Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **CA & R 16/2020**
Heard on: **14/02/2022**
Delivered on: **20/05/2022**

In the matter between:

GENERICO TUKU Appellant

and

THE STATE Respondent

Quorum: Mamosebo J et Ramaepadi AJ

JUDGMENT ON APPEAL

MAMOSEBO J

[1] Notwithstanding his plea of not guilty, the Regional Court President, Mr K Nqadala, convicted the appellant and two other co-accused who are not party to this appeal, in the Regional Court for the Northern Cape Region held at Hopetown. On 02 December

2019, the appellant was found guilty on one count of rape[1] read with the provisions of s 51(1) of the Criminal Law Amendment Act[2] and was sentenced on 12 December 2019 to life imprisonment. The appeal is against both conviction and sentence, which he exercised in terms of his automatic right of appeal. It bears recording that accused 2 (Meldon Pieterson) and accused 4 (Vernon Philiso) were also convicted of rape but did not appeal. Accused 3 was found not guilty and discharged.

[2] The appeal is premised on the grounds that the trial court erred:

2.1 In accepting as truthful the evidence of Mr Ricardo Meintjies, a single witness, without applying the cautionary rule and despite the contradictions and inconsistencies;

2.2 In finding that the State had proved the case against the appellant beyond reasonable doubt;

2.3 In finding that the complainant was not able to give valid consent to sexual intercourse;

2.4 Misdirected itself in finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment; and

2.5 In finding that a direct life imprisonment sentence was an appropriate sentence under the circumstances.

[3] The appellant was legally represented by Ms Madelein Gerrits on *judicare* throughout the proceedings before the trial court. He

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[1] Section 3 of Act 32 of 2007

[2] 105 of 1997

elected not to disclose the basis of his defence by exercising his constitutional right to remain silent.

[4] The complainant, Ms Minerva Fisher, died from natural causes on 04 October 2016 before the trial commenced.[3] However, before her passing she had deposed to an affidavit in which she laid criminal charges against the appellant and his co-perpetrators. Her affidavit was ruled inadmissible by the trial court, regard being had to s 3 of the Law of Evidence Amendment Act[4], dealing with hearsay evidence.

[5] The following documents were handed in as exhibits by agreement between the parties: The report by the medical practitioner, the J88 form; the statement by the forensic analyst and the reporting officer of the Forensic Science Laboratory of the South African Police Service in terms of s 212 of the Criminal Procedure Act (the CPA); Ms Michelle Baard, who subsequently gave oral evidence in court; as well as the appellant's buccal forms exhibits "E1" and "E2".

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[3] Death certificate on indexed papers p 971 of the record.
[4] 45 of 1988 which stipulates: **3. Hearsay evidence**
Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
(c) the court, having regard to –
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[6] The subject of contention against the State's case is the evidence of Mr Richard Ricardo Meintjies (Meintjies), the single witness, whose testimony was attacked on the ground that the trial court failed to heed the cautionary rule when assessing his evidence, which is along these lines: Meintjies did not remember the date of the incident except that it happened on a Saturday morning. The charge sheet reflected it occurred on or about 25 July 2015 between 03:00 and 04:00 at or near Hopetown. The defence does not contest the date and it has become a *non sequitur.*

[7] Meintjies testified that he was in the company of the complainant and Ms Jolene Tier. They had been at Mama Lloyd's Tavern where they had consumed intoxicating liquor. He and the complainant were drunk. The complainant was almost in a paralytic state of intoxication. She had slumped on the table at the tavern and he had to support her all the way home.

[8] Jolene left him and the complainant and went home. Meintjies felt a sense of duty to struggle with the complainant and get her home safely. Four men accosted them. It was during the morning of 25 July 2015 between 03:00 and 04:00. He knew three of them, one of whom was the complainant's colleague, who is also the appellant. Visibility at this scene ("Scene 1") was good, supplied by some electric street light, hence his ability to positively identify the attackers that he knew.

