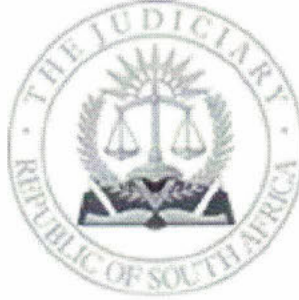


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A124/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27/05/2024	
DATE	SIGNATURE

In the matter between:

**THABO DAVID MOLLO**

APPELLANT

And

**THE STATE**

RESPONDENT

**MABESELE J ET KUNY J**

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**JUDGMENT**

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**MABESELE J:**

[1] This is an appeal against conviction and sentence. The appellant was convicted of several counts of rape of his 12 years old stepdaughter. He was sentenced to imprisonment for life. The conviction followed on the evidence of the complainant and her mother and two medical practitioners. The appellant contends that the state has failed to prove its case against him beyond reasonable doubt and the sentence imposed on him is shockingly inappropriate.

[2] The complainant was a single witness. She testified on how she was raped several times by the appellant, in May 2014 and beyond. It is common cause that the complainant and her two siblings, aged three and six, and her mother resided at the same house with the appellant. The appellant was unemployed. He spent most of the time at home with the children. The complainant's mother was employed. She reported to work on shifts, that is, reporting to work in the morning until afternoon and night to morning. The complainant was attending school, daily. The school transport picked her up every morning to school and transported her back home after school. After school she spent most of her time at home doing her schoolwork. She always found her siblings and the appellant home when she arrived from school.

[3] The complainant testified that in May 2014 she arrived home from school and found the appellant in the sitting room. The siblings were watching television in the dining room. She greeted the appellant and went to her bedroom. After she had closed the door she took out her school uniform and wore a T-shirt and jeans and began studying. The appellant opened the door

and called her to his bedroom. After she had entered the bedroom the appellant closed the door and told her that he loved her. Thereafter the appellant pushed her gently against the wall. While she was leaning against the wall the appellant came closer and touched her breasts, buttocks and vagina. The appellant again told her that he loved her and should not tell her mother. The appellant hugged her, squeezed her and said that she, too, should hug him. Thereafter the appellant moved his body forward and backward and asked her to do same. She complied because she was scared of the appellant. While they were busy moving their bodies forward and backward someone opened the door of the sitting room. They stopped their actions and the appellant asked her to leave the bedroom. She went into her bedroom and studied. She went to school the following day. When she came back from school she went into her bedroom. As she was about to do her schoolwork the appellant opened the door and called her to his bedroom. She became frightened and thought that the appellant was going to beat her up as he always did. After she had entered the bedroom the appellant again told her that he loved her and should not tell her mother. Should she tell the mother, he will beat her up. The appellant asked her to take off her T-shirt, jeans and panty and lie on the bed with her eyes closed. After she had obeyed the instructions, she felt the appellant's weight on her body. It became difficult for her to breath but was afraid to tell the appellant because she was extremely terrified. The appellant made up and down movement on top of her and told her that he loved her. She felt something hot enter through the lips of her vagina. The 'thing' was moving sideways. The whole incident lasted for approximately an hour. Her eyes were closed. After some time the appellant asked her to open her eyes and climb off the bed. The

appellant again told her that he loved her and should not tell her mother or anyone, to avoid trouble. She agreed. The appellant told her to wear her clothes and leave the bedroom. She dressed and left the room. She got into her bedroom, sat on the chair and tried to study. It became difficult for her to concentrate because she always thought of what happened to her.

[4] The complainant testified that few days after the said incident, she arrived home from school and found her siblings playing in the bedroom. The appellant was seated in the dining room. After she had entered her bedroom the appellant shouted her name. She quickly rushed to the dining room. Upon arrival the appellant asked her to clean his shoes. She undertook to clean the shoes but forgot to do so because her mind was occupied by schoolwork. After the appellant had realized that his shoes were not cleaned he approached her and slapped her with an open hand. She fell on the floor. When she stood up the appellant said to her that her mother made a big mistake by allowing her to reside with them. The appellant grabbed her by the neck and dragged her into his bedroom. She pleaded with the appellant not to assault her. At that stage the siblings were in the bedroom. The appellant pushed her into his bedroom and closed the door. He instructed her to undress, lie on the bed and close her eyes. Thereafter the appellant pulled her legs towards the edge of the bed and opened them roughly. She told the appellant that he was hurting her. She was told to "shut up". Subsequently, she felt an object forcefully penetrating her vagina and she screamed. The appellant hit her with a fist and steel rod several times and she ended up bleeding on her buttocks. The appellant told her to get out of the bedroom and go and wipe off the blood. The appellant pushed her

out of the room. She went to her bedroom, took a facecloth and wiped off blood. She could not do her schoolwork due to pains on her buttocks. At approximately 22:00-23:00 the mother arrived home and entered her bedroom to ascertain whether she and her siblings were well. She told the mother that the appellant gave her hiding for not cleaning his shoes. She did not tell the mother about rape incident because she was scared of the appellant. The mother applied certain medication on her body and felt sorry for her. Thereafter the mother went into her bedroom. The pain was unbearable. She testified that one evening the appellant came to her bedroom while she and her siblings were asleep. The appellant asked her to take off her pyjamas. After she had done so, the appellant climbed on top of her and told her to close her eyes. Subsequently she felt an object penetrating her vagina. After 30 minutes the appellant got off her and told her to wear pyjamas and open her eyes. Thereafter the appellant left the room. She became frustrated and did not know who to resort to because the appellant had promised to beat her up should she ever tell anyone about the rape incident. On the other occasion the appellant visited her room after she had taken a bath and was about to wear a panty. The appellant closed the door and pulled her gently towards him. The appellant kissed her, rubbed her vagina, touched her breasts and squeezed her buttocks. The appellant asked her to climb on top of the bed. After she had done so, she felt an object penetrating her vagina. She told the appellant that he was hurting her. In response, the appellant asked her whether she felt butterflies.

