IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

(Coram: Kusevitsky J, et Andrews AJ)

CASE NO: A 151/2024

In the matter between:

DERICK CONRADIE Appellant

and

THE STATE Respondent

JUDGMENT

ANDREWS, AJ:

Introduction

[1] Mr Derick Conradie (the "Appellant"), was arraigned on two counts of contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters Amendment Act) Act 32 of 2007 ("SOMA") to wit rape, in Oudtshoorn Regional Court.

[2] The Appellant, who was legally represented, pleaded not guilty on 6 May 2021 and was, pursuant to trial proceedings, convicted on 30 August 2021 on both counts of rape. On 13 October 2021, the Appellant was sentenced to Imprisonment for Life in terms of Section 51(1) of the Criminal Law Amendment Act[1] ("CLAA") on each count. He was declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act[2]. The court also ordered that his details be entered into the National Register for Sex Offenders in terms of Section 50(2)(a)(i) of SOMA.

[3] The Appellant elected to exercise his automatic right of appeal in terms of Section 309 of the Criminal Procedure Act.

Factual Background

[4] The complainant, who was 15 years old at the time of the incidents, resided in Calitzdorp with her foster mother, F[redacted] C[redacted] ("Ms C[redacted]"), the Appellant and her younger foster sister, S[redacted] F[redacted] ("S[redacted]"). Ms C[redacted] is the biological mother of the accused, who was approximately 42 years old, at the time of the respective incidents.

The first incident

[5] On the evening of 24 April 2020, the Appellant requested the complainant to accompany him to the "Plate" because he wanted to smoke drugs. The Appellant consumed the drugs, whereafter he told the complainant to go into the "shack" which

[1] Act 105 of 1997.
[2] Act 60 of 2000.

belonged to Piepie and Van where there was nobody home at the time. The Appellant then propositioned the complainant for sex. The complainant refused and attempted to run away, but the Appellant pulled her back. She tried to raise an alarm by screaming, but nobody heard her. The Appellant proceeded to have sex with the complainant without her consent. The complainant described that she felt pain in her vagina. Thereafter they walked home together. The Appellant gave a report of what happened to her to her foster sister, S[redacted].

The second incident

[6] On 1 May 2020 the Appellant requested the complainant to accompany him to Gamka. They walked together until they reached the river where the Appellant asked the complainant for sex. The complainant refused and the Appellant pulled the complainant back when she attempted to run away. The Appellant took out his knife and threatened to kill the complainant. The Appellant threw the complainant down on the stones and then proceeded to pull down her pants. The Appellant had sex with the complainant without her consent. When the complainant tried to scream, the Appellant covered her mouth so that no-one could hear her. Thereafter, the complainant accompanied the Appellant to Gamka to the residence of the Appellant's girlfriend, Juffroutjie. The Appellant remained there and the complainant proceeded to go home on her own.

[7] The complainant reported the incident to Ms C[redacted] the following day. Ms C[redacted] asked her whether they should report what happened at the police station. Nothing happened until Thursday the 5th of May 2020 when the complainant went to aunt S[redacted] R[redacted] ("Ms R[redacted]") and reported what happened to her. Ms R[redacted] accompanied the complainant to the police station to press charges.

Grounds of Appeal *ad* Conviction

[8] The Appellant's salient grounds of appeal included *inter alia* that the court *a quo* erred:

(a) in accepting that the complaint's evidence was satisfactory in all material aspects;

(b) in not applying sufficient weight to the cautionary rules;

(c) in not demonstrating the required degree of analysis when considering the probabilities of the matter; and

(d) in rejecting the Appellant's version as not being probable.

Applicable Legal principles

[9] The approach by a court of appeal as set out in ***S v Francis***[3] is explained as follows:

> *'In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence – reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of the oral testimony.'*

Principal submissions by the Appellant

[10] The Appellant submitted that the court *a quo* did not apply sufficient weight to the applicable cautionary approach. It was also contended that the

[3] 1991 (1) SACR 198 (A) 198 – 199G.

