IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. : A05/2013

In the matter between

GK **APPELLANT**

And

THE STATE **RESPONDENT**

Gamble J, Rogers J & Matthee AJ

Heard: 15th March 2013

Date Delivered: 24th May 2013

JUDGMENT (Dissenting)

MATTHEE AJ:

Arriving at an appropriate sentence for a crime often is the most difficult part of a criminal trial. If one has regard to the host of reported and unreported cases dealing with the sentencing of

rapists, it is clear that arriving at an appropriate sentence for such persons is perhaps the most difficult of all matters, especially where the victims are children.

Whilst a court obviously must have regard to such reported and unreported matters, at the end of the day it must be mindful of Majiedt JA's words in the matter of **Samson Mawela Mudua and The State** with case number 764/12 in a judgment handed down on 9 May 2013:

"[13]…. I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case."

Appellant was convicted on the 11th October 2012 of one count of contravening section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 and further read with the provisions of section 256 and 261 of Act 51 of 1977, Rape. The rape was committed on 1st October 2011.

The trial court found there were no substantial and compelling circumstances to justify a departure from the prescribed minimum sentence and Appellant was sentenced to life imprisonment on 7th November 2012. The minimum sentence provisions applied as the

victim of the rape was a person under the age of 16 years.

Leave To Appeal against sentence was granted on the 22nd November 2012.

The complainant was seven years old when the crime was committed by Appellant. The trial court accepted the version of the complainant.

In essence the complainant testified that on the day she and friends had been playing in the vicinity of Appellant's house. He had asked her to go and buy cigarettes for him. On her return from purchasing the cigarettes Appellant had forcibly pulled her into his house and locked the door. Thereafter he pulled her into his bedroom where he forced her mouth open and forcibly placed his penis into her mouth. This hurt her. Despite her attempts to resist and screams he persisted and compelled her to move her head to and fro with his penis in her mouth. When he had finished he removed his penis from her mouth, gave her R5 – 00 and told her to tell nobody.

Appellant vacillated in the nature of his defence but at the end of the day testified that he was drunk on the day and could not really

remember what happened. The nature of his defence compelled the complainant to relive her ordeal by telling the trial court what happened and being cross examined about it.

After the conviction of Appellant an “Impact Report” of the rape on the complainant was compiled by a Social Worker and submitted to the trial court.

In her summary, the Social Worker’s first conclusion was that the complainant was so traumatised by the rape that she needed therapy for six months thereafter. In this regard she indicated the possible need for further counselling.

Secondly, as a result of the rape the complainant had experienced vulgar ridicule from children in her community and “het in die proses haar spontaniteit en ‘kindwees’ prys gegee.”

Thirdly, the entire family of the complainant had been emotionally gravely affected by the rape and had been humiliated by members of the community who had supported Appellant.

Elsewhere in the report the Social Worker *inter alia* testified that her investigations revealed marked changes in the behaviour of

the complainant after the rape. This included ill discipline, less open communication with family members, guilt feelings about the rape, a loss of trust in people, a fear of men, more prone to crying, nightmares, bed wetting, fear of the dark, loss of self image and a self and community imposed stigma.

Dealing with the approach adopted by our courts in applying the minimum sentencing legislation, in **S v PB** 2011(1) SACR 448 (SCA) at page 450 Tshiqi JA stated:

"[9] The approach to an enquiry such as the present appears in paras 7 , 8 and 9 at 476e-477b of the judgment [S v Malgas 2001 (SACR) 469 SCA] **and the legislation has been followed consistently by the courts in applying the minimum sentence legislation. The learned judge of appeal stated at 476f – 477f:**

'It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.

In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may…Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be

departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'...

