A SYSTEMATIC CONTENT ANALYSIS OF RAPE SENTENCING JUDGMENTS IN THREE PROVINCES:

2016 - 2022

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1. INTRODUCTION

1.1 Background and Context

About the Masiphephe Network:

The Masiphephe Network project is gender-based violence prevention project led by the *Centre for Community Impact* (CCI) who is the prime recipient of the financial support provided by the American people through the United States Agency for International Development (USAID) for the work of Masiphephe. CCI is a registered South African non-profit organisation that aims to improve the health and well-being of all South Africans. The Masiphephe Network is implemented in partnership with the *Gender, Health and Justice Research Unit* (GHJRU) as the research and policy advocacy strategic partner as well as five community-based organizations in Gauteng, Mpumalanga and KwaZulu-Natal. These include: Agisanang Domestic Abuse Prevention and Training (ADAPT) in Alexandra, City of Johannesburg (COJ) in Gauteng Province; Sonke Gender Justice (Sonke) in Diepkloof, Soweto in COJ; Project Support Southern Africa (PSASA) in Emalahleni and Mbombela Municipalities in Mpumalanga Province; Gugu Dlamini Foundation (GDF) in Inanda, Ntuzuma and KwaMashu in eThekwini Municipality; and Ethembeni Crisis Centre (Ethembeni) in eThekwini Municipality in KwaZulu-Natal Province.

The objectives and working method of the Masiphephe Network include: using qualitative research and ongoing learnings from the project to 'advance gender equality and equity as well as transform social and gender norms that reinforce patriarchy, inequality and harm both men and women.'[1] This report seeks to provide the Network with a better understanding of the way in which in our courts are implementing the sentencing legislation in rape sentencing judgments, given the prevalence of sexual and gender-based violence in the provincial sites, as well as the concerns raised by members of the Network and participants of the legal training organised by the community partners in conjunction with the GHJRU, in February and March of 2022.

The following report is a based on a sexual offences case analysis completed by the Gender, Health and Justice Research Unit, UCT ('the GHJRU') in 2017.[2] The original report analysed 345 high court rape sentencing judgments from all nine provinces and included the Supreme Court of Appeal ('SCA'), for the years 2008 to 2015. For the purposes of this report, rape sentencing judgments from the three Masiphephe Network ('Masiphephe') provincial sites were analysed for the subsequent seven year period (2016 to 2022). The provinces that were included in this case analysis are Gauteng, KwaZulu-Natal, and Mpumalanga. Cases from the Supreme Court of Appeal and the Constitutional Court have

[1] Masiphephe Network 'What We Do' available at https://www.masiphephe.org.za, accessed on 05 June 2023.

[2] *See* Artz, L., Galgut, H., & Gihwala, H. (2017). *A Systematic Content Analysis of Rape Judgments: 2008-2015*, commissioned by the Women's Legal Centre, Cape Town, South Africa. The 2017 report analysed 365 rape judgments. Here, with input from Kelly Phelps (UCT) and Claire Ballard (Lawyers for Human Right) gave substantive legal interpretative advice in relation to the understanding of "substantial and compelling Circumstances (SCCs) and implied substantial and compelling circumstances" as well as on life imprisonment. The 2017 report was also reviewed by Stephan Terblanche who provided substantive feedback on specific issues, including SCCs, mitigating and aggravating circumstances, minimum sentencing, 'misdirections', among other technical issues identified in the first report. This report draws on the general framework of Artz et al., but important amendments to the input of cases, coding, and analysis of finding. It also focuses on the subsequent seven years of judgments (2016-2022) and on the three provinces in which the Masiphephe Network implements its GBV prevention projects.

also been included. A total of **340 cases** were analysed**.** The rules defined for data collection will be set out in *section 1.2* below.

The objectives of this study were to analyse the rape sentencing judgments, that fell within the parameters of pre-determine data collection criteria, to ascertain the following:

a. Whether courts are departing from the prescribed minimum sentences for rape cases; and
b. In examining this, to systematically document the factors that courts take into consideration when sentencing.

Contextually, it is important to put into perspective the number of rape sentencing cases being heard by our courts in comparison to the number of reported rapes being cited by the South African Police Service. At present, these statistics represent the most comprehensive picture of the number of reported rapes being committed in the country, across the different provinces. According to the 2021/22 South African Police Service ('SAPS') Annual Report[3], the national statistics for rape have gone up by 5558 cases from the previous reporting year. This is a 15.2% increase from the 2020/2021 statistics, which recorded 36 552 reported cases. The 2021/22 SAPS annual report recorded a total number of 42 110 rape cases. Of the total number of sexual offences in South Africa (53 174), rape statistics (*vs* other sexual offences) made up 79.1% of the recorded number of cases. This is a 0.6% increase from the 78.5% reported in 2020/21.

The SAPS Annual Report records the following rape statistics per province[4]:

Table 1:
SAPS Annual Report Rape Statistics

Province	**2020/21**	**2021/22**	**Count difference**	**% change**
Gauteng	7525	8675	1150	**15.3%**
KwaZulu-Natal	6685	7966	1281	**19.2%**
Mpumalanga	2611	3016	405	**15.5%**

[3] South African Police Service Annual Report 2021/22 p 134 accessed on 30 May 2023 available at: https://www.gov.za/sites/default/files/gcis_document/202211/saps-2021-22.pdf
[4] Ibid at 141 – 147.

Of the national total of recorded rape cases (42 110) for 2021/22, Gauteng makes up 20.6%, KwaZulu-Natal 18.9%, and Mpumalanga 7.1%. This is a cumulative percentage total of 46.6% of the total number of national reported cases of rape. As such, the total number of cases across all three provincial sites accounts for close to 50% of the total number of recorded cases for all of South Africa. To put these statistics further into perspective, for the reporting period 2021/2022, the murder statistics for the three provinces were recorded as follows: Gauteng – 5 570; KwaZulu-Natal – 6 495; and Mpumalanga – 1201. Incidences of rape therefore outnumbered murder cases for all three of the provinces by at least 1 400 cases. These statistics should be seen in light of what we know about underreporting with respect to rape cases, and that estimating the extent of underreporting remains a challenge.[5] It is further important to note that for the period 2021/2022 the National Prosecuting Authority ('the NPA') reported bringing 4 547 sexual offences cases[6] to verdict, with a conviction rate of 74.3% (which amounted to 3 379 cases). In 2020/2021 the number of sexual offences cases brought to verdict numbered 3 349, with 2 539 of those cases resulting in a conviction. With the rates of both reported rapes and cases being brought to verdict remaining substantially the same annually, it is safe to note that there is a considerable difference in the number of rapes being reported annually to SAPS, versus the number being brought to verdict, let alone those resulting in a conviction, by the NPA. Despite this, it remains important to understand how our courts are treating rape cases once they are before them. This includes whether they are implementing the prescribed minimum sentences in terms of our sentencing legislation, and which factors they are taking into account when handing down sentence. Without an understanding of this, we will be unable to ascertain whether our sentencing legislation is being effectively implemented for rape cases, how it could be improved, and whether our judicial officers are ensuring that the precedent being set by our courts is in line with our country's constitutional obligations towards victims/complainants of rape. The experiences of rape victims as their cases navigate their way through the criminal justice system will always remain of paramount of importance.

1.2 Research Process

The report consists of cases collected from each provincial site in which Masiphephe and its members work. The sites are Gauteng, KwaZulu-Natal and Mpumalanga. Cases from the SCA and the Constitutional Court ('CC') were also included in the sample of cases analysed. The time period for the cases was selected based on where the original report ended off, which was 2015. This report therefore included all rape sentencing judgments for the years 2016 to 2022. We excluded all cases from 5 August 2022 to the end of 2022, as this was the date upon which the Criminal and Related Matters Amendment Act 12 of 2021 ('the 2021 Act') commenced. This Act brought into effect a number of amendments to

[5] Sheena Swemmer 'Justice Denied? Prosecutors and presiding officers' reliance on evidence of previous sexual history in South African rape trials' (2020) 69 *SA Crime Quarterly* 45 at 46.
[6] Note that the National Prosecuting Authority does not provide statistics specifically for rape.

circumstances or 'jurisdictional facts' that, when present, result in the legislation requiring that the prescribed minimum sentences be implemented. It also changed the prescribed minimum sentences for rape cases that fall within certain categories. The exclusion of cases from 5 August 2022 therefore ensured that all of the cases analysed for this study were subject to substantially the same sections and schedules of the legislation, with the content of those sections and schedules not having changed considerably during the period under review.

In order to ensure that the collection of the cases was as methodical and comprehensive as possible, three case databases were used to collect the cases. These were SAFLII, LexisNexis and Juta Online Publications. There were two legal researchers who collected the cases, and they made use of a cloud-based collaborative Teams Excel Sheet ('the Sheet') to capture the cases that were being downloaded as part of the sample. The Sheet was used to allow both researchers to collect cases at the same time, using different search databases, while still ensuring that there were measures in place to minimise the collection of duplicate cases. Cases were captured using the following details: case citation; judgment date; court; judge/s (who heard the matter); search database (sourced from); search categories (used to source the case); whether the case was reported or unreported; and which of the two researchers sourced the judgment.

The search performed in each of the case law databases differed slightly because of the nature of the databases themselves, and the way in which they will allow you to perform a search or the method in which they will produce the best results possible. For SAFLII, search bar was used and the search terms "rape" + "substantial and compelling" were used to search all databases. The results were filtered by date. For Juta, the search terms "rape" + "substantial and compelling" were used. The search was further refined using a drop-down menu/list to include sentencing reports mentioning the term 'substantial and compelling circumstances'. This was then further filtered and organised according to cases and years. For LexisNexis, the search term 'rape' was used under 'all content'. The filters 'All SA Law Reports', 'Constitutional Law Reports', 'Judgments Online for 2016 to 2022' were applied. The search term 'substantial and compelling circumstances' was then used to search in the content that was filtered through.

1.3 Inclusion and Exclusion Criteria

In addition to the requirements that the cases fall within the correct time period – and were handed down by a court within one of the three provincial sites, the SCA or CC – there were a number of other rules for inclusion. This ensured that the cases that were included in the final sample were aligned to the central research questions. On this basis, exclusions were made on the following bases:

- Duplicates of a case already included in the Sheet;
- Applications for leave to appeal, that were not an actual appeal;
- Cases in which the accused was not charged and/or not convicted of rape;
- Applications to adduce further evidence;
- Applications regarding orders concerning parole;
- Appeals against conviction only;
- Cases where the appeal against conviction succeeded, and thus the sentence was also set aside;
- The case was not a rape sentencing judgment;
- The accused/appellant was a child in terms of the Child Justice Act 75 of 2008;
- The appellant was convicted of multiple offences, rape being one of them, but they are not appealing their rape conviction or sentence;
- The case concerned a question of law only; and
- The appellant's sentence was not considered, and the matter was remitted back to the court a quo to consider their appeal against sentence.

Once these exclusions were made, we were left with a sample of 399 cases. During the coding phase, a further number of 58 cases were excluded, resulting in a final number of **340 analysed cases**. These cases did not fall within the parameters set. Only applicable case law fell within the sample, namely, cases dealing directly with rape sentencing, in which the minimum sentencing framework was implemented and that the reasons for deviating from the prescribed minimum sentence, or not were discussed. During the second phase of exclusions, cases were excluded for the following reasons:

- Applications for leave to appeal sentence;
- The case concerned a charge for attempted rape;
- The case was not a rape sentencing judgment;
- The case was concerning a procedural application;
- The appeal concerned a non-parole period only;
- Sentence was set aside due to mental incapacity to appreciate trial proceedings;
- The case was incorrectly filed and did not belong to any of the provincial sites;
- The case fell within the time period August 2022 to December 2022;
- The matter was referred back to the court a quo in order for a report on the appellant's mental health to be obtained;
- The appeal against conviction was upheld;
- The appeal against conviction and sentence was upheld, and the matter remitted back to the court a quo;
- The case concerned a question of law only; and

- The offence was committed before the commencement of the sentencing legislation and therefore the Act could not be used for the purposes of sentencing the offender.

This second phase reduced the cases down from 399 to 340 cases, which is the final sample that was coded by the two legal researchers. The case collection process can be summarised as follows[7]:

n = 399

***Phase 1**:* Cases were collected from the three case law databases, bearing in mind the inclusion and exclusion criteria, with researchers searching the Teams Excel Sheet before adding each new case to the Sheet to avoid duplications.

n = 340

Phase 2: Any duplications, or cases that fell outside the parameters of the research question were erased during the coding phase to ensure that only cases relevant to the research question remained.

The final breakdown of cases per year per province was as follows:

Table 2:
Analysed Cases by Year and Province

YEAR	Gauteng	KZN	Mpumalanga	SCA AND CC
2016	46	5	0	4
2017	58	7	0	5
2018	44	3	1	6
2019	33	7	0	2
2020	34	4	3	1
2021	35	10	3	1
2022	20	5	2	1
Total	**270**	**41**	**9**	**20**
				TOTAL: 340

1.4 The Coding Sheet

The project employed systematic content analysis. Content analysis refers to a systematic method of examining themes, trends, or patterns in documents (and other sources of material). It may be conducted

[7] All efforts have been made to ensure that no duplicates appear in the sample. In addition to the use of the Teams Excel Sheet, the downloaded cases were saved in folders according to the province they were handed down in, as well as the date of the judgment. Cases were then divided amongst the two reviewers in such a way so as to minimise the chances of reviewers being unaware of duplicate cases among the folders.

on either qualitative or quantitative data. The key to *systematic* content analysis is the development of explicit rules for organising information into thematic categories or codes. Stemler describes it as a 'systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding.'[8] The author explains that what makes this technique particularly meaningful is its reliance on both exhaustive and mutually exclusive codes that can be used to analyse documentary data.

