IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE No: A1134/2019

In the matter between:

CHRISTOPHER BOWLER Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 16 OCTOBER 2020

Salie, AJ

INTRODUCTION:

[1] On 27 July 2017, the appellant pleaded not guilty in the Parow Regional Court ("court *a quo*"), on three (3) counts of sexual assault; five (5) counts of rape; two (2) counts of exposure to/or the displaying of pornographic material to a minor; and one (1) count of compelling, or causing a minor to witness a sexual act.

[2] Pursuant to the State and the appellant's evidence, and on 05 September 2018, the appellant was found guilty and sentenced to five years imprisonment on counts 1, 2 and 11 (which were taken together for purposes of sentencing); and five years' imprisonment on counts 6, 7 and 10 (which were taken together for purposes of sentencing). On counts 3, 4, 5, 8 and 9, (on the rape counts), the appellant was sentenced to life imprisonment, the convictions having been taken as one for purposes of sentencing.

[3] Since both the complainants mentioned in the charge sheet are minors and in order to maintain their confidentiality (as well as that of their parents), I shall refer to them as SP and CP respectively.

[4] I shall summarise the above charges as follows:

a. Three counts of sexual assault by having contravened section 5(1), read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"):

i. Count 1 was allegedly committed during the period 2012 to 2015 in respect of the complainant SP (date of birth 20 May 2002 and accordingly 10 to 15 years of age at the time) by means of touching her breasts on diverse occasions;

ii. Count 2 was allegedly committed during the period 2014 to 2015 in respect of the complainant SP by means of requesting the complainant to touch the appellant's penis;

iii. Count 11 was allegedly committed during the period 2013 to 2014 in respect of the complainant CP (date of birth 15 June 2007 and accordingly 6 to 7 years of age at the time) by means of the appellant licking her vagina on diverse occasions.

b. Five counts of rape by having contravened section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60, 61 and 68 of SORMA, read with sections 51 and 52 and schedule 2, Part 1, of the Criminal Law Amendment Act 105 of 1997:

i. Count 3 was allegedly committed during 2015 in respect of the complainant SP (13 years of age at the time) by

inserting the appellant's penis into the complainant's vagina;

ii. Count 4 was allegedly committed during the period of 2014 to 2015 in respect of the complainant SP (12 to 15 years of age at the time) by the appellant inserting his finger(s) into the complainant's vagina on diverse occasions;

iii. Count 5 was allegedly committed during 2015, in respect of the complainant SP (13 years of age at the time) by the appellant inserting his penis into the complainant's mouth on diverse occasions;

iv. Count 8 was allegedly committed during the period 2013 to 2015 in respect of the complainant CP (6 to 8 years of age at the time) by the appellant inserting his finger(s) into the complainant's vagina on diverse occasions;

v. Count 9 was allegedly committed during the period 2013 to 2015 in respect of the complainant CP (6 to 8 years of age at the time) by the appellant inserting his penis into the complainant's mouth on diverse occasions.

c. Two counts of exposure, or the displaying of, or causing exposure, or the displaying of pornography to children by

contravening section 19(a) read with sections 1, 20(1)(a) / (b), 56, 57, 58, 59, 60 and 61 of SORMA, read further with the provisions of sections 92(2) and 94 of the Criminal Procedure Act, Act 51 of 1997:

i. Count 6 was allegedly committed during the period of 2013 to 2015 in respect of the complainant SP (11 to 15 years of age at the time) by the appellant showing the complainant material depicting people engaging in sexual intercourse;

ii. Count 7 was allegedly committed during the period 2013 to 2015 in respect of the complainant CP (6 to 8 years of age at the time) by the appellant showing the complainant pornographic material depicting people engaging in sexual acts.

d. One count of compelling, or causing children to witness sexual acts or self-masturbation by contravening section 21(1) read with sections 1, 20(1)(a) / (b), 56, 57, 58, 59, 60 and 61 of SORMA, read along with the provisions of sections 92(2) and 94 of the Criminal Procedure Act, Act 51 of 1997.

e. Count 10 was allegedly committed during the period of 2013 to 2015 by the appellant masturbating in the presence of the complainant, CP (6 to 8 years of age at the time).

[5] Most of the above offences took place at a house in Bellville, bar the one rape charge (charge 5), which occurred at, or near a high school. The two minors resided at the aforestated address with their mother ("RP"), with whom the appellant was in a relationship from approximately 2010 after RP divorced her husband ("HP"). Similarly, for the sake of confidentiality, they will be referred to as above.

[6] The appellant pleaded not guilty to all the above mentioned charges and proffered a defence of bare denial. The court *a quo*, having considered the evidence in its totality concluded that the State had proven the guilt of the appellant beyond reasonable doubt and rejected his version as false beyond reasonable doubt.

[7] The appellant sought condonation for the late filing of the appeal and in view of the State not opposing the said application, and having considered the application prior to the hearing, condonation was granted.

ISSUES ON APPEAL:

[8] It was submitted on behalf of the appellant that the court *a quo* erred in the following respects:

a. in concluding that both complainants' evidence was satisfactory in material respects;

b. in failing to evaluate the evidence of both complainants' with the necessary caution and merely paying lip service to the cautionary approach to be adopted in respect of the evaluation of the evidence of both SP and CP being single witnesses in their respective complaints;

c. failed to have had regard to the complainants' delay in the reporting of the alleged offences to their parents, teachers and/or friends. In this regard the appellant levels criticism against the application of sections 58 and 59 of SORMA;

d. failed, in respect of sentence, to have concluded that substantial and compelling circumstances existed, justifying an alternative term of imprisonment other than life imprisonment.

[9] At the commencement of the hearing, this court was requested to view images on a compact disc ("DVD"), allegedly handed up by the appellant's Counsel at the conclusion of the hearing in the court *a quo*, in an attempt to impugn the credibility of SP. Based on the content of the DVD and inasmuch as the appellant's defence was one of denial, the appellant's counsel on appeal submitted that this court cannot ignore the inference that consensual intercourse with SP could be excluded. If this is so, then the appellant should be found guilty of the statutory offence pursuant to section 15 of SORMA, which is a competent verdict on a charge of rape.

