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**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: A04/2022

In the matter between:

EMILE TERBLANCHE

APPELLANT

And

THE STATE

RESPONDENT

Heard: 20 October 2023

Delivered: 12 February 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an appeal against conviction on four counts of sexual assault and three counts of rape as well as against the resultant sentence of life imprisonment imposed against the appellant by the Parow Regional Court. The appellant was convicted by the Regional Court on five counts of sexual assault in contravention of section 5(1) and on

three counts of sexual penetration in violation of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, respectively. The appellant pleaded not guilty at the trial and exercised his right to remain silent. Before the trial commenced, the sentencing provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('CLAA') were explained to the appellant, who understood.

[2] The State alleged on count 1 that the appellant was guilty of contravening section 21(3) of Act 32 of 2007, exposure and self-masturbation, in that on or about 2016 to 2018 at or near Parow, the accused unlawfully and intentionally forced the complainant, a female minor aged 14, to look at him while he was performing self-masturbation. Concerning count 2, it was alleged that from 2016 to 2017, the appellant unlawfully and intentionally violated the complainant by touching her breast. Regarding count 3, it was alleged that during 2016 and 2017, the appellant unlawfully and intentionally violated the complainant by touching her vagina. On the fourth count, it was alleged that during 2016 and 2017, the accused unlawfully and intentionally violated the complainant by licking the complainant's vagina. In count 5, it was alleged that during 2016 to 2017, the accused unlawfully and intentionally violated the complainant by rubbing his penis against her vagina on more than one occasion.

[3] Concerning count 6, the State alleged that during the period 2016 and at near Parow, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by pushing his penis into her mouth without her consent. Count 7 and 8 also involved charges of sexual penetration. It was alleged in count 7 that during

2017 and 2018, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis in her vagina without her consent. In count 8, it was alleged that during the same period as in count 7, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by pushing his fingers into her vagina on more than one occasion without her consent.

[4] The prescribed minimum sentence in terms of the CLAA for counts 6 to 8 was life imprisonment because the complainant was under 16 years of age when the alleged offences were committed. (Offences were committed before the 2022 amendments). However, the Regional Magistrate found substantial and compelling circumstances meriting a deviation from the prescribed minimum sentence. The trial court took the three counts of sexual penetration together for the purposes of sentence. It imposed a sentence of life imprisonment in respect of those counts.

[5] The court *a quo* imposed a sentence of three years imprisonment in respect of count 1. The court took the four counts of sexual assault together for the purposes of sentence. It imposed a sentence of five years direct imprisonment in respect of those counts. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the trial court declared the appellant unfit to possess a firearm. The court also made an ancillary order in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It directed that the appellant's name be entered in the Sexual Offences Register.

[6] Discontented by this decision, the appellant exercised his automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA), seeking a reversal of the conviction and sentence imposed by the court *a quo*. The appellant avers that the Regional Magistrate misdirected herself in finding that the State has discharged its onus and proven the guilt of the appellant beyond a reasonable doubt. The appellant seeks an order in this court that sets aside the conviction against him as well as the resultant sentence.

Background Facts

[7] To fully comprehend the pertinent issues that must be determined in this appeal and the view I take in this matter; it is necessary to sketch out a brief background of the facts underpinning the reasons that fortify my conclusion. The State called three witnesses in a quest to prove the guilt of the appellant beyond reasonable doubt. The appellant testified and did not call witnesses to testify in his defence. Several documentary pieces of evidence, including the medical expert report and witnesses' statements, were handed in by agreement as exhibits. To the extent necessary, I will summarise the evidence led at the trial and not repeat the evidence verbatim. Where necessary, I will refer to the exhibits handed in during the hearing at the court below.

[8] The State tendered the evidence of the complainant. At the time of giving evidence, she had already reached the age of majority and was 18. To prevent the likelihood of prejudice to the complainant, on the application of the State, the court directed that she

testifies through a close circuit television in terms of section 158(3) of the CPA. In summary, the complainant testified that she knew the appellant as he was in love with her mother. The complainant and her mother moved in and lived with the appellant on Kompanje Street in Avondale, Parow in 2015. The complainant lived with the appellant and her mother at this place from 2015 to September 2018. From there, she went to live with her father in Viking Palace.