We employed a structured method of coding prominent factors considered in the judgments. Both *a priori* (or pre-determined) and *emergent* (or post-data entry) coding schemes were created to ensure that all relevant and significant sentencing factors were accounted for in the analysis of these judgments. Accordingly, each identified sentencing factor was assigned a 'code'.

The pre-determined codes were established by the key research team based on both a reading of a small sample of the cases collected for this review as well as on the previous codes that were developed in the study concluded in 2017. The development of the coding scheme was based on the following: (i) an extensive literature review on sexual offences case outcomes; (ii) a review of a broad sample of rape sentencing judgments; and (iii) consultation with a range of sexual offences/sentencing experts regarding factors conventionally considered by the judiciary in the sentencing of rape cases. This coding scheme was then used to review a random sample of cases. The pre-determined codes were then further amended to include additional factors – or variables – that emerged from a review of the case law. Any key factor that emerged from a judgment that did *not* correspond to a pre-determined code, was recorded on the coding sheet as "other" and later assigned a code (post-coded) during the data entry process.

For the purposes of this report, a Word document version of the coding sheet can be found at *Appendix B*, however for the purposes of coding the researchers used Google Forms to code the cases. The coding sheet captured was designed to capture sentencing data, which included, *inter alia*, information about the prescribed minimum sentence under review, and whether or not the prescribed sentence was departed from. It also captured which factors courts took into consideration when deciding on an appropriate sentence.

The factors that courts take into consideration when handing down sentence were divided according to seven main variables:

- Procedural irregularities/misdirection
- Offender characteristics
- Victim characteristics
- Circumstances of the offence

[8] Steve Stemler 'An Overview of Content Analysis' (2000 - 2001) 7(17) *Practical Assessment, Research, and Evaluation* 1.

- Morality, history or social context
- Institutional factors
- Process and procedural irregularities and misdirections

Each of the main (parent) variables had sub-variables. Offender characteristics had the most, with a total of 28 sub-variables, and morality, history and social context had the least with ten sub-variables. In addition to this, data on whether there were multiple offenders, multiple victims, multiple charges at trial and whether these charges were amended on appeal were also captured. Each of the sub-variables could be coded according to whether the court took it into consideration as *aggravating circumstance*, a *substantial and compelling circumstance*, or an *implied substantial and compelling circumstance*.

2. PRESCRIBED MINIMUM SENTENCES – THE LAW

2.1 The Development and Criticisms of the Legislation

In 1997, in response to alarming rates of sexual offences and criticisms aimed at government claiming that their response was insufficient, the *Criminal Law Amendment Act* 105 of 1997 ('the 1997 Act'), was enacted.[9] While it was originally meant to be a temporary measure, the enactment of the 1997 Act saw the introduction of South Africa's very first prescribed minimum sentences.[10] The sentencing framework created by the 1997 Act does not apply to all criminal offences, instead it lists specific sentences, including rape and murder, and then sets out the corresponding prescribed minimum sentence for the crime based on a number of factors. These factors include the circumstances in which the crime was committed, whether it included the commission of additional offences, any particular vulnerabilities on the part of the victim and whether the offender has been convicted of previous offences, and if so, how many.

Despite the intentions of the legislation to ensure a standardised, predictable and severe response to untenably high rates of violent crimes, the response to the legislation's enactment, from both the courts and the literature, was not positive.[11] Criticisms levelled against the 1997 Act included that it was poorly drafted, without nuance, and that it unduly infringed on the judiciary's jurisdiction.[12] In part, the 1997 Act's vague terminology and the lack of guiding principles within the Act became causes for concern.

[9] Kristina Scurry Baehr 'Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa' (2008) 20 *Yale JL and Feminism* 213 at 215.
[10] *S v Malgas* 2001 (1) SACR 469 (SCA) para 7.
[11] Nicole J Kubista ''Substantial and compelling circumstances': Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18 *South African Journal of Criminal Justice* 77.
[12] Scurry Baehr 'Mandatory Minimums Making Minimal Difference' at 224- 225 and 237-2238.

In particular, the Act did not specify what it meant by the term *substantial and compelling circumstances.* It was however ultimately the inclusion of this phrase that helped secure the constitutional validity of the legislation's provisions. Section 51(3)(*a*) states that if a court finds that 'substantial and compelling circumstances exist' justifying 'the imposition of a lesser sentence than the sentence prescribed', the court shall record those reasons and then it may impose the lesser sentence. The types of factors that should be considered as part of the evaluation as to whether substantial and compelling circumstances exist or not, as well as the manner in which these circumstances should be considered, is not specified by the Act, and as such has generated discrepancies in our sentencing case law. In the absence of well-defined sentencing provisions and guidelines, it has been the court's exercise of judicial discretion when justifying departures from prescribed sentences that has had the potential to cause harm. This harm is caused to sentencing precedent and the experiences of victims of serious offences, particularly rape. Therefore, despite the statutory imposition of prescribed minimum sentences, in 2021 Holoboff and Gilligan opined that there was a significant lack of consistency and predictability in sexual offences sentencing across the courts.[13] Reliable, systematic, empirical and up-to-date evidence of this, however, is not available.

2.2 The Prescribed Minimum Sentences

In terms of the legislation, and of import to this report, are sections 51(1) and 51(2)(*b*) of the 1997 Act. Section 51(1) read with Part I of Schedule 2 of the 1997 Act mandates life imprisonment for rape in the following circumstances:

> (a) 'when committed –
>
> (i) where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
>
> (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
>
> (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
>
> (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
>
> (b) where the victim –
>
> (i) is a person under the age of 16 years;

[13] Gilligan, C and Holoboff, A *Rape Sentencing in South Africa 2008-2012* (2021) South Africa: Women's Legal Centre.

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007[14]; or

(c) involving the infliction of grievous bodily harm.'

In terms of section 51(2), read with Part III of Schedule 2, where rape occurs under circumstances other than those referred to above, the sentence is prescribed based on the offender's number of previous convictions. First-time offenders should, in the absence of a finding of substantial and compelling circumstances, be sentenced to at least 10 years, while a second offender would receive a sentence of not less than 15 years. A third or subsequent offender would be imprisoned for a minimum of 20 years.

As stated above, an important provision contained in the 1997 Act was what ultimately became known as the escape clause.[15] It was this phrase that resulted in a long line of case law attempting to interpret its meaning. By some it was thought that for substantial and compelling reasons to be found, the facts of the particular case would have to present some circumstances so exceptional in its nature that imposing the prescribed minimum sentence would expose the injustice of the statutory prescribed sentence in the particular case.[16] The court went on to find that 'substantial and compelling' meant '…factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes…'[17]

At the other extreme was Judge Leveson's interpretation in *S v Majalefa and Another* (unreported, Rand Supreme Court, 22 October 1998) that the Act was not intended to introduce major change, but merely conformity, and that the starting point remained a consideration of aggravating and mitigating factors in the way they were traditionally considered. In the case of *Homareda v S* [1999] 4 All SA 549 (W), the court disagreed with the court in *S v Mofokeng* and held that:

> '…all the factors previously held to be relevant to the passing of sentence, remain relevant. But the starting point must be that the sentence prescribed by Parliament has to be imposed and the sentencing process cannot be the same as it was before the Act was passed.'[18]

[14] In the 1997 Act this originally read: 'is a mentally ill woman as contemplated in section 1 of the Mental Health Act. 1973 (Act No. 18 of 1973)'
[15] Scurry Baehr 'Mandatory Minimums Making Minimal Difference' at 215.
[16] *S v Mofokeng* 1999 (1) SACR 502 (W).
[17] *Mofokeng* supra note 12 at 524c-d.
[18] *Homareda v S* [1999] 4 All SA 549 (W) at 553.

Ultimately, this debate was brought to an end by the Supreme Court of Appeal case of *S v Malgas,*[19] where the court held, *inter alia*, that with respect to the prescribed minimum sentences, they '… were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'[20]

However, Marais JA went on to state that factors that were 'traditionally taken into account in sentencing' should continue to play a role.[21] In summing up its findings with respect to the meaning of substantial and compelling circumstances, and its implications for the way in which courts were to consider sentencing the court found the following:

> 'A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
>
> B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
>
> C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
>
> D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
>
> E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the

[19] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.
[20] *Malgas* at para 25.
[21] *Malgas* at para 25.

emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.'

The guidance provided by the SCA was approved by the Constitutional Court in *Dodo*, where the CC states that the overarching principles enunciated in *Malgas* will be 'refined and particularised' by courts as required by the particular case that is before them.[22]

2.3 The 2007 Amendment Act

Recognising the extent to which inconsistency was undermining the efficacy of the 1997 Act, the South African Law Reform Commission proposed a draft Sentencing Framework Bill in 2000.[23] However, the Sentencing Framework Bill was never enacted. Instead, the 1997 Act was partially amended by the

[22] *S v Dodo* 2001 (1) SACR 594 (CC).
[23] South African Law Commission Report 'Project 82: Sentencing: A New Sentencing Framework' (2000) available at https://www.justice.gov.za/salrc/reports/r_prj82_sentencing%20_2000dec.pdf, accessed on 06 June 2023.

Criminal Law (Sentencing) Amendment Act 38 of 2007 ('the 2007 Act'), in which the legislature specified that:

'When imposing a sentence in respect of the offences of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed.'[24]

However, with the 2007 Act being the only real guidance as to what a court should or should not consider when deciding upon sentence, our courts have displayed differing interpretations of the substantial and compelling circumstances requirement of the 1997 Act. For example, circumstances deemed substantial and compelling in judgments have included: the age of the accused; whether the accused was intoxicated; whether a weapon was involved; the accused's employment status; and a lack or apparent lack of psychological harm to the complainant. Interestingly enough, and despite the limited guidance provided by the legislature in the 2007 Act with respect to factors that are not to be taken into consideration, some of our courts have continued to take into consideration a lack of physical injury to the complainant. This, they have reasoned, is permissible because '…a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences.'[25]

The SCA in this judgment goes on to state that:

'..."the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied". He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must

[24] Criminal Law (Sentencing) Amendment Act 38 of 2007.
[25] *S v SMM* 2013 (2) SACR 292 (SCA).

add that it is settled law that such factors need to be considered cumulatively, and not individually.'[26]

Thus, despite this guidance provided by the legislature, and the (at times contradictory) precedent stemming from our highest courts, authors such as Terblanche have over the years concluded that, 'even with intimate knowledge of the functioning of the [South African] criminal justice system, the eventual sentence remains nothing but guesswork.'[27] Case law emanating from the SCA has at times irrevocably steered the direction of our courts' focus during rape sentencing judgments. The Court in this judgment, despite acknowledging that the prescribed minimum sentences are to be respected and not just superficially referred to, creates a continuum or hierarchy for rape cases.[28] It does this when it refers to the facts of the case under review as 'not one of the *worst cases of rape*', in spite of the facts of the case depicting the rape of a 14-year-old by her father in their home.

In recent years, there has been a shift in the way in which society views and understands rape and its consequences for victims. This understanding has in turn made its way into our courts' jurisprudence, with our highest court in the case of *S v Tshabalala and Another* 2020 (2) SACR 38 (CC) remarking that '…for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and, in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa.'[29] The Court goes on to state that the legislature's 'bold step' in enacting the minimum sentences legislation in response to the public outcry about the sheer number of rapes being committed in the country has unfortunately not had any significant impact on our statistics. The Court therefore states that 'Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security.'[30]

It is therefore these changes within the law and society, and in turn within our case law that can only truly be accounted for and systematically documented through studies such as this one. This report, in

[26] Ibid at para 26.
[27] Terblanche, SS 'Rape sentencing with the aid of Sentencing Guidelines' (2006) 39 *Comparative and International Law Journal of Southern Africa* 1.
[28] *S v Abrahams* 2002 (1) SACR 116 (SCA).
[29] *S v Tshabalala* at para 1.
[30] *S v Tshabalala* at para 63.

conjunction with the report concluded by the GHJRU in 2017, seeks to provide empirical evidence of the ways in which our courts are implementing the sentencing legislation, as well as the factors that our courts are taking into consideration when handing down sentences for rape cases.