Magistrate did not demonstrate in his judgment the required degree of analysis in its approach to the probabilities and improbabilities in the complainant's evidence. Furthermore, the Appellant argued that the evidence of the complainant was not satisfactory in all material respects as there were clear discrepancies, contradictions and improbabilities in her evidence.

Respondent's principal submissions

[11] The Respondent contended that it is not disputed that the complainant and the Appellant were together on the dates of the respective incidents. It was furthermore submitted that the court is to have regard to the fact that the Appellant was not a good witness and despite having initially put up a bare denial, proffered a version that was never put to the complainant during cross-examination.

[12] It was argued that the complainant's evidence on the other hand, was consistent, which is born out by the first reports. In this regard, it was submitted that reliability in the complainant's evidence can also be found in the concessions made by the complainant. In addition, the Respondent contended that the court *a quo's* assessment of the complainant as a witness, cannot be faulted. It was furthermore argued that given the age of the complainant, there is no indication that the complainant was not a trustworthy witness.

Evidence of a single child witness

[13] The court *a quo* had regard to the applicable legal principles pertaining to the cautionary rules, in particular in relation to sexual offences matters and the approach to the evidence of child witnesses.

[14] The general approach relating to the evidence of a single witness is encapsulated in the seminal judgment of ***S v Carolus*** [4]. It is trite that there is no legal provision requiring corroboration of the evidence of children, but it is settled law that the evidence of children should be approached with caution'.[5] In the matter of ***DPP v S***[6], Kirk-Cohen J stated that the proper judicial approach is not to insist on the application of the cautionary rules, but to consider each case on its own merits.[7]

[15] The manner in which the evidence of a young child should be approached has been thoroughly analysed in ***Woji v Santam Insurance Company Ltd***[8], where it was stated that:

> *'The court must assess the reliability of the evidence according to the child's powers of observation, ability to remember and ability to relate events. These factors, of course, apply to the assessment of all witnesses, not only children. The danger of believing a child when the child's evidence stands alone must not be estimated. It is not, however, a scientific formula which is applied perfunctorily. One is dealing with people, albeit immature people who are susceptible to suggestion and flights of fancy, who have short memories and attention spans and who are perhaps still unaware or uncertain of the line separating fantasy and reality, but people nonetheless. For that reason one should approach a child's evidence with insight and considerations, viewing the child as a person, but also with awareness of the circumstances in which the child made*

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[4] 2008 (2) SACR 207 (SCA) at 211J-212A. *'Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the evidence of any competent witness. There is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence.'*

[5] Hiemstra's Criminal Law 24-7; See also *R v Mandla* 1951 (3) SA 158 (A) at 163; *R v J* 1966 (1) SA 88 (RA); *S v S* 1995 (1) SACR 50 (ZA),

[6] 2000 (2) SA 711 (T) page 714I – J.

[7] Pages 714J – 715A - B *'It is so that children lack the attributes of adults and, generally speaking, the younger, the more so. However, it cannot be said that this consideration ipso facto requires of a court that it apply the cautionary rules of practice as though they are matters of rote.*
On a parity of reasoning... it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before a conviction take place.'

[8] 1981 (1) SA 1020 (A) at 1028.

observations. The presiding officer should ensure that questions to children, especially when put via an intermediary, are open-ended, non-leading…'

[16] The court *a quo* was alive to the legal principles pertaining to the evaluation of the evidence of a single witness. It is evident that the trial court thoroughly dealt with the evidence as envisaged in the seminal judgment of ***S v Sauls***[9] where the court held:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness…The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there is shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told'

[17] The identified discrepancies in the evidence of the complainant included *inter alia*:

(a) that she did not report either of the incidents at the first available opportunity;

(b) that she did not argue with the Appellant despite her evidence that she and the Appellant would argue a lot because he stole food from the house;

(c) that the complainant testified that she was afraid of the Appellant which is not in line with her foster sister's testimony that the complainant was not afraid of the Appellant;

(d) that the complainant initially denied the version of the Appellant that was put to her, however, she conceded later that she was at Pat's house, the Appellant's friend. She also conceded that they went to Sakkie's house where they consumed drugs;

[9] 1981 (3) SA 172 (A) at 180E - G.