[9] When they moved in to live with the appellant, her mother was working but later lost her job. The witness testified that in 2016, the appellant started to touch her a lot and tickled her incessantly. In the beginning, the appellant touched her on top of the clothing, but later, he started to touch her under the clothes on her body. The first time was in 2016/2017, in which the appellant placed her on his lap and then rubbed his penis against her vagina. When this happened, she was on her back, and the appellant was on top of her. After that, the appellant stood up and ordered her to place her mouth over his penis. According to the complainant, the alleged rape happened from 2017 to 2018. These incidents happened in her room and her mother's room. The appellant would take advantage when her mother was not around.

[10] She testified that in her mother's room, the appellant would remove her trouser and would rub his penis against her vagina, and he would lick her vagina. When so doing, the appellant would tell her she could ask him any time to stop. However, when she told him to stop, he continued saying he had convinced her. The appellant would tell her how much he loved her and her mother. She never told her mother what the appellant did to

her as she feared that if she told her, the appellant and her mother would fight, and her mother would have ended up not having a place to stay.

[11] The complainant further explained that the appellant touched her breast, her stomach as well as her legs. Around 2016 and 2017, the witness testified that the appellant licked her vagina and placed the front part of his penis in her mouth. In 2017/2018, the appellant placed the front part of his penis inside her vagina. The appellant also rubbed his penis against her vagina and placed his fingers inside her vagina and making up and down movements.

[12] According to the complainant, her ordeal usually happened after work between 17h00 and 18h00 when her mother was asleep or taking a shower or when she was out shopping or at work. Her mother was aware that the appellant would creep into her bed; however, she testified that nothing happened in the mornings. Her mother would fight with the appellant over that. This happened in the year 2018. The complainant also described an incident where they had placed a mattress in their living room. She slept on the right, the mother on the left, and the appellant in the middle. When her mother fell asleep, the appellant placed his fingers inside her vagina.

[13] She moved out from the appellant's premises as her mother, and the appellant fought a lot. She went to stay with her father. She did not tell her father what the appellant did to her as she did not think the father would believe her. She only told her friend. She told him that the appellant was touching her a lot and that he was making her

uncomfortable. According to her, she did not tell her friend how the appellant was touching her. Her alleged ordeal became known because she wrote a poem that had to stay private or a secret. She wrote the Poem on Poetry Amino, a place where one could write poetry anonymously. The relevant part of the poem stated:

"I still feel your hands on me every single day. I no longer feel free in my whole body. You think I did it willingly. You pushed me down. I was not asking for it. You said we can stop anytime."

[14] The witness testified that she wrote this poem in September 2018 while living with her father. She felt safe posting the poem as her mother told her that she had deleted the *app* (Poetry app). Her mother saw the poem and called her. The complainant's mother asked the complainant if she was referring to the appellant in the poem, and she answered yes. The mother then informed the complainant's father, and they contacted the police. At that time, the complainant's mother had already moved from the appellant's place and was staying with her friend. They went to the police and later went to the doctor.

[15] During cross-examination, she testified that she has a good relationship with her father and mother. The witness testified that her mother is always there for her, and she can tell her everything. She added that the fight between her mother and the appellant made her heart sore. They fought regularly, and her mother cried a lot. It was her testimony that she had a good relationship with the appellant except for the allegations she levelled against him. They would play games or watch movies together. She also gave him a Father's Day card.

[16] When she was asked as to when the first time was that the appellant placed his finger inside her vagina and she asserted in response that due to the trauma she went through, she could not specifically remember whether it was in 2016/2017. According to her, her molestation happened after work and, at times, over weekends. She also confirmed during cross-examination that in 2017 and 2018 was when the appellant placed the front part of his penis inside her vagina. This happened not more than three to four times. Most of the time, it happened when her mother was in bed sleeping as she suffered from cancer and had to undergo chemotherapy.