3. RESEARCH FINDINGS

3.1 Contextualising the Findings

In reading the findings from the report, there are a number of considerations that should be noted:

- The reading and interpretation of the case law are, to a degree, a subjective exercise. Unfortunately, there are very few judgments where our courts clearly define which factors they are taking into consideration as aggravating, and which they are taking into consideration as substantial and compelling. It is this realisation that prompted the inclusion of the category 'implied substantial and compelling circumstances.' This category was included in order to mitigate against the incorrect inclusion of factors taken into account by a court as a substantial and compelling circumstance ('SCC'), while also avoiding excluding a factor(s) that were taken into consideration by the court during sentencing, without having expressly been identified as such by the court.
- There were two legal researchers who coded the cases, and their reading of the cases and the coding sheet may differ slightly. However, every effort was made to ensure that a sample of test cases were coded before beginning the process of officially coding to ascertain whether the researchers were interpreting the cases and the coding sheet in a substantially similar manner. The researchers also remained in contact while coding the cases in order to ensure that any challenges or questions that arose with respect to the interpretations of the coding sheet or the law could be resolved together.
- At times a single statement by a court could be coded under multiple different codes. For instance, a court's comment on the number of times that a victim was raped by multiple offenders could be coded as '*Number of sexual offences committed in this case'*, and '*Multiple offenders*.'
- The judgments that were coded for the purposes of this report were predominantly appeal court judgments, and all of them were judgments from the High Courts from the three provinces, the SCA and the CC. Magistrates' Court judgments could not be coded, as these are not transcribed and published in publicly available case law databases.
- When there were two judgments handed down by the same court for the same case, the majority judgment was coded.
- There were several cases where the court did not fully explicate its reasons for finding that the prescribed minimum sentence should or should not be departed from. The court would simply find

that it agreed with the trial court's reasoning, and that there were no reasons to depart from the trial court's finding. As stated by the Court in *S v Ngcobo*,[31] within the bounds of an appeal court judgment, 'interference with the sentence will be justified only if the trial court is shown to have misdirected itself in some respect, or if the sentence imposed was so disturbingly inappropriate or disproportionate that "no reasonable court would have imposed it." The test is not whether the trial court was wrong, but whether it exercised its discretion properly.'

3.2 Additional Codes

To comprehensively capture the sentencing data and facts of the cases that are relevant, or that play a part in the sentencing consideration, a number of factors were added to the coding sheet for this report that were not present in our 2017 report. The current report includes the following factors in the analysis:

- The reason for the prescribed sentence;
- Whether the case involved a suspended, cumulative or concurrent sentence;
- Whether there were multiple victims and their ages;
- Whether there were multiple offenders, and if so, how many;
- Whether there were multiple charges at trial, the number and what those charges were;
- Whether the charges were amended on appeal, and what they were amended to;
- Whether there were any procedural irregularities or misdiretions by the trial court that resulted in the prescribed minimum sentence being amended, and/or the case being remitted back to the trial court;
- The offender's prospects of rehabilitation; and
- The seriousness of the offence.

More detail will be provided on these variables later on in the discussion.

3.3 Descriptive Findings

3.3.1 Breakdown of cases by court

The section below provides a picture of the court levels, cases per court level and cases per province.

As set out above, the final number of cases included in the analysis was 340. Of those 340 cases, 320 (94.1%) of them were high court cases, 19 (5.6%) were from the SCA and only one (0.3%) was from

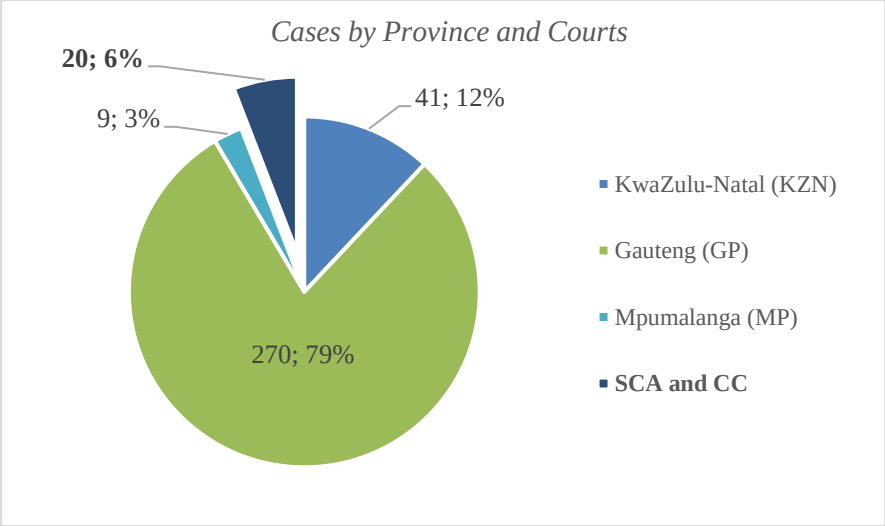
[31] *S v Ngcobo* 2018 (1) SACR 479 (SCA).

the CC. The low number of cases reaching our highest courts is to be expected. The majority of the cases that were coded were appeal court cases. This is because rape sentences are primarily handed down in the magistrates' court first. Then, should an appeal be lodged by either the offender or the state, the matter will be heard in the high court by a full bench. Most cases are not appealed any further, and as such they do not reach the SCA or the CC. The CC will also only hear matters in certain instances, that is, when they concern constitutional matters.[32]

Table 3:
Cases Per Court Level (N=340)

Court level	Frequency (Number)	Percent
High Court (HC)	320	94.1%
Supreme Court of Appeal (SCA)	19	5.6%
Constitutional Court (CC)	1	0.3%
Total	**340**	**100**

Figure 1:
Cases Per Province and Court (N=340)



In terms of the breakdown per province, a large majority of the cases, being 270 (79%) were from Gauteng; 41 of the cases (12%) were from KwaZulu-Natal ('KZN'); and only 9 (3%) were from Mpumalanga.[33] This is a large departure from the 2017 GHJRU report, in which 149 of the cases were from Gauteng, 22 cases were from KZN and there were no cases from Mpumalanga. There are also less

[32] Constitutional Court of South Africa 'Role of the Constitutional Court' available at https://www.concourt.org.za/index.php/about-us/role, accessed on 07 June 2023.
[33] Numbers have been rounded off to the nearest whole number.

cases from the SCA that were part of the sample for the current report (19), while the original report had 29 SCA cases. There were no CC cases that formed part of the analysis for the original 2017 report.

Considering the statistics presented in the introduction to this report, it is perhaps not unexpected that Gauteng has the greatest number of cases, followed by KZN and then Mpumalanga. It is however of concern that the number of judgments being handed down by Gauteng outnumbers the other two provinces by such a significant amount. In terms of reported cases, KZN lagged behind Gauteng in the period 2021/2022 by only 709 cases. Mpumalanga also had just over 3000 rape cases for the 2021/2022 reporting period alone. Given that this sample of cases was collected over a period of seven years, it is difficult to understand why only nine cases have emanated from Middelburg and Mbombela High Courts.

With respect to the statistics being provided by the NPA, according to the 2021/2022 Annual Report, the NPA's conviction rate in sexual offences cases for Gauteng for the reporting period 2019/2020 was 611 convictions, in 2020/2021 it was 304 convictions and in 2021/2022 it was 463 convictions.[34] This amounts to over 1300 cases for a three-year period. For KZN there were 516 convictions in 2019/2020, 255 convictions in 2020/2021 and 409 convictions in 2021/2022.[35] This amounts to more than 1 100 cases that resulted in convictions and would have resulted in sentencing proceedings. Lastly, for Mpumalanga, there were 349 convictions in 2019/2020, 213 convictions in 2020/2021 and 260 convictions in 2021/2022.[36] This amounts to just over 820 cases over the three-year period.

There is therefore a large discrepancy between the number of sexual offences cases resulting in convictions in the three provinces, versus the number of rape sentencing appeal court judgments coming from the provinces for the seven-year period under review for the purposes of this report. This will be discussed in further detail in the analysis section below.

3.3.2 Prescribed minimum sentence under review

Table 4: Prescribed Minimum Sentence Under Review (N=340)

Minimum Sentence	Frequency (Number)	Percent
Life imprisonment	304	89.4%
10 yrs	34	10%
20 yrs	2	0.6%
Total	**340**	**100**

[34] NPA Annual Report at 84 and 86.
[35] NPA Annual Report at 88.
[36] NPA Annual Report at 90.

The prescribed minimum sentence that was applicable to the case, in terms of the provisions of the legislation, was life imprisonment in 304 cases (89.4%) out of the total number of cases that were analysed (340 cases). In 34 of the cases, ten years (10%) was the prescribed minimum sentence applicable to the case under review, and in only two cases the prescribed minimum sentence was 20 years. There were no cases where 15 years was the prescribed minimum sentence for the case under review. The high occurrence of cases involving the prescribed minimum sentence of life can be accounted for based on the provisions of the Judicial Matters Amendment Act 42 of 2013, which amended section 309(1)(*a*) of the Criminal Procedure Act 51 of 1977. The Criminal Procedure Act now allows any person who is sentenced to life imprisonment by a regional court in terms of section 51(1) of the 1997 Act to note an appeal against their conviction and sentence without having to apply for leave to appeal first. This means that it has become significantly easier for offenders to appeal a sentence of life imprisonment. Sentences of life imprisonment also made up the majority of cases in the original report, where they numbered 291 cases.

3.3.3 Reason for prescribed sentence

Table 5: Reason for Prescribed Sentence

***Note:** Some of the cases had multiple reasons for prescribed sentence under review. There was 1 case where no reason for prescribed sentence was coded. Due to the number of cases where multiple reasons were cited, the total number of reasons is 411.

Reasons for prescribed sentence		**Frequency (number)**	**Percent**
1.	Victim is an older person in terms of the Older Persons Act	1	0.2%
2.	Victim raped more than once by same or different perpetrators	144	35%
3.	Victim raped by more than one person in furtherance of common purpose or conspiracy	11	2.7%
4.	Victim raped by a person convicted (but not yet sentenced) to two or more offences of rape	1	0.2%
5.	Victim raped by a person knowing they have HIV/AIDS	2	0.5%
6.	Where the victim is under 16 years old	173	42.1%
7.	Where the victim is physically disabled or due to physical disability is particularly vulnerable	7	1.7%
8.	Where the victim is mentally ill in terms of the Mental Health Act	4	1.0%
9.	Where the rape involved the infliction of grievous bodily harm	32	7.8%
10.	10 years - first offender	34	8.3%
11.	20 years – third or subsequent offender	2	0.5%
Total		**411**	**100**

The coding sheet for this report was amended to include a section where the coder could indicate the reason why the prescribed minimum sentence was the applicable sentence in terms of the provisions

of the 1997 Act. This was not captured for the original report. The first nine categories in the table above pertain to cases where the prescribed minimum sentence was life imprisonment. The last two pertain to cases that fall within Part III of Schedule 2, and the applicable minimum sentence is based on how many previous convictions the offender had. Some cases had one 'jurisdictional fact' (reason for the prescribed minimum sentence) that brought it within the purview of Part I of Schedule 2 (life imprisonment), but many had multiple. For instance, the victim could have been below the age of 16 years old and was also raped more than once by the same perpetrator, or a co-perpetrator. It should also be noted that the provision of Part I of Schedule 2 that states that where a victim is an older person in terms of the Older Persons Act 13 of 2006, an offender who is found guilty of rape should be sentenced to life imprisonment, is a provision that was added by the Judicial Matters Amendment Act 8 of 2017 (JMAA). Despite the inclusion made by this Amendment Act however, there were a total of 5 cases in which the appeal was heard after the 2017 JMAA. In only 1 of these cases (0.2%) was the JMAA's inclusion of older persons specifically cited as a reason for the applicable prescribed minimum sentence.

There was a total of 173 cases (42.1% of the total of 411 reasons) where the victim was under the age of 16 years, and 144 cases (35%) where the victim was raped more than once, either by the same perpetrator or a co-perpetrator. There were also 32 cases where grievous bodily harm was inflicted (7.8%). In 11 cases (2.7%), the prescribed minimum sentence was life imprisonment because the victim was raped by more than one perpetrator in furtherance of a common purpose or conspiracy. At times it was unclear whether a court was relying on the provision of the 1997 Act which accounts for the victim being raped more than once by the same perpetrator or a co-perpetrator, and when they were relying on the victim being raped in furtherance of a common purpose or conspiracy. When this was the case, at times both of these reasons were coded. In a number of cases the courts did not specify why Part I of Schedule 2 was applicable, it merely stated that it was. However, from the facts of the case, or the factors taken into consideration during sentencing, the reason had to be gleaned by the coders. Where it was expressly mentioned, the reason that was provided was what was coded, despite there being instances where the court may have missed out on additional 'jurisdictional facts' or provisions in terms of the 1997 Act. A lack of clarity on the part of the court also accounts for the one case where no reason was cited by the coder.

3.3.4 Number of years sentenced at trial

Table 6: Number of years sentenced at Trial (N=340)

Number of Years Sentenced	Frequency (number)	Percent
5	1	0.3%
6	1	0.3%
7	2	0.6%
8	3	0.9%
9	1	0.3%
10	22	6.5%
12	3	0.9%
15	16	4.7%
16	1	0.3%
18	4	1.2%
20	14	4.1%
22	3	0.9%
23	1	0.3%
25	4	1.2%
30	3	0.9%
45	2	0.6%
60	1	0.3%
Life imprisonment	258	75.9%
Total	**340**	**100**

Once again, it is clear from the table indicating the sentence handed down at trial that life imprisonment was handed down in the majority of cases (75.7%). This sentence was handed down in 258 cases. The second most frequent sentence handed down at trial court level was 10 years, in 22 cases (6.5%), and then 15 years, in 16 cases (4.7%). The longest determinate sentence handed down by a trial court was handed down in one case and it was a sentence of 60 years. The shortest sentence was also handed down in one case (0.3%), and it was a sentence of 5 years. One of the sentences where a determinate sentence of 45 years was handed down was a case in which the trial court handed down an effective term of imprisonment of 25 years for the rape convictions that the court was specifically considering. This sentence in effect ran cumulatively with a 20-year sentence for a previous conviction, making the effective term of imprisonment 45 years.