[10] I shall contextualise the evidence of both complainants in order to determine whether any of the criticism levelled against it justifies the upsetting of the findings of the court *a quo*.

THE EVIDENCE OF SP:

[11] The evidence of SP was led via an intermediary on counts 1, 2, 3, 4, 5 and 6, and by demonstration on dolls.

[12] SP testified that the appellant moved into their home when she was in Grade 2. This was in the year 2010. When she reached Grade 4, in 2012, the appellant began touching her inappropriately.[1]

[13] He initially touched her above her clothing and progressively moved his hands to underneath her clothing. These events had taken place while her mother, RP was either absent from home, or whilst she was shopping and/or attending church, in the shower, or busy cooking.[2] The appellant also touched her breasts and other parts of her body in and during 2013, whilst she was in Grade 5.[3]

[14] In the year 2014, whilst she was in Grade 6, the sexual misconduct escalated to the point where the appellant asked her to touch his penis, which she did, even though she despised it. She nonetheless had done so because the appellant instructed her to do so. He also placed his

[1] Page 96, lines 5 – 10 ("*Oom C... het vatterig geraak*")
[2] Page 98, line 19 ("*Ja, hy gaan soos onder my klere vat*")
[3] Page 99, lines 10 - 11

finger in SP's vagina.[4] The first time he had done so was when she was in Grade 4. She remembers that the insertion of the appellant's finger into her vagina took place in her room at a time when her mother was at church. The "*fingering*" had taken place on several occasions.

[15] During the course of her mother's absences, the appellant would show her pornographic material on his laptop, where a male and female engaged in sexual acts. She expressly described the pornographic content, and the appellant would also show her similar content whilst her mother was at home, but by shielding the laptop from her mother and turning down the volume.

[16] In and during Grade 7, the sexual misconduct by the appellant continued and intensified when, after he had fetched SP from extra-mural activities at a venue associated with their church in Bellville, the appellant parked his vehicle close to a school in the area and requested her to perform oral sex on him. According to her, he inserted his penis into her mouth.[5] SP admitted not having been truthful with her mother when she had enquired via whatsapp message as to their delay in arriving home from the extra-mural activities.[6]

[17] At the time SP was 13 years old and in Grade 7, she vividly recalled how the appellant called her to watch pornography on his laptop and

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[4] Page 100, lines 24 - 25
[5] Page 102, lines 20 - 25
[6] Page 101, lines 18 - 25

following this, the appellant requested her to suck his penis in order to become erect. Although she was shy and did not want to accede to his request, he threatened that she would not be allowed to visit her friends and that she would remain "incarcerated" in her room. He thereafter laid SP on her back and opened her legs, whereupon the appellant penetrated her vagina with his penis. She explained in detail that subsequent to this vaginal penetration, he requested her to turn around and lie on her stomach, whereupon he inserted his penis, from behind, into her vagina again. On this occasion, he made use of a condom.[7]

[18] Further to the above conduct, and also during the course of 2015, (whilst in Grade 7) the appellant had requested SP, on a number of occasions, to place his penis in her mouth and on two occasions, at least, she clearly recalls that she despised these abominable actions.[8]

[19] On one occasion, SP said that she had seen how the appellant had shown her younger sister, CP, pornographic material on his laptop when he had also exposed himself to them, and played with his penis. At that stage the appellant also asked her to touch his penis but she simply walked away.

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[7] Pages 104; 105; 114 – 116; 207

[8] Page 105, lines 14 – 18: "*Soos wat altyd gebeur het ek moes sy penis gesuig het dat hy kom maar hy het altyd in sy hand gekom en 'n paar keer was dit in my mond want dit het net twee keer gebeur wat ek kan onthou en dit het nie rerig lekker geproe nie.*"

[20] During the course of 2015, SP and CP, fortuitously, confided in each other that the appellant had hurt them. SP testified as follows: "*Een aand toe ons by pappa was, het ons in die garage gesit, met ander woorde, in die braaikamer en toe het ons net geheime vir mekaar vertel en toe se ek vir (CP) maar ek word seergemaak deur Oom C... en toe het sy ook vertel maar sy word ook seergemaak.*"[9]

[21] SP testified that, although their grandmother had fetched both herself and CP from school at times, she could not disclose the actions of the appellant to her grandmother, as she did not have a particularly close relationship with her. The appellant's abuse had come to light when SP told her friends at school during August 2015,[10] whereafter, a teacher was called in and the matter was finally reported to the police.

[22] Significantly, SP testified that, although she had been teased by girlfriends about the stretch marks on her body, she ultimately started self-mutilating as a coping mechanism to deal with her emotions. It is only hereafter that the truth surfaced and was eventually reported.

[23] As regards to how the matter was reported to the police, SP testified that following her friends' enquiring about her self-mutilation, she informed them that she simply had had enough and revealed to them what was happening to her.

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[9] Page 106, lines 18 - 23
[10] Page 148, lines 1 - 15

[24] SP testified that she had been deceived by the appellant into accepting that she may send nude pictures of herself to anyone, which she admittedly did. She also admitted having sent the appellant a picture of her breasts.

[25] In cross-examination, it was put to SP that the naked photo of her breasts was taken with the appellant's phone and that he was unaware thereof, to which SP replied that he definitely knew, since the appellant was sitting next to her when the photograph was taken.

[26] In cross-examination she maintained that the appellant consistently threatened her not to disclose his actions to anyone.

[27] Significantly, SP was cross-examined with reference to the J88 medical report duly completed by Dr Andrews and in particular with reference to part D - paragraph 10 thereof in which a complainant's last previous sexual history with consent is documented and which reads as follows: "*10. Date and time of last intercourse with consent*", to which SP answered, "*long time ago*". SP was asked with whom she had previously engaged in sexual intercourse. She referred to the appellant as the person with whom she last had intercourse but maintained it was without her consent, as she was scared of the appellant. Her response is worth quoting: "*Eerstens ek het nie maar hy het my gedreig so ek het toe toestemming gegee want ek was*

bang."[11] And when she was asked how he had threatened her, she responded by stating that he would confine her to her room as a form of punishment without access to the outside world.[12]

[28] With reference to the threats of the appellant in general, SP testified as follows regarding her non-disclosure: "... *want ek is bang hy gaan iets doen, ek weet nooit wat hy eindlik rerig aan 'n mens kan doen nie...*"[13]

[29] The situation had eventually become so traumatic that SP began mutilating herself, and when confronted by her mother in this regard, she laid the blame on being teased at school about stretch marks on her body. Eventually the situation became so untenable ("*gatvol*") that she finally disclosed the abuse and exploitation to her friends at school.[14]

[30] In cross-examination, SP repeated that she had not reported the incidents of rape and/or sexual assaults to her father, because this would have hurt him. She also believed that it was her fault, and for this reason she did not report the abuse.