[9] The attackers demanded with menaces that he leave them with the complainant. He resisted because he realised that foul play was brewing. The men pelted him with an assortment of missiles

putting him to flight. He made a beeline to the complainant's mother's home and reported the incident to her. She is Ms Katryn Fisher. The two of them went to "Scene 1" but the men and the complainant had disappeared. A search for them yielded no results.

[10] The police were summoned to Steynville High School ("Scene 2") later the very morning of 25 July 2015. Sgt Justine Nqanjiso and Cst Anne Carol Persent had reported for duty at 07:00. They were on patrol duty when they received a telephonic complaint from an informant whose name, unfortunately, neither appears on record, nor did the person testify. Be that as it may, they proceeded to Scene 2 where they found the complainant.

[11] According to them, the complainant was in a sorry state. She was clearly traumatised and very emotional. Her clothes were dishevelled and soiled. The back of her head was similarly soiled. She had sustained injuries to her face which was swollen. The injuries were indicative of blunt trauma. Her upper lip was also swollen and bruised. Whereas the evidence shows that she had earlier worn shoes the police found her barefoot. She was naked on her nether region. Her pair of panties were discovered a distance away from her at Scene 2.

[12] The police escorted the complainant to Hopetown Wege Hospital for examination by Dr Thrista Strauss who completed a J88 medical examination form. Dr Strauss holds an MBCHB from the University of the Free State. She has 15 years practicing medicine. She noticed the following: blunt trauma to the face and that she

was traumatised and emotional. The gynaecological examination did not display any tears or bleeding, bruises or injuries. The doctor, however, observed extensive genital warts. She recorded on the J88 form that there was no evidence of forced penetration. She, nevertheless, took samples from the vulva, vagina and cervix. The complainant's pair of panties and a black tight were also sent to the laboratory as part of the exhibits.

[13] The investigating officer, Cst Frans Louw, collected and packaged the condoms and the condom wrappers found at Scene 2, (Steynville High School). He also pointed the scene out to Cst. Modisaotsile Piet Tshabadira, attached to the Local Criminal Record Centre, who compiled a photo album of the scene. The complainant (deceased) also made certain pointings out to Cst. Tshabadira.

[14] W/O Siphosethu Nyathi, attached to the Forensic Science Laboratory in Cape Town, is in possession of BSc Honours and Masters Degrees with majors in human biology and physiology and herbal science, obtained from the University of the Western Cape. Her studies are relevant to DNA analysis. She has 13 years' experience in biological science. She identified all the exhibits that she received for analysis. By virtue of also having received information that the case involved rape she conducted specific tests involving testing for semen. She examined the vaginal swab, the cervix swab and the vulva swab. All these swabs had the presence of semen. She further examined the pair of panties, which had no presence of semen and blood. This is

understandable as the underwear must have been undressed before the sexual assault, which is not in doubt.

[15] There were also skin cells collected at the crime scene, Scene 2. There were stockings with an indication of possible semen but no blood. W/O Nyathi also examined the condoms, some with the presence of semen and others without. Condom wrappers were also examined. Her findings were compiled in a table format. The appellant was positively linked to the sexual activity through this DNA genetic material.

[16] Undeniably, the deceased/complainant reported a crime of rape as a result of which a police docket was registered. Notwithstanding that the trial court ruled her statement inadmissible it remains a fact that the police investigated a rape complaint and that there was transfer of the appellant's semen onto the genitals of the complainant.

[17] The State also called members of the South African Police Service who took buccal samples of the four male persons to testify. The investigating officer, Cst Louw, also testified. Their evidence is uncontroverted.

The appellant's case and defence

[18] The appellant did not disclose the basis of his defence; neither did he proffer any plea explanation. In other words, as already alluded to, he exercised his constitutional right to remain silent. Ms Gerrits' cross-examination of Meintjies commences at p312 (21) to p

323(21). However, the only indication of appellant's line of defence appears at p323 (9) to (11) where the following is recorded:

"Ms Gerrits: *Mr Tuku said he did not see you that night.*
Mr Meintjies: *He will say that of course."*

[19] The only inference from this so-called line of defence is that the appellant seems to intimate that he was at Mama Lloyd's Tavern at some stage but did not see Meintjies there. He is as silent as the grave about what may have unfolded at Scene 1 where the attack on Meintjies took place. He also does not suggest anything concerning his co-accused, whether at Scene 1 or Scene 2. He further does not suggest anything on whether he had sexual intercourse with the complainant with or without her consent.