[10]In *S v Matyityi*, approximately nine years after *Malgas* this court noted that criminality is still on the rise in our country despite the imposition of minimum sentences and has again stressed the relevance of the legislation as follows (para 23):
'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas,* it still is "no longer business as usual". And yet

one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'"

In the matter of **Bailey and The State** with case number 454/2011 [2012] ZASCA 154 at page 12 Bosielo JA stated:

"[19]The minority judgment in the court below appears to reflect the misunderstanding that the refusal by this court to endorse the life imprisonment imposed in the three cases of *Abrahams, Sephika* and *Nkomo* constitutes a benchmark or a precedent binding other courts. That is a misconception. Such an approach or trend can never be elevated to a benchmark or binding precedent. Those cases remain guidelines. Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing as enunciated in a long line of cases which includes *S v Zinn* 1969 (2) SA 537 (A) which espoused a proper consideration and balancing of the well-known triad; *S v Rabie* 1975 (4) SA 855 (A) at 862; and *S v de Jager and another* 1965 (2) SA 616 (A) at 628-9. This salutary approach has recently been endorsed by Marais JA in *S v Malgas* para 12.

[20]What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.

[21]The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part the sentencing court. I have, however, found the following definition in *S v Malgas* (above) para 22 to be both illuminating and helpful:

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.' "

Fundamental to the quoted authority, is that at all times regard must be had to the starting point in all these matters, with respect succinctly summed up in ***S v Matyityi*** 2011 (1) SACR 40 (SCA) at page 50 where Ponnan JA stated:

"[18] The trial judge appeared not to fully appreciate that the starting point in respect of … the murder and rape convictions was not a clean slate upon which he was free to inscribe whatever sentence he thought appropriate, but imprisonment for life."

In the present matter I am unpersuaded that the trial court erred when arriving at the decision that there were no substantial and compelling circumstances present to justify a departure from the prescribed minimum sentence. There is no "**sense of unease"** in me as I reflect on the sentence imposed.

I do not agree with Ms Adams, who appeared for Appellant, that the trial court "misdirected itself by merely reciting the well-established principles that ought to be taken into account when determining an appropriate sentence, but failed properly to apply these principles to the circumstances of this case…". The court *a quo* in its judgment on sentence assessed all the evidence before it and did have regard to the traditional triad of the crime, the offender and the interests of society. Throughout this process it is clear that the trial court took as its point of departure the imposition of a life sentence, unless substantial and compelling reasons were shown to exist.

Furthermore, particularly if one has regard to the far reaching consequences of the rape on the complainant, who was only seven years old when she was raped, and the absence of remorse on the part of Appellant which amongst other things forced the complainant to relive the traumatic assault on her, I cannot agree

with Ms Adams that “the sentence of life imprisonment (is) disproportionate to the offence (committed).”

When determining whether substantial and compelling circumstances were present, the trial court made reference to a recent decision by this court where life imprisonment was imposed for the same offence as the present one and where the victim was fourteen years old.

Ms Allchin, who appeared for the State, was requested by the court to obtain the details of this matter from the trial magistrate. The magistrate has furnished the court with a copy of the unreported matter of **Ebrahim Tofie and The State** with case number A75/2012. Although the complainant in that matter was below sixteen years old (fifteen years old) and life imprisonment was imposed, the facts of it clearly are of no assistance in the present matter and it would have been an error by the trial court to rely on it when making its decision.

On reading the trial court’s judgment on sentence, I am unpersuaded that the magistrate relied in any material way on **Tofie** *supra* when concluding that there were no substantial and compelling circumstances present. However, even if I accept that

she did rely on it, at the end of the day the issue remains whether or not notwithstanding this error the trial court was correct when it found that there were no substantial and compelling circumstances present.

In the matter of **S v Mahomotsa** 2002 (2) SACR 435 (SCA) at page 444 Mpati JA (as he then was) stated:

"[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."

The victim in the present matter was seven years old when she was raped by Appellant. The mere fact that I can imagine a worse rape than the present one, does not assist Appellant. A crucial consideration is the age of the victim. The minimum sentencing provision germane to the present matter stipulates the age of the victim as needing to be younger than sixteen years old. The victim in the present matter was less than half that age. In my opinion that in itself makes it **"horrendous enough to justify the imposition of the maximum penalty."**

I recognise the danger of a degree of arbitrariness when drawing a line at one age as opposed to another age – for example fifteen years old as opposed to eleven or twelve years old. In this regard a reading of **The Child Justice Act 75 of 2008** (hereafter "the Act") is instructive.

Dating back to Roman Law the age when a child was deemed to be *doli incapax* was set at children below seven years old. Between seven years old and fourteen years old a child was deemed to be *doli capax* – in other words there was a rebuttable presumption that the child lacked criminal capacity. The Act has retained this distinction between *doli incapax* and *doli capax*.

