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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no. A 207/2016

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Nuku
The Hon. Mr Justice Papier

First hearing: 9 February 2018
Rehearing (s 14(3) A/10 of 2013): 8 August 2018
Judgment: 25 September 2018

In the matter between:

MONELEZI ZAMLA

Appellant

and

THE STATE

Respondent

Order: The appeal against conviction and sentence is dismissed.

JUDGMENT

BINNS-WARD J (dissenting):

[1] This appeal was heard initially by my Brother, Nuku J and me on 9 February 2018. After the two of us had exchanged draft judgments, it became apparent that we were unable to agree on the outcome of the appeal concerning sentence. The appeal was thereafter reheard on 8 August 2018 before a supplemented bench, as provided for in terms of s 14(3) of the Superior Courts Act 10 of 2013. The third judge, Papier J, has subscribed to the judgment prepared by Nuku J dismissing the appeal; whilst, for the reasons set forth below, I remain of the view that the appellant's appeal against sentence should have been upheld.

[2] I gratefully adopt Nuku J's description of the facts of the matter. I concur in my colleagues' conclusion that the appeal against conviction should be dismissed.

[3] I also endorse the observations made in Nuku J's judgment that the magistrate intervened inappropriately during the leading of the evidence of the witnesses, both in chief and during cross-examination. Whilst no point was made of this in the grounds of appeal or the heads of argument, when the appeal was argued before Nuku J and me, counsel for both the state and the appellant acknowledged the disquieting extent of the trial magistrate's interventions when we raised the matter ourselves at the first hearing.

[4] In my view, it was especially disturbing that the magistrate appeared during the trial to question the propriety of the appellant's previous conviction for the statutory rape of the complainant. Leaving aside the question of the admissibility prior to his conviction of the evidence concerning the previous conviction, the ineluctable implication in the remarks made by the magistrate in this regard was that there had been a miscarriage of justice, and that the appellant should instead have been previously convicted on the basis of non-consensual sexual relations with the complainant. The magistrate in her sentence judgment then found, without hearing the prosecutor in the previous case or having insight into the police docket in that matter, that the previous conviction had been the product of the neglect by '*an indolent prosecutor*' and that the sentence that had been imposed was '*totally and utterly inappropriate*'.¹

¹ When the defence attorney during her address on sentence referred to the appellant's previous conviction for statutory rape, the magistrate interrupted with the comment: '*Yes, that's the problem that I have here, it is the*

[5] In point of fact, although its significance appears to have been overlooked by both the magistrate and the appellant's legal-aid appointed attorney at the trial, the complainant's evidence, if anything, actually tended to corroborate the existence of a prior romantic relationship between herself and the complainant, of which her mother had been disapproving. I refer in this connection to the following passage in the complainant's evidence concerning her having misled her mother that she was going to spend the October school holidays at a school camp:

Defence attorney: And did your mother also ask you why you lied to her in the first place?

Complainant: No I can't recall that.

Defence attorney: Did any of the questions that your mother or your aunt asked you; did it have anything to do that they thought you are going out with boys or mixing with boys?

Complainant: Yes there was a suspicion that there's a boy.

Defence attorney: Were you seeing a boy at that time or did you have relations with a boy at that time or not?

Complainant: No I never had a boy.

Defence attorney: So when they asked you those questions then what did you tell them?

Complainant: No they suspected that I have got a boy and then I denied it to them. I said no I don't have a boyfriend and by the time that they wanted to examine me; at that time my mother she was aware – she heard information that they have seen the accused around.

[6] The complainant's evidence indicates that the complainant's mother suspected that she was conducting a romantic relationship with the appellant, and that that had been the reason for her having misled her mother into believing she was going to a school camp whereas in fact she went to spend the school holiday at the house of her grandfather not far from her home. The mother's reported suspicions (which, it must be said, no-one at the trial saw fit to investigate further with the complainant, or with the mother when she gave evidence) are consistent with there having been some prior liaison between the appellant and the complainant: A fact that would make sense of the nature of the appellant's previous conviction.

[7] More pertinently, there was just no basis for the magistrate to have appeared on the record to go behind the nature of the appellant's previous conviction. Her treatment of the matter in the sentence judgment, without any properly informed insight into the proceedings

very same complainant and very clear from the history that it was a case of a prosecutor not having done his or her work properly'. (My translation from the Afrikaans original.)

in the other court, amounted to a material misdirection that by itself entitles this court to revisit and, if needs be, interfere with the sentence that was imposed.

[8] This was not the only disquieting feature of the trial. Others relate to the magistrate's understanding and treatment of the medical evidence and to the victim impact report; matters with which I shall deal later.

[9] It is therefore with not a little diffidence that I have been satisfied, after an anxious consideration of the record of proceedings assessed in their totality, that the appellant's fair trial rights were nevertheless not so materially infringed by the magistrate's conduct as to have vitiated the proceedings.

[10] I regret, however, that, as indicated at the outset, I am unable to agree with the majority's conclusion that the appeal on sentence should be dismissed. The essential basis for the difference between us is that I do not think that a sentence of life imprisonment was a proportionate sanction. In this regard my colleagues and I appear to have a materially divergent conception of the principles pertaining to the application of the prescribed minimum sentence regime.

[11] I do agree with Nuku J's view that a long sentence of imprisonment – one that would remove the appellant from society for a long period – would be appropriate. In my judgment that can be achieved by imposing a very lengthy sentence of imprisonment, somewhere in the range of between 15 and 25 years. Sentences in that range are by no means representative of a 'business as usual' approach when compared with the significantly shorter sentences of imprisonment that used to be imposed for rape prior to the promulgation of the Criminal Law Amendment Act 105 of 1997.² I think it is relevant, when considering what an appropriate sentence would be, to bear in mind that sentences in that range are regularly imposed by our courts under the prescribed minimum sentence regime for crimes involving very serious instances of violence in which innocent and often especially vulnerable victims are brutalised, badly injured and even murdered. There is a vast difference between the practical implications of such sentences for the convicted accused person and one of life imprisonment.

² Compare, for example, the Supreme Court of Appeal's description of the sentences of seven years' imprisonment for each count of rape imposed in *S v Chapman* 1997 (3) SA 341 (SCA), at para 3, as 'undoubtedly severe'. It was noted in *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353, at para. 51, that Parliament was advised before the Criminal Law Amendment Act 105 of 1997 was adopted that "for rape *“generally a sentence of three or four years would be imposed, or six to ten years in very serious cases”*".