[20] The appellant's counsel sought to persuade this court that the trial court overlooked the contradictions and the inconsistencies by Meintjies in assessing his evidence as a single witness. First, an attack was levelled at the discrepancy between his evidence in court and what he had said to the police when making a statement regarding his attackers. While in court, Meintjies said the appellant and his co-perpetrators attacked him with a bottle and stones. However, in his statement to the police he said it was one of appellant's friends who did so. In his evidence-in-chief, he said when he fled the complainant just stood there because they forced her to be there but she did not want to leave with them. Further, and to the contrary, during cross-examination by accused 3, he testified that the complainant said they should leave her and Meintjies alone. Meintjies is also criticised for omitting to mention

in his police statement that the complainant was pulled away and only brought it out during cross-examination.

[21] Mr Cloete, arguing for the State, and invoking *S v Bruiners en 'n Ander*[5] and *S v Mafaladiso en Andere*[6] submitted that the criticism on the stated contradictions levelled against the evidence of Meintjies are trivial and not material. I agree. This is so because the evidence is clear that he was put to this flight with an assortment of missiles. He had no other reason or choice but to leave the complainant, whom he cared for so much, in the hands of hostile men. Consistent with this conduct is that he immediately reported the attack and the danger, which the complainant was facing, to her mother. There is no gainsaying evidence that the pair risked their safety in a vain attempt to rescue the complainant. The gang had clearly abducted the complainant from Scene 1 to Scene 2 where she was ravaged and left helpless.

[22] I am inclined to accept Meintjies' evidence that he was attacked with a half-empty beer bottle because he maintains that he had been drinking beer out of it but had put it down when he helped the complainant to her feet. One of the assailants picked it up, attacked him with it, and even hurled it at him.

[23] Ms Gerrits in her cross-examination was deliberately non-committal. This evidently has to do with the instructions of her client to her. The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union*

[5] 1998 (2) SACR 432 (SE) at 437g – 438a
[6] 2003 (1) SACR 583 (SCA) at 594d - h

and Others[7] made the following instructive remarks pertaining to the cross-examination of witnesses:

> *"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witnesses' testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn[(1893) 6 The Reports 67 (HL)] and has been adopted and consistently followed by our courts."*

[24] The reasoning of the trial court in its acceptance of Meintjies' evidence as reliable and credible[8] goes as follows:

> *"[S]uggestions by the defence in cross-examination which were not repeated in evidence that Ricardo [Meintjies] was so drunk that he cannot recall what happened are without substance, because the suggested drunken condition is inconsistent with him, that is Ricardo, being able in that condition to give assistance to the drunken Minerva [the deceased]. It is also inconsistent with him to have been picking her up when she fell and assisting her to walk on. It is also inconsistent to him having [been] able to have run to Minerva's home to report to her mother when he was attacked and chased by the abductors of Minerva. And it is also inconsistent with him as having been able in that condition to accompany Minerva's mother to go look for Minerva even though they did not find her……Ricardo was a credible witness and his evidence is corroborated in all material respects by the undisputed evidence of this occurrence as well as by the police evidence as regards the state of intoxication of Minerva. The differences between the police*

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[7] 2000 (1) S 1 (CC) at para 61
[8] From p925 of the record

statement and his evidence in court as were identified did not amount to contradictions but were merely his evidence in court assuming a more detailed account of the incident and he adequately explained these as responses to the questions posed."
I agree with the Regional Magistrate's approach.

[25] Sight must not be lost of the evidence by Meintjies that the complainant was so drunk that she fell down and even had to be assisted to walk home. This evidence was supported by the evidence of the investigating officer, Cst. Louw, who testified that he could not obtain her statement outright because she was still under the influence of liquor that morning. Now this is compelling evidence from two witnesses pertaining to the extent of her intoxication. It is inexplicable how the appellant can argue otherwise. She was therefore incapable in law of appreciating the nature of the sexual act perpetrated on her. In my view, s 1(3)(d)(iii) finds application because consciousness or judgement was adversely affected. Diemont JA in *S v Sauls and others*[9] remarked that the State is not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.