(e) that the complainant contended that S[redacted] told Ms C[redacted] about the incident whereas S[redacted] testified that the complainant told her;

(f) that under cross-examination the complainant testified that the Appellant threatened her to go with him on the 1st of May 2020, however, during examination in chief, the complainant did not testify to that effect. In this regard it was illuminated that in the complainant's evidence in chief, she testified that she willingly went with the Appellant and that the threat came later when she resisted the Appellant's request to have sex with him and;

(g) that the medico-legal report is inconsistent with the testimony of the complainant insofar as there being no mention of a back injury. Furthermore, the complainant did not testify about being strangled, but same was noted in the report.

[18] It is trite that information contained in a J88 contributes towards or tests consistency of the complainant's version. It was argued that the differences are indicative that there are inconsistencies in the complainant's evidence which affects her credibility. Although the complainant stated during cross-examination that she informed the doctor that her back was hurt, this discrepancy is not material as regard is to be had to where the second incident had taken place, namely close to the river. It can be accepted that there would be rocks in the surrounding terrain or natural environment close to a river. Regard must also be had to the fact that the Appellant threatened the complainant at knife point and had sexual intercourse with her while covering her mouth. Furthermore, the complainant only had the medical examination a few days after the incident. In my view, the back injury in these circumstances would not be the focus but rather the sexual assault.

[19] The complainant testified under cross-examination that she informed the doctor that her back got hurt during the incident. The fact that the medico-legal report does not make mention thereof, in my view, does not discredit the complainant and or bring into question the veracity of what had happened to her as there are other safeguards on which the court *a quo* placed reliance in order to reach his conclusion.

[20] The matter of ***S v Bruiners en 'n Ander*** [10] is instructive the court's approach in dealing with difference that arise in the evidence of witnesses. In this regard, the court stated that:

> *'It was a fallacy to presuppose, on the basis merely of differences in the evidence, that neither or both of the witnesses in question were untruthful or unreliable. Experience has shown that two or more witnesses hardly ever give identical evidence with reference to the same incident or events. It was thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State's version.'*

[21] In my view, the details which were omitted or discrepancies during the complainant's evidence is not indicative that she was not a truthful witness. Those omissions or deviations, on a conspectus of the evidence, are not material in my view. The court *a quo* indicated that the complainant made a good impression and testified in a satisfactory manner in relation to the material aspects of the events. The trial court also found no evidence that the complainant had an ulterior motive to falsely implicate the Appellant.

[10] 1998 (2) SACR 432 (SE) at 437*h*.

[22] Our law pertaining to the court's approach in dealing with the cautionary rules has developed through decided cases. The applicable law in matters of this nature was enunciated resolutely where Gubbay CJ in ***Banana v State*** [11] stated:

> *'Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.'*

[23] The complainant's innocent reference to sex and the sexual encounters lends credence to her version. In this regard she uses references to the effect, *"hy sê hy soek oulik"* and *"toe doen hy my oulik"*, which in my view, is indicative that the complainant's version is not concocted.

[24] The court *a quo* also observed the demeanour of the complainant and that she became emotional when she recounted the incident at the river.