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[11] Page 116: "*So toe het hy gese maar ek mag nie meer vriendinne soos oor hê nie, ek mag nie by hulle gaan kuier ekke gaan dan in my kamer wees en dan moet ek twee ure leer elke liewe dag en mag ek nie uit my kamer uitgaan nie.*"
[12] Page 116
[13] Pages 151 – 152; 114 – 116; 207
[14] Pages 126 - 127

[31] SP maintained in cross-examination that the appellant had told her not to be shy of her body;[15] and therefore, she had sent the photographs to some of her male friends. She maintained that she asked the appellant to delete those photographs from her cellphone, as she did not want her mother to become aware thereof.

[32] SP conceded that the first persons she reported the incidents to were her friends at school.[16]

[33] SP confirmed in cross-examination that the appellant had exposed himself in the presence of CP and requested her to touch his penis, which she refused to do.[17]

[34] SP was re-called to testify regarding certain cellphone text messages found by the police on the appellant's device in which she is nicknamed "Nini". She confirmed that she received these messages from the appellant,[18] which read as follows: "*Wil gou net vinnig jou tiet suig.*" and "*Vok, ek is lus vir jou pielsuig.*"[19]

[35] In cross-examination, she explained that the reason why she had not testified about these messages earlier, was that she had forgotten about them.[20] The complainant denied this allegation.

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[15] Pages 136 - 140
[16] Page 148, lines 19 – 20: "*Dit was my vriende by skool, Telana, Lindy en Janke.*"
[17] Page 151, lines 20 - 23
[18] Page 305, line 11 – 12; page 306
[19] Page 306, 307 and 750
[20] Page 313, ln 7 - 10

THE EVIDENCE OF CP:

[36] CP testified insofar as counts 7 to 11 are concerned, and also in her case, with the assistance of an intermediary and by demonstration of actions using dolls.

[37] CP was six years old in 2013, seven years old in 2014, and eight years old in 2015. She testified that during these years the appellant had inserted his finger in her vagina; inserted his penis in her mouth; rubbed her private parts; had shown her pornographic material; masturbated in her presence; and licked her vagina; all without her consent.

[38] CP vividly described how the appellant had placed his finger in her vagina, as follows: "*Ek moet voorop sit en ek moet my broek aftrek of hy sit sy hand in my privaat.*"[21]

[39] CP testified that nobody would be able to see the event which occurred in the yard, as there were no windows facing the yard at the time when the appellant put his penis in her mouth, and in this regard she testified that the event took place: "*... agter die huis ...*"

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[21] Page 12, line 23

[40] Apart from the appellant placing his penis in CP's mouth, she was forced to suck his penis and in this regard she testified that: *"Ek moes altyd sy ding suig en dan het hy sy vinger in my privaat gesit."*[22] CP reiterated, *"Hy het sy privaat in my mond gesit. Hy het sy vingers in my privaat gesit en partykeer sy tong."*[23]

[41] On a specific question by the Prosecutor as to what the appellant did with his tongue, CP responded: *"As jy se partykeer sy tong, wat maak Oom C... met sy tong..."*[24] she said: *"Hy sit dit in my privaat."*[25]

[42] The appellant perpetuated the above conduct from the time that CP was in Grade 2. She was afraid to tell anyone, as he would threaten her. In this regard it is worth quoting her response: *"Hy het gese dat hy gaan ons seermaak as ons vertel"*.[26]

[43] The appellant had also shown CP pornographic material, at times at home in the dining room and once at work, in which the video depicted a male and female engaging in sexual activity.

[44] In cross-examination, CP was probed about her relationship with her mother and grandparents and the reason why she had not reported the incidents to her grandmother and/or her mother. Her reason for not doing so was because she was scared of the appellant.

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[22] Page 14, lines 9 - 11
[23] Page 14, line 25; to page 15, line 1
[24] Page 15, line 4
[25] Page 15, lines 4 - 6
[26] Page 16, lines 12 -13; page 33, line 14; page 66

[45] When these assaults had taken place, CP testified that her mother had either been in another room, or was absent from the home. She was interrogated as to whether she had "liked/enjoyed" what the appellant had done to her and she answered in the negative. "*Het jy gehou van wat Oom C... gedoen het?*"[27] She responded: "*Nee, ek het nie*".[28]

[46] CP furthermore repeated in cross-examination that the appellant had placed his tongue in her private parts, either in the garage of the house, or in the house itself. She described in detail one such incident:[29]

[47] Similarly, in cross-examination, CP testified what had been done to her whilst she was in Grade 1: the appellant had sucked her private part in the dining room.[30] This had occurred at times when RP was either in the shower or asleep.[31]

[48] CP repeated that the appellant would show her sexually explicit videos on his laptop, whereafter he would put his finger in her vagina and then force her to suck his penis.[32] She repeated this in cross-examination. The videos depicted males and females engaging in sexually explicit acts.