In the original report, the maximum number of years that an offender was sentenced at trial was 40 years, and the minimum was 2 years. These numbers have therefore increased since this study was last conducted for the period 2008 – 2015. In the original report, life imprisonment was handed down in 209 cases (60.6% of the total number of cases). The highest prevalence for a determinate sentence was for 15 years, which occurred in 10.7% of the cases in the original report. This was followed by 20 years

(in 6.4% of cases) and 10 years (in 4.9% of cases). There was therefore an increase in the number of cases where the trial court handed down a sentence of life imprisonment, and in the percentage of cases where 10 years was handed down in this study versus in the original report. There was a decrease in the percentage of cases where 10 and 15 years were handed down in this study versus in the original report.

3.3.5 Sentence increased

Table 7: Sentence Increased (N=279 Sentences)

Sentence increased on appeal	Frequency (number)	Percentage
Appeal dismissed	247	88.5%
Increased to life imprisonment	10	3.6%
N/A (trial court judgement)	16	5.7%
13 yrs	1	0.4%
15 yrs	1	0.4%
5 yrs	2	0.7%
8 yrs	2	0.7%
Total	**279**	**100**

In 247 cases (88.5%), the offender's appeal was dismissed, and the trial court's sentence was therefore upheld. In the original report, this number was only 160 cases (46.4%). Therefore, there have been far more cases where appeal courts are not interfering with the sentences handed down by the trial court. As set out above, there are specific instances in which it is appropriate for an appeal court to interfere with a trial court's sentence.

In 15 cases (5.2%) the case under review was a trial court judgment, and as such no data could be captured with respect to an appeal court decision. In 10 cases (3.4%) a trial court's sentence was overturned and a sentence was increased to life imprisonment. In the original report this number was 5 cases (1.4%). It should be noted that both a sentence being increased to life, and a sentence being reduced from life cannot be represented numerically. This is because in law a sentence of life imprisonment does not have a numerical number. The numerical numbers in the table indicate the number of years that determinate sentences were increased by. For example, in 1 case each (0.4%), a sentence was increased by 13 years and 15 years. The latter number was the highest determinate number that a sentence was increased by. In two cases each (0.7%), sentences were increased by 5 years and 8 years. Comparatively, in the original report, the highest determinate number that a sentence was increased by was 20 years.

3.3.6 Sentence reduced

Table 8: Sentence Reduced (N=61 Cases)

Number of Years Reduced	Frequency (number)	Percent
1	1	1.6%
2	1	1.6%
3	1	1.6%
4	1	1.6%
5	4	6.6%
6	1	1.6%
10	2	3.3%
12	1	1.6%
25	1	1.6%
5 months	1	1.6%
Life sentence reduced	47	77%
Total sentences reduced	**61**	**100**

***Note:** This table presents only the 61, out of 340 cases, where sentences were reduced.

Out of the 61 cases where a sentence was reduced, 47 of them (77%) were cases where the trial court originally handed down a sentence of life imprisonment and on appeal this sentence was reduced to a determinate number of years. The rest of the cases (14 cases, which amounts to 22.95%) were all instances where there were numerical reductions to determinate sentences. The highest reduction being 25 years, which occurred in 1 case (1.6%), and the lowest being 5 months, which also occurred in 1 case. The numerical reduction that occurred most frequently was 5 years, which occurred in 4 cases (6.6%). It should be noted that in one of the cases represented in *Table 8* where there was a reduction of 10 years, this reduction was made by the court taking into consideration a previous conviction for which the offender was serving a 20-year sentence. The appeal court therefore found in favour of allowing 10 years of the sentence for the prior conviction to run concurrently with the 25 years that the trial court had handed down for two counts of rape for a current conviction. This reduced the offender's effective sentence by 10 years, and meant he was sentenced to 35 years imprisonment as opposed to 45 years.

In the original report, in 95 of the cases a life sentence that was handed down by the trial court was reduced by the appeal court. There were therefore far more reductions from life in the original report. The numerical reduction that was most prevalent in the original report was also 5 years, as it was in this report, but it occurred in 2.9% of cases, which was a total of 10 cases in the original study, rather than in 4 cases in the present one.

3.3.7 Victim ages

Table 9: Victim Ages in Age Bands

Victim Age Bands		
Age Range (Yrs)	**Frequency**	**Valid %**
0-7	37	15.5
8-12	83	34.9
13-16	61	25.6
17-21	21	8.8
22-30	16	6.7
31-40	7	2.9
41-50	4	1.7
51-60	3	1.3
61-70	4	1.7
71-80	2	0.8
Total	**238**	**100**

Table 9 represents victims ages in bands. The frequencies therefore represent the number of victims, as opposed to the number of cases. With respect to the ages of victims, victims were most often in the age band 8 to 12 years old (83 victims or 34.9%). In 61 instances (25.6%), the victims were between the ages of 13 and 16 years old. In total, the age group 0 – 16 years old accounted for 76% (181) of the victims. This represents instances where data was able to be collected on victim ages. Of these 181 victims between the ages of 0 and 16 years, 172 of the victims were between the ages of 0 and 15 years old. Where the facts of a case showed that the victim was raped on multiple occasions and over multiple ages, the youngest age was captured.

It should however be noted that not all cases specified the ages of victims, and in some cases, there were multiple victims. In cases where there were multiple victims, at times all of the victims' ages were specified and other times only some appeared. In 16 cases there were two victims, and both of their ages were provided by the court. In 1 case there was three victims, and all three ages were provided by the court. Cases where there were multiple victims (more than 3), did not provide all of the victims' ages. There were 9 cases where the reason for the prescribed minimum sentence was coded as the victim(s) being under the age of 16 years, however the age(s) of the victim(s) were not provided and are therefore not represented in *Table 9*. Cases where the victim was not a minor often did not specify the age of the victim, as the victim's age was not specifically seen as an aggravating factor. This means that the data for victim ages where the victim was a major will not accurately account for the frequency with which the different age groups were actually represented in the cases under review.

With respect to the original report, the age band of 0 – 16 years accounted for 81.2% (208) of the cases where data could be collected for victim age. However, the age band that occurred most frequently was 13 to 16 years with 102 cases. The age band that appeared most frequently during this study has therefore become younger (8 – 12 years), and there were 12 more victims that were coded as being in this age group in current study versus in the original report. The oldest age group for the purposes of this report was 71 to 81 years old, while there were 3 cases where the victim was over the age of 81 in the original report.

With respect to cases where no data could be captured for victim age, there were 120 cases where age was not specified in this study, and 220 cases where it was specified. In the original report, there were 256 cases where victim ages were specified and only 89 cases where it was not.

3.3.8 Multiple offenders and victims

Table 10: Multiple Offenders and Victims (N=340 Cases)

Multiple Offenders			**Multiple Victims**		
	Frequency (number)	**Valid Percent %**		**Frequency (number)**	**Valid Percent %**
No	281	82.6	No	302	88.8
Yes	59	17.4	Yes	38	11.2
Total	**340**	**100**	**Total**	**340**	**100**

In 59 of the cases (17.4%) there were multiple offenders, and in 38 of the cases (11.2%) there were multiple victims. It should be noted that for the purposes of coding and analysing the data, whether there were multiple victims (and how many victims there were) was captured with respect to the number of victims that the appeal dealt with specifically. This is because the court should only be dealing with the aggravating factors and SCCs with respect to the facts of the case that pertain to the victims involved in the conviction and sentence that is being considered by the court. However, with respect to the number of offenders, this was captured and analysed according to the number of offenders that took part in the offence, irrespective of whether all of them were convicted or were part of the appeal. This was because if the court found in favour of the state that there were multiple offenders that took part in the offence, irrespective of whether they were all convicted or were all before the court, the sentence could, and should, take this into account.

Whether the facts of a case involved multiple victims or multiple offenders was not data that was captured for the original report.

3.3.9 Suspended, concurrent, and cumulative sentences

Table 11: Suspended Sentence (N=340 Cases)

	Frequency (number)	Percent
No	338	99.4%
Yes	2	0.6%
Total	**340**	**100**

Table 12: Concurrent Sentence (N=340 Cases)

	Frequency (number)	Valid Percent %
No	280	82.4
Yes	60	17.6
Total	**340**	**100**

Table 13: Cumulative Sentence (N=341 Cases)

	Frequency (number)	Percent
No	330	97%
Yes	10	3%
Total	**340**	**100**

Data with respect to whether multiple sentences were ordered to run cumulatively or concurrently, or whether an entire sentence, or a portion thereof, was suspended, was collected for the purposes of this report. It was not captured for the previous report. However, because all of these orders would affect an offender's effective term of imprisonment, it was seen as important to capture it this time around. There were however very low frequencies of suspended and cumulative sentences. There were only two (0.6%) cases where a sentence was either entirely suspended, or a portion of the sentence was suspended. There were 10 (3%) cases where there were multiple sentences that were ordered to run cumulatively. There were 60 (17.6%) cases where there were multiple sentences for multiple convictions, and they were ordered to run concurrently. All three of these orders would have an impact on the offender's effective term of imprisonment. It should be noted that there were more cases where an offender was sentenced to multiple sentences for multiple convictions, and these sentences were ordered to run concurrently, however, it did not affect the offender's effective terms of imprisonment and therefore was not captured for the purposes of *Table 12* above. This would have been the case where one of the terms of imprisonment was life. This is discussed more in the analysis section.

3.3.10 Victim characteristics

Table 14: Victim characteristics (N=340 Cases)

Victim Characteristics	Aggr. Circ. Frequency	Aggr. Circ. %	SCC Frequency	SCC %	Implied SCC Frequency	Implied SCC %
Victim previous sexual history	1	0.3	0	0	0	0
Victim relationship with accused(s)	3	0.9	0	0	0	0
Victim virginity	13	3.8	0	0	0	0
Victim drug/alcohol use	0	0	1	0.3	0	0
Victim physical attributes	6	1.8	0	0	0	0
Victim behavioural characteristics	2	0.6	0	0	0	0
Victim received gifts or other benefits from accused	1	0.3	0	0	0	0
Victim intellectual or psycho-social disability	1	0.3	0	0	0	0
Victim level of education	0	0	0	0	0	0
Victim level of awareness or maturity	4	1.2	0	0	0	0
Victim gender identity or sexual orientation	0	0	0	0	0	0
Victim employment (incl. ref to sex work)	0	0	0	0	0	0
Victim family status	1	0.3	0	0	0	0
Victim pregnant at time of offence	1	0.3	0	0	0	0
Victim pregnant due to the offence	7	2	0	0	0	0
Victim age	122	36	0	0	0	0
Victim physically and/or intellectually disabled and rendered particularly vulnerable as a result	8	2.3	0	0	0	0

With respect to victim characteristics, *Table 14* sets out which characteristics were considered by the courts and whether they were considered an aggravating factor, a SCC or an implied SCC. Victim age was coded most often, and it was coded as an aggravating factor in 122 cases (36%). The second most frequent sub-variable with respect to the victim was virginity. This was coded as an aggravating factor in 13 cases (3.8%). Drug/alcohol abuse was the only victim characteristic which was used as a SCC in one case (0.3%). There were no victim characteristics that were used as implied SCCs. The three characteristics that were coded most often were: victim age; virginity (13 cases or 3.8%); and victim physically and/or intellectually disabled (8 cases or 2.3%). These sub-variables were all linked to the victims' vulnerability. Virginity, and victim pregnant due to the offence (7 cases or 2%) were noted in the cases as factors that impacted on the lasting effects of the rape on victims.

In the original report, factors that were most frequently noted as SCCs or implied SCCs were the victims' age (1.5%), and behavioural characteristics (0.6%). As aggravating factors, age (55.9%) and virginity (7.5%) were the two most frequently coded sub-variables, as they were in the current study.

It should be noted that in cases where an appeal court upheld a trial court's sentence, and the trial court did not deviate from the prescribed minimum sentence, SCCs would not be coded for that case. Only aggravating circumstances. This is because where a court finds SCCs to be present in a case, it will depart from the prescribed minimum sentence according to section 51(3)(*a*) of the 1997 Act. Where the court does not find SCCs to be present, it will uphold the prescribed minimum sentence.

3.3.11 Offender characteristics

Table 15: Offender characteristics (N=340 Cases)

Offender Characteristics	**Aggr. Circ. Frequency**	**Aggr. Circ. %**	**SCC Freque -ncy**	**SCC %**	**Implied SCC Freque -ncy**	**Implied SCC %**
Offender age	13	3.8	28	8.2	4	1.2
Offender health	0	0	1	0.3	2	0.6
Offender level of education	0	0	2	0.6	0	0
Offender socio-economic/employment status	0	0	4	1.2	3	0.9
Offender culture	1	0.3	0	0	0	0
Offender marital status	0	0	1	0.3	0	0
Offender occupation/profession	0	0	1	0.3	0	0
Offender family status/obligation/breadwinner	0	0	3	0.9	1	0.3
Offender community or political standing	0	0	0	0.0	0	0
Offender evidence of remorse	94	27.6	6	1.8	0	0
Offender cooperativeness	34	10	7	2.1	0	0
Offender plea bargain/guilty plea	0	0	2	0.6	0	0
Offender drug/alcohol use	3	0.9	5	1.5	1	0.3
Offender perception of accused re: causing harm to victim	13	3.8	0	0	0	0
Offender HIV status	4	1.2	1	0.3	0	0
Offender health status	0	0	1	0.3	0	0
Offender first offence	0	0	28	8.2	4	1.2
Offender first sexual offence	0	0	3	0.9	0	0

Offender previous offences	31	9.1	1	0.3	1	0.3
Offender previous sexual offences	18	5.3	0	0	0	0
Offender number of sexual offences committed by the offender against the victim in this case	35	10.3	0	0	0	0
Offender time already served for this offence	2	0.6	14	4.1	6	1.8
Possibility of mental illness of accused	0	0	1	0.3	0	0
The 'moral blameworthiness' of the perpetrator	48	14.1	1	0.3	0	0
Offender prospects of rehabilitation	36	10.6	20	5.9	2	0.6

With respect to offender characteristics, *Table 15* depicts that evidence of remorse (94 cases or 27.6%), moral blameworthiness (48 cases or 14.1%) and the offender's prospects of rehabilitation (36 cases or 10.6%) were most frequently taken into consideration as aggravating circumstances. With respect to SCCs, the offender's age (28 cases or 8.2%), that it was their first offence (28 cases), and the offenders' prospects of rehabilitation (20 cases or 5.9%) were most often taken into consideration. Only a small number of cases were coded as having implied SCCs, with the only sub-variable that was coded on more than 5 occasions (almost 2%) being the 'offender had already served time for the offence'. This was coded in 6 cases as an implied SCC, and in 14 cases (4.1%) as a SCC.