Delayed reporting

[25] The court *a quo*, dealt extensively with the issue of delayed reporting. In this regard, the court *a quo* was alive to the fact that the complainant was threatened, and that she told S[redacted] what had happened to her. The court *a quo* also identified the conflict experience by her foster mother, Ms C[redacted], after having been confronted with the information. The court *a quo*, took cognisance of why Ms C[redacted] believed the report of the complainant, followed by the reaction of Ms C[redacted] to immediately pack the Appellant's clothing. Although there was an opportunity to inform Juffroutjie, the Appellant's girlfriend after the second incident, it is

[11] [2000] 4 LRC at page 632e – f.

understandable why the complainant would be apprehensive. This, in my view, is the same apprehension she experienced when she did not immediately inform Ms O[redacted] after the first incident. One can only imagine the trauma of a child just having been sexually violated and then being confronted with an added turmoil of how to convey this news to a girlfriend or biological mother of the assailant, in circumstances where the complainant is in foster care.

[26] The court *a quo* correctly indicated that the purpose of a first report is to show consistency. Section 59 of SOMA states that *'[i]n criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'* In this instance, the complainant was evidently afraid and conflicted. The matter of ***S v Hammond*** [12] referenced by the Appellant's counsel clearly predates the Sexual Offence and Related Matters amendment Act and, in my view, finds no application as it suggests that such delay goes to the complainant's credibility, which was not the intention of the legislature.

[27] The court *a quo* also correctly made no negative inference. In my view, whatever delay there may have been, was not unreasonable, and the court *a quo* was correct to not draw any negative inference therefrom, if regard is had to the unique circumstances and factual matrix of this matter.

[28] As regards to the minor issue of who informed Ms O[redacted], nothing turns on it, as the complainant was present when she was informed. Consequently,

[12] 2004 (2) SACR 303 (SCA) at paras 308j – 309a; 309c – 310c – e.

I am of the opinion that the court a quo's credibility finding cannot be faulted, if regard is had to the considerations taken into account. It is generally accepted that courts of appeal are hesitant to interfere with the credibility findings of a trial court as enunciated in ***S v Horn*** [13]**:**

> *'In this regard it is of course true that not every error made by witnesses, not every contradiction or deviation, necessarily affects the credibility of a witness. These issues must be carefully weighed, viewing the evidence as a whole, in order to decide whether the truth has been told, despite possible shortcomings.'*

Consent

[29] In dealing with the issue of consent, it is uncontroverted that the complainant was 15 years old at the time of the respective incidents. It is settled law that a child under the age of 16 years cannot consent to sex. Therefore, even if the complainant propositioned the Appellant to have sex for TIK, as alleged by the Appellant, that could never be a justification for the Appellant, being a 42-year-old man, having had sexual intercourse with a child who was under the age of 16 years at the time. In any event, this version put to the complainant changed when the Appellant testified in his defence.

[30] I am reminded of what was stated in ***S v Jackson***[14] that *'the cautionary rule in sexual assault cases based on an irrational and out-dated perception and fundamentally discriminates against women, by far the majority of complainants in sexual offences. The out-dated perception wrongly states that complainant's in sexual assault cases are automatically unreliable'*.

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[13] 2020 (2) SACR 280 (ECG) at para 75.
[14] 1998 (1) SACR 470 (SCA); *S v J* 1998 (4) BCLR 424 (SCA).

The court a quo's approach to evaluating the evidence of the Appellant

[31] It is trite that no onus rests on the accused to convince the court that any explanation is improbable, but beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to be acquitted.[15] There were marked differences in the Appellant's version. His evidence in chief differed to the version that was put to the complainant during cross-examination.

[32] It was submitted that despite the Magistrate's finding that the complainant provided *prima facie* evidence in support of the offences, the court *a quo* nevertheless assessed the defence case to ascertain whether the Appellant's version is probable when weighed up against the evidence of the complainant. The court *a quo* identified the Appellant's inconsistencies in relation to count 1. The court *a quo* had regard to the fact that the Appellant initially denied that he was in the shack and that he had intercourse with the complainant. The court *a quo* noted that the Appellant provided a different version to what he instructed his attorney, which version was put to the complainant during cross-examination. In this regard, the version put was that the complainant would give the Appellant sex in exchange for TIK. The Appellant did not testify about this. When questioned about this during cross-examination, he indicated that he had no knowledge thereof.