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[27] Page 31, line 24
[28] Page 32, line 10
[29] Page 38, lines 15 – 23: "*Ek moes op die stoel sit en my broek aftrek en hy het toe afgebuk en sy privaat in my mond gesit.*"; page 14, lines 9 - 11
[30] Page 41, lines 23 - 24
[31] Page 43, lines 15 - 20
[32] Page 48, lines 19 - 20

[49] On the various occasions when the appellant had shown CP pornographic videos, the appellant would pull down her panties and put his private parts in CP's mouth: "*..ek moet my mond in sy privaat sit*".[33]

[50] Further cross-examination revealed that the appellant had put his finger deeper into CP's vagina and to this effect she testified: "*Hy het dit op en af met sy vinger harder gegaan.*"[34]

[51] CP corrected the cross-examiner when asked whether the appellant had placed his penis into her vagina, by stating that he had only placed his finger into her vagina.[35]

[52] CP confirmed that she too had confided in SP regarding what the appellant had done to them.[36]

[53] When it was put to CP - in relation to count 10 - that she had not volunteered in her evidence in chief that the appellant had exposed himself and played with his penis, CP understandably responded that she had forgotten.[37]

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[33] Page 58, line 23
[34] Page 54, line 30
[35] Page 59, lines 20 - 25
[36] Page 69, lines 18 - 20
[37] Page 83, line 18

MEDICAL EVIDENCE:

[54] Pauline Bagaza, a forensic nurse, testified in relation to the statutory J88 medical report which she completed in respect of CP. She confirmed that a cleft was found at the 06h30 position and that the hymen membrane was missing. Seemingly, the entire hymen was absent. Her evidence was that it was likely that the injury suffered by CP was as a result of vaginal penetration by a penis, a finger or blunt object.[38]

[55] A further statutory J88 medical report, duly completed by Dr Andrews in relation to his examination of SP, was handed in as evidence, by agreement.[39] This report confirms the presence of old tears of the hymen consistent with vaginal penetration in the past.[40] The medical examinations in respect of the complainants were done on 22 October 2015 and 27 October 2015, respectively.

THE REMAINDER OF THE EVIDENCE:

[56] "RP", the mother of the complainants, testified that the appellant had been her boyfriend. They commenced a relationship during 2010 and soon thereafter the appellant moved into the common home shared by the children and herself. She was unaware of the sexual assaults perpetrated against the complainants, which came to light only after the

[38] Page 222
[39] Exhibit "G"
[40] Page 589

appellant was arrested in October 2015. It was put to her in cross-examination that a possible motive existed on the part of her ex-husband to influence the children to lay false charges against the appellant. RP denied this suggestion.

[57] RP further testified about the cuts inflicted upon SP's body and stated that she had questioned SP about this and accepted that this was as a result of her being teased by children at school regarding stretch marks on her body. RP confirmed that on the particular day when the alleged rape occurred outside the school, she had sent a whatsapp text message enquiring about the whereabouts of both SP and the appellant.[41]

[58] RP testified that she only became aware of the assaults on her children when she was summoned to the police station, where she was met by CP and her ex-husband, HP.

[59] HP, the complainants' father, testified that he had confronted the appellant at a social gathering and had cautioned the appellant that should he to do anything untoward to his children, there would be problems.[42] He denied that he had told the appellant that he knew that the appellant had molested SP and CP.[43]

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[41] Page 236, lines 11 – 25; pages 722 - 723 Exhibits 3, 4 and 5
[42] Page 267
[43] Page 274, lines 4 - 10

[60] Warrant Officer Kotze (a member of the South African Police Services) testified that he had arrested the appellant and later impounded his car at a friend, Ms L's brother's home. Kotze testified that it was only after SP's statement had been taken that it became apparent that CP had allegedly been assaulted as well. He thereupon obtained a search warrant for the appellant's cellphone and laptop.

[61] Warrant Officer Johannes Albertus Louw (a member of the South African Police Services) testified that he had examined the hard drive of the appellant's laptop and confirmed that the appellant had visited numerous pornographic websites.

[62] Finally, Ms L testified about removing the appellant's car from the police station pursuant to a power of attorney given to her by the appellant for safekeeping. Her evidence does not take the matter any further.

APPELLANT'S EVIDENCE:

[63] The appellant testified that he was an IT specialist and testified that once RP's divorce was finalised, he moved into her home in 2010, where he co-habited with her and the complainants.

[64] Soon after the appellant moved in with RP, SP and CP, the appellant discovered pornographic videos at their home. After questioning RP about this, she responded that it belonged to her ex-husband and that

he should just leave it. This aspect was not put to either RP or HP, however, it was put to RP that SP had been caught watching these videos on three occasions, which she denied.

[65] The appellant conceded further that he did in fact watch pornography, but not in the presence of the complainants. He said he watched pornography with RP, but this allegation was not put to RP.[44]

[66] In relation to the alleged sexual assault on SP after being fetched from the church venue, the appellant testified that the reason for being late was that on that specific night he had been parked in. This was at variance with his evidence under cross-examination, being that he had taken a different route home in order to avoid traffic. This route however, was a longer route home.[45]

[67] The appellant also addressed SP's behaviour in general, more particularly, her smoking and drinking habits and the theft of his Twisp (a vapour product) as well as the circulation of nude photographs to her friends.[46] Regarding the theft of the Twisp, this aspect was neither canvassed with SP or RP in cross-examination.

[68] The appellant further denied having seen the nude photographs of SP's breasts on her cellphone prior to it being shown to him by his previous

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[44] Page 346, ln 8 - 20
[45] Page 405, ln 11 - 20
[46] Page 355

attorney.[47] He proffered the following explanation: "*Either the photographs were taken with my phone or the photograph was sent to me and the message was deleted*"[48] the appellant hereby suggesting that SP could have had access to his cellphone, sent this photograph to him from her cellphone and then deleted same from her cellphone.

[69] The record reflects that the appellant was prepared to speculate as to whether SP could have gained access to his cellphone whilst he was sleeping and/or whilst being on his laptop late at night.

[70] As regards the absence of a hymenal membrane of CP, the appellant testified that this may have been self-inflicted.[49] This was neither put to CP. Similarly, in relation to the injuries and old tears of the hymen of SP, the appellant's evidence was that this too, was self-inflicted however this version was not put to SP.

[71] Regarding the two suggestive messages, the appellant stated: "*I can use the same methodology by saying that those messages was either sent and deleted, well, that's basically the only way ...*"[50]

[72] At the hearing of the appeal, the appellant's counsel applied to have several of the alleged nude photographs of the complainant depicted on the aforesaid DVD handed in as exhibits. It was suggested that the

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[47] Page 357
[48] Page 358, ln 1 - 3
[49] Page 409, ln 11
[50] Page 361, ln 15 - 18

complainant had sent them to certain male friends living in close proximity to her father and that they would come and visit her on weekends.[51] From the record it appears that there was no application in the court *a quo* to have the DVD admitted into evidence. I shall return to this issue later herein.