[17] She also emphasised the incident where the appellant allegedly placed his penis in her mouth. According to her, when this incident happened (oral sex), her mother was not around because the witness' bedroom door was open. She conceded that in the two statements she made to the police, she did not mention the appellant forcing her to give him oral sex. However, when the court asked her questions, she stated that the statement, particularly A18, was not read back to her. It was written, and she was just asked to sign. She explained this to the prosecutor when she consulted with her in preparation for the hearing. She could not answer the differences in her statement and in her testimony and her statement where she indicated that one morning, the appellant pulled her pants and pushed his tongue into her private parts.

[18] When she was quizzed on how she reported to her friend, she testified that she must have told her friend telephonically that the appellant touched her in a way that made her uncomfortable. However, she did not tell her friend everything. It was put to her that

the appellant did not rape her or sexually assault her as she alleged. In response, she was adamant that the appellant touched her breast, inserted his fingers in her vagina more than once and forced her to have oral sex with him. She further reaffirmed that the appellant masturbated in her presence in front of her and even inserted his penis in her vagina.

[19] The complainant's friend, C[...] G[...], also came to testify. This witness testified that he was in the same school as the complainant, and they were friends. In June 2018, the complainant told him that the appellant touched her a lot and stared at her a lot. One time, when he was on a call with her, the complainant told her that the appellant was staring at her so much that she told him she was feeling uncomfortable. The complainant was quiet the following day at school until the second break. He asked her what the problem was, and the complainant did not tell her anything. During that time, he observed that the complainant was very emotional and withdrawn. It was only after she reported the case that she said to him that she was molested.

[20] The complainant told him in September 2018, after the case was reported, that the appellant penetrated her through his penis and with his fingers. The complainant also said to him that the appellant had oral sex with her. She did not agree or consent to what happened and never permitted him to do so.

[21] Under cross-examination, the witness testified that the complainant reported the alleged offences to her after she reported the case to the police. When he was quizzed as to precisely what the complainant told him, he stated that the complainant said to him

that the appellant penetrated him vaginally through his fingers and through his penis. She never permitted him to do that to her.

[22] The complainant's mother, Ms J[...], testified that he was in a relationship with the appellant. Their relationship started in 2014 and ended on 1 September 2018. The complainant lived with her up until she began chemotherapy in 2018. Before her diagnosis, she was on anti-depressant, sleeping medication and anti-anxiety medication. She testified that in September 2018, she sent the complainant an SMS, and the latter did not reply. She then went to read poems on *Imena* because she missed her.

[23] She found a newish poem that described how she went through sexual abuse. She phoned the complainant and confronted her about it. She asked the complainant whether it was the appellant that she was referring to in the poem because what the abuser said to the complainant, as stated in the poem, was similar to two things that the appellant used to say to her. These are words to the effect that you are 'easy to convince'. From the poem, she gathered that the complainant was abused orally, and this is what the appellant was obsessed with in their relationship.

[24] She asked the complainant what happened, and the latter told her she was with the father and did not want to talk then. The witness then asked to speak to the father. She explained the poem that the complainant wrote to the father and sent him a screenshot of it. The latter promised to talk to the complainant to get to the bottom of the matter. The complainant did not give her the details of the alleged abuse, but she just told

her the poem was about the appellant. She later gave the full details of the alleged sexual assault and rape on her 18th birthday. It was the first time she described in detail what happened to her. During cross-examination, it was asked what the complainant told her, and she stated that the complainant mentioned that the appellant did not fully penetrate her. However, he only penetrated her with the tip of his penis.

[25] Dr Donovan Andrews, who examined the complainant, also came to testify. On 04 October 2018, he examined the complainant and completed a medical report (J88 form). He examined the complainant and found that the hymen and the vagina were intact. He recorded in his report that the absence of injuries does not rule out rape or sexual assault. The doctor also explained that the complainant had an elastic hymen, which would only tear with childbirth. During cross-examination, he testified that he could not find any indication of penetration. However, when asked by the court whether it was possible or not with an elastic hymen like that of the complainant to find any sign of penetration, if there was any, his answer was no.