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[15] *R v Difford* 1937 AH on page 373; see also *S v V* 2000(1) SACR 453 AH on page 455. *'...there is no obligation upon an accused person, where the state bears the onus, to convince the court. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict, unless it is satisfied not only that the explanation is improbable, but beyond any reasonable doubt, it is false. It is permissible, to look at the probabilities of reasonably possibly true, but whether one subjectively believes him is not the test.'*

[33] The court *a quo* also dealt with the Appellant's warning statement, more particularly that there was an ominous line drawn through the content. The court *a quo* noted that the Appellant's warning statement was in line with the version as put to the complainant. It is noteworthy that the Appellant during his evidence in chief denied the content of the warning statement and during cross-examination, denied that he had made the statement. During cross-examination, the Appellant testified to aspects that were not put to the complainant and not testified by him during his evidence in chief. The Appellant also added onto his evidence during cross-examination.

[34] Furthermore, there were aspects of the Appellant's version that were never canvassed with his mother and as such, never tested. In this regard, it was contended that although the Appellant's defence was a bare denial of the allegations, there were aspects of his version that are highly improbable with specific reference to the Appellant's evidence on possible motives for the complainant to falsely implicate him in the crimes. The Appellant suggested that the complainant had falsely implicated him because she did not like him because he had stabbed her brother. It was also proposed that the complainant's boyfriend might have influenced her to falsely implicate him. The court *a quo* could not find that the complainant had any motive to falsely implicate the Appellant.

[35] Moreover, regard is also to be had to the Appellant's reaction when his clothes were placed outside by his mother. On previous occasions, he would argue with his mother about putting him out, whereas on this occasion, he did not utter a word and simply left. This, despite the fact that he maintained his innocence.

Discussion

[36] It is a fundamental legal principle that the powers of a court of appeal to interfere with the finding of a trial court is limited. It is evident that the court *a quo* was alive to the cautionary principles applicable to child witnesses as well as the court's approach to the evidence of a single witness. The court *a quo,* considered the probabilities and the improbabilities in the version of the Appellant as well as the version of the complainant. In this regard, the complainant's recollection of the details of both events were dealt with in detail in the judgment. The court *a quo*, after carefully analysing the evidence and correctly applying the applicable legal principles and caution, was satisfied that the complainant gave a chronological account of the incidents. The court *a quo* found the complainant to be a credible and reliable witness and was satisfied that the complainant did not have an ulterior motive.

[37] In the absence of demonstrable and material misdirection by the trial court, its findings of facts are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[16] It is trite that the Appellant bears the onus to convince the court on adequate grounds why the trial court was wrong. It is further accepted in our law, that a court of appeal will not lightly interfere with a trial court's factual findings unless findings were clearly wrong. Therefore, in the absence of any misdirection in the trial court's conclusion, it is presumed to be correct.

[16] *S v Hadebe* 1997 (2) SACR 641 (SCA) 645e – f.

[38] Therefore, on a conspectus of the evidence, I am satisfied that the court *a quo* considered the matter in its entirety and safely rejected the Appellant's version as being so improbable that it cannot be reasonably possibly true. Consequently, I am satisfied that the court *a quo* correctly found the evidence of the complainant to be clear and satisfactory in material respects and can find no misdirection in its finding.

***Ad* Sentence**

Appellant's grounds of appeal on sentence

[39] The Appellant's grounds of appeal on sentence included *inter alia*:

(a) That by imposing the minimum sentence of life imprisonment, the court erred when not finding that the cumulative effect of the fact that the Appellant was a first offender for rape, the incidences do not fall under the most serious of rapes and the totality of the Appellant's personal circumstances amount to substantial and compelling circumstances, justifying a lesser sentence and;

(b) That the court erred by imposing a sentence which is shockingly inappropriate given that the trial court did not place enough weight on the rehabilitation of the appellant and did not properly evaluate all of the factors.