[26] Section 1(3)(d)(iii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[10] stipulates:

"(3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any

[9] 1981 (3) SA 172 (AD) at 181H – 183C
[10] 32 of 2007

other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

> *(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act –*

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected."

[27] Mr Steynberg relied on this Court's unreported appeal judgment in *S v Vernon Vincent Sarel Long*[11] where the appellant was convicted by the Regional Court on two counts of rape and sentenced on each count to 10 years imprisonment. There the appellant threatened the complainant with a knife and coerced her to accompany him to his house where he committed two acts of sexual penetration without her consent. An immediate striking difference between the case *in casu* and the *Long* case is that there were several eyewitnesses whose account of what they witnessed was found to be contradictory. The appeal court, per Olivier J, Williams J concurring, also found the testimony of the complainant improbable and unsatisfactory in many respects. In the case before us we find that the evidence of Meintjies was not only reliable and credible but was corroborated by objective evidence.

[28] The Constitutional Court in *S v Boesak*[12] made the following insightful remarks on the failure to controvert *prima facie* evidence:

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[11] CA&R 12/2014

[12] 2001 (1) SACR 1 (CC); 2001 (1) SA 912 (CC) at para 24

"[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.""

[29] Mr Cloete, also relying on the *Long* judgment argued, correctly in my view, that it was improbable that a complainant would, after being forced to accompany a group of men, consent to have sex with them.

[30] It is competent for a court to convict on the evidence of a single competent witness. See *S v Sauls*[13] where the following *ratio decidendi* by Diemont JA appears:

> *"In R v T 1958(2) SA 676 (A) at 678 Ogilvie Thompson AJA said that the cautionary remarks made in the 1932 case*[14] *were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness"; it provides merely that*
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> > *"an accused may be convicted on the single evidence of any competent witness".*
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> *The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as Wigmore points out, "indefinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean*
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> > *"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"*
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> *(per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

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[13] (Supra) footnote 10 at 180C - G
[14] R v Mokoena 1932 OPD 79 at 80

[31] The correct approach to the evaluation of evidence in a criminal trial is enunciated thus by the SCA in *S v Chabalala:*[15]

> "*The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). 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.*"

[32] In my view, it is not for this Court to speculate in favour of the appellant but must decide on the facts placed before it. Regard being had to all the evidence considered hereinbefore and the supporting authorities, it follows that the trial court was indeed correct to convict the appellant of rape read with s 51(1) of the CLAA. **The appeal against his conviction must therefore fail.**

On the question of sentence

[33] In terms of the grounds of appeal and Mr Steynberg's contention, the trial court erred in finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. Counsel conceded the seriousness of the offence of rape and that its heinous nature calls for a need for the protection of members of society against these kinds of offences and that such offences warrant a substantial term of imprisonment. He nevertheless sought to urge this Court to find that there was absence of serious injuries, which should be taken into account when the seriousness of the offence is considered.

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[15] 2003 (1) SACR 134 (SCA) para 15

[34] I paraphrase from *S v Malgas,*[16] that the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer had a clean slate to inscribe whatever sentence it thought fit for specified crimes. It had to approach the question of sentencing, conscious of the fact that the Legislature has ordained life imprisonment as the sentence which should ordinarily be imposed, unless substantial and compelling circumstances were found to be present.

[35] The appellant elected not to testify in mitigation of his sentence nor was any evidence led on his behalf. From the bar the following personal circumstances were placed on record, that: Appellant was 30 years of age at the time of the commission of the offences; he was not married and has three minor children aged 11, 6 and 2 years who resided with him until his arrest; he attended school up to Grade 10; he was employed at OK Grocer at Hopetown for about one year and 8 months when arrested and earning R2,650.00 per month; he has a previous conviction of assault with intent to do grievous bodily harm committed on 30 August 2013 and was sentenced to 12 months imprisonment wholly suspended for 4 years on specified conditions; the offence of rape was committed during this period of suspension and it involves violence on another person; the appellant was arrested on 26 July 2015 and released on bail in February 2016, meaning that he was in custody for a period of about 7 months.