[12] As I shall discuss presently, the authorities show that the effect of these practical implications must be taken into account when the determination of what an appropriately proportionate sentence might be is considered. It must be borne in mind, even when it is the prescribed punishment, that the sentence of life imprisonment is the most extreme sentencing option available under our law. It is understandable in the circumstances that the Supreme Court of Appeal has observed that *‘[f]rom those who are called upon to sentence convicted offenders such cases [i.e. rape cases] call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound’*.³

[13] The need for a carefully measured judicial approach to sentencing is particularly important in respect of especially heinous crimes that are liable to elicit an instinctively harsh visceral human response. In this respect I believe that I find support in the observations by the Supreme Court of Appeal in the opening paragraphs of that court’s salient judgment in *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353:

[1] Rape is a repulsive crime. It was rightly described by counsel in this case as ‘an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity’. In *S v Chapman* [(1997) (3) SA 341 (A) at 345A-B] this court called it a ‘humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim’ and went on to say that

[w]omen in this country . . . have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

[2] Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape ‘the evidence points to the conclusion that women’s right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa’. During 2007 as many as 36 190 reports of rape were made to the police. Perhaps in some cases the report was false but the figure is nonetheless staggering bearing in mind that rape is notoriously under-reported. It is also notorious that relatively few offenders are caught and convicted.

[3] There is considerable risk in those circumstances that excessive punishment will be heaped on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge. But the Constitutional Court reminded us in *S v Dodo* [2001 (1) SACR 594 (CC) (2001 (3) SA 382; 2001 (5) BCLR 423), at para. 38]. that punishment must always be

³ *S v Vilakazi* supra, at para. 21, and see also *S v Mudau* (Reported in the SACR *sub nom. S v SMM*) [2013] ZASCA 56; 2013 (2) SACR 292 (SCA), at para. 19.

proportionate to the deserts of the particular offender - no less but also no more - for all human beings 'ought to be treated as ends in themselves, never merely as means to an end'.

(Footnotes omitted.)

[14] We were not presented with any statistics, but the common – and, I suspect, justified – perception is that the incidence of rape in South Africa remains as appallingly high today as it was more than a decade ago when the judgment in *Vilakazi* was delivered.⁴ The statutory and constitutional context for sentencing in such matters is still the same as it was then. The temptation to indiscriminately visit the commission of such dastardly crimes with the harshest of punishments is also just as pressing, if not more so, as it ever was. These are all good reasons, in my respectful view, why sentencing courts must remain astute to what Nugent JA described in para. 3 of *Vilakazi* as ‘*the considerable risk*’ of the imposition of disproportionate punishment in these cases.

[15] The Criminal Law Amendment Act 105 of 1997 has aptly, with respect, been described by the Supreme Court of Appeal as a blunt instrument.⁵ In this regard, taking the sentencing provisions for the crime of rape as an example, the Court pointed to the vast disparity between the ‘standard’ provision in the Act for a 10-year sentence of imprisonment and the sentence of life imprisonment prescribed in respect of the crime committed in any of the eight categories of circumstances described in paragraph 12 of the judgment, and noted the absence of any provision for a gradation between the two poles to take account of the peculiar circumstances of a given case.⁶ The Court identified this as reflecting the omission of any provision for proportionality. It explained that in the circumstances it was the only the implication of a means of achieving proportionality by applying the determinative test posited in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220 that had saved the minimum sentence regime when it was scrutinised for constitutional compatibility in *S v Dodo* supra.⁷

[16] *Malgas* is the seminal judgment in our jurisprudence concerning the approach that courts are enjoined to adopt in respect of the prescribed minimum sentence regime. It was endorsed by the Constitutional Court in *S v Dodo* supra. The judgment in *Malgas* held that the proper approach to the application of the prescribed sentence regime was to apply what

⁴ Cf. *S v Mudau* supra, at para. 14.

⁵ *S v Vilakazi* supra, at para. 9-11.

⁶ *S v Vilakazi* supra, at para. 12-13.

⁷ *S v Vilakazi* supra, at para 14-19.

the Constitutional Court labelled as the ‘determinative test’. The judgment articulated the substance of that test as follows: *‘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.’*⁸

[17] The Constitutional Court emphasised in *Dodo*⁹ that the effect of applying the determinative test was *‘that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross’*.¹⁰ The result, as noted in *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353, is that it might well be that the prescribed minimum sentence in respect to some offences is *‘seldom proportionate to the offence’*.¹¹

[18] In expressing its approval of the approach stated in *Malgas* at para. 25, the Constitutional Court described it ‘an overarching guideline’, one that *‘will no doubt be refined and particularised on a case by case basis, as the need arises. It steers an appropriate path, which the legislature doubtless intended, respecting the legislature’s decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 and at the same time promoting “the spirit, purport and objects of the Bill of Rights.”’* The judgment in *Vilakazi* is a well-respected exegesis on the jurisprudence in *Malgas* and *Dodo*. It represents an important beacon in the process of refinement that the Constitutional Court contemplated would follow its judgment in *Dodo*. Importantly, it debunked the thesis that the effect of the judgment in *Malgas* was that the prescribed minimum sentence must be imposed as the norm, and only departed from as an exception.

[19] In paragraph 16 of his judgment in *Vilakazi* Nugent JA held that the judgment in *Malgas* did not say:

⁸ *S v Malgas* supra at para. 25.

⁹ At para. 40.

¹⁰ The SCA has not consistently acknowledged that an injustice may be visited on an accused by the imposition of a prescribed sentence that is merely disproportionate rather than ‘grossly disproportionate’; see e.g. *Ngcobo v S* 2018 ZASCA 06 (23 February 2018), at para. 20.

¹¹ At para. 18.

... that the prescribed sentences ‘should ordinarily be imposed’. What it said is that a court must approach the matter ‘**conscious of the fact that the Legislature has ordained** [the prescribed sentence] as the sentence which should *ordinarily and in the absence of weighty justification* be imposed for the listed crimes in the specified circumstances’²⁴ (the emphasis in bold is [Nugent JA’s]). In the context of the judgment as a whole, and in particular the ‘determinative test’ that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite ‘weighty justification’ for the imposition of a lesser sentence.

That the prescribed sentence is evidently disproportionate in a given case is therefore indicative of the existence of weighty justification to depart from it.

[20] The judgment in *Vilakazi* also emphasised that *Malgas* did not hold ‘*that the various [prescribed] sentences are indeed proportionate to the particular crimes – and thus to be imposed as the norm*’. It pointed out that the court in *Malgas* had not pertinently considered sentence regimes prescribed in the Act for the various offences in any particularity, and concluded ‘*To say that a court must regard the sentence as being proportionate a priori and apply it other than in an exceptional case runs altogether counter to both Malgas and Dodo*’.¹²

[21] The point was very recently reiterated by the Supreme Court of Appeal in *S v De Beer* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA), in which reference was made with approval to the ‘insightful’ majority judgment in this court in *S v GK* 2013 (2) SACR 505 (WCC) (per Rogers J, Gamble J concurring; Matthee AJ dissenting). In *De Beer*, Ploos van Amstel AJA writing for a unanimous five-judge bench stated: ‘*The minimum sentencing legislation (the Criminal Law Amendment Act 105 of 1997) has had a far reaching effect on sentences imposed in respect of the offences listed in the Act. This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved. ... it is therefore important, in every case, to guard against an injustice being perpetrated by adhering slavishly to the prescribed minimum sentences*’.¹³ In that connection the court underscored the observation by Marais JA in *Malgas* that ‘*While speaking of injustice, it is necessary to add that the*

¹² At para. 17.

¹³ *De Beer v S* supra, at para. 17-19.