[73] The appellant, in short, was of the view that both SP and CP had fabricated the claims against him because he was strict with them, compared to the life they had with their biological father. This possible motive was neither put to the complainants nor RP.

APPELLANT'S CONTENTIONS:

THE CONTENTION THAT BOTH COMPLAINANTS' EVIDENCE WAS UNSATISFACTORY IN MATERIAL RESPECTS AND THAT THE COURT A QUO HAD NOT APPLIED THE NECESSARY CAUTION AND MERELY PAID LIP SERVICE TO SUCH AN APPROACH:

[74] The appellant's counsel submitted that both complainants were young at the time and that SP, being the older, had possibly been influenced by classmates to make the claims against him and that she could have influenced CP to level false charges against the appellant. As stated above, this contention was not put to either of the complainants.

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[51] Page 365, ln 4 - 14

[75] The caution expressed by appellant's counsel is to be found in *S v Raghubar*, [52] where Tshiqi JA stated as follows:

> "***The cautionary rule was applicable to the evidence of the complainant. He was a single witness to the alleged indecent assault and he was very young when the offences were allegedly committed and during the trial. It appears, however, that the court merely paid lip service to the cautionary rule because it ignored several contradictions in his own testimony and that of the other State witnesses.***"

[76] Where there is an allegation of sexual misconduct and the complainant is a single witness, the courts have developed a rule of practice that requires the evidence of a single witness to be approached with caution.[53]

[77] An accused may of course be convicted of an offence on the evidence of a single competent witness [54] and the exercise of caution in evaluating such evidence must not be allowed to displace the exercise of common sense.[55]

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[52] 2013 (1) SACR 398 (SCA) at 44, para 11
[53] *Viveiros v S* [2000] 2 All SA 86 (A)
[54] See the provisions of Section 208 of the Criminal Procedure Act 51 of 1977 (as amended)
[55] *S v Artman* 1968 (3) SA 339A at 341B-C

[78] Inasmuch as the cautionary rule in rape cases had been abolished in *S v Jackson*,[56] this court nevertheless is required to evaluate the evidence of both the complainants with the necessary caution.

[79] I have carefully considered the evidence, *ex facie* the record, of both the complainants and while no exact dates and times of the various incidents are recorded, they gave detailed accounts of the incidents, and vividly described how the appellant perpetrated the offences against them.

[80] The common thread was that the appellant would initially touch their breasts and that the sexual assaults would then eventually escalate to vaginal penetration, as summarised in their evidence.

[81] In cross-examination both SP and CP confirmed these allegations in graphic detail as well as the manner in which the appellant had repeatedly cautioned them not to disclose to any person the crimes he perpetrated against them.

[82] SP was unequivocal in her evidence that it was the appellant who had told her not to be shy of her body, hence her sending naked photographs of parts of her body to friends at school and to the appellant at his request.

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[56] 1998 (1) SACR 470 (SCA)

[83] Both complainants gave simple, logical and consistent accounts of what had occurred. CP would, for example, not commit to the fact that the appellant had sexually penetrated her with his penis, and rather stated that he had done so with his finger.

[84] Both complainants testified that the crimes were perpetrated over a period of approximately three years. I agree with the State's counsel that, given the passage of time and the nature of how the crimes were committed, the appellant was essentially 'grooming' the two complainants to weaken their resolve to report his behaviour to, for example, RP.

[85] I agree with the court *a quo* that inasmuch as there may have been contradictions in CP's evidence, these were not material, and having critiqued her evidence, the court *a quo* was correct in assessing and accepting the complainant's evidence as truthful and reliable.[57] After all, the court *a quo* saw and heard the witnesses and was able to adequately assess them as witnesses and, as a court of appeal, we are bound to consider this finding, unless it is not warranted, on an objective reading of the record.[58]

[86] In addition, the complainants never swayed from their core evidence that they had been sexually assaulted and raped by the appellant, notwithstanding the lengthy cross-examination to which they had been

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[57] Page 470
[58] R v Dlumayo 1948 AD 681; S v Francis 1991 (1) SACR 198 (A) at 204c-d

subjected. The court *a quo* correctly accepted, in my view, their evidence as consistent throughout.[59]

[87] The court *a quo* correctly rejected the contention that the complainant's injuries were self-inflicted more particularly SP's evidence that she had never used a vibrator, although she was aware that there was one present in the house.[60]

[88] The appellant's counsel had not put to either of the complainants that the injuries to their vaginas had been self-inflicted. This only arose on appeal when it was contended that CP could have been born without a hymen. As stated above, the medical evidence does not support such a finding.

[89] Inasmuch as the statutory medical report in relation to SP was admitted by consent between the parties, it bears repetition that it was never put to SP that she had consensual intercourse with the appellant. In this regard, as referred to above, paragraph 10 in the statutory report consists of an open-ended query as to when SP had previously engaged in consensual intercourse, to which SP responded: "*long time ago*". *Ex facie*, this seems to suggest that SP had previously engaged in consensual sex with the appellant, however, the overwhelming evidence suggests otherwise.

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[59] Judgment, p 470, ln 10 - 20
[60] Judgment, p 471

[90] Insofar as the contention that the complainants' evidence was unsatisfactory in material respects and that their evidence was not treated with the necessary caution, this submission falls to be rejected. The overwhelming evidence does not support this contention. The court *a quo* correctly, in my view, accepted the evidence of SP and CP as consistent and reliable and this finding cannot be faulted.

AN ADVERSE INFERENCE TO BE DRAWN IN THE COMPLAINANTS' DELAY IN REPORTING THE ALLEGED OFFENCES:

[91] Inasmuch as criticism was levelled at the complainants for not reporting the alleged abuse to their mother, their failure must be viewed in the context of them living with the appellant prior to the reporting of the matter.

[92] Both complainants were consistent throughout their evidence that their inhibitions were suppressed by either threats not to report, or the appellant having manipulated their personalities to the extent that they were rendered helpless.

[93] It was neither put to RP or HP that they had been complicit in laying false charges against the appellant.