However it has increased the age from seven years old to ten years old of children deemed to be *doli incapax*.

Quite clearly the legislature was of the view that children less than ten years old need to be distinguished from children older than ten years old and needed added special protection as a result of their age. Similarly the Act provides children between ten years old and fourteen years old with more protection than children older than fourteen years old.

No doubt underpinning these distinctions *inter alia* are the different developmental stages of children at different ages. Although in the present matter the legislature has not drawn a distinction between a fifteen year old child and a seven year old child, it would fly in the face of the rationale of the said distinctions in the Act, and indeed in the common law before the Act, not to draw a distinction between such children when assessing the gravity of a rape and the need to give protection to them against rapists.

In my view where the victim is seven years old, there is no doubt that raping her is “horrendous enough to justify the imposition of the maximum penalty.” A reading of the record reveals a young

girl in effect devoid of any means, physical or intellectual, to protect herself against Appellant. Furthermore, as elaborated on later in this judgment, her tender years also would compromise her ability to give meaningful evidence pertinent to the issue of long term damage to herself. Accordingly I am of the view that just as the Act would provide her with special added protection as opposed to a twelve year old or a fifteen year old, so this court needs to give her and other children of seven years old special added protection. (Thus for example the present matter is distinguishable from the various matters discussed in Mudua *supra* where the victims' ages ranged from twelve years old to sixteen years old.)

Added to this is the evidence that Appellant is a 58 year old man, old enough to be the victim's grandfather, was known to the complainant and in effect lured her to his house before forcibly dragging her into his house. Appellant also persisted with his actions notwithstanding the complainant's screams. He then cynically gave her money to buy her silence.

In addition to this is Appellant's previous conviction in 2002 for attempted rape. This has direct bearing on the responsibility of the court going forward to protect girls against rapists such as

Appellant. The absence of remorse is also indicative of Appellant having no insight into his reprehensible conduct. This suggests that the chances of the rehabilitation of Appellant are remote and that he always will be a threat to girls.

In the present matter, although there is no evidence of physical injuries to the complainant, the evidence of the Social Worker is clear as regards the emotional and psychological effects on the complainant. The rape by Appellant has forever changed the life of the complainant. In effect she has been given a life sentence by Appellant.

I would note that as regards the need for courts to have regard to the consequences of a rape on a victim when it comes to sentencing, I am in respectful agreement with the sentiments expressed by Satchwell J in the matter of ***S v M*** 2007(2) SACLR 60 (WLD), more specifically at page 88 paragraph 98 through to paragraph 102. *Inter alia* in paragraphs 98 she stated:

> **"As enjoined to do by the Supreme Court of Appeal I have paid careful regard to the 'impact' of the rapes upon N. However, I have some concern that it is not possible at the time of and in the course of a criminal**

trial to fully ascertain the after- effects of these experiences."

The learned Judge continued at paragraph 99:

"Furthermore, the responses of rape survivors are surely as complex and multi - layered as are the individuals who experience rape. We must therefore expect the manifestations of the impact of rape to be varied in every respect. Some responses will be publicly displayed and others privately endured. Some rape survivors will collapse while others will bravely soldier on."

And then finally at paragraph 101:

"It would seem that sentencing courts are expected to view rape as 'more serious' where a rape survivor cannot sleep, fears men and sex, is unable to concentrate and cannot complete school, or has a career or relationships destroyed. If this is so, then other rape survivors may question why their rapes are viewed as 'less serious' because they may have been fortunate or privileged enough to receive professional assistance, be endowed

with different personalities and psyches, exhibit fewer post-traumatic effects, and so on. The Legislature does not seem to have intended the rapist to be less morally and legally blameworthy because the rape survivor appears to or actually does survive, or continues life with less apparent trauma."

The reality is that in the present matter only in 30 to 40 years time will the full emotional consequences of the rape on the complainant be known. It is profoundly unfair on the victim to give her rapist any benefit because the court does not know now what the full long term consequences of the rape will be on the seven year old victim.