*imposition of the prescribed sentence need not amount to a shocking injustice (“n skokkende onreg” as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking’.*¹⁴

[22] In *Makumbane and Others v S* [2014] ZASCA 116, Wallis JA highlighted the pertinence as a point of departure in any determination of a proportionate sentence that it be consciously appreciated that a sentence of life imprisonment is the most stringent sentence that our courts can impose. The learned judge proceeded: *‘Then there must be an overall assessment of whether on the facts of [the] case a sentence of life imprisonment is proportionate to the offence committed by the applicants. In making that latter assessment the court will always be conscious of other cases in which it has had to consider the appropriate sentence to be imposed for serious crimes, and the assessment in those cases of which crimes are truly the most heinous and warrant the heaviest sentence. I see no point in reciting those cases as they all turn on their own facts, but they inevitably form a backdrop to the sentencing process in terms of the legislation prescribing certain minimum sentences for serious crimes.’*

[23] In this regard I was especially conscious when preparing for the hearing of this appeal that I had in that very week imposed a sentence of 20 years’ imprisonment in a gang murder case in which the accused had with deliberate intention killed the unarmed and defenceless deceased by firing at least 12 bullets into his body from close range.¹⁵ In considering the sentences imposed in comparable cases for the purpose of imposing sentence in that case I had discovered, somewhat to my surprise, that 20 years’ imprisonment was in the upper range of comparable sentences.

[24] I am mindful that the prescribed minimum sentence for murder (even with actual intent) - an offence with the most extreme effect on the victim - is 15 years’ imprisonment, and not for life as it is for the offence of which the appellant was convicted. As remarked upon in *Vilakazi*,¹⁶ such incongruities in the legislation are amongst its characteristics that have been the subject of strident criticism. It is the requirement that courts are obliged to impose proportionate sentences, and in that regard - as mentioned in the passage from

¹⁴ *S v Malgas* supra, at para. 23.

¹⁵ In *S v Jordaan and Others* [2018] ZAWCHC 10 (7 February 2018).

¹⁶ At para. 13.

Makumbane quoted in the preceding paragraph - imposes a duty on judges to be conscious of the sentences that are imposed in other serious cases across the spectrum, that ameliorates the effect of the anomalous distinctions for sentence purposes in the Criminal Law Amendment Act between various types of serious crime. Such amelioration is necessary, in my view, if coherent expression is to be given to the requirement that sentences must not be disproportionate. A broader cross-category perspective is necessary for a constitutionally compatible application of the legislation.

[25] Bearing all the foregoing principles in mind, it is my respectful opinion that the proper approach to be adopted by this court sitting on appeal was appositely summed up in para. 14 of the majority judgment in *S v GK* supra, where Rogers J, dealing with an appeal against a sentence of life imprisonment for rape, stated:

I thus must not approach the present appeal with a mind that a life sentence is a priori a just punishment for the appellant. Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case, bearing in mind however that even discretionary sentences for crimes dealt with in the Act (ie once substantial and compelling circumstances have been found to be present) can be expected to be more severe than before. In this regard Cameron JA stated in *Abrahams* supra [2002 (1) SACR 116 (SCA)] that the Act ‘creates a legislative standard that weighs upon the exercise of the sentencing court’s discretion’ (para 25). If the just sentence, approached in this manner, falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas* (para 23), substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be ‘disturbingly’ inappropriate or ‘induce a sense of shock’. In other words, a discrepancy falling short of the latter test (which applies when an appellate court considers whether it may interfere with a trial court’s discretionary sentence) may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.

[26] The exercise posited by Rogers J has to be undertaken mindful of the provisions of s 51(3)(aA) of the Criminal Law Amendment Act. That provides that when imposing a sentence in respect of rape, the following will 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. Taken literally, the

provision would substantially thwart a court's ability to apply the determinative test, which, as rehearsed in the preceding part of this judgment, was the feature manifesting the retention of judicial discretion that saved the prescribed minimum sentence regime in terms of the statute from being held by the Court in *S v Dodo* to be constitutionally incompatible. It is trite, however, that legislation should, insofar as its language reasonably permits, be construed in a manner that renders a constitutionally congruent meaning in preference to one that would result in constitutional incompatibility.¹⁷ Section 51(3)(aA) was interpreted in that manner in *S v Nkawu* [2009] ZAECHGHC 21; 2009 2 SACR 402 (ECG), in which Plasket J held that it should be understood to mean that any one of the stipulated factors '*on their own may not be regarded as a substantial and compelling circumstance justifying a departure from the prescribed sentence but that each one of them may be considered along with other factors cumulatively to amount to substantial and compelling circumstances*'.¹⁸ The learned judge's construction of the provision was referred to with approval by the appeal court in *S v Mudau* supra, at para. 26.

[27] While on the topic of questions of relevant principle it is pertinent to remember that in treating of appeals in cases in which the sentence is subject to the prescribed minimum sentence regime a finding by the trial court that there is an absence of special and compelling circumstances to depart from the prescribed sentence does not entail the exercise of a true or narrow discretion, and the appellate court is therefore entitled to substitute its decision in that respect if it disagrees with the finding of the court a quo. It is not a prerequisite that there have been a misdirection by the trial court in the exercise of its discretion. Rogers J called attention to this important consideration in *S v GK* supra, at para. 3-7. See also *S v Homareda* 1999 (2) SACR 319 (W); [1999] 4 All SA 549, at 326c-d (SACR) (per Cloete J and Robinson AJ), and my own review of the position (Riley AJ concurring) in *S v Tafeni* [2015] ZAWCHC 150; 2016 (2) SACR 720 (WCC), at para. 2-8. Consider also the dictum of Bosielo JA in *Bailey v S* [2012] ZASCA 154; also reported *sub nom. S v PB* 2013 (2) SACR 533 (SCA), at para 20:

What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or

¹⁷ See *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* [2000] ZACC 12; 2001 (1) SA 545 (CC), at para. 22.

¹⁸ At para. 16.

that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.

[28] Sentencing under the minimum sentence regime in rape cases is a hotly contentious issue. The glaring inconsistency in sentences for rape in terms of the prescribed minimum sentence regime has been remarked upon in SS Terblanche, *The Guide to Sentencing in South Africa* 3rd ed. (LexisNexis, 2016), at §3.5.4.6 and 3.5.5. The observation is indeed borne out by the jurisprudence.¹⁹ As I have myself remarked in an earlier judgment (albeit concerning robbery, not rape), ‘*It is evident from ...[a] review of the pertinent jurisprudence of the top-tier courts that the constitutionally compatible administration of the minimum sentence legislation is reliant on judicial nuance. That is hardly desirable, as indeed certain passages in Vilikazi clearly imply. It is a position that is bound in practice to result in approaches to sentence that are difficult to reconcile and appear to be discordant*’.²⁰

[29] Professor Terblanche has noted ‘*Sentencing for rape has now reached the point where judicial officers who take a hard line in their sentencing impose life imprisonment and take their authority from Matyityi,^[21] while those of a more moderate persuasion follow Vilakazi.*’²² Whilst there might well be a sound foundation for that observation, I think it is important to remember, however, that the judgment in *Matyityi* did not purport to express a departure from *Vilakazi*. The dicta in *Matyityi* were uttered in the context of a criticism of an unjustified departure from the prescribed sentences in a matter in which the crimes involved had been committed with extreme violence and savagery. In my view the judgment does not presage ‘a hard line’, but serves rather as a trenchant and pertinent reminder that the legislation cannot be disregarded and must be applied in a principled manner.