It should be noted that the sub-variable 'prospects of rehabilitation' did not appear in the original report, however it was coded as an 'Other' during the coding process. The aggravating factors that was coded most frequently in the original report was 'number of sexual offences committed the offender against the victim *in this case*' (31.6%), which was coded fourth most frequently in the current study. This was followed by evidence of the offender's remorse (25.6%) in the original report, which was coded most frequently in the current study. With respect to SCCs, that the offence under consideration was the offender's first offence (18.8%), and that they had already served time for the offence (13.9%), either as an awaiting trial prisoner or while waiting for their appeal to be heard, were coded most frequently. These two factors continued to be relatively frequently considered in the current study. There were far more implied SCCs that were coded in the original report. These included the offender's age (7.8%), their socio-economic/employment status, family status/obligations, and evidence of remorse. The last three sub-variables were all coded as an implied SCC in 6.7% of cases. As noted above, there were very low frequencies for implied SCCs in the current study, with evidence of remorse not being coded at all, and the offenders' age, socio-economic/employment status, and family status/obligations being coded in 4 (1.2%), 3 (0.9%) and 1 (0.3%) case respectively.

The authors regard the move away from taking into account offenders' personal circumstances without any real engagement with their importance for the offenders' chance of recidivism, their relevance for society or impact on the victim as a step in the right direction. Meaningful engagement with all factors that are taken into consideration by judicial officers during sentencing should be both encouraged and expected.

3.3.12 Circumstances of the offence

Table 16: Circumstances of the offence (N=340 Cases)

Circumstances of the Offence	Aggr. Circ. Frequency	Aggr. Circ. Frequency %	SCC Frequency	SCC Frequency %	Implied SCC Frequency	Implied SCC Frequency %
'The rapes do not fall within the worst category of cases' or the rape in question was 'not the worst kind of rape'	3	0.9	6	1.76	2	0.59
The use of a dangerous weapon or firearm	31	9.1	0	0	0	0
The lack of use of dangerous weapon or firearm	0	0	0	0	0	0
The victim was threatened with additional harm	37	10.9	2	0.59	0	0
Number sexual offences committed in this case	29	8.5	1	0.29	0	0
Multiple offenders	17	5	1	0.29	0	0
Premeditation factors	24	7	0	0	0	0
Threat to society	19	5.6	0	0	0	0
Victim 'consented'	0	0	0	0	0	0
Location of rape	44	12.9	2	0	0	0
The form of penetration used in the commission of the offence	5	1.5	2	0.59	0	0
Perpetrator related to victim	40	11.7	0	0	0	0
Perpetrator known to the victim	41	12.0	1	0.29	0	0
The perpetrator breached the victim's trust	66	19.4	0	0	0	0
Existence or lack of evidence of physical injury, or aggravating circumstances	61	17.9	17	4.99	3	0.88
Existence or lack of evidence of psychological injury or	108	31.7	6	1.76	0	0

aggravating circumstances						
Seriousness of the offence	180	52.8	1	0,29	0	0

Finally, with respect to circumstances of the offence, *Table 16* above depicts that the seriousness of the offence was the sub-variable that was most often coded as an aggravating factor. This was done in 180 cases (52.8%). This is a sub-variable that did not exist in the coding sheet used for the original report, and as such this factor was coded as 'Other' for the original study. The existence of evidence of psychological injury was coded second most frequently (108 cases or 31.7%) in the current study. In the original report this factor appeared as an aggravating factor in 44.2% of cases. It should be noted that in the original report, evidence of both physical and psychological injury did not form part of the variable 'Circumstances of the offence', but were instead standalone variables. In the current study, that the perpetrator breached the victim's trust was the third most frequently coded sub-variable. It was coded in 66 cases (19.4%). In the original report it was the most frequently coded aggravating factor coded under 'Circumstances of the offence' and was coded in 23.8% of cases. This sub-variable usually relates to instances where the victim was a minor, who trusted, or should have been able to trust, the offender. It was often linked to cases where the victim was either related to the offender (40 cases or 11.7%), or where the offender and the victim knew each other (41 cases or 12%).

Interestingly, the judicial officer's assessment that there was a lack of evidence of physical injury was most frequently coded as a SCC and was done so in 17 cases (4.99%). This was also the most frequently coded implied SCC (3 cases or 0.88%). This is a remnant of the SCA's 2002 judgment of *S v Abrahams*. The Court in this matter placed an emphasis on a lack of physical injury to the complainant as a justification for deeming a rape involving a minor and her father, who was the offender, as 'not the worst case of rape'. Along with a lack of evidence of psychological injury, the sub-variable assigned to a rape being deemed 'not the worst case of rape' was coded second most frequently as a SCC in the current study. This was done in 6 cases or 1.76% each. It was also the only other implied SCC that was coded (2 cases or 0.59%). In the original report, that the rape was deemed to not fall into the category of 'worst case of rape' was coded most frequently as both a SCC (7%) and an implied SCC (6.1%).

4. ANALYSIS AND RECOMMENDATIONS

4.1 Putting the Findings in Perspective

While this report can provide no immediate answers to why there is such a strong contrast between the number of appeal cases being heard by our high courts versus the number of sexual offences cases resulting in convictions in the three provinces, there were a few factors that should be borne in mind. First, the NPA does not disaggregate its data for rape cases from its data for sexual offences. Thus,

while it can be assumed that the majority of cases being captured under the term 'sexual offences' would account for rape cases, it is not clear exactly how many of their convictions for sexual offences can be attributed to rape cases. Secondly, the impact of the COVID-19 pandemic was certainly felt in 2020 and may to some degree continue to be felt for some time with respect to the speed at which cases, and specifically appeals, reach, are heard by and most importantly judgments handed down in our courts. Thirdly, the judgments that were analysed for the purposes of this report were only rape sentencing judgments that were heard in the high courts, or by the SCA or CC. This means that the majority of the cases were appeal court judgments, with the magistrates' court having been the court of first instance who handed down sentence for the offender. The offender then either appeals their judgment, after being granted leave to appeal, or they are automatically entitled to appeal because they were sentenced to life imprisonment.[37] It is therefore not a given that all rape cases in which a sentence was handed down will either be appealed, or the offender will make use of their automatic right of appeal.

The difference in the number of rape sentencing judgments being handed down by each of the provinces in terms of this report versus the original report could also be accounted for by virtue of the enactment of the Judicial Matters Amendment Act, which came into effect in January 2014 and allows those who have been sentenced to life by a regional magistrates' court to appeal their conviction and sentence without applying for leave to appeal first. This will likely have caused an increase in the number of cases being appealed to our high courts, given how simple the process is for those who have been sentenced to life imprisonment. In addition, appealing a sentence of life imprisonment has traditionally been seen as a 'no-lose game', whereby it is not possible for the court to increase the offender's sentence, as life imprisonment is the most severe sentence that a court can hand down. They can therefore only choose to decrease it, or for it to remain the same. For this reason, appeals will most frequently include sentences of life imprisonment. Further, the more sentences of life imprisonment that our courts are handing down, because of the facts of the cases they are hearing, the more offenders there will be who have the opportunity to automatically appeal their cases, and in turn the more appeals our courts will hear.

From the data analysed with respect to victim ages and the reason for prescribed sentence, it is clear that rape of children below the age of 16 years continues to be a significant issue within our society. Despite much controversy around the provision, and why the age of 16 years was selected by the legislature, it remains one of the primary reasons for the prescribed minimum sentence of life being applicable to a case. Interestingly, this provision has been amended by the Criminal and Related Matters Amendment Act 12 of 2021 to include cases where the victim was under the age of 18 years old. Therefore, all minors will be included in the provision. It will therefore be interesting to note whether this amendment impacts on the number of rape sentencing appeal judgments being heard by our courts,

[37] Section 10 of the Judicial Matters Amendment Act 42 of 2013.

given what we know about the offenders' automatic right of appeal in cases where the offender was sentenced to life imprisonment.

The purpose of capturing data concerning whether there were concurrent or cumulative sentences in instances where the offender was convicted of more than one rape, was simply to ensure that we were able to capture when an offender's effective term of imprisonment may have been impacted by a trial court's order or an amendment to a sentence on appeal against sentences for multiple offences. However, because most cases dealt with instances where the offender was sentenced to life imprisonment, all sentences in addition to that automatically run concurrently. Section 39(2)(*a*)(i) and (ii) of the *Correctional Services Act* 111 of 1998 states that all determinate sentences run concurrently with a life sentence, and that one or more life sentences also runs concurrently. In addition to this, section 51(5) of the 1997 Act read with section 297(4) of the Criminal Procedure Act ('the CPA') prohibits suspending any whole or part of a minimum sentence imposed in terms of section 51 of the 1997 Act in terms of section 297 (4) of the CPA. The relevant section of the CPA specifies that a court may suspend a sentence, or a portion thereof, for a period not exceeding five years on condition that one of the alternate forms of punishment are handed down. Once again, this section of the CPA provides that it may not be relied upon in instances where the legislation prescribes a minimum punishment for the offence. It has been argued in the literature, and by some of our courts, that this section does not apply in instances where the court has decided to depart from the prescribed minimum sentence. Given the wording of the cited sections of the 1997 Act and the CPA, read together, in conjunction with the judgment of *S v Malgas*, where the court specifies that even in cases where a court finds SCCs to be present, and a departure from the prescribed minimum sentence justified, the prescribed sentence is to be considered a benchmark which the legislature has enacted for the offence. The court elaborates on this by stating that it should be considered that any offence which appears in the 1997 Act 'has been singled for severe punishment.'[38] It is thus argued by the authors that any interpretation of the law which allows for a court to suspend any sentence, or portion thereof, whether in favour of an alternate sentence or not, should not be considered in keeping with the prescripts of the legislation.

Of importance with respect to the sentencing data is the increase in the number of cases where life was the prescribed minimum sentence. There were 304 cases, out of the total of 340, in the current report, versus 291 cases in the previous report. This should be seen in light of the data collected for both the reason for prescribed sentence, and the ages of the victims, which illustrates that offences involving children (under the age of 16 years – 173 cases) make up most of the life imprisonment cases that are being heard. Additionally, we can tell from *Table 5* that rape cases in which the victim is raped more than once, either by a perpetrator or co-perpetrator (144 cases),[39] also make up a significant percentage

[38] *Malgas* supra at para 25.
[39] Added to this is the number of cases in which the victim was raped in furtherance of a common purpose of conspiracy (11 cases or 2.7%).

of our statistics. It is therefore rape cases that involve these circumstances that could call for more attention and considered effort on the part of both our government and civil society efforts against rape. Further, it can be noted that the number of cases in which an appeal is dismissed has risen significantly in this report (247 cases), compared to in the last (160 cases) report. The number of cases in which a life sentence was reduced has also occurred in less instances in this report (47 cases), compared to in the original report (95 cases). Therefore, as a whole it can be inferred that more sentences of life imprisonment are being handed down by trial courts, and upheld by our appeal courts, for rape sentencing cases. This statement is however made while bearing in mind that the data for the current report is based off rape sentencing appeal judgments from the three Masiphephe provincial sites, the SCA and CC only, while the previous report considered judgments from six of our provinces and the SCA.

With respect to the factors being taken into consideration for the purposes of sentencing, it must be noted that this report has chosen to focus on three of the main variables. These are: victim characteristics, offender characteristics and circumstances of the offence. Further, while every effort was made to ensure that all sub-variables that are primarily considered by our courts during sentencing appear in the coding sheet, there are factors that courts will at times raise that require their own code. As such, the coding sheet was designed so as to allow for coders to input their own sub-variable under each of the main variables when necessary.

With respect to the frequency with which the sub-variables were coded, it should be borne in mind that an appeal court's jurisdiction to interfere with a trial court's sentence is limited to certain instances. Specifically, this rule has been fully enunciated in *S v Malgas* when the Court said the following:

> *'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 as if it were a court of first instance and the sentence imposed by the trial court has no relevance…However, even in the absence of material misdirection, an 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'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to*

that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.'[40]

This means that in a number of cases that were read and coded by the researchers, the appeal court would either only discuss some of the factors it was taking into consideration before finding in favour of not interfering with the trial court's sentence and reasoning, and dismissing the appeal, or it would not mention any factors at all, but would instead state that there was no basis upon which to interfere with the trial court's sentence. The SCA's discussion in the same judgment of the sentencing legislation being a benchmark against which any sentence, irrespective of whether it is a prescribed sentence, for an offence listed in the 1997 Act should be measured against, is an additional factor that will impact when a sentence can be departed from, to what degree, and, it has been found, often the extent of the discussion that an appeal court will narrate before deciding not to depart from the trial court's sentence.