In any event, in this regard no matter what evidence is led on possible long term emotional consequences, such evidence inevitably will involve speculation, not least of all given that the victim was only seven years old when she was raped. Such a young person would be unable adequately to discern and articulate the indicators of long term damage to her psyche.

Furthermore, if one has regard to the minimum sentencing provisions for the offence of rape, they presuppose that there will

be devastating long term effects on the rape victim – which is clearly one of the reasons for the legislature prescribing the maximum sentence. A court must be careful of in effect undermining this presupposition by in effect placing an onus on victims to show that the rape will have devastating long term consequences on her. If anything, it should be the rapist who should have to lead evidence to rebut this presupposition in a particular matter where the court is trying to decide whether or not substantial and compelling circumstances exist. This would be particularly important in matters where the victims are as young as the victim in the present matter, especially given the inability of a seven year old child to lay an adequate evidential foundation for speculation by an expert.

In any event, in the present matter I am of the view that the evidence before the court does not support speculation in favour of Appellant that there will not be far reaching adverse affects on the victim.

I also am mindful of the present community outrage concerning the high prevalence of the crime of rape within our community, particularly the rape of girl children.

In a judgment of this division in 2000, **S v Van Wyk** 2000(1) SACR 45 (C) at pages 46 – 47, Davis J stated:

"Mr Bouwer, who appeared on behalf of the State,… , referred to the horrific statistics with respect to rape in this part of the country, namely the Western Cape.

Incidence of rape

According to the statistics presented by Mr Bouwer, in the last six months of 1998 in the Western Metropole, Boland and South Cape, there were 2 783 reported rapes. Of these, 372 occurred where the victim was under 12 years old. In the first six months of 1999 there were 2535 reported rapes, of which 340 involved victims under the age of 12. Ms Friedman, who testified on behalf of the State, and who is a clinical psychologist with considerable experience in the area of rape counseling, informed the Court that most rape counsel agencies consider that the statistic of one reported rape to every 20 unreported rapes reflects the present picture of the sheer cancer of rape which has ravaged South Africa."

In 2007 I presided in the unreported matter of **The State v Mlandeli Dayimani** (ECD) with Case No.: CC12/2007 DATE: 26 SEPTEMBER 2007. In my judgment I included certain rape

statistics (although the statistics quoted are mostly from the Eastern Cape, if one has regard for example to the statistics in **van Wyk** *supra,* there is no reason to believe that they did not reflect the situation in the rest of the country as well). I also made certain observations which I am of the view are as relevant today as they were in 2007. The extract begins at page 10 of the judgment:

"At the request of the Court the evidence of Senior Superintendent Krause from the Criminal Crime Information Analysis Centre was placed before the Court.

From this Court's own experience of presiding at rape trials I was of the opinion that rape, not least of all the rape of girls, had become a problem in our community. Superintendent Krause's evidence conclusively revealed that this Court's opinion that rape had become a problem was a grave understatement of the situation and that a more appropriate word would be a plague.

I will now highlight some of this evidence. Between 2001 and 2006 there were 269 491 rape complaints submitted to the South African Police Services. This is an average of about 54

000 per year. This figure represents only the cases where reports have actually been made to the South African Police Services. The national percentage increase of official reports to the South African Police Services from 2001 / 2002 year to the 2005 / 2006 year was 1.2 %. That is close on two more alleged rapes per day in 2005/2006 than in 2001/2002.

More disturbing and indeed frightening for the community and particularly for the women of the Eastern Cape, and might I add also for all the fathers in the Eastern Cape, was that the increase in the same period in the Eastern Cape was 32.6 % as compared to the national increase of 1.2 %.

I now turn to the Eastern Cape, more particularly the Grahamstown Policing area. The Grahamstown Policing area does not include the two biggest centres, population wise, in the Eastern Cape, namely the Nelson Mandela Metropole and the East London/Mdantsane/KWT/Zwelitsha area. The Grahamstown Policing area consists of Grahamstown and a number of surrounding towns.

In this Grahamstown Policing area during the period January 2005 to June 2007 there were 1 277 reports of rape. That is

approaching two such reports a day on average. Of these 308 involved girls younger than 15, nearly a quarter of the overall figure for the Grahamstown Policing area. Of these 308, 182 were girls between 11 and 15. 72 were girls between 6 and 10 and 54 were girls younger than 5.