[30] As with other crimes that all have devastating impacts on the victims such as robbery with aggravating circumstances and even murder, some instances of rape are worse than others. This much has been expressly acknowledged more than once by the appeal court; see

¹⁹ Compare, for example, the majority and minority judgments in *S v Nkomo* [2007] 3 All SA 596 (SCA); *S v Opperman and Another* 2010 (2) SACR 248 (SCA); [2010] 4 All SA 267; and in *S v Monageng* [2009] 1 All SA 237 (SCA). See also the examples provided in *S v Mabaso* 2014 (1) SACR 299 (KZP), at para 13 ff.

²⁰ *S v Fortune* 2014 2 SACR 178 (WCC), at para. 7.

²¹ *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).

²² Op. cit. at §3.5.4.6 (4) (p.82).

S v Abrahams 2002 (1) SACR 116 (SCA), at para. 29, *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at para. 17-19 and *S v Mudau* supra, at para. 17-18. A proportionate approach entails that in general the most severe sentence is appropriate in cases that fall into the category of the worst instances of the commission of the crime. I make that statement acknowledging that life imprisonment might well be an appropriate and proportionate sentence in a case falling short of the most egregious example imaginable of the crime. But if the principles that I have sought to rehearse are not accepted, then we have learned nothing from the exposition in *S v Vilakazi*.

[31] The rape involved in the current matter does not in my opinion fall into the category of the worst instances of the crime. The appellant showed the complainant a knife with the threat that he would use it if she did not submit, but no actual violence was involved beyond the act of forced sexual intercourse itself. On the second occasion when the complainant was bleeding from her vagina, which might well have been menstrual, the appellant ceased his assault as soon as he became aware of it. Moreover, this was a case in which, according to the appellant's previous conviction, there had been a history of prior consensual intercourse with the complainant, who was 13 years and nine months old at the time. (I referred earlier to the complainant's evidence in this respect that was not properly explored at the trial.)

[32] It is true that the appellant showed no remorse and persisted in his denial of the complainant's allegations, but there is no evidence to support a conclusion that he represents a threat to society and women in particular. The history suggests that his fixation has been with the complainant, and no-one else. There is no reason to believe that he would continue to represent a threat to the complainant upon release from a lengthy period of imprisonment. Life is likely to have moved on for both of them by then. His only other previous conviction was in respect of an offence in terms of s 36 of the General Law Amendment Act 62 of 1955 ('failure to give a satisfactory account of possession of goods') committed in 2010, and for which he received a fine that was wholly suspended.

[33] A victim impact report prepared by a social worker was handed in as documentary evidence at the trial. It reported that the complainant was experiencing adverse psychological consequences as a result of her experiences at the hands of the appellant. That, sadly, is only to be expected in crimes of this nature, as indeed the academic source material cited in the social worker's report apparently confirms. It would be a rare case in which a forced invasion of a person's dignity, physical integrity and most intimate physical privacy would not have a materially adverse effect on their sense of security, well-being and self-esteem.

These virtually invariable consequences for the victims are what in large part inform society's revulsion against rape as amongst the most serious of offences that can be perpetrated. The victim impact report related that the complainant was benefitting from ongoing therapy and recorded that the support that she was receiving from her mother was having a positive impact on her healing process.

[34] Of concern, however, is the extent and nature of discrepancy between the content of the victim impact report's description of the factual background and the evidence adduced at the trial. The social worker (who recorded that she had interviewed the complainant on six occasions and the complainant's mother on one occasion) does not appear to have been aware of the nature of the appellant's previous conviction, or of the fact that when the complainant was discovered to have gone to stay at her grandfather's house instead of attending a school camp, as she had represented, her mother suspected that it was because she was having an affair with a boy - and that the boy in question was the appellant. The social worker's description of how the appellant was reported to have used the knife to subdue and restrain the complainant also conflicted with the evidence that the complainant had given at the trial. There were other inconsistencies that I find unnecessary to particularise. It is of concern in the circumstances that no-one at the trial thought it necessary that the social worker should have been required to give oral evidence. The defence attorney's statement that the 'content and correctness' of the report were admitted was puzzling to say the least in the circumstances. The manner in which the victim impact report was allowed in by the court without interrogation recalls to mind the pertinent observations by Nugent JA in *Vilakazi* regarding the all too frequent superficiality with which this type of case, which, as the learned judge of appeal remarked, is requiring of '*of the greatest care to be taken*' and of '*meticulous attention to detail*' is treated, and illustrates how short of those standards the conduct of the trial in the current matter fell. It is apparent from the magistrate's sentence judgment that the social worker's report played a very influential role in the determination of the sentence that was imposed.

[35] The magistrate's misdirected treatment of the appellant's previous conviction for statutory rape persisted in her reasoning in the sentence judgment. She referred to the appellant having stolen the complainant's childhood not only once, but on four occasions. The reference to four occasions plainly included the matter in which the appellant had been convicted of statutory rape. The magistrate also remarked in the sentence judgment:

Not only was she [the complainant] raped ...(inaudible) the injuries that she incurred from the first time you raped her and unfortunately it wasn't dealt with in that matter by the Court or by the state as the magistrate would not have known of those facts had it not been brought before him or her.

This was evident from the doctor who testified in this matter that there were old injuries and then once again new injuries that you inflicted on her.

I believe that this Act [the Criminal Law Amendment Act 105 of 1997] was designed exactly for this type of case.

This passage not only highlights the persistent effect of the magistrate's treatment of the appellant's previous convictions, it also demonstrates a misconceived understanding by the magistrate of the import of the medical evidence that was adduced at the trial. No injuries were identified in the medical evidence. What was found was that the complainant had three sores in the *fossa navicularis*. The doctor was unable to state with certainty what would have caused the sores and speculated that they might be indicative of a sexually transmitted disease such as herpes. The only other signs of 'injury' were bumps and clefts in the hymenal opening that were indicative of prior sexual penetration. It was evident from the medical evidence that such bumps and clefts might be expected irrespective of whether the prior sexual penetration had been consensual or forced.

[36] The magistrate made no reference to proportionality in her sentence judgment. She also gave no indication whatsoever of having followed the cautious approach advocated in the jurisprudence to which I referred above. She made no reference to sentences imposed in comparable cases and showed no appreciation of the need to appreciate that there is a gradation of severity in rape case that needs to be reflected in the proportionality of punishment. On the contrary, her judgment reflects that she adopted an *à priori* and inflexible approach that the imposition of a sentence of life imprisonment in the case of the rape of any girl under 16 should be the norm. This approach was plainly articulated in her statement: *'There are no shades of grey when it comes to raping a child'*.

[37] The shortcomings in the trial to which I have referred above are by themselves enough to justify a critical, if not sceptical, re-examination of the appropriateness of the sentence imposed by the trial court, even without the significant unease that I felt in any event about its proportionality.