Overall, with respect to the frequencies that appear in relation to implied SCCs, there is a marked difference between the current report and the original report. This can be attributed to there being less cases in which the researchers were uncertain of whether factors were being taken into consideration by a court as a SCC or not. There were also cases that will account for some of the implied SCCs that were coded where a court would mention the factors taken into consideration by a trial court before departing from the prescribed minimum sentence. The appeal court would mention these factors, without engaging with them, and would find in favour of the trial court's sentence. These factors were coded as implied SCCs, as they contributed to the appeal court's finding that a departure from the prescribed minimum sentence was warranted, though the appeal court's lack of engagement with the factors mentioned meant that they could not be coded as SCCs.

The courts' veering away from placing much, or any, real emphasis on the victims' characteristics, attributes or factors that can be attributed to the victim with respect to SCCs or implied SCCs should be seen as a step in the right direction. Courts are instead using victim characteristics to better understand the aggravating factors that relate to a case. These characteristics or attributes pertain particularly to a victims' vulnerability. For instance, victims' age and their virginity (which is often also linked to comments about their age), were taken into account most frequently as factors aggravating sentences.

With respect to offenders, there has been some continuity between this report and the original report with respect to the factors that courts consider aggravating. A lack of evidence of remorse, the offender's moral blameworthiness and the number of sexual offences committed against the victim in this case remain at the top of the list of aggravating factors. However, coded in just one additional instance than the number of sexual offences committed, was the offender's prospects of rehabilitation. As stated above, this was not a standalone sub-variable that was included in the original report. It was, however, often coded as an 'Other'. It was as a result of this that it was given its own code for the

[40] *Malgas* at para 12.

purposes of the coding sheet used for the current report. With respect to SCCs, the courts' focus remains on factors that affect an offenders' prospects of recidivism. These include: their age; whether they have committed other offences; and their prospects of rehabilitation. The latter factor is often gleaned by the court on the basis of a social worker's report, or the manner in which the offender conducted themselves during the trial. This latter consideration can be linked to an offender's cooperativeness and whether they show remorse.

Finally, our courts' reliance with respect to factors that aggravate a sentence and pertain to the circumstances of the offence primarily concern the seriousness of the offence, evidence of psychological injury to the victim and whether the perpetrator breached the victim's trust. Evidence of physical injury inflicted on the victim follows closely on from the latter. In addition to whether a victim's trust was breached by the offender, factors that relate to the offender and the victim either knowing each other, being related to one another and where the rape was committed are all interlinked and relate to whether a victim reasonably saw themselves as being safe and cared for in the environment that they were in, or in the offender's company. These factors or sub-variables can also be closely related to victim's age, specifically for cases involving minors. With respect to SCCs, a lack of evidence of physical injury, and the rape not falling within the category of 'worst cases of rape' were considered most frequently by the courts. As stated above, any consideration of the rape being placed on a 'hierarchy of severity' is as a result of the SCA's judgment in *S v Abrahams*. In recent years, thankfully, it is a judgment that the courts have largely tried to move away from, instead adopting the CC in *S v Tshabalala's* stance on the nature and seriousness of rape, as well as its impact on victims and society as a whole. It is this recognition by our courts with respect to the harmful nature of rape, and its impact that goes far beyond physical injuries, that the authors would encourage for all courts moving forward, as it is clear from the coding that it is an approach that has not yet been fully achieved.

4.2 Recommendations

As with the original report, this report recommends that a number of improvements be made to our sentencing judgments and legislation moving forward. These are:

- That judicial officers be encouraged to draft clear and concise judgments with respect to the factors being taken into consideration for the purposes of sentence. Ensuring that judgments can be clearly interpreted is an important aspect of access to justice for both victims and offenders.
- It would be advisable that clear guidance be provided to our lower courts (including the high courts) with respect to factors that are or are not to be taken into consideration during sentencing. This guidance could either be provided by the legislature, or it could be provided by the SCA and CC. It is however recommended that the guidance come from the legislature to avoid differences in interpretation or factors to be considered by the courts, and to ensure a level of consistency across

rape sentencing judgments and determinations of substantial and compelling circumstances. There have been instances where the SCA has provided confusing and contradictory comments and precedent about the consideration of factors during sentencing, and even the correct interpretation of the 1997 Act.

- Certain aspects of the current legislation require clarity. For instance, it is the authors' opinion that the intention of the 2008 Act was to eliminate any consideration of all four of the mentioned factors from consideration as SCCs when courts hand down sentence for rape cases. The courts have not struggled with removing any reference to the complainant's previous sexual history, the accused's cultural or religious beliefs, or any prior relationship between the accused and complainant with respect to SCCs. Some courts have however struggled with the idea of removing a 'lack of physical injury to the complainant' from their reasoning. It is thus submitted that clarity should be provided by the legislature with respect to whether their intention is only to limit the use of the four factors as an SCC in and of themselves, or whether the legislation has limited their use as SCCs altogether. The question of whether a court is empowered to suspend a sentence, or any part thereof, for an offence as described in the sentencing legislation should also be definitively clarified.

4.3 Limitations and Challenges

As described above, the cases that were capable of being analysed for the purposes of this study were only cases that were published in the case law databases. This meant that they had to be high court judgments, or judgments from our SCA or CC. While this meant that the majority of the cases that were coded were appeal court judgments, there were also a number of trial court judgments, where the high court sat as the court of first instance in respect of handing down sentence to the offender.

Time played a significant part in the management of this project. This project was completed in just over five months. The original 2016/2017 report was completed in just over a year. It should however be noted that the lessons learnt from the completion of the first report were put to good use in designing this project and completing the current report. One of the legal researchers that partook in the process of the original report was also part of coding cases and drafting this current report. Professor Lillian Artz was also part of both processes and was therefore able to guide this process so as to overcome some of the challenges faced during the data analysis process for the original report.

Designing a coding sheet that accurately captures all of the nuances of sentencing judgments is a challenge. There are many moving parts, including: the way in which judges discuss the factors that they are or are not taking into consideration that often requires much in the way of interpretation on the part of the coder; complicated facts of cases that could include multiple offenders, multiple offences, appeals of sentences for some convictions and not others; and designing the coding sheet and capturing the data so as to accurately capture relevant aspects of the law. For instance, when is a concurrent

sentence relevant to the research question, or when is it relevant that there were multiple victims and when is it not. In addition, as described above, the coding sheet had to be designed so as to allow for coders to input their own factors/sub-variables that courts were taking into consideration, should they not have appeared in the coding sheet but have impacted on the court's ultimate sentence.

The coding sheet needed to be designed in such a way that it captured as much of the qualitative data coming from the cases as possible, as accurately as possible, and in such a way that it could be represented in quantitative data. In instances where cases either did not comprehensively explicate all of the details usually expected in sentencing judgments, such as the reason for prescribed sentence, or the victim's age, or when the courts' descriptions were not entirely clear, it became a difficult task to ensure that cases were being captured accurately.

Linked to the challenge of designing a coding sheet that captures all of the nuances that researchers came across, and ensuring that cases were accurately described, was the challenge of cleaning the data. This became a multi-step process that required the entire research team to assist in ensuring that the data has been represented and described as accurately as possible.

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APPENDIX A: Case Law

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40. S v Phage 2016 JDR 1232 (GP)
41. S v Radebe 2016 JDR 1436 (GP)
42. S v Rakhudu 2016 JDR 1115 (GJ)
43. S v Sekamette 2016 JDR 1140 (GP)
44. S v Zwane 2016 JDR 0875 (GJ)
45. Sibanyoni v S (A691/2012) [2016] ZAGPPHC 1189 (9 November 2016)
46. Sibiya v S (A451/2015) [2016] ZAGPPHC 716 (1 April 2016)
47. SVN and Others v State (A523/2012) [2016] ZAGPPHC 381 (20 April 2016)
48. Bogatsu v S (A100/2016) [2017] ZAGPJHC 79 (27 March 2017)
49. Bran v S (A248/2015) [2017] ZAGPPHC 316 (7 July 2017)
50. Buthelezi v S (A416/2016) [2017] ZAGPPHC 925 (15 December 2017)
51. Cele v S (A933/2015) [2017] ZAGPPHC 118 (24 March 2017)
52. Dzimbiri v S (A4/2016) [2017] ZAGPPHC 234 (11 May 2017)
53. Futshane v S (A805/2015) [2017] ZAGPPHC 778 (3 November 2017)
54. Grobler v S (A40/2013) [2017] ZAGPJHC 383 (12 December 2017)
55. Khanye v S (A66/2015) [2017] ZAGPJHC 320; 2020 (2) SACR 399 (GJ) (13 March 2017)
56. Khoza v S (A872/2015) [2017] ZAGPPHC 91 (17 February 2017)
57. Lehihi v S (A508/2016) [2017] ZAGPPHC 686 (29 August 2017)
58. Lushaba v S (A764/15) [2017] ZAGPPHC 440 (1 August 2017)
59. M v S (A29/2016) [2017] ZAGPJHC 35
60. Maanya v S (A143/2016) [2017] ZAGPPHC 603 (25 July 2017)
61. Makhubela v S (A11/2016) [2017] ZAGPPHC 266 (18 May 2017)
62. Manana v S (A890/2015) [2017] ZAGPPHC 1217 (30 October 2017)
63. Masenya v S (A871/2012) [2017] ZAGPPHC 229; 2018 (1) SACR 407 (GP) (24 May 2017)
64. Mashaba v S (A178/16) [2017] ZAGPPHC 270 (25 April 2017)
65. Mashiyane v S (A313/2016) [2017] ZAGPPHC 329 (22 June 2017)
66. Masina v S (A790/16) [2017] ZAGPPHC 1111 (1 December 2017)
67. Mhlambi v S (A429/2016) [2017] ZAGPPHC 935 (28 November 2017)
68. Modisani v S (A183/2016) [2017] ZAGPPHC 630 (22 September 2017)
69. Moilwa and Others v S (A536/2016) [2017] ZAGPPHC 915 (19 June 2017)
70. Mokalare v S (A28/2016) [2017] ZAGPPHC 274 (2 June 2017)
71. Mokobaki v S (A708/16) [2017] ZAGPPHC 1069 (19 September 2017)
72. Mokoroane v S (A38/2016) [2017] ZAGPPHC 471 (26 June 2017)

73. Monoketsi v S (A893/2015) [2017] ZAGPPHC 92 (16 February 2017)
74. Motaung v S (A659/2016) [2017] ZAGPPHC 627 (12 September 2017)
75. Mtambo v S (A91/2016) [2017] ZAGPPHC 267 (24 March 2017)
76. Munyai v S (A843/16) [2017] ZAGPPHC 850 (1 September 2017)
77. Naidoo v S (A195/2016) [2017] ZAGPJHC 203
78. Ndubane v S (A238/2016) [2017] ZAGPPHC 111 (8 February 2017)
79. Nkadimeng v S (A894/2015) [2017] ZAGPPHC 842 (15 March 2017)
80. Noka v S (A301/2016) [2017] ZAGPPHC 947 (15 December 2017)
81. Nyabaza v S (A400/14) [2017] ZAGPJHC 60 (23 February 2017)
82. P v S (A766/2015) [2017] ZAGPPHC 116
83. Panyane v S (A542/2016) [2017] ZAGPPHC 1107
84. Radebe v S (A202/16) [2017] ZAGPPHC 969 (6 November 2017)
85. Radiau v S (AS577/2016) [2017] ZAGPPHC 469 (30 June 2017)
86. Rafatlema v S (A627/2015) [2017] ZAGPPHC 481 (9 March 2017)
87. Rafutho v S (A288/2016) [2017] ZAGPJHC 36 (27 February 2017)
88. S v Khumalo (SS81/2016) [2017] ZAGPJHC 253 (8 September 2017)
89. S v Dlangamandla 2017 JDR 0605 (GP)
90. S v Fakude 2017 JDR 0991 (GP)
91. S v Khumalo 2017 JDR 0589 (GJ)
92. S v Nkuna 2017 JDR 1020 (GJ)
93. S v Ntete 2017 JDR 1787 (GP)
94. S v Sangweni 2017 JDR 1208 (GP)
95. S v T 2017 JDR 0862 (GP)
96. S.M.M.N.R v S (Leave to Appeal) (A502/2016, 14/4145/2006) [2017] ZAGPPHC 279 (2 June 2017)
97. Seleka and Another v S (A331/2012; A208/2016) [2017] ZAGPJHC 418 (16 November 2017)
98. Shai v S (A320/16) [2017] ZAGPPHC 1290 (15 December 2017)
99. Shongwe v S (A876/16) [2017] ZAGPPHC 1099 (3 November 2017)
100. Sithole v S (A228/2016, SA56/2016) [2017] ZAGPPHC 633 (22 September 2017)
101. Sithole v S (A548/2015) [2017] ZAGPPHC 224 (26 May 2017)
102. T v S (A496/2015) [2017] ZAGPPHC 581
103. Tsotetsi v S (A230/2017) [2017] ZAGPPHC 1209 (6 November 2017)
104. Van Wyk v S (A88/2017) [2017] ZAGPPHC 560 (31 July 2017)
105. Wanyara v S (A147/2016) [2017] ZAGPPHC 600 (14 September 2017)
106. Ceylon and Another v S (A33/2011) [2018] ZAGPJHC 665; 2019 (1) SACR 698 (GJ) (14 May 2018)
107. Chauke v S (A107/2014) [2018] ZAGPJHC 57 (23 March 2018)