[94] In respect of the delay in reporting, the provisions of section 59 of SORMA provides:

"In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof."

[95] In *Monageng v S*,[61] the court held:

"[24] It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure.[62] *Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides, in s59, that 'in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof'. Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the*

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[61] 2009 (1) All SA 237 (SCA) at para [24]
[62] T B Goodman-Brown et al 'Why Children Tell: A Model of Children's Disclosure of Sexual Abuse' *Child Abuse & Neglect* 27 (2003) 525-540

complainant's behaviour and her explanation for not immediately reporting the appellant is plausible."

[96] Similarly, I agree with the conclusions expressed in the above finding that a court may not necessarily draw an adverse inference merely because of a delay in time more particularly in this case -the reporting by both SP and CP of the allegations of rape and sexual assaults committed by the appellant.

[97] Inasmuch as these provisions were criticized in the appellant's Heads of Argument that it impacts on a fair trial, these provisions were not attacked as unconstitutional and the court *a quo* was correct in relying thereon.[63]

AN ADVERSE INFERENCE TO BE DRAWN FROM THE STATE'S FAILURE TO CALL THE FIRST REPORT WITNESSES:

[98] The appellant's counsel further criticised the State for not having called SP's friends and/or teachers to confirm the so-called first report. In this regard, it is worth quoting the provisions of Section 58 of SORMA, which provides as follows:

"*Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw*

[63] Page 468 - the court *a quo* correctly relied on section 58 of SORMA

any inference only from the absence of such previous consistent statements."

[99] SP testified that she had disclosed what had happened to her to her friends at school, as it appears they, at the time, insisted as to why she was mutilating herself. The mere fact that the State did not call any of these witnesses, in my view, does not mean that the remainder of the evidence of either SP and/or CP falls to be rejected. See in this regard *S v Vilakazi* 2016 (2) SACR 365 (SCA), where Dambuza JA stated as follows at para [16]:

"*[16] Indeed where, such as in this case, the 'first report' of rape resulted from intimidation, it cannot constitute evidence of a voluntary or spontaneous first complaint. But that does not render incomplete or insufficient the evidence led at a consequent trial... The court must consider whether the rest of the evidence proves the charge of rape beyond reasonable doubt."*

[100] I agree with the State's contention that in fact SP and CP had been each other's "first report" when they confided in each other as set out above. In any event, as stated above, the failure on the part of the State to call a first report witness does not justify the drawing of an adverse inference in this respect.

[101] The court *a quo*'s conclusion that SP and CP were each other's first report, cannot be faulted.

THE ADMISSION OF THE DVD TO THE COURT ON APPEAL:

[102] Insofar as the submission that this court view the DVD evidence in order to underpin the submission that SP possibly had consensual intercourse with the appellant, this falls to be rejected. The DVD was not handed in by consent between the appellant and the State in the court *a quo*. It was contended on behalf of the appellant that the content of the DVD would cast SP as a mature person who might have engaged in consensual sex with the appellant.

[103] The above contention has no merit for the following reasons. Firstly, the DVD was handed in unilaterally in the court *a quo* by the appellant's counsel at the conclusion of the evidence. The procedural admissibility thereof remains questionable as it was not submitted into evidence by consent. Secondly, in the absence of a serious procedural shortcoming, the probative value is highly diminished. Thirdly, the DVD, as per appellant's counsel's submission, contained a host of images of genitalia, without a face thereto. I am accordingly of the view that the court *a quo* correctly placed no evidentiary value thereon nor, by implication, of SP being promiscuous, as contended on appeal.

THE COURT *A QUO*'S REJECTION OF APPELLANT'S VERSION AND THE CONTENTION THAT THE COURT TREATED THE COMPLAINANTS' VERSIONS WITH EMPATHY:

[104] In view of the appellant's denial, the court *a quo* had to assess the evidence presented in its totality in order to determine whether the appellant's version was reasonably possibly true. Having considered the evidence as such, the court *a quo* concluded as follows:

"*After evaluation of all the evidence, the court can come to no other conclusion other than that the accused is lying, in the light of the evidence presented by the state.*"[64]

[105] Notwithstanding the above finding of the court *a quo*, this court still needs to assess the evidence and determine whether the court *a quo* had committed any misdirection in rejecting the appellant's version as reasonably possibly true.

[106] It is trite law that in the absence of demonstrable and material misdirection by the court *a quo*, its findings of fact are presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong.[65]

[107] In assessing the evidence, a court must, in the ultimate analysis, view the evidence holistically in order to determine whether the guilt of the appellant is proven beyond a reasonable doubt.

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[64] Page 473
[65] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; S v Dlumayo (*supra*)

[108] In *S v Van Der Meyden* 1999 (1) SACR 447 (WLD) at 449h – 450b, Nugent J said the following:

"*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.*"

[109] In the matter of *S v Chabalala*,[66] the Supreme Court of Appeal articulates the approach as follows:

"*The correct approach is 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 strengths 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.*"

[110] It follows from the above authorities that the onus rests upon the State to prove the guilt of the appellant beyond reasonable doubt and no onus rests on the appellant to prove his innocence.

[111] In *S v Jaffer*,[67] Tebbut J remarked as follows:

"*The test is, and remains, whether there is a reasonable possibility that the appellant's evidence may be true. In applying that test, one must also remember that the court does not have to believe her story; still*

[66] 2003 (1) SACR 134 (SCA) at para [15]
[67] 1988 (2) SA 84 (C) at D-E

less has it to believe it in all its details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true."

[112] The appellant's version was one of bare denial. He testified and maintained his innocence throughout, and denied that he had committed any wrongdoing towards either to SP and/or CP. He further testified that he was like a father-figure to the children, however, he admitted that he had visited pornographic sites. He denied that he had shown the contents thereof to either of the complainants. He also denied having sent SP any naked photographs of himself and further denied that he had ever asked SP to send him photographs of her naked breasts. He acknowledged that he had sent photographs of his genitalia to other women via a pornographic website called "Milf".

