arrived he left the child with her under the blankets and left saying that he is going to the toilet. When he did not return she went to look for him but could not find him. She contacted the (appellant's) sister Joyce who told her to remain with the child as she will alert the child's family that the child is there.
On 1 July 2013 K[…] and P[…] in the company of the police fetched NSM from the (appellant's) parental home in his absence. K[…] noticed that the child had a foul-smelling discharge from vagina. She and NSM went police officers to Taung Hospital where the child was examined by Dr IO Kingsley who concluded that the injuries he observed to the vaginal area of NSM is strongly suggestive of forceful penetration of her vagina by a blunt object…
…
When the Court considers the totality of the evidence it is common cause between the State and the Defence that NSM went with (the appellant) on 29 June 2013 and was returned to her mother K[…] K[…] on 1 July 2013."

[11] In appeal, this Court has to determine whether, on the evidence as a whole, the State has established the guilt of the appellant beyond reasonable doubt. In **S v Chabalala** 2003 (1) SACR 134 (SCA) at para 15, Heher AJA stated the approach as follows:

> *"to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of*

inherent strength and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[12] In the matter of **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 705, the Appeal Court (as it was then known) stated:

"*The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked".*

[13] The advantages of the trial court in observing the witnesses, were confirmed by the Supreme Court of Appeal in a similar vein in the matter of **S v Kebana** [2010] 1 All SA 310 (SCA) para [12] as follows:

"*It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was*

wrong, this court is not at liberty to interfere with his findings".

[14] In **Khoza v S** (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16] it was confirmed that a *"… court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong."*

[15] This Court has carefully perused the record and find that the court *a quo* did not err in the evaluation of the evidence presented to it. Having consideration of the evidence presented before the court *a quo*, I am satisfied that the court *a quo* did not err in convicting the appellant on the charge of rape of the 5 year old girl. The State has proven beyond reasonable doubt that the girl was raped by the appellant.

[16] The finding of the court *a quo* guilt of both counts are confirmed as procedurally and substantively just and fair. The appeal against the conviction is subsequently dismissed.

Sentence

[17] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:

> *"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person—*
> *(a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 … to imprisonment for life."*

[18] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and determines the following:

> *"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."*

[19] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase *"substantial and compelling*

circumstances" by stating which facts shall not constitute *"substantial and compelling circumstances"*. This provision reads as following:

> *"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:*
>
> *(i) The complainant's previous sexual history;*
>
> *(ii) an apparent lack of physical injury to the complainant;*
>
> *(iii) an accused person's cultural or religious beliefs about rape; or*
>
> (iv) *any relationship between the accused."*

[20] The appellant did not have any previous convictions.

[21] The accused testified in mitigation of his sentence. His evidence can be summarised as follows:

21.1. He is 53 years old and not married.

21.2. He has 3 children.

21.3. He is not permanently employed but self-employed as a bricklayer and earns about R3,000 to R4,000 per month doing bricklaying.

21.4. He did not attend school.

21.5. One of his children is currently residing with him.

21.6. He is a first offender.

[22] It was argued by the appellant that the above circumstances are substantial and compelling circumstances.

[23] On appeal, this Court is to determine whether the court *a quo* erred in finding that the above circumstances was not substantial and compelling.

[24] In respect of the sentence which the appellant has received in respect of count 1 and count 2, having regard to all the facts placed before this Court, there is no reason advanced by the appellant or otherwise which can be evident why this Court should interfere with the sentence imposed by the court *a quo*. In this regard, this Court again applied the principles as set out above.

[25] On an appeal against conviction from the Regional Court, the following was held in **S v R** 2015 (1) SACR 571 (GP) in relation to the evaluation of evidence done by the court *a quo*

(quoted from the headnotes):

> *"Held, that, …. The decision whether or not to receive further evidence under s 309B(5)(c)(i) was that of the court which tried the applicant. Subparagraph (c)(ii) required the court granting an application to lead further evidence to evaluate that evidence, with reference, amongst other things, to the cogency and sufficiency of the evidence and the demeanour and credibility of the witnesses who gave it. An appeal court heard such evidence only rarely and did not enjoy the well-known advantages of a trial court in relation to the evaluation of the evidence in the context of the trial as a whole."*

[26] Insofar as proof of the commission of the rape is concerned, circumstantial evidence is presented by the State and testified by the medical practitioner who examined the child, proves beyond any doubt that the girl's vagina was forcefully penetrated.

[27] I have given careful consideration to the record of the proceedings *a* quo, to the detailed written submissions in relation to the appeal. I am not persuaded that the Magistrate

was misdirected on any relevant or material respect in the assessment of the evidence and in the factual findings pursuant thereto.

[28] In a recent Supreme Court of Appeal decision penned by Tokota AJA **Jerome Cupido v State** Case Number 1257/2022 dated 16 January 2024 it was unanimously found that, if the trial court found the appellant's evidence unreliable and not reasonably possibly true, the trail court did not err in finding the appellant guilty.

[29] For the reasons set out above, the appeal against the sentence of the appellant is dismissed as well.

Order:

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

i) The appeal is dismissed.

ii) The sentence of life imprisonment on count 1 is confirmed.

iii) The sentence of 4 years' direct imprisonment is confirmed.

iv) It is confirmed that the two (2) sentences are to run concurrently.

_____

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

I agree

_____

NG LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING : 29 NOVEMBER 2023

DATE OF JUDGMENT : 16 APRIL 2024

APPEARANCES

ON BEHALF OF THE APPELLANT:	**ADV MEIRING JOHANNESBURG ASSOCIATION OF ADVOCATES**
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