[26] On the other hand, the appellant put up the following version in his defence: he confirmed that he had a relationship with the complainant's mother, Ms J[...]. He explained that the complainant and her mother moved into his place in May 2016. The appellant explained his relationship with the complainant and said they got along well with each other. The complainant showed him games on the cell phone and even downloaded some games to his cell phone. He would regularly assist the complainant with her

homework. He taught the complainant how to make smoke bombs and helped her with her schoolwork, particularly school projects like science and maths.

[27] The appellant testified that he would wake the complainant up in the morning and take her to school. Sometimes, he would take her to her friends. The complainant was enjoying staying with them, and she would invite friends who would come, and they would play games. The complainant would also ask him to watch movies with him or play games. Regularly, the complainant sought his company. They would watch movies, and at times, they would engage in pillow fights. The complainant and her mother have a mother-and-daughter relationship. According to the appellant, his relationship with the complainant's mother near the end of 2018 got a little bit rough as they fought a lot, and the environment was an uncomfortable one. He could see that it was affecting the complainant.

[28] The appellant disputed the allegations the complainant levelled against him. He also explained the Christmas bed incident in which they took mattresses and placed them in the lounge in front of the TV. They would all congregate in front of the TV, eat snacks, watch movies, have tickle fights, or play around until they all fell asleep. When it came to sleeping time, the complainant's mother would sleep in the middle, the appellant would sleep on one end, and the complainant would sleep on the other. It was his evidence that he had no idea of all the charges levelled against him, and he had no idea why the complainant would do this. It hurts him deeply to hear this.

[29] Under cross-examination, the appellant stated that he ended the relationship with the complainant's mother as they had a big fight, and he told her he could not continue the fight. At that time, it was about a month or two that the complainant left them and was living with her father. When he was asked why the complainant no longer visited them after she left, he stated that before she left, the complainant stated that she was struggling with the fighting between him and her mother, which negatively affected her schoolwork. Notwithstanding the fights between him and the complainant's mother, his relationship with the complainant remained good.

[30] After they separated, the complainant's mother lived with her friend. At that time, he never had any contact with the complainant. He only had contact with the complainant while she was living with them. According to him, he suspects the complainant was upset about his breakup with her mother. The appellant also confirmed that the complainant's mother was sick and was using anti-depressant medication as she was exhausted and not motivated. Due to the depression, she did not give him and the complainant attention. She was tired and slept most of the time.

[31] When it was put to him that due to her state, his attention moved away from the complainant's mother to the complainant, he disputed this. He stated that they were still intimate sometimes, but not a lot. The main problem was that she argued a lot and fought a lot. He denied during cross-examination that he masturbated in front of the complainant or that he touched the complainant or penetrated her vaginally through his penis or his fingers. He confirmed that the complainant wrote little stories and poems.

The findings of the trial court

[32] After considering the conspectus of the evidence, the trial court made favourable credibility findings regarding the evidence of the complainant, who was a single witness. It held that the complainant gave a reasonable version to the court about what had transpired from the time she and her mother went to reside with the appellant at his residence. The trial court found that the complainant's version was credible and trustworthy and was corroborated by the evidence of her friend, Connor G[...]. To the contrary, the court found that on the totality of the evidence, the version of the appellant that he did not sexually abuse the complainant as alleged by the State, was false beyond reasonable doubt and that his version of a bare denial is merely to protect himself.

The grounds of appeal

[33] The applicant raised various grounds of appeal on conviction and sentence. The grounds of appeal as discernible from the notice of appeal may, in a nutshell be summarised as follows:

[34] The trial court erred in finding that the State had proved the appellant's guilt beyond reasonable doubt, particularly in that the court a *quo* failed to attach the necessary weight to the vagueness of the complainant's testimony as she was incapable of giving a coherent timeline of the alleged incidents and could not specify how frequently the incident occurred, nor could she recall when and how the incidents occurred.