Legal principles on sentence

[40] It is trite that an appeal court will not lightly interfere with the trial court's exercise of its discretion in relation to sentence, as was held in ***S v Romer***[17] where Petse AJA (as he then was), stated:

'It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with

[17] 2011 (2) SACR 153 (SCA) at para 22; See also *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is

(a) Disturbingly inappropriate;

(b) So totally out of proportion to the magnitude of the offence;

(c) Sufficiently disparate;

(d) Vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and

(e) Is otherwise such that no reasonable court would have imposed it.'

[41] The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by irregularity or misdirection or where there is a striking disparity between the sentence passed and that which this court have imposed.[18] In ***S v Pillay***[19], the court set out the correct approach to an appeal against sentence:

> *'As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'*

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[18] *State v Steyn* 2014 JDR 0596 (SCA) para 11 where Mhlantla JA stated:
'The imposition of sentence is pre-eminently within the discretion of the trial court. The court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or so totally out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection showing that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it.'

[19] [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G; See also *S v Van de Venter* 2011 (1) SACR 238 (SCA) at 243c – e; *S v Malgas* 2001(1) SACR 469 (SCA) at para 12.

Submissions on behalf of the Appellant

[42] The Appellant contended that the court *a quo* did not properly evaluate all the factors and did not place enough weight on the rehabilitation of the Appellant, and by doing so, imposed a sentence which is shocking in the circumstances and would not assist in his reintegration back into society.

[43] In addition, the Appellant contended that a life sentence is the most stringent sentence that a court can impose and that a sentencing court ought to appreciate that there is a gradation of severity in rape cases that needs to be reflected in the proportionality of the punishment. Counsel for the Appellant acknowledged that the Appellant's personal circumstances were not unique. It was however submitted that the nature of the crime and the personal circumstances taken together would justify a deviation from the prescribed minimum sentence.

Respondent's principal submissions

[44] The Respondent submitted that the sentence imposed by the court, may appear, on first consideration of the cumulative effect of the circumstances of this matter to be not the "worst of the worst" and therefore a sentence of life imprisonment may be disproportionate to the crimes. In augmentation of this submission, the Respondent requested that the court is to have regard to what was stated in ***S v Abrahams*** [20]

> *'...rape can [n]ever be condoned. But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.'*

[20] 2002 (1) SACR 116 (SCA) at para 29.

[45] However, it was submitted that the court should consider that on the merits of this matter life imprisonment is justified, if regard is had to the following aggravating circumstances of the case, namely:

(a) that regard is to be had to the fact that the complainant was in foster care;

(a) that the Appellant was convicted on two counts of rape of a minor on two separate occasions and that the Appellant had sufficient time to reconsider his actions;

(b) the nature of the offences triggered a sentence of life imprisonment in terms of Section 51(1) of the CLAA, in respect of rape of a minor and that the victim was raped more than once;

(c) that the complainant considered the Appellant to be her "Boeta" and abused the relationship of trust;

(d) the Appellant used a knife as well as verbal threats to intimidate the complainant to not report the incidents, thereby instilling fear into the complainant;

(e) the circumstances of the case are suggestive that the offences were planned;

(f) that the court *a quo* considered the prevalence of rape in the area of jurisdiction of the trial court, and therefore the imposition of life imprisonment would not be misplaced as it sends a message to deter like-minded people.

Discussion

[46] It is trite that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and would be disregarded only if the recorded evidence showed them to be clearly wrong. This court on appeal cannot simply *juxtapose* its views and opinions on sentence and then conclude that the sentence of the court *a quo* is inappropriate if it differs from what

this court would have done. It is only when the trial court has exercised its discretion in an improper manner or misdirected itself that interference will be warranted.[21]

[47] Ponan JA in ***Van de Venter v S***[22] deals with the circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court and recapitulated the considerations as stated in ***S v Malgas***[23], where Marais JA held:

> *"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...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".'*