[113] The appellant admitted having watched pornography on his laptop, but denied having exposed the complainants to any of it. On the contrary, he testified that it was SP who asked him to remove certain pornographic material from her cellphone. The record reflects that the appellant would not hesitate to distance himself from any wrongdoing, but instead, shifted the blame onto the complainants, more particularly, to SP. For example, he would not accept that the messages to SP, found on his own cellphone were sent by him; suggesting that she, whilst he was asleep, could have sent these to him. The appellant admitted having fetched SP from extra mural activities and that they had taken a longer route to get home but denied that along the route

he had committed any sexual act. SP's evidence was consistent that the appellant had raped her on this occasion.

[114] The appellant denied having asked SP to send him photographs of her breasts saying that this was done of her own accord. He also denied having sent any naked pictures of himself to SP. The evidence, however, demonstrates the likelihood that it was the appellant who had requested of SP to send the photographs of her breast to him.

[115] As to the relationship between the appellant and the complainants, the court *a quo* correctly concluded that the appellant had established an emotional connection with both SP and CP in order to avoid detection of his sexual misconduct. While the appellant was not charged with the offence of sexual grooming, it is useful to have regard to the provisions of section 18(2) of SORMA.[68]

[116] In my view, the appellant clearly sought to coerce his young victims into believing that his conduct was lawful and to dissuade them from disclosing the true state of affairs to other adults whose trust they enjoyed.

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[68] Section 18(2) provides as follows: *"A person ('A') who- (a) ... ; (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to- (i) perform a sexual act with A ... ; (ii) perform an act of self-masturbation in the presence of A ... ; (iii) be in the presence of or watch A ... performs a sexual act or an act of self-masturbation; (iv) be exposed to child pornography or pornography; (v) be used for pornographic purposes as contemplated in section 20 (1); or (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B; (c) ... ; (d) ... ; (e) ...*
is guilty of the offence of sexual grooming of a child." (emphasis added)

[117] In my view, SP's evidence that she thought she was partially to blame for not disclosing the crimes committed by the appellant, as he had threatened both of the complainants not to disclose anything to family and friends is perfectly understandable; it is also understandable why SP did not feel constrained by sending nude photographs of herself to her friends at school because it had been the appellant who told her not to be shy of her body. In this regard it is worth quoting Cameron JA (as he then was) when, in a minority judgment,[69] he summarised a minor's evidence, who had also acquiesced to the advances by an appellant, and concluded:

"*The notion of shared guilt and sexual and moral contamination, articulated more than once in the complainant's evidence, not only ensured silence; later when the appellant was still to be held to account, a failure to understand the coercive power should not result in unjust questioning of her credibility.*"

[118] The appellant, to my mind, exploited the physical spaces of the complainants in their very home and therefore had the authority and power to coerce them into silence.

[119] Given the totality of the evidence, the court *a quo* correctly found that the appellant had essentially groomed both the complainants over the years to prepare them for sexual abuse.

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[69] *Johan Marx v Staat* 2006 (1) SACR 135 (SCA)

CORROBORATION:

[120] It is no coincidence that the statutory medical reports in respect of both SP and CP corroborate their versions that they had been raped. What constitutes corroboration was set out in *S v Gentle,*[70] where the court states:

"*It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute.*"

[121] I am of the view that the medical evidence provides strong corroboration for the versions as proffered by both complainants.

[122] The following corroborating evidence was found in respect of both complainants' evidence:

a. Upon a consideration of the medical evidence, the injuries sustained by both SP and CP proves that penetration took place;

b. In relation to SP, there were old tears found of her hymen. Furthermore, SP testified that the Appellant had used a condom at the time when she was vaginally raped. This is confirmed in

[70] 2005 (1) SACR 420 (SCA) at 430j – 431a

the J88 report which tends to lend credence to the consistency of her testimony;

c. In relation to CP, Nurse Bagaza similarly found that the vaginal entrance was wide open with no hymen / membrane and the possibility of vaginal penetration could not be excluded;

d. It was the undisputed evidence of the complainants that they were indeed raped, and this was not placed in dispute, the only issue was the identity of the perpetrator;

e. The reporting of the sexual assault by SP and CP to each other, corroborates that the appellant was the person who had raped them;

f. It was not the appellant's case that there was an opportunity for another person to have committed these offences;

g. In addition to the above, Warrant Officer Louw, an expert in cyber-crime investigations, testified that he had analyzed the hard-drive of the appellant's laptop and found that the latter had visited a large number of pornographic websites, including teen pornography.[71] This evidence was unchallenged. The evidence of pornographic websites on the appellant's laptop, lends credence to and corroborates the versions of both complainants

[71] Annexure "M", pages 627 – 628, 630; 632 and 650

that the appellant had shown them pornographic material on his laptop.

[123] *Ex facie* the record, I agree with the State's contention that the appellant appeared to have been an evasive and argumentative witness and did not hesitate to cast aspersions on the complainants' evidence. For example, he would simply not admit that he sent the intimate messages to SP, when it was obvious that he had been the author thereof.

[124] The appellants' bare denial, given the totality of the evidence tendered by the State, was correctly rejected by the court *a quo* as false, and therefore not reasonably possibly true. I conclude that the appellant was correctly found guilty of the charges.[72]

***AD* SENTENCE:**

ARE THE SENTENCES IMPOSED DISPROPORTIONATE – HAVING CONSIDERED ALL THE RELEVANT CIRCUMSTANCES OF THIS CASE?

[125] In *S v Vilakazi* 2009 (1) SACR 552 (SCA), a leading case dealing with rape and the consequences thereof, Nugent JA expounds on the imposition of the minimum sentencing provisions, as follows:

"*[15] It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in*

[72] "*After evaluation of all the evidence, the court can come to no other conclusion other than that the accused is lying, in light of the evidence presented by the state.*"

every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence." (emphasis added)

[126] Further in the aforementioned judgment, the Learned Judge of appeal in paragraph [18] further expounds in that regard:

"*It is plain from the determinative test laid down by Malgas, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in Dodo, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case.*" (emphasis added)

[127] On appeal, the appellant contends that the court *a quo* had not considered an alternative term of imprisonment on the charges of rape other than life imprisonment, and further, that the court *a quo* ought to have considered that the sentences on the sexual assault charges, together with the charges in relation to the display of pornography, ought to have run concurrently.