[38] My unease hardened into a certainty that the magistrate was wrong to impose the ultimate sentence when I considered the markedly lesser sentences that were imposed in a number of previous cases in comparable or materially worse instances of rape. I say this

mindful of the inconsistency in sentencing remarked upon by the commentators to which I referred earlier, and also of the fact that the cogency of any comparative analysis is to some extent inevitably undermined by the uniqueness of the character of individual cases. Comparable cases nonetheless indubitably serve as a guide, hence their well-established use by judicial officers as a sentencing tool. They certainly provide the most obvious framework by which to test whether a sentence is proportionate or not. The judgments in comparable matters are unfortunately legion. A comprehensive survey is beyond my time and resources, but the examples given below suffice to make my point.

[39] In *Gcaza v S* [2017] ZASCA 92; 2016 JDR 1896 (SCA), the appeal court dismissed a cross-appeal by the state against the imposition of an effective sentence of 23 years' imprisonment on a 23 year old offender who had been convicted of the murder and anal rape of a six year old boy. The offender was accepted to have been under the influence of alcohol narcotic drugs (methamphetamine, commonly known as 'tik'). There was, however, also evidence that he was psychopath who presented a danger to society, and that he was a doubtful candidate for rehabilitation. In declining to interfere with the sentence on appeal the court was mindful that the crimes were '*gross and inhumane*' and that '*[t]he enormity of th[e] crime was aggravated by the fact that it was committed against an unsuspecting young boy*'.

[40] In *S v Calvin* 2014 JDR 2020 (SCA), the Supreme Court of Appeal substituted the sentence of life imprisonment imposed on a 20 year old offender for the rape of six year old girl with a sentence of 20 years' imprisonment. The appellant had denied committing the offence and pleaded not guilty to the charge at his trial. In upholding the appeal against sentence the court took into account the appellant's relative youthfulness, the fact that he had been incarcerated for seven months awaiting trial and that there '*was no gratuitous violence in addition to the rape*'. Acknowledging that '*[t]he rape of a girl of six years is always a very serious crime*', the court, quoting from some of the passages in the judgment in *Vilakazi* to which I have referred above, concluded that a sentence of life imprisonment was nevertheless disproportionate in the circumstances.

[41] In *S v AR* 2013 JDR 2186 (SCA),²³ the Supreme Court of Appeal set aside a sentence of life imprisonment imposed on a 19 year old offender for raping a 13 year old girl and substituted a sentence of 8 years and 10 months' imprisonment antedated to the date on which the life sentence had been imposed. The appellant had pleaded guilty at his trial,

²³ Also published on SAFLII as *Rasirubu v S* [2013] ZASCA 140.

showed remorse and was a first offender. It was held that the trial court had been materially misdirected in proceeding to sentence the appellant without ensuring that it had adequate information before it to consider whether there were substantial and compelling circumstances to deviate from the prescribed minimum sentence. This appears to have been a less serious case than the current one, but when it comes to assessing proportionality the disparity between a sentence of less than nine years' imprisonment and a life sentence is particularly striking.

[42] In *S v Makhang* 2017 JDR 0540 (ECG); [2017] ZAECGHC 42, the court set aside a life sentence imposed on a 24 year old offender with two previous convictions for assault with intent to do grievous bodily harm who had been convicted of raping an adult woman vaginally and anally (which resulted in a sentence of life imprisonment being prescribed in terms of the Criminal Law Amendment Act). A knife had been wielded to subdue her and frighten off persons who had tried to come to the complainant's assistance. The appellant had denied having committed the offences and had appealed unsuccessfully against his conviction. With reference to *S v Mudau* supra, the appellate court held that the trial court had misdirected itself by failing to weigh whether the life sentence that it imposed was proportionate. The appellate court substituted the sentence of life imprisonment with one of 15 years' imprisonment.

[43] In *S v Thunzi* 2014 JDR 0765 (WCC) this court (per Samela J, Baartman J concurring) set aside a sentence of 18 years' imprisonment imposed on an offender who at age 21 had raped a 10 year old girl. A social worker's report in the case had advised that the complainant '*has nightmares, has difficulty trusting male persons, and is experiencing personality problems. Furthermore, that she is also severely, emotionally and traumatized*' and '*...needs counselling to cope with the present condition and future challenges in her life*'. The appellant had denied his guilt and had appealed unsuccessfully against his conviction. He had therefore shown no remorse. The court had regard to the fact that the appellant was a first offender and had spent over three years in prison awaiting trial. It held that the sentence imposed by the trial court was '*shockingly inappropriate*' and substituted a sentence of 15 years' imprisonment.

[44] I consider, having regard to the nature of offence, the personal characteristics of the appellant and the interests of society, that a sentence of 20 years' imprisonment would meet the justice of the current case. By contrast, a sentence of life imprisonment in the circumstances is disproportionate and unjust. I would therefore have upheld the appeal

against sentence, set aside the sentence imposed by the trial court and substituted it with a sentence of 20 years' imprisonment antedated to 29 January 2016.

A.G. BINNS-WARD
Judge of the High Court

NUKU J:

[45] The appellant was convicted in the Regional Court, Somerset West (*“the trial Court”*), on 29 January 2016 on three counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (*“the Sexual Offences Act”*). The charges against him were that on 30 September 2014, 1 October 2014 and during October 2014 and at or near an open field near Onverwacht and Nomzamo, in the regional division of the Western Cape, he unlawfully and intentionally committed acts of sexual penetration with the complainant, who was a 13 year old girl at the time, by inserting his genital organ into her genital organ and thereby had sexual intercourse with the complainant without her consent. He was sentenced on 22 February 2016 in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (*“the Criminal Law Amendment Act”*), to imprisonment for life. The trial Court took all three counts of rape together for purposes of sentence. Leave to appeal is not required as the appellant was sentenced by a regional court in terms of section 51 (1) of the Criminal Law Amendment Act. The appeal is in respect of both conviction and sentence. The appellant was legally represented throughout the proceedings in the trial Court.

[46] The appellant prepared his notice of appeal without legal representation. In his notice of appeal he raises the following grounds of appeal in respect of conviction:

1. That the trial Court erred and misdirected itself in finding that the State had proved beyond a reasonable doubt that he was guilty of rape, especially in light of the fact that it was only the complainant's statement that placed him

on the scene, and that no further corroborating evidence was presented by the State;

2. That the trial Court erred and misdirected itself when it refused to accept evidence tendered by the defence or a history of the complainant who has a motive to frame and/or falsely implicate him, more especially in light of the fact that the complainant failed to report the incident on the same day it occurred so that the State could be able to find his DNA for testing.
3. That the trial Court erred and misdirected itself in rejecting his evidence as not being reasonably possibly true, and attached too much weight to immaterial discrepancies in his evidence;
4. That the trial Court erred and misdirected itself in not taking cognisance of the fact that his evidence was not contradictory and in disregarding the cautionary rule with regard to the evidence of a single witness in the absence of the independent corroborating evidence;
5. That the trial Court erred and misdirected itself in accepting the evidence of the State witnesses, which lacked credibility and reliability in all material respects and in rejecting his evidence and by attaching too much weight to immaterial discrepancies in his evidence.
6. That the trial Court erred and misdirected itself by not taking into account, or giving sufficient weight to the following:
 - (i) The complainant's previous sexual history;
 - (ii) The lack of tangible evidence and/or forensic evidence, that is, no DNA found, or presented by the State.
 - (iii) An apparent lack of physical injury to the complainant; and
 - (iv) Failure by the complainant to report the alleged rape timeously.