Thus on average about every third day during the past 2 and a half years in the Grahamstown Policing area there has been a report to the South African Police Services of the rape of a girl 15 and younger. Another frightening conclusion is that on average every about 16 days in this period there has been such a rape report involving a girl of 5 years and younger.

And here it must be emphasised that these figures only represent matters which were in fact reported to the South African Police Services. I accept that there would be a certain lie factor in these statistics but have no doubt that such lie factor would be outweighed by the many matters of rape which never are reported.

In this regard a truly frightening piece of evidence given by Superintendent Krause was that in 2005 / 2006 in the Eastern Cape only 36 % of these reported matters reached the Courts

and of those there was only a conviction rate of 5.9 %. These figures were even worse for the period January through to June 2007 in that only just over 28 % of these matters came to Court and there was only a 3.6 % conviction rate.

Given such statistics, it is easy to see why some women would not want to put themselves through the ordeal of reporting their rape and the ensuing trial.

I have an aversion for adjectives and exaggeration, but in the light of the statistics highlighted above I can without fear of contradiction state that our Province and indeed our Country faces an evil of gigantic proportions especially when it comes to the barbaric dehumanisation and brutalisation of girl children by means of rape.

Children and in the present case particularly girls, are one of the few groups of individuals targeted specifically for protection in the Bill of Rights. In assuming office as a Judge I have taken an oath to uphold this Bill of Rights. I thus have an obligation before God to protect all girls in this country and to play my role in making sure they are safe.

Furthermore, if the courts are not seen by the community to be saying so far and no further as regards rape, particularly the rape of young girls, the Rule of Law itself will be brought into jeopardy as in such a scenario outraged communities will be tempted to take the law into their own hands.

This obviously is not to say that at the end of the day the various considerations applicable to sentencing must not be balanced before a final decision is taken about an appropriate sentence."

Tragically very little seems to have changed since 2000 and 2007 when it comes to rape, especially the rape of girl children. For example on the same day as this appeal was originally set down for, I am aware of at least one other appeal in this court which dealt with the rape of a six year old child (**Andre Lewis and The State** with case number A37/2013 – in that matter there was penetration of the vagina by means of the rapist's finger and a sentence of life imprisonment was confirmed by Dlodlo J and Mantame J). Various current publications are also replete with references to the scourge.

In this respect Majiedt JA states in **Mudau** *supra*

"[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In *S v RO*, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within a family context.[1] If anything, the picture looks even gloomier now, three years down the line."

Consequently in the sentences imposed on the rapists of girl children, especially those as young as the complainant in the present matter, I am of the view that the courts of this land must send out a clear message that such heinous crimes will not be tolerated.

No doubt some will argue that all these statistics prove is that long sentences are not helping the situation. This might be so, but, as already alluded to, in assessing an appropriate sentence for such crimes there must be no compromise in the need to impose sentences which would help protect future possible victims

[1] *S v RO* 2010 (2) SACR 248 (SCA) para 1.

against the jailed rapist, in this case Appellant. Thus part of the process of “individualising” the sentence in the present matter is to look at the future threat Appellant might pose to other young girls.

In this regard in the matter of **S v Swart** 2004 (2) SACR 370 at [12] Nugent JA stated:

“In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”

Thus I am of the view that when it comes to sentencing rapists, especially of children as young as seven years old, it cannot be **“business as usual”** and the protection of possible future victims must be central to any decision on an appropriate sentence. As already alluded to, in this decision the remorse or absence of

remorse in the rapist is critical.

I must emphasize that in the present matter it weighs particularly heavily with me that there was not a shred of remorse or insight by Appellant as regards his monstrous treatment of the victim. In effect he forcibly used the complainant's mouth to masturbate and then cynically dismissed her. To him this seven year old girl, no doubt filled with the dreams of future wonders in her life, was no more than a thing which he could use to satisfy himself. In that moment he changed her life for ever.