[5] The complainant testified that one day she came home from school and found her mother. During conversation with the mother, the mother advised her

to stay away from boys. The mother said that not far away from her home a five-year-old girl was raped. She told her mother that she heard news that a sixteen-year-old girl was raped by her father. The mother said to her that such things do happen. The mother told her about the three-year old baby who was raped by her uncle. She testified that the mother said to her that she should not be scared to tell her anything that is not right. She then said to her mother that she wanted to tell her something. She proceeded to tell her mother that the appellant had been having sexual intercourse with her. The mother became shocked and cried. She was free to tell her mother about the incident because the appellant was not present at home. The mother phoned the family of the appellant in Mpumalanga. The appellant arrived home late that day. She was taken to the clinic. It was put to her, during cross examination, that indeed there was a time the family of the appellant came to her home to discuss the report that was made to them by her mother.

[6] The mother of the complainant testified. She said that the appellant left employment in 2013. The appellant spent most of the time at home. He took care of the children while she was at work. Around 2015 she had a conversation with the complainant about a child who was raped in their neighbourhood and the three years-old baby raped in Ivory Park. She advised the complainant to be careful. The complainant, too, told her about an article she had read wherein the story of a pastor who raped a child was reported. The complainant then told her that she wanted to tell her something. The complainant looked at her and said: 'Daddy has been raping me, daddy has been sleeping with me, daddy has been putting his penis into my vagina'. She asked the complainant since when

did that happen. The complainant said since Moriting where they initially resided. She then phoned one of her in-laws to come to her place of residence. When the in-laws arrived she informed them that the complainant told her that the appellant raped her. The appellant was present. One of the in-laws fetched the complainant from the bedroom and asked her to relate the story in the presence of the appellant and other family members present. The complainant indeed confirmed what she (her mother) told the in-laws about. It was then agreed that the complainant be taken to the doctor the following morning. The complainant was taken to Dr Thandisa, a private medical doctor. The doctor examined the complainant. His clinical findings revealed signs of vaginal penetration. Thereafter the complainant was referred to Tembisa hospital. Upon arrival, she was examined again by doctor Ngobeni. His clinical findings did not exclude sexual assault. He testified during cross-examination and clarified his findings. He explained to the court that if sexual assault is not excluded, penetration could have taken place.

[7] The appellant testified. He confirmed the version of the appellant that the latter always found him home when she came back from school. He had good relations with the complainant. He agreed that complainant was 12 years old in 2014. He denied that he had sexual intercourse with the complainant. He said that the complainant has never entered his bedroom. He said that the complainant did not play with other children. She devoted her time on school work.

[8] The state relied on evidence of single witness who was a minor then. Section 208 of the Criminal Procedure Act<sup>1</sup> makes provision for conviction of accused, of any offence, on the single evidence of any competent witness. Such evidence should be approached with outmost care. The evidence should be clear and satisfactory in all material respects. The magistrate correctly warned himself of the danger inherent in the evidence of a child witness. He was alive to the fact that some safeguard is required to reduce risk of a wrong conviction on the evidence of the child witness. He relied on S V Artmann and another<sup>2</sup>.

[9] The undisputed clinical findings of the medical doctors revealed that the complainant was sexually penetrated. According to the complainant, she was sexually penetrated on several occasions at home. It is common cause that the appellant was the only male person who always looked after the complainant and her siblings when the mother was at work. The appellant was unemployed. The complainant was going to school and back home. At no stage that she ever came home late from school or spent a night elsewhere. She had no boyfriend. It is also common cause that the mother of the complainant called the family members of the appellant to her place of residence after she received a report of the rape incident from the complainant. The appellant did not dispute the version of the complainant's mother that the complainant related the rape incident to his family members in his presence. The complainant, young as she was, explained in detail how she was raped by the appellant on each occasion.

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<sup>1</sup> 51 of 1977

<sup>2</sup> 1968(3) SA 339(A)

The magistrate correctly found that the evidence of the complainant was clear and satisfactory in all material respects. For all these reasons the appellant was correctly convicted of rape.

[10] The essential enquiry in an appeal against sentence is not whether sentence was right or wrong, but whether the court exercised its discretion properly and judicially or whether the sentence is shockingly inappropriate<sup>3</sup>. It stands to reason that the court can only interfere with sentence if it is satisfied that the trial court had not exercised its discretion reasonably.

[11] The magistrate took into account the personal circumstances of the appellant. The appellant was a first offender. He has 5 minor children who reside with their mothers. He was unemployed. The appellant was a pastor. It was correctly found that these facts do not constitute substantial and compelling factors that satisfy deviation from the prescribed minimum sentence. In fact, the status of the appellant as a pastor and assault that he inflicted on the complainant are aggravating factors. All these reasons justify non-interference with the sentence.

[12] In the result, the following order is made:

12.1 The appeal against conviction and sentence is dismissed.

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<sup>3</sup> See Director of Public Prosecutions, Kwazulu-Natal V P, 2006 (1) SACR 243(SCA) at P. 250(b)



**M.M MABESELE**

(Judge of the High Court Gauteng Local Division)

I agree



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**KUNY**

(Judge of the High Court Gauteng Local Division)

Appearances

On behalf of the Appellant	: Adv.T.K. Malatji
Instructed by	: SH Maake Incorporated
On behalf of the Respondent	: Adv. C. Britz
Instructed by	: Director of Public Prosecutions
Date of Hearing	: 20 May 2024
Date of Judgment	: 27 May 2024