[16] 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA) at paras 7 and 8

[36] For the State Mr Cloete submitted that rape is a serious offence; that the complainant had a right to enjoy herself at the tavern; that the appellant and his friends had no right to accost her and take her to a secluded area and rape her; that this conduct continues to put the spotlight on the abusive treatment of women in this country who continue to be subjected to the same abuse.

[37] Ponnan JA, writing for the majority, remarked insightfully in *S v Matyityi*[17] pertaining to an appellant's age and his silence:

> *[14] …At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.*
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> *[21] …His silence thus leads irresistibly to the conclusion that there was nothing to be said in his favour."*

[38] It is trite that sentencing resides pre-eminently within the discretion of the trial court. In *Malgas*[18] Marais JA enunciated the test as follows:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence*

[17] 2011 (1) SACR 40 (SCA) at 48b – c and 52b-c
[18] Supra at 478d-g

as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, the appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"."

[39] The submission by Mr Steynberg is that these personal circumstances considered cumulatively with the fact that there were no serious injuries suffered by the rape victim should serve as substantial and compelling circumstances, which ought to result in the appeal succeeding and the appellant's sentence being substituted with a lesser sentence. Counsel submitted a period of 25 years should be appropriate.

[40] Mr Cloete submitted that the responsibility lies with the justice cluster to promote justice and once a person has been convicted, an appropriate sentence must follow. In this instance, argued counsel, the heinousness is compounded because this is a gang rape, which carries a minimum sentence. Her dignity and respect dissipated as soon as she was left in the early hours of the morning at the open school terrain partially dressed, injured and soiled. How can it be said that the sentence is inappropriate? How can it even be argued that the absence of serious injuries and the personal circumstances should constitute substantial and compelling circumstances? Counsel for the respondent asked the Court to find that there are no substantial and compelling circumstances, which would justify a lesser sentence, and to confirm the sentence of life imprisonment.

[41] On the aspect of lack of serious physical injuries, in *S v Radebe*[19] the Court enunciated that the absence of physical injuries of a complainant in a sexual offence complaint does not mitigate against the seriousness of what the appellant did.

[42] Over three decades ago, the Supreme Court of Appeal in *S v Chapman*[20] already expressed its deprecation in a rape case when it made these remarks:

> *"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."*

[43] The remarks in the quoted decided cases are particularly pertinent to this case. The appellant was not a child at the age of 30. Two years before the rape he had already experienced brushes with the law. There was planning involved which could not even be prevented by Meintjies. The appellant and his co-perpetrators displayed a determination to rape the complainant. The attack degraded her particularly by being left partially naked, injured and traumatised. The appellant and his gang of marauding co-perpetrators forcefully removed the complainant from her protector with menaces and assortment of weapons. They kidnapped and

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[19] 2019 (2) SACR 381 (GP) at 396i-397a
[20] 1997 (3) SA 341 (SCA)

abducted her. They physically and sexually assaulted her. She was extremely fortunate to have survived the ordeal. The Criminal Law (Sexual Offences and Related Matters) Amendment Act defines her state as an altered state of consciousness to the extent that her consciousness or judgement were adversely affected.

[44] Having considered all the personal and mitigating circumstances against the aggravating factors as well as the interests of society, I have not found the existence of any substantial and compelling circumstances to justify the deviation from the prescribed minimum sentence. In other words, I also could not find any misdirection on the part of the trial court regarding the imposition of life imprisonment on the appellant.

It therefore follows that the appeal against sentence also stands to fail.

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

The appeal against conviction and sentence is dismissed.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I agree

MJ RAMAEPADI
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the appellant: Mr H Steynberg
Instructed by: Legal Aid South Africa

For the respondent: Adv JJ Cloete
Instructed by: The Office of the Director of Public Prosecutions