108. Ifaenyi v S (A620/2016) [2018] ZAGPPHC 394 (1 June 2018)
109. Jaars and another v S (A304/2016) [2018] ZAGPJHC 428
110. Khoale v S (A247/17) [2018] ZAGPJHC 717
111. Khoza v S (A672/2016) [2018] ZAGPPHC 718 (2 March 2018)
112. Mabena v S (A371/2016) [2018] ZAGPPHC 721 (2 March 2018)
113. Makhanya v S (A178/2017) [2018] ZAGPPHC 845 (19 December 2018)
114. Malambu v S (A526/16) [2018] ZAGPPHC 767 (5 February 2018)
115. Maluleka v S [2019] JOL 43264 (GP)
116. Maluleke v S [2019] JOL 43266 (GP)
117. Mandlazi v S (A765/2016) [2018] ZAGPPHC 395 (22 May 2018)
118. Manzini v S (A446 /2016) [2018] ZAGPPHC 533 (2 March 2018)
119. Masanabo v S (A477/16) [2018] ZAGPPHC 342
120. Mbatha v S (A252/2017) [2018] ZAGPJHC 130 (15 February 2018)
121. Mokhale v S (A71/2018) [2018] ZAGPJHC 612 (20 September 2018)
122. Motaung v S (A384/2016) [2018] ZAGPPHC 368 (13 April 2018)
123. Motaung v S (A249/2017) [2018] ZAGPJHC 618 (16 August 2018)
124. Mvuyane v S [2019] JOL 43617 (GP)
125. Naledi v S [2019] JOL 43629 (GP)
126. Ngamle v State (A751/2016) [2018] ZAKZDHC 51 (14 September 2018)
127. Ngobeni v S (A684/16) [2018] ZAGPPHC 715 (23 February 2018)
128. Oliphant v S (A468/2010) [2018] ZAGPPHC 651 (16 April 2018)
129. S v Ganca (SS162/2016) [2018] ZAGPJHC 111 (15 March 2018)
130. S v Daile 2021 JDR 1879 (GP)
131. S v Malatjie 2018 JDR 0695 (GP)
132. S v Masunga 2018 JDR 1147 (GP)
133. S v Mazivi 2018 JDR 1159 (GJ)
134. S v Moabi 2018 JDR 1019 (GP)
135. S v Monyai 2018 JDR 0910 (GP)
136. S v Nkomo 2018 JDR 0521 (GP)
137. S v Potsane 2018 JDR 1071 (GP)
138. S v Usinga 2018 JDR 0737 (GP)
139. Simelane v S (A268/2017) [2018] ZAGPJHC 457 (22 February 2018)
140. Siyale v S (A415/17) [2018] ZAGPPHC 162 (29 March 2018)
141. Swabuluka v S (A10/2016) [2018] ZAGPJHC 75 (28 March 2018)
142. Viljoen v S [2019] JOL 44628 (GP)
143. W v S (A229/16) [2018] ZAGPPHC 569
144. Zulu v S (A66/2017) [2018] ZAGPPHC 393 (1 June 2018)

145. Ajose v S (A624/2017) [2019] ZAGPPHC 1083 (14 May 2019)
146. Diseko v S (A600/2017) [2019] ZAGPPHC 1010 (12 December 2019)
147. Frank v S [2019] JOL 45182 (GP)
148. Ionnades v S (SH363/2014, SA 8/2018, A18/2018) [2019] ZAGPPHC 280
149. Joyisi v S (582/17) [2019] ZAGPPHC 58 (12 March 2019)
150. Kekana v S (A348/2019) [2019] ZAGPPHC 223 (6 May 2019)
151. Madube v S (A116/2015) [2019] ZAGPPHC 277
152. Majola v S (A54/2019) [2019] ZAGPJHC 445 (25 October 2019)
153. Maluleka v S [2019] JOL 45273 (GP)
154. Mantjane v S (A22/17) [2019] ZAGPPHC 270 (28 June 2019)
155. Mokhahlane v S (567/17) [2019] ZAGPPHC 57 (12 March 2019)
156. Morake v S [2019] JOL 46134 (GP)
157. Mosikare v S (A137/2018) [2019] ZAGPPHC 391 (16 August 2019)
158. NDPP v N.M and Another (A226/16) [2019] ZAGPPHC 151 (3 May 2019)
159. Ngwenya v S (A169/2018) [2019] ZAGPJHC 11 (20 February 2019)
160. Nomqolo v S (A68/2019) [2020] ZAGPPHC 518 (14 September 2020)
161. S v Mothapo (CC44/2019) [2019] ZAGPPHC 506 (1 August 2019)
162. S v Brick 2019 JDR 0414 (GJ)
163. S v Mahlo 2019 JDR 0294 (GP)
164. S v Mwelase 2019 JDR 2237 (GP)
165. S v Ngwato 2019 JDR 0292 (GP)
166. S v Ninow 2020 JDR 2159 (GP)
167. S v RJM 2019 JDR 0451 (GJ)
168. S v Radebe 2019 JDR 1257 (GP)
169. S v Shikwambana 2019 JDR 1165 (GP)
170. Sithole v S (A750/16) [2019] ZAGPPHC 495 (10 September 2019)
171. Tau v S [2019] JOL 44484 (GP)
172. Tsotetsi v S [2019] JOL 45952 (GP)
173. Yona v S (A76/2016) [2019] ZAGPPHC 1038 (12 December 2019)
174. Afrika v S [2020] JOL 48251 (GP)
175. Director of Public Prosecutions, Grahamstown v Mantashe [2020] JOL 47313 (SCA)
176. Director of Public Prosecutions, Pretoria v Zulu [2021] JOL 51966 (SCA)
177. Director of Public Prosecutions, Free State v Mokati [2022] JOL 52758 (SCA)
178. Matsimela and another v S [2019] JOL 43346 (GP)
179. Ndlovu and Another v S (A725/16) [2018] ZAGPPHC 545 (16 February 2018)
180. Nkosi v S (A331/16) [2018] ZAGPPHC 121 (2 March 2018)
181. Sebogo and Another v S (A55/2018) [2018] ZAGPJHC 639 (12 November 2018)

182. Chilembe v S [2020] JOL 48452 (GP)
183. Dlamini v S (271/2019) [2020] ZAGPPHC 195 (28 May 2020)
184. S v Ndziweni (SS149/2015) [2018] ZAGPJHC 117 (20 April 2018)
185. Bila and another v S [2019] JOL 45293 (GP)
186. Macane v S (A55/2018) [2020] ZAGPJHC 206 (20 May 2020)
187. Gaosiwe and Another v S (A281/2017) [2019] ZAGPPHC 1001 (24 October 2019)
188. S v Obi and Others (CC40/2018) [2019] ZAGPPHC 1045 (18 September 2019)
189. S v Sithole (CC38/19) [2019] ZAGPPHC 1026 (12 December 2019)
190. Manqele and Another v S (A492/2013) [2020] ZAGPJHC 210 (4 June 2020)
191. Masiteng v S (A272/2019) [2020] ZAGPPHC 471 (12 August 2020)
192. Mathebula v S (A14/2020) [2020] ZAGPJHC 197 (30 July 2020)
193. ABM v S [2020] JOL 48248 (GP)
194. Mgwevu v S [2020] JOL 48763 (GP)
195. TIM v S [2020] JOL 48750 (GJ)
196. Modisenyane v S [2020] JOL 47001 (GP)
197. Molaza v S [2020] JOL 47971 (GJ)
198. Molefe v S [2020] JOL 49061 (GJ)
199. MSN v S [2020] JOL 49208 (GJ)
200. Nkabinde and Another v S (A205/2019) [2020] ZAGPJHC 312 (25 August 2020)
201. Nkosi v S [2020] JOL 50174 (GP)
202. Nqothula v S [2020] JOL 49118 (GP)
203. OHM v S [2020] JOL 48705 (GP)
204. S v Sithole (CC40/2019) [2020] ZAGPPHC 497
205. S v Bhaso 2020 JDR 1621 (GJ)
206. S v Buthelezi 2020 JDR 0895 (GP)
207. S v FT 2020 JDR 0432 (GJ)
208. S v Letsibane 2020 JDR 1087 (GP)
209. S v Mathenjwa 2020 JDR 1902 (GP)
210. S v Mdletshe 2020 JDR 0396 (GP)
211. S v Mokhabela 2020 JDR 2124 (GP)
212. S v Ndlovu 2020 JDR 0534 (GJ)
213. S v Nkopane 2021 JDR 0151 (GP)
214. S v Ntimba 2021 JDR 0154 (GP)
215. S v Nxumalo 2021 JDR 0042 (GP)
216. S v Tshokolo 2020 JDR 1799 (GP)
217. TS v S (Appeal Judgment) [2020] JOL 49434 (GP)
218. Tshebesepe v S [2020] JOL 49271 (GP)

219. Valela v S (A23/2020) [2020] ZAGPJHC 165 (3 June 2020)
220. Griesel v S (A309/2019) [2021] ZAGPPHC 866 (15 December 2021)
221. Hadebe v S [2021] JOL 50596 (GP)
222. Khuzwayo v S [2021] JOL 51978 (GJ)
223. Madonsela v S [2021] JOL 50901 (GJ)
224. Magabe v S (Appeal Judgment) [2021] JOL 49536 (GP)
225. Mahlangu v S [2021] JOL 51522 (GP)
226. Manana and others v S [2021] JOL 52679 (GP)
227. Maphosa v S [2021] JOL 50075 (GP)
228. Maqhwara v S [2021] JOL 51949 (GJ)
229. Mavuso v S [2021] JOL 52482 (GJ)
230. Mazibuko v S [2021] JOL 53465 (GP)
231. Mbele v S (A94/2020) [2021] ZAGPPHC 272 (30 April 2021)
232. Mhlanga v S [2021] JOL 52677 (GP)
233. Monareng and another v S [2021] JOL 51039 (GP)
234. Mothate v S [2021] JOL 50532 (GP)
235. Mthimkhulu v S [2021] JOL 51275 (GP)
236. Nene v S [2021] JOL 50987 (GJ)
237. Ramotekwa v S [2021] JOL 53748 (GP)
238. RR v S [2021] JOL 52464 (GP)
239. S v Jiyane [2021] JOL 52978 (GJ)
240. S v Obono (Sentence Judgment) [2022] JOL 53814 (GP)
241. S v Duma 2021 JDR 2878 (GJ)
242. S v IT 2021 JDR 1097 (GP)
243. S v Mampana 2021 JDR 0617 (GP)
244. S v Masuku 2021 JDR 0115 (GP)
245. S v Maswanganyi 2021 JDR 0425 (GP)
246. S v Mokhare 2021 JDR 1331 (GP)
247. S v Nkabinde 2021 JDR 2418 (GP)
248. S v Toons 2021 JDR 0761 (GP)
249. Sebaka v S (A316/2019) [2021] ZAGPPHC 794 (30 November 2021)
250. Sechaba v S [2021] JOL 50590 (GP)
251. Seroka v S [2021] JOL 51029 (GP)
252. Simelane v S [2021] JOL 50389 (GP)
253. Talane v S [2021] JOL 50942 (GP)
254. Talimo v S [2021] JOL 50611 (GP)
255. S v Ndlangamandla 2019 JDR 1072 (MN)

256. S v Mokoena 2020 JDR 1179 (MN)
257. Sibanyoni v S [2020] JOL 47446 (ML)
258. Sithole v S [2020] JOL 48717 (MM)
259. Dlamini v S [2021] JOL 53121 (ML)
260. Gumede v S [2021] JOL 50806 (ML)
261. Masina v S [2021] JOL 52675 (ML)
262. S v Janse van Rensburg (CC70/2020) [2022] ZAMPMBHC 51 (21 June 2022)
263. S v Mashego 2022 JDR 0834 (MN)
264. Ximba v S [2019] JOL 45727 (SCA)
265. The Director of Public Prosecutions: Gauteng Division, Pretoria v Buthelezi (142/18) [2019] ZASCA 170 (29 November 2019)
266. Director of Public Prosecutions Limpopo v Motloutsi [2019] JOL 40676 (SCA)
267. Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi 2018 JDR 0685 (SCA)
268. Director of Public Prosecutions, Free State v Mashune 2018 JDR 0687 (SCA)
269. Director of Public Prosecutions, Grahamstown v Peli 2018 JDR 0627 (SCA)
270. Haarhoff & another v Director of Public Prosecutions, Eastern Cape (1192/17) [2018] ZASCA 184 (11 December 2018)
271. S v Ngcobo 2018 (1) SACR 479 (SCA)
272. Buso v S [2022] JOL 54529 (GP)
273. Changwaza v S [2022] JOL 52976 (GP)
274. Chauke v S [2022] JOL 54004 (GJ)
275. Danga v S [2022] JOL 52201 (GP)
276. Latakgomo v S [2022] JOL 54765 (GP)
277. Madikizela v S [2022] JOL 54433 (GJ)
278. Makwakwa v S [2022] JOL 52318 (GP)
279. Masuku v S [2022] JOL 55596 (GP)
280. Molete and another v S [2022] JOL 54789 (GP)
281. Mphabantshi v S (A259/2021) [2022] ZAGPPHC 521 (4 July 2022)
282. Mtimba v S [2022] JOL 54759 (GP)
283. Mzangwa v S [2022] JOL 54423 (GP)
284. Mzinyane v S [2022] JOL 52095 (GJ)
285. Ngake v S [2021] JOL 52424 (GP)
286. Rasehlapa v S (A26/2021; RC174/2017) [2022] ZAGPJHC 1 (21 January 2022)
287. S v Khumalo and Another (SS 031/2021) [2022] ZAGPJHC 166 (9 March 2022)
288. Sekete and Another v S (Al 56/2013) [2022] ZAGPJHC 204 (8 April 2022)
289. Seodisa v S [2022] JOL 54172 (GP)
290. Zwane v S [2022] JOL 54006 (GJ)