[47] Ms *Levendal* from Legal Aid South Africa, Cape Town Justice Centre, appeared for the appellant and Ms *Ajam* appeared for the State. In her written submissions Ms *Levendal* raised the following grounds of appeal in respect of conviction:

1. That the trial Court failed to properly apply the cautionary rule as is required when dealing with the evidence of a single witness and/or a child witness;

2. That the evidence of the complainant was not satisfactory in all material respects;
3. That the complainant's evidence was not credible; and
4. That the medical evidence does not corroborate the complainant's evidence.

[48] Ms *Ajam*, on the other hand, contended that the trial Court properly applied the cautionary rule and correctly found the evidence of the complainant to be credible. She further submitted that contradictions in the State's case were immaterial and that the medical evidence supported the complainant's version.

[49] A brief review of the facts is necessary. At about 15h00 during the afternoon of 30 September 2014 the complainant was playing with her friends when their ball got lost and she went looking for it. While she was looking for their ball, she saw the appellant. The appellant approached her, grabbed her by her arm and uttered words to the following effect: "*Yes your (sic) bitch I found you can you see the police has released me from jail*". The appellant also told the complainant that he knew where she and her family lived. The appellant took a knife out of his pocket and told the complainant that they should go to a place behind the informal settlement. When they got to this place, the appellant lowered the complainant's pants and her underwear to her ankles. He instructed her to lie on her back. He lowered his pants to his ankles and thereafter proceeded to have sexual intercourse with the complainant, without her consent. He thereafter uttered words to the following effect: "*I am finished you must do it on a regular basis because the police have released me.*" He also threatened to kill the complainant and her family if she reported the matter. The complainant went home and did not report the matter.

[50] The following day, on 1 October 2014, the complainant was on her way to school when she met the appellant next to an informal settlement. She tried to run away but the appellant caught up with her. He pulled her by her arm and took her to the same place as the previous day. When they got to this place he first instructed the complaint to pull her tracksuit pants down whereafter he proceeded to pull the complainant's tracksuit pants down to her ankles. He lowered his pants to his ankles and proceeded to have sexual intercourse with the complainant without her consent. In the process the complainant started bleeding from her genital organ and upon this the appellant stopped. Once again the appellant threatened to kill the complainant if she reported the matter. Thereafter they parted ways and

the complainant went to her grandmother's place. As on the previous day, the complainant did not report the matter.

[51] The complainant could not remember the exact date of the third occasion. This was still during early part of October 2014 and closer to the end of the school term before the September/October school holidays. The complainant was on her way to school when she met the appellant. The appellant took her to the same place as in the two previous occasions. As on previous occasions, upon their arrival at the place, he also proceeded to have sexual intercourse with her without her consent. Thereafter he told the complainant that she should come back to the same place on a regular basis. This presumably so that the appellant could have sexual intercourse with her. The complainant went home thereafter.

[52] At home the complainant made up a story about her school going to a school camp for the September/October school holidays. She requested and got her mother's permission to go to the school camp. Under the pretext that she was going to the school camp, she went to stay with her paternal grandfather. Her explanation for lying to her mother about the school camp was that she wanted to get away from the appellant. She returned home close to the end of the September/ October school holidays.

[53] When the complainant went back home, her mother already knew that she had lied about the school camp and that she had been with her paternal grandfather. She was not happy about this and she also suspected that the complainant was involved with boys. She, together with the complainant's aunt, N T ("N") confronted the complainant about this but she would not divulge anything. It was only after N had inspected the complainant's genital organ that she reported having been raped by the appellant on three occasions. The complainant was taken to the police station a day later. She was also examined by a doctor and the appellant was subsequently arrested.

[54] The complainant's mother gave evidence as to the age of the complainant, namely that she was born on [...] 2001. She also confirmed the evidence of the complainant regarding the circumstances under which the complainant reported having been raped by the appellant. Her evidence differed to that of the complainant regarding the sequence of events leading up to the complainant reporting having been raped. Her evidence was that the complainant reported having been raped before she was inspected by N whereas the complainant's evidence was that she only reported after the inspection carried out by N.

[55] N also gave evidence that she was requested by the complainant's mother to speak to the complainant. This because the complainant's mother was concerned with the complainant's behaviour. The complainant told her that the appellant had raped her on three occasions. Thereafter she inspected the complainant's genital organ and found that it had been tampered with.

[56] Dr Vermeulen also gave evidence that she examined the complainant. Upon examination she noted that the complainant's genitalia was tender and had some bruises. In her opinion this was consistent with recent penetration with a blunt object.

[57] The appellant testified in his defence and called no witnesses. He denied having raped the complainant. He also denied any knowledge of the complainant. When he was confronted about a matter in which he had pleaded guilty to statutory rape on this basis that he had had consensual sex with the complainant, he blamed this on his legal representative.

[58] The trial Court was faced with two mutually destructive versions, namely; that of complainant alleging rape, and that of the complainant denying rape. In order to come to factual findings the trial Court made credibility findings. After having applied the necessary caution, the trial Court found that the complainant was a credible witness and accepted her version. It further rejected the version of the appellant as not being reasonably possibly true.

[59] The approach to be adopted by a court of appeal when dealing with the factual findings of a trial Court is trite. A court of appeal will not disturb the factual findings of a trial Court unless the trial Court has committed a material misdirection or where it is convinced that the trial Court is wrong. (See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

[60] The evidence of the complainant was not seriously challenged and was clear. The only aspect of her evidence which was contradicted by the evidence of her mother and N relates to the sequence of events between her reporting the rape and her inspection by N.

[61] In the trial Court, as in this Court, the complainant's credibility was attacked on the basis that she had lied to her mother about going to a school camp when in fact she went to stay with her paternal grandfather during the September/October school holidays. It is the complainant who told the trial Court that she lied about the school camp. Her explanation for lying was that she wanted to get away from the appellant. The complainant's explanation is understandable when viewed in light of the appellant's threats to her and the fact that the

appellant had instructed her to come back to the same place where he had raped her. Thus, there is no merit on this attack.

[62] The complainant was also criticised for the delay and her reluctance to report the rape. The complainant testified that the appellant threatened to kill her and her family if she were to report him. The complainant's evidence was also that the appellant had boasted about the fact that the police would not do anything to him. Taking into account the fact that the appellant had just come back from incarceration in respect of a matter involving the complainant it is understandable that the complainant would believe that the police would not do anything to the appellant. The complainant found herself helpless under the circumstances as her reporting the matter would put her life and that of her family in danger.