[128] Sentencing is pre-eminently a matter for the discretion of the court *a quo*.[73]

[129] Where the court *a quo* has failed to exercise its discretion properly, judicially, or at all, and thereby committing a material misdirection, an appeal court will be at liberty to interfere with the sentence.

[130] Whilst it is so that sentences imposed must be commensurate with the offence, the personal circumstances of the offender and the interests of society, it ought to be blended with a measure of mercy. However, in *Vilakazi (supra)*, Nugent J said the following: *"[58] ... in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, ...* " (emphasis added) It is apparent that in serious cases, personal circumstances are bound to yield to the elements of retribution and deterrence in assessing an appropriate sentence. In passing, in *Vilakazi*, the appellant was 30 years; had a clean record; was married and where the complainant's age although not properly determined ranged between infancy and 16.

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[73] *S v Pillay* 1977 (4) SA 531 (A) at 534H-535A; *S v Fazzie* 1964 (4) SA 673 (A)

[131] The court *a quo*, to my mind, had duly considered the personal circumstances of the appellant, namely, that he was 40 years of age at the time of his conviction; did not have an ideal upbringing and had been previously convicted for crimes of dishonesty; the seriousness of the offences and the interests of society when considering an appropriate sentence.

[132] The question therefore remains whether the court *a quo* erred in finding that there were no substantial and compelling circumstance to deviate from the minimum sentences prescribed.

[133] The court *a quo* had considered the report of the Probation Officer, Mr T C Majikela tendered on behalf of the appellant, along with the pre-sentencing reports of both SP and CP (Exhibits "P" and "Q"), as well as the evidence of Ms Thompson, the appellant's cousin; and Mathew Bowler the twin brother of the appellant, and found that no substantial and compelling circumstances existed, and imposed a term of life imprisonment on the rape charges.

[134] The State had proven previous convictions against the appellant, which included crimes of dishonesty. Although the appellant disclosed that as a young schoolboy he had been raped whilst running away from boarding school, no such corroborating evidence had been forthcoming from his twin brother.

[135] The appellant clearly exhibited no remorse and had no compunction to further shift blame. He has a history of antisocial behaviour and refuses to accept responsibility for a series of heinous crimes.

[136] To my mind the court *a quo* correctly considered that the complainants suffered severe psychological trauma as a result of the rapes and sexual assaults at the hands of the appellant. SP makes the following assertion in her own hand: "*Before the incident I was a happy chappy and scared for none.*"

[137] SP goes on to say that after each incident of rape or abuse, she was unable to sleep and always blamed herself. When she was in grade 5 she started smoking and self-mutilating. At certain times she is unable to hold back and just cries because of what had happened to her and her sister. When sex education was being taught at school, she would begin crying in class and leave the room. However, she realises that to conquer and overcome her trials and tribulation, she has to be, and to stay strong.[74] This is particularly insightful, considering her ordeal, for such a young person.

[138] Similarly, CP writes that: "*Hy het my so seergemaak dat ek hom nie in 'n lank tyd kan vergewe nie. My lewe was alright tot hy inkom.*"

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[74] Record, p 699

[139] RP testified that this entire episode was a massive shock to her: "*Die verleentheid is groot.*"[75] She has withdrawn from community affairs and she cries for her children. It will remain a bitter experience for her which she will live with for the rest of her life.

[140] Much has been made of the fact that the complainants are not suicidal, however, this factor, *per se*, is but one factor to consider besides that the complainants must have suffered serious psychological trauma arising from their experiences.

[141] In an unreported judgment of *Director of Public Prosecutions, Grahamstown v T M*,[76] a case where the sentence of direct imprisonment of an effective 22 years imprisonment involving three counts of rape was substituted with life imprisonment. Nicholls JJA describes the rape of a vulnerable child, as follows:

"*[14] There can be no greater crime, in my view, than to deprive a child of her innocence, especially a vulnerable child such as the complainant here. This heinous act was not perpetrated by a stranger, but by a person who said he considered the child to be his own daughter. For a child to be violated in the sanctity of the only place she can call home is a most egregious breach of trust. Can she ever feel safe again? Unsurprisingly, the psychologist's report diagnosed the child with post-traumatic stress. Apart from the fears, the nightmares, the diminished*

[75] Record, p 706
[76] (131/2019) [2020] ZASCA 5 (12 March 2020)

social and scholastic functioning exhibited at the time the report was compiled, there will be long term psychological consequences. It is stated that these will have a negative impact on her psychological growth and psychosexual development into adulthood – no amount of counselling can counteract this. In short, this young girl's life has been irreversibly damaged."

[142] I am in agreement with the State's contention that the appellant is a danger to society and as a "*predator inserted himself into the lives of two young girls who were particularly vulnerable and then systematically disabused them of the privacy, dignity and their right to discover their sexuality in an appropriate manner*".

[143] It is apparent that the appellant occupied a position of trust and power in relation to both the complainants. He used his affinity with their mother and the fact that he was the only other adult and figure of authority in the home as a means to subvert their juvenile trust. He was supposed to have performed the role of a *pater familias* and allow the complainants unhindered scope on developing their true potential with a view to being shaped as productive citizens. Instead, he befriended the complainants, gained a hold over them and controlled, groomed and subjected them to ongoing heinous acts which can only be viewed as a cycle of abuse over a substantial and sustained period of time. He insidiously gained their trust by deception and manipulation, to the extent that their future remains unforetold.

[144] I am of the view that the sentences imposed by the court *a quo* are not disproportionate, having had regard to the appellant's personal circumstances, the severe invasion of the complainants' privacy / physical integrity, and the interests of society. On the contrary, they are entirely appropriate in the circumstances.

[145] In the premises, I make the following order:

ORDER:

(a) The appeal against the convictions and sentences are dismissed;

(b) In addition, the appellant's personal particulars be added both in the National Register for Sexual Offenders in terms of Section 50(2) of Act 32 of 2007 and in terms of Section 114(1)(b), read with Section 120 of the Children's Act 38 of 2005 and Section 103(1) of Act 60 0f 2000. The appellant is declared unfit to possess a firearm.

M SALIE

ACTING JUDGE OF THE HIGH COURT

I agree, and so ordered.

P A L GAMBLE
JUDGE OF THE HIGH COURT