291. S v Ninow [2022] JOL 53211 (GJ)
292. Dlamini v S [2016] JOL 36807 (KZP)
293. S v Nkwanyana 2016 JDR 1762 (KZP)
294. S v Govender 2016 JDR 0265 (KZP)
295. S v Msibi 2016 JDR 1550 (KZP)
296. Gumede v S (AR545/2016) [2017] ZAKZPHC 29 (7 March 2017)
297. Makhanyana v S (AR96/15) [2017] ZAKZPHC 28 (23 March 2017)
298. Mthembu and Another v S (AR131/16) [2017] ZAKZPHC 21 (30 June 2017)
299. Mxolisi v S (AR483/16) [2017] ZAKZPHC 5 (23 February 2017)
300. Ngwadla v S (AR208/2012) [2017] ZAKZPHC 23 (10 May 2017)
301. S v Myeza 2017 JDR 1632 (KZP)
302. S v Nyuswa 2017 JDR 1144 (KZP)
303. Buthelezi v S [2019] JOL 42709 (KZP)
304. Makhanya v S [2019] JOL 43248 (KZP)
305. S v Nxumalo (CCD6/2017) [2018] ZAKZDHC 48 (22 October 2018)
306. Fakudze v S (AR410/2018) [2019] ZAKZPHC 32 (7 June 2019)
307. Khumalo v S (AR 398/2017) [2019] ZAKZPHC 53 (29 July 2019)
308. Mjoli v S (AR391/16) [2019] ZAKZPHC 69 (1 November 2019)
309. Nombele v S [2019] JOL 55110 (KZP)
310. Nxumalo v S (AR265/2017) [2019] ZAKZPHC 46 (19 July 2019)
311. S v Ndlovu 2019 JDR 1431 (KZP)
312. S v Ngobese 2019 JDR 0649 (KZP)
313. Khumalo v S (AR111/2019) [2020] ZAKZPHC 22 (10 July 2020)
314. Majikijela v S (AR199/2015) [2020] ZAKZPHC 64 (6 November 2020)
315. S v Mthombeni 2020 JDR 1437 (KZP)
316. S v Myeni 2020 JDR 1385 (KZP)
317. Dulela v S [2022] JOL 54986 (KZP)
318. Khoza v S [2022] JOL 54652 (KZP)
319. Mhlongo v S [2022] JOL 55115 (KZD)
320. Tshazi v S (AR22/21) [2022] ZAKZPHC 27 (20 June 2022)
321. Zondi v S (AR117/2021) [2022] ZAKZDHC 27 (2 June 2022)
322. Hadebe and Others v S (AR545/2018) [2021] ZAKZPHC 59 (3 September 2021)
323. Hadebe v S (AR242/20) [2021] ZAKZPHC 47 (5 August 2021)
324. Khanyile v S [2021] JOL 51649 (KZP)
325. Mhlongo v S (AR504/19) [2021] ZAKZPHC 45 (30 July 2021)
326. Mombika v S [2021] JOL 51749 (KZP)
327. S v Gumede 2021 JDR 1044 (KZP)

328. S v Sishwili 2021 JDR 1256 (KZP)
329. Xaba v S [2021] JOL 51466 (KZP)
330. Sibiya v S (AR03/17) [2021] ZAKZPHC 13 (11 February 2021)
331. S v Pillay (Sentence Judgment) [2021] JOL 53039 (KZD)
332. S v Palmer 2017 JDR 1552 (SCA)
333. S v GO 2017 JDR 1582 (SCA)
334. S v Gcaza 2017 JDR 0995 (SCA)
335. De Beer v The State (1210/2016) ZASCA 183 (5 December 2017)
336. Ndlovu v The State [2017] ZACC 19
337. D v The State (89/16) [2016] ZASCA 123 (22 September 2016)
338. S v Kaywood 2016 JDR 2203 (SCA)
339. S v Seedat 2016 JDR 1820 (SCA)
340. S v Tshoga 2017 JDR 0057 (SCA)

APPENDIX B: Coding Sheet

Case Citation:
SCA: _____ HC: _____

Court/province:
Prescribed minimum sentence in case under review:
Reason for prescribed sentence:
Number of years sentenced at trial:
Number of years' sentence reduced or increased on appeal:

Age of the victim(s):
Suspended sentence: Y/N

Sentences run concurrently (with other sentences): Y/N
Sentences run cumulatively: Y/N

No.	Code Description	Google Form Variable Name	Y/N	(Actual) Prescribed Min Sentence ito Legislation	Amended Prescribed Min Sentence	Matter Remitted (Y/N)
	Procedural Irregularities/Misdirections					
0.1	Offender not informed of applicability of Act/correct section of Act	OffenderNotInformed_Applicability		IfYes_ActualPMS	IfYes_AmendedPMS	Matter_Remitted
0.2	Misdirection by the court					

0.3	Notes and comments	Note_Comments				

Code Description		Google Form Variable Name	Y/N	Nr.	Comments/Notes
1.	Multiple offenders	Multiple_Offenders		**Other on Google Forms**	
2.	Multiple victims	Multiple_Victims		**Other on Google Forms**	
3.	Multiple charges at trial	MultipleCharges_Trial		**Other on Google Forms**	
4.	Multiple charges amended on appeal	MultipleCharges_AmendedAppeal		**Other on Google Forms**	

Code No.	Code Description	Google Form Variable Name	Aggr.	SCCs (mitigating)	Implied SCCs	Notes/Quotes
5. Offender Characteristics						
5.1	Age	Age_Offender				
5.2	Health	Health_Offender				
5.3	Level of education	Education_Level				
5.4	Socio-economic/ employment status	Employment_Status				
5.5	Culture	Culture				
5.6	Marital status	Marital_Status				
5.7	Occupation/profession	Occupation				
5.8	Family status/obligation/breadwinner	Family_Status				
5.9	Community or political standing	CommunityPolitical_Standing				
5.10	Evidence of remorse	Evidence_Remorse				
5.11	Cooperativeness	Cooperativeness				
5.12	Plea bargain/guilty plea	PleaBargain_GuiltyPlea				

5.13	Drug/alcohol use	Drug_AlcoholUse				
5.14	Perception of accused re: causing harm to victim	Perception_Harm Victim				
5.15	HIV status	HiV_Status				
5.16	Health status	Health_Status				
5.17	First offence	First_Offence				
5.18	First sexual offence	First_SexualOffen ce				
5.19	Previous offences	Previous_Offence s				
5.20	Previous sexual offences	Previous_Sexual Offences				
5.21	Number of sexual offences committed by the offender against the victim *in this case*	NumberSexualOff ences_CurrentVic tim				
5.22	Time spent in custody	TimeSpent_Custo dy				
5.23	Possibility of mental illness of accused	Poss_OffMentalill ness				
5.24	The 'moral blameworthiness' of the perpetrator	Moral_Blamewort hiness				
5.25	Prospects of rehabilitation	Prospects_Rehabi litation				
5.26	Additional Factors Offenders	Additional_Factor sOffenders				
5.27	Quotes					
5.28	Notes and Comments					
	6. Victim Characteristics					
6.1	Previous sexual history	Previous_Sexual History				
6.2	Relationship with accused(s)	Relationship_Wit hAccuseds				
6.3	Virginity	Virginity				

6.4	Drug/alcohol use	Drug_AlcoholUse				
6.5	Physical attributes	Physical_Attributes				
6.6	Behavioural characteristics (provocative, opened door/invited accused in, "willing victim")	Behavioural_Characteristics				
6.7	Received gifts or other benefits from accused	GiftsReceived_FromAccused				
6.8	Intellectual or psycho-social disability	IntellectualPsychosocial_disability				
6.9	Level of education	Education_ Level				
6.10	Level of awareness or maturity					
6.11	Gender identity or sexual orientation	GenderID_Sexual Orientation				
6.12	Employment (incl. ref to sex work)	Employment				
6.13	Family status	Family_Status				
6.14	Pregnant at time of offence	Pregnant_During Offence				
6.15	Pregnant as a result of offence	Pregnant_DueTo Offence				
6.16	Age	Age				
6.17	Physically and/or intellectually disabled and rendered particularly vulnerable as a result	Physically_IntellectuallyDisabled				
6.18	Additional Factors Victims	Additional_FactorsVictims				
6.19	Quotes	Quotes				
6.20	Notes/Comments	Notes/Comments				
	7. Circumstances of the Offence					

7.1	'The rape(s)does/does not fall within the worst category of cases' or the rape in question was 'not the worst kind of rape'	NotWorst_KindRape				
7.2	The use of a dangerous weapon or firearm	UseDangerousWeapon_Firearm				
7.3	The lack of use of dangerous weapon or firearm	LackUseDangerousWeapon_Firearm				
7.4	The victim was threatened with additional harm (for example: should s/he scream or fight back during the commission of the offence or report thereafter)	VictimThreatened_AddHarm				
7.5	Seriousness of the offence	Seriousness_Offence				
7.5	Number sexual offences committed *in this case (for example: gang rape)*	NumberSexualOffences_ThisCase				
7.6	Multiple offenders	Multiple_Offenders				
7.7	Premeditation factors	Premeditation_Factors				
7.8	Threat to society	Threat_Society				
7.9	Victim 'consented'	Victim_Consented				
7.10	Location of rape (home, shebeen, field, accused's home, etc.)	Location_OfRape				
7.11	The form of penetration used in the commission of the offence	PenetrationForm				

7.12	Perpetrator related to victim	PerpetratorRelated_Victim				
7.13	Perpetrator known to the victim (For example: the relationship is not one of blood, adoption, sex, romance or functional dependency but more distant. Alternatively, there is no 'relationship' as such but they are known to one another – from the same school, seen around in the neighbourhood, the partner or friend of a family member/housemate etc.	PerpetratorKnown_Victim				
7.14	The perpetrator breached the victim's trust	PerpetratorBreached_VictimTrust				
7.15	Existence or lack of evidence of physical injury	ExistenceLackEvidence_PhyInjury				
7.16	Existence or lack of evidence of psychological injury, or aggravating circumstances	ExistenceLackEvidence_PsychInjury				
7.17	Additional Factors Circumstances	Additional_FactorsCircumstances				
	Quotes	Quotes				
	Notes and Comments	Notes/Comments				
	8. 'Morality, history or social context'					
8.1	Reference to violent SA history	Ref_ViolentSAhistory				
8.2	Reference to rape itself being a violent crime	Ref_RapeViolentCrime				
8.3	"Moral degeneration" of society	MoralDegeneration_Society				

8.4	Position on gender expression and/or sexual orientation of victim/perpetrator	PositionGenderExpression_VicPerp				
8.5	The constitutional rights of victims (for example: to dignity and/or equality and/or freedom and security of their persons etc.) and the violation of these rights by the accused	ConstitutionalRights_Victims				
8.6	Expectations of society	Expectations_Society				
8.7	Rape statistics/frequency of cases/Prevalence	RapeStats_Prevalance				
8.8	Additional Factors Morality	Additional_FactorsMorality				
8.9	Quotes	Quotes				
8.10	Notes/Comments	Notes/Comments				
	9. Institutional Factors					
9.1	Capacity within prisons or other correction facilities	Capacity_Prison				
9.2	Existence and/or capacity of community programmes	Capacity_CommunityProgrammes				
9.3	Reference to mental illness/need for psychiatric care	Ref_NeedPsychCare				
	Additional Factors Institutional	Additional_FactorsInstutional				
	Quotes	Quotes				
	Notes and Comments	Notes/Comments				
	10. Process and Procedural Irregularities/ Misdirections					
10.1	Absence of victim impact statement or victim impact statement dismissed by court	Absence_VIS				

10.2	Was victim impact statement persuasive	VIS_Persuasive				
10.3	Expert evidence in mitigation or aggravation of sentence (comment on use of expert evidence)	Expert_Evidence				
10.4	Failure on the part of expert psychologist report to specify long term psychological damage likely to be suffered by a victim	Failure_ExpertPsychologist				
10.5	Express reference to minimum sentencing framework	Ref_MinimumSentencingF				
10.6	Express reference to judicial discretion in sentencing	Ref_JudicialDiscretion				
10.7	Reference by the Appeal Court to the Trial Court having 'over-emphasised the serious of the offence'	Reference_Appeal Court				
10.8	Reliance on precedent/case law	Reliance_PrecedentCcaseLaw				
10.9	Role of the Courts to promote rehabilitation	RoleCourts_PromoteRehabilitation				
10.10	The State agreed before the Appeal Court that the prescribed minimum sentence imposed by the Trial Court is 'shocking', 'heavy' and/or 'inappropriate' and, thus, should be departed from	StateAgreed_BeforeAppealCourt				
10.13	Additional Factors Process	Additional_FactorsProcess				
	Quotes	Quotes				

	Notes and Comments	Notes_Comments				