[63] The further aspect of the State's case that was criticised was the contradiction between the complainant's evidence on the one hand and that of her mother and N on the other hand. The complainant testified that she was first examined whereafter she reported whereas her mother and N testified that she first reported before being examined. This is the only aspect where there is contradiction which could not be explained. This contradiction, in my view is not material as it does not relate to the aspect that proves or disproves the appellant's guilt and can be attributed to the fallibility of human memory in recalling events of the past.

[64] There are, however, some aspects that require mentioning. The conduct of the regional magistrate deserves some attention. Firstly, her level of interference with the leading of the witnesses as well as the cross examination bordered on descending on to the arena. As the prosecutor was leading the witness she would at times interfere and take over some part of the leading of the witness. She also interrupted the cross examination by the appellant's legal representative. Whilst the judicial officers are not expected to adopt a supine attitude in respect of matters they are presiding over there is a limit as to how much they can get involved in the management of the trial. There is also a thin dividing line between managing a trial and getting involved in the fray and it is expected of judicial officers to maintain a balancing act so as not to cross the dividing line as the consequences thereof may be dire and may at times result in the proceedings being found to be irregular. The interference by the regional magistrate, although concerning, was not such as to render the proceedings irregular and that point was also not taken in this court.

[65] The second issue relates to a matter in which the appellant had pleaded guilty to statutory rape on the basis that he had had consensual sex with the complainant. Judging from her questions and comments during the proceedings, she appeared not to accept that the appellant could have had consensual sex with the complainant. This was despite the fact that there was no evidence presented by the State to challenge the correctness of the finding of the court that convicted the appellant of statutory rape. Court proceedings are presumed to be correct and in the absence of evidence seeking to prove otherwise, judicial officers are bound to accept the correctness thereof as failure to do so may, under certain circumstances and depending on the impact thereof on the said proceedings, be adjudged as a misdirection. There is no evidence in this matter that the attitude of the regional magistrate had an impact on the proceedings and as such there is no basis to find that there was misdirection.

[66] Taking into account the criticism levelled at the evidence of the complainant as well as the conduct of the magistrate as stated above, I am not persuaded that the trial Court misdirected itself or was wrong and as such there is no reason to disturb its findings.

[67] The complainant was indeed not only a single witness but also a child witness and the trial Court appreciated this fact. The trial Court proceeded to consider the complainant's evidence with the necessary caution and came to the conclusion that it could convict on the basis of the said evidence. As stated above, the complainant's evidence was clear, not challenged and was not contradictory. Thus, there can be no merit in the submission that the trial Court failed to properly apply the cautionary rule. The result is that the appeal against conviction must fail. The evidence of the complainant was that the appellant had sexual intercourse with her without her consent. The findings by Dr Vermeulen were consistent with recent history of penetration with a blunt object. This is an independent fact which confirms that the complainant was penetrated sexually. Taking the evidence of the complainant as discussed above as well as the findings by Dr Vermeulen I am satisfied that the State proved the guilt of the appellant beyond reasonable doubt and that the trial Court correctly convicted him. It follows that the appeal against conviction must fail.

[68] Upon conviction the trial Court sentenced the appellant, in terms of section 51 (1) of the Criminal Law Amendment Act, to imprisonment for life, this being the prescribed minimum sentence. This was after the trial Court took the three counts of rape as one for the purposes of sentence. Counsel for the appellant submitted that the trial Court, under-emphasised the interests of the appellant; did not properly take into account the nature of the

offence as the rape, in this instance, was not as serious or as violent, and did not place enough weight on rehabilitation of the appellant.

[69] The question to consider in this appeal is the presence or otherwise of the substantial and compelling circumstances to warrant the deviation from the prescribed minimum sentence of life imprisonment. There is no closed list of what constitutes substantial and compelling circumstances and each case must be considered on its own merits. This of course taking into account all the traditional factors that play a role in sentencing.

[70] In sentencing the appellant the trial Court took into account the personal circumstances of the appellant, the nature of the offence and the interests of society. The factors that must weigh in favour of the appellant is the fact that he is 29 years old and as such he is relatively young and the fact that the complainant did not sustain physical injuries apart from those associated with sexual penetration.

[71] There are a number of factors which I consider to be aggravating circumstances. Firstly, the appellant did not show any remorse. He pleaded not guilty to the charges pretending not to know the very complainant he had previously claimed to have had a consensual sexual intercourse with. Secondly, the appellant must have known that the age of the complainant in order for him to have previously pleaded guilty to statutory rape. The fact that the complainant was 13 years of age at the time of rape is in itself one of the factors that trigger the application of the minimum sentence under the Criminal Law Amendment Act. Thirdly, the appellant raped the complainant on three separate occasions. This, also on its own is a factor that triggers the application of the minimum sentence under the Criminal Law Amendment Act. The evidence further suggests that the appellant would have continued to terrorise the complainant as he had instructed her to come back to the same place where he had raped her. Fourthly, the appellant has a relevant previous conviction. He was convicted in August 2014 on the charge of statutory rape which had occurred during 2013. He was given a wholly suspended sentence. He was in custody in that matter until the matter was finalised in August 2014 when he was released. Upon his release, the very next month he raped the complainant repeatedly. To make matters worse he boasted to the complainant that there is nothing that the police would do to him. Fifthly, the appellant threatened to kill the complainant and her family. Lastly, a victim impact report which was handed in suggests that the complainant became suicidal and that she requires long term therapy. It is clear thus that the complainant continues to suffer from the consequences associated with the rape by the appellant.

[72] The legitimate interests of society demand that the appellant is removed from society for a lengthy period of time. Rape in itself is a heinous crime and repulsive crime. In sentencing the appellant the regional magistrate commented that “*there is no difference between the punishment which notionally I would have imposed on (sic) the exercise of my discretion and the prescribed sentence in respect of these offences*” and I agree fully with this comment. The sentence which was imposed by the trial Court fits the appellant, the crime and serves the legitimate interests of society. I cannot find any substantial and compelling circumstances that warrant any other punishment than the sentence of imprisonment for life. In my view the appeal against sentence must also fail.

[73] In the circumstances the following order is made;

The appeal against both conviction and sentence is dismissed.

L.G. NUKU

Judge of the High Court

PAPIER J (concurring in the judgment of NUKU J):

[74] I was added as a third judge to hear the appeal, in terms of Section 14(3) of the Superior Courts Act No 10 of 2013²⁴.

[75] I had the privilege and benefit of perusing and considering the detailed judgments of my brothers, Binns-Ward J and Nuku J in this appeal. They both agree that the convictions are correct and should be confirmed, but differ on sentence.

[76] I align myself entirely with my brothers Binns-Ward J and Nuku J, in their respective findings with regard to the conviction of the accused, and am satisfied that the accused had been correctly convicted in the court a quo.

²⁴ Sec 14(3) – *Except where it is in terms of any law required or permitted to be otherwise constituted, a court of a Division must be constituted before two judges for the hearing of any civil or criminal appeal: Provided that the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may in the event of the judges hearing such appeal not being in agreement, at any time before a judgement is handed down in such appeal, direct that a third judge be added to hear that appeal.*

[77] The facts and circumstances of the matter are summarised and well documented by Binns-Ward J and Nuku J in both of their respective judgements, and I will therefore not repeat it.