[48] It must however be borne in mind, that even in the circumstances set out in ***Malgas*** *(supra)*, courts are not free to 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.[24] This view supports what was stated in ***S v Barber***[25], where Hefer J remarked as follows:

> *'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would*

[21] *S v Rabie* 1975 (4) SA 855 (A); See also *S v Pieterse* 1987 (3) SA 717 (A).
[22] (342/10) [2010] ZASCA 146; 2011 (1) SACR 238 (SCA) (29 November 2010) para 14.
[23] 2001 (1) SACR 469 (SCA) para 12.
[24] Ibid, page 478, para 12.
[25] 1979 (4) SA 218 (D) at 220E – H.

be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly...[26] (my emphasis)

[49] The approach set out in ***Romer*** *(supra)* is predicated on what was stated in ***Malgas***[27] that:

'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 would be entitled to impose a lesser sentence.'

Factors considered by the court *a quo*

[50] The court *a quo* considered the aims of punishment and the ***Zinn*** triad[28] namely, the Appellant's personal circumstances, the nature and severity of the crime. In addition, the court *a quo* had regard to the interest of the community; the mitigating and aggravating circumstances of this matter, interest of the victim, as well as the relevant legal principles set out in the CLAA, together with the relevant case authorities. The court *a quo* found no substantial and compelling reasons to deviate from the prescribed minimum sentence. This court is called upon to determine whether the trial court erred in making this finding.

[51] In the matter of ***S v Ncheche***[29] the learned judge describes rape as:

'... an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her

[26] See also *Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para 7.
[27] Ibid, page 482*e – f*.
[28] See *S v Zinn* 1969 (2) SA 537 (A) and *Fredericks v S* [208/11] [2011] ZASCA 177 (29 September 2011).
[29] 2005 (2) SACR 386 (WLD) at 395h-I [35] and 396b-f [37].

family... A woman's body is sacrosanct and anyone who violates it does so at this peril and our legislature, and the community at large, correctly expect our courts to punish rapists very severely... It behoves our courts to bear in mind that we are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specific kind are committed [Malgas at 481g].'

[52] It was stated in ***Director of Public Prosecutions, North Gauteng v Thabethe***[30]

'What is even more disturbing is the emergence of a trend of rapes involving young children which is becoming endemic. A day hardly passes without a report of such egregious incidents. Public demonstrations by concerned members of society condemning such acts have become a common feature of our everyday news through the media.'

[53] The words of the court in ***S v Jansen*** [31] rings true and it is as if it was written for a time such as this where the court remarked that rape of a child was said to be:

'an appalling and perverse abuse of male power...it is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background...and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer the added psychological trauma which resulted in a marked change of attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.

It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be

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[30] 2011 (2) SACR 567 (SCA) at para 17.
[31] 1999 (2) SACR 368 (C) at 378h – 379a.

an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

[54] The complainant *in casu*, was placed into foster care at the tender age of around 2 years. The ideology behind foster care is to place children who are "in need of care protection" into a home that is to provide a favourable environment for a child's growth and development. The question that arise is whether the system has failed the complainant in this instance. Foster care, by all accounts is meant to be temporary in nature.

[55] The complainant, grew up in the home of her abuser, regarded him as her "Boeta", but sadly it seems that the Appellant has wielded a reign of terror over the home. This is demonstrated by the uncontroverted fact that his own mother put him out of the house on several occasions; that he threatened his own mother and the complainant at knife point.

[56] Although this is the first time that the Appellant has been found guilty for a sexual offence, he is no stranger to the criminal justice system; having previously received direct imprisonment and at some point, having violated his parole conditions. The Appellant's first brush with the law was in 1995, when he was approximately 17 years old.

[57] The Appellant and his siblings were not raised by Ms C[redacted]. It is unclear from the record when he moved back home. It is noteworthy that his mother, in the victim impact report, expressed distress because the Appellant threatened to harm her too. She indicated that she is fearful of him. The Appellant's mother does not want him back home. She is worried that he will execute his threat to burn her

house down. She stated that what the Appellant has managed to do to the complainant in this matter, he attempted to do to another one of her foster children in Cape Town. This was not challenged by the Appellant's legal representative during the trial. It is evident that the Appellant, has shown no remorse and taken no responsibility for his actions.