The failure by Appellant in any way to grasp the evil of what he has done, militates against the possibility of his future rehabilitation. I am mindful of there being different reasons for an accused to deny a crime and that such denial does not necessarily of itself indicate no remorse whatsoever. However for me to find that there might be some remorse in the present matter I need to have regard to Ponnan JA's words at paragraph [13] in **S v Matyityi** *supra*:

"In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that

happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."

In the present matter Appellant meets none of these requirements.

As already stated, his previous conviction for attempted rape also is a significant factor to be taken into consideration when making a decision about whether or not there are substantial and compelling factors present justifying a lesser sentence than life imprisonment. As alluded to above, his previous conviction further calls into question the possibility of Appellant's rehabilitation.

Simply stated, on the evidence before me I am not prepared to risk allowing Appellant back into a community where he has access to young girls. Central to my oath as a judge, and as the upper guardian of children, is that I must do whatever I can do to give content to section 28 of the Bill of Rights.

I am mindful of the dangers of lapsing into speculation, succumbing to the temptation of merely wanting to exact revenge and imposing the court's subjective considerations on a sentencing decision. As Majiedt JA warns in **Mudau** *supra:*

"[13] …. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. "

In this regard I make the following observations.

Firstly, as already alluded to, given the large number of decisions on the issue, it is clear that our courts find the sentencing of rapists a particularly vexing balancing act. The present matter is no different.

Secondly, when it comes to sentencing for rape, particularly the rape of children as young as seven years old, protection of possible future victims against the actual rapist must be a significant consideration. As I already have stated, remorse and insight into the nature of his crime by the rapist should be an

important consideration in this regard.

Thirdly, in such matters a measure of subjectivity when it comes to sentencing is inevitable. As Marais JA stated in paragraph [25] at page 481 of **Malgas** *supra*

"A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence… ."

Furthermore, Marais JA's previously quoted words at paragraph [22] of **Malgas** *supra* that **"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice."** involves a measure of subjectivity.

In this respect I am deeply aware of the fact that I am a man and thus by definition unable fully to place myself in the shoes of the victim, who in this case is a girl, and indeed in most cases, are women and girls. I also am aware that unlike the trial court I did not experience the victim and perpetrator giving their testimony.

This leads me to my final observation which deals with subjectivity and speculation. As I have considered the nature of the crime in

the present matter and its effect on the victim, it has become clear to me that a measure of speculation is inevitable, no matter what decision one arrives at.

Thus for example, is oral rape less repulsive to a woman than vaginal or anal rape? To a woman is virginity merely a matter of whether or not her hymen has been penetrated? Does it make any difference to a woman if there was actual ejaculation or not? (In any event, as regards the latter, in the present matter where there is no evidence of ejaculation, it needs to be asked whether a seven year old girl who has an adult's penis in her mouth and who is screaming at the time, would know whether or not there has been ejaculation.)

It is when I apply my mind to such questions that the thinking underlying the approach of Satchwell J makes most sense. Her approach reduces the role speculation and subjectivity will play in such matters. Furthermore for example if I merely accept that the legislature draws no distinction between vaginal, anal and oral rape and that only penetration, and not ejaculation as well, is required to constitute rape, speculation and subjectivity can be further reduced. There is a real danger that judges as men or women, wives and husbands, mothers and fathers, products of

different cultural upbringings *et al* wittingly or unwittingly unduly impose their worldview when arriving at a sentence on such a deeply personal issue as rape.

Thus while the ideal is **"to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors**.", the reality is that judges are not blank canvasses when it comes to sentencing. It is for this reason that I am of the view that when it comes to rape, especially of children as young as seven years old, it is important for a court as far as possible to adopt an approach which best ensures **"...Predictable outcomes, not outcomes based on the whim of an individual judicial officer,...."(S v PB** *supra*).

Thus even if for whatever reason I was at large to consider sentencing afresh, given that the starting point for the present offence is life imprisonment and that "**In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response."(Malgas** *supra)*, I am unpersuaded that there are any substantial and compelling reasons present in this matter which permit me not to impose life imprisonment.

I might add that even if I was not faced with a minimum sentencing provision, in the present matter exercising my discretion I would also have imposed the maximum sentence on Appellant.

Accordingly I would dismiss the appeal, and confirm the sentence of life imprisonment.

K MATTHEE

ACTING JUDGE OF THE HIGH COURT