[78] The magistrate in the court a quo, after taking all the facts and circumstances into account, imposed a sentence of life imprisonment on the appellant.

[79] I am required to decide whether or not the trial court exercised its discretion, judicially and properly when sentencing the appellant²⁵. Binns-Ward J, proposed setting the judgment on sentence aside, and substituting the sentence with one of 20 (twenty) years imprisonment. Nuku J, proposed that the sentence of life imprisonment imposed by the Magistrate in the court a quo, be confirmed. I am required to decide whether or not I agree with Binns-Ward J; Nuku J, or whether to propose any other sentence in the circumstances.

[80] I considered the following facts, relating to and briefly summarised as follows:

1. The personal circumstances of the appellant, as recorded in the record.
2. The circumstances of the complainant who was a thirteen year old girl at the time, when she was raped thrice by the appellant, in circumstances where he had previously been charged and convicted of statutory rape in respect of the same complainant.
3. The appellant showed no remorse for what he had done, boasted to the complainant that there is nothing the police could do to him, and threatened to kill the complainant and her family if she were to report the incident.
4. The complainant had become suicidal, and required long term therapy, and continued to suffer from the consequences associated with the rape by the appellant.

²⁵ See *S v Pillay* [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G, where the court said the following with regard 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.” See also *S v Rabie* [1975] 4 All SA 723 (A) 724; 1975 (1) SA 855 (A) 857E-F I this regard.

[81] In deciding this question, I had regard to the decisions referred to by my learned brothers in their respective judgements, as well as the decisions of:

1. **S v Malgas** 2001(2) SA 1222 (SCA), where Marais JA noted the following in paragraph 8 and 9 of the judgment – pages 1230 and 1231 respectively:

“First, a court was not to be given a clean slate on which to inscribe whatever sentence it saw fit. Indeed, it was required to approach the question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribe period of imprisonment as the sentence which should ordinarily be imposed for the commission of listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response.

...

The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubt 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 ... What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure”.

In this matter, I could find no “truly convincing reasons” to justify a departure.

2. In **S v Kwanape** 2014(1) SACR 405 (SA) Petse JA, found that a twelve year old girl who was abducted whilst playing with friends and held overnight, who suffered devastating consequences as a result of the rape, received a sentence of life imprisonment, even though the appellant in that case was young and a first offender. In coming to this decision, the court of appeal had regard to **S v Fraser** 1987(2) SA 859(A) (in paragraph 16 – 22, on pages 410 – 412, of the judgment) – where the following was stated:

“it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object at arriving at the appropriate

sentence. Ultimately each case must be decided in the light of its peculiar facts”.

Rape is undeniably a despicable crime. In *N v T* 1994(1) SA 862 (C) it was described as “horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feeling of [v] “victim”.

3. In *S v Chapman* 1997(2) SACR 3 (SCA) (1997) (3) SA 341 the court said it is “a humiliating and degrading and brutal invasion of the privacy, the dignity and the person of the victim”. Its gravity in this case is aggravated by the fact that the victim was a twelve year old child.
4. In *S v Janson* 1999(2) SACR 368(C) rape of a child was said to be an appalling “an appalling and perverse abuse of male power”. The court went on to say:

“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 social censure.”

It is utterly terrifying that we live in a society where children cannot play in the street 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 expires to be an open and democratic one based on freedom, dignity and equality, the very touchstone of our Constitution. Petse JA went on to say in paragraph 18: “I holy align myself with these sentiments.

4. In a similar vein *S v D* 1995(1) SACR 259(A) underscored the vulnerability of children and went on to say:

“Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. ...”

Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children."

5. Petse JA, cited with approval, the decision of **S v De Beer** paragraph 18 – SCA Case No: 121/2004, 12 November 2004, where the court said the following:

"Rape is a topic that abounds with myth and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as dramatic as the rape itself."

It was further submitted on behalf of the appellant that this was not the worse rape imaginable. Thus, concluded the argument, that consideration, viewed with other mitigating factors, justifies a lesser sentence. I do not agree.

5. In **S v Mahomotsa** 2002(2) SACR 435 (SCA) [2002](3 ALL SA 534) at note 7 at paragraph 19 the court made plain that the fact that more serious cases than the one under consideration are imaginable, is not decisive. Mpati JA said:

"Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something must be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severe sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, none the less all call for a maximum penalty

imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.”

6. In **S v Matyityi** 2011(1) SACR 40 (SCA) Ponnann JA at page 45 paragraph 10 stated the following:

“But with respect, to restrict the enquiry to permanent physical injuries, as the learned judge appeared to have done, is to fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance for the victim.”

At page 50 paragraph 19 the court went on to say:

“I cannot discern why the trial judge displayed such a marked reticent to impose the prescribed minimum sentences. The two incidents were five days apart. Sufficient time, one would have thought, for pause and reflection. Each was breathtakingly brazen and executed with a callous brutality.”

At page 53 paragraph 23 the following was stated:

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfed our country. The situation continues to be alarming. It follows that, to borrow Malgas, it still is “no longer business as usual”. And yet one notes all too frequently a willing on the part of sentencing courts to deviate from the minimum sentences prescribed by the Legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes claim, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution, and like other arms of state, owe their fealty to it. Our Constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due difference to the legitimate domains of power of the other arms of state. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing

reasons for departing from them. Courts are not free to subvert the will of the Legislature by resort to vague, ill- defined concepts such as “relative youthfulness” or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officers personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual Judicial Officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

7. **The Director of Public Prosecutions, Grahamstown v Peli** 2018(2) SACR 1 SCA Hughes AJA at page 5 paragraph 11 cited with approval the decision in Hewitt (para 9 at 313 f-314, a) where the court stated the following:

“This court pronounced that rape of a child was usually committed by those perpetrators who believe that they can get away with it. The complainant in this instance is an innocent, defenceless and vulnerable victim of the respondent’s despicable and cruel act. The respondent even in addition threatened and assaulted the complainant to achieve his purpose. The complainant will have to live with the emotional scars and stigma of having been humiliated and violated for the rest of her life. The curse in our society of rape, is considered by the courts, and society alike, as deserving of severe punishment. The rape of young children is considered as being a very serious offence, especially so if the child is under the age of sixteen. ... I fail to comprehend the High Court’s characterisation of the rape of the six year old child as not being severe so as to induce a sense of shock. ... The court said that the rape of a child is more horrendous than other forms of rape.

In conclusion, the High Court committed a serious misdirection when it unjustifiably decided that the general or neutral factors advanced in mitigation constituted substantial and compelling circumstances sufficient to impose a lesser sentence than the prescribed sentence.”

[82] I am of the respectful view, that magistrate exercised his discretion properly and judicially. Furthermore, the sentence of life, imposed by the magistrate, does not amount to a shocking injustice, warranting a departure from the prescribed sentence.

[83] For these reasons I concur in the order made by Nuku J dismissing the appeal against conviction and sentence.

T.D. PAPIER
Judge of the High Court