[58] I am in agreement with the court *a quo's* finding that there are no substantial and compelling circumstances to justify a departure from the imposition of the minimum sentence of life imprisonment. The circumstances of the Appellant, are in my view, ordinary. In this regard, the Appellant was 43 years old at the time of sentence, unmarried, was employed as a general farm worker, has 10 children who have different mothers. He was not in a position to support his children. Even though the nature of the incidents is perhaps not the most serious degree of rape as alleged by Counsel for the Appellant, the nature of the crime is regarded as serious and egregious, more especially when it is perpetrated on children. Rape is a social evil that plagues many communities and, in this instance, the victim was by all accounts the Appellants foster sister who trusted him.

[59] In ***S v Zitha and Others***,[32] it was remarked that the courts should send out a message to everyone in society, that crimes of violence and, especially sexual violence against women and children will not be tolerated by the courts and that they will not shy away from their duty to protect society even if it means that severe sentences like life imprisonment be imposed however painful it might be for the courts to do so.

[32] 1999 (2) SACR (W).

[60] There can be no disputing the fact that offences of a sexual nature committed against women and children in particular are viewed by society and any reasonable person in a very serious light. If regard is had to the purpose for which the CLAA, which provides for minimum sentences for certain serious offences, was enacted; it serves as an indicator of how serious offences are viewed and regulated in South Africa today. The sentences that courts impose must surely dispel any notion of uncertainty in this regard. Rape is an abhorrent crime. It is not only humiliating and degrading but is also a brutal invasion of privacy of the dignity and touches the very core of the victim's dignity.[33]

[61] There can be little doubt that rape is a repulsive crime and our courts have in the past warned offenders that it '...shall show no mercy to those who seek to invade those rights'[34]. Therefore, in light of the unique circumstances of this matter, and the interest of the community, taking into account the prevalence of this offence in that particular community, I am of the view the court *a quo* exercised its discretion correctly and that the imposition of life imprisonment on both counts is just; does not induce a sense of shock harsh, and sends a strong message to would-be offenders that rape on children will not be tolerated and will be meted with the full might of the law. I can therefore find no misdirection.

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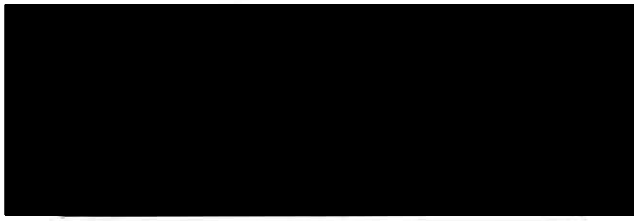
[33] *S v Chapman* 1997 (3) SA 341 (SCA) at para 38.

[34] *S v Chapman* 1997 (3) SA 341 (SCA) at para 38. *S v Ncheche* 2005 (2) SACR 386 (WLD) at 395h-I [35]; *The Sate v Nkunkuma & Others* (101/13)[2013] ZASCA 122 (23 September 2013) at para 17.

'Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape ... Rape is a repulsive crime. It was rightly described by counsel in this case as "an invasion of the most private and initmate zone of a woman and strikes at the core of her personhood and dignity".'

[62] Consequently, I would dismiss the appeal on conviction and sentence.



P ANDREWS, AJ

I agree and it is so ordered.

D S KUSEVITSKY, J

APPEARANCES

For the Appellant:	Advocate I B M G Levendall
Instructed by:	Legal Aid South Africa, Western Cape
For the Respondent:	Advocate S M Galloway
Instructed by:	National Prosecuting Authority, Western Cape

Date of Hearing: 23 August 2024
Date of Judgment: 06 September 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.