[35] That the trial court erred and misdirected itself in failing to approach the complainant's evidence with the critical scrutiny when considering the application of the cautionary rule of a single witness. That the court *a quo* summarised the evidence but that there was no indication that an analysis of the evidence whilst exercising great caution was done. That the trial court erred and misdirected itself by failing to attach sufficient weight to the inconsistencies between the complainant's testimony in court and her two written statements and that the trial court incorrectly applied the evidence of the State in its rejection of the appellant's version and therefore misdirected herself.

[36] Regarding sentence, the appellant contended that the trial court failed to consider the findings of the Correctional Officer and the Probation Officer in their reports who found that the appellant would be a suitable candidate for correctional supervision. The appellant further contended that the Regional Magistrate correctly found that there were substantial and compelling circumstances; however, she erred in imposing a prescribed minimum sentence of life imprisonment on the applicant. The trial court failed to consider the appellant's personal circumstances properly but merely provided lip service to his circumstances.

Applicable Legal Principles and Discussion

[37] It is settled law that in a matter such as the present, this court's powers to interfere on appeal with the findings of fact of the trial court are limited in the absence of demonstrable and material misdirection. Where there is no misdirection on fact, the

presumption is that its findings are correct, and the appellate court will only interfere with them if it is convinced that they are wrong. This principle was restated in *S v Jochems*¹ as follows:

“It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless is convinced on a conspectus of the evidence that the trial court was clearly wrong. ***R v Dhlumayo and Another 1948(2) SA 677 (A)*** at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para12. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.”

[38] However, in *Minister of Safety and Security & others v Craig & Others NNO*,² Navsa JA, stated that although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness’ demeanour, but predominantly upon inferences and other facts and upon probabilities. In such a case, a court of appeal with the benefit of a full record may often be in a better position to draw inferences.

[39] Against this backdrop, I turn to evaluate the merits of this appeal.

[40] The issue for determination in this appeal is whether the appellant’s guilt was established beyond reasonable doubt. At the hearing of this appeal, Mr Scholzel, who appeared for the appellant, submitted that the court below had misdirected itself firstly by

¹ 1991(1) SACR (A) at 211 E-G.

² 2011(1) SACR 469 (SCA) para 58.

ignoring the inconsistencies in the complainant's testimony when measured against the two statements she made to the police and that there was no guarantee of truth in the evidence of the complainant. Moreover, Mr Scholzel submitted that the complainant's evidence is that of a single witness, was not satisfactory in all material respects, and had not been corroborated by other state witnesses. He submitted that if these aspects had been correctly considered by the court below, it would have concluded that the State had not discharged the onus of proving the appellant's guilt beyond a reasonable doubt or that the version of the appellant was reasonably possibly true in the circumstances and therefore entitled to be acquitted of the charges levelled against him.

[41] On the other hand, Mr Koti, the State's Counsel, argued that the court a *quo* correctly weighed up the complainant's evidence and found her to be a credible, reliable, and honest witness. Mr Koti further submitted that the court a *quo* found that the evidence of the complainant was corroborated by the evidence of Mr G[...] and the evidence of the doctor. He implored the court to dismiss the appeal both on conviction and sentence.

[42] It is well established in our law that the duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. The accused need not assist the State in any way in discharging this onus.³ In assessing whether the State has discharged the onus of proving its case against the accused beyond a reasonable doubt, it must consider all the evidence in concluding whether to convict or acquit an accused. In other words, a court's conclusion must account for all the evidence presented before it.⁴

³ *S v Mathebula* 1997 (1) SACR 10 (W).

⁴ *S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h.

[43] The complainant in this matter is a single witness. The complainant was 14 years old at the time of the commission of the alleged offences. She was 18 when she testified at the trial. Her evidence was given through a close circuit television in terms of section 158 of the CPA. The complainant was a single witness thus, her evidence must be evaluated cautiously.

[44] Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness. The testimony of a single witness should be clear and satisfactory in all material aspects. The exercise of caution must not be allowed to displace the exercise of common sense.⁵ The approach to the evidence of a single witness was enunciated in *S v Sauls and Others*,⁶ where Diemont JA said:

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (Per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2)

⁵ *S v Artman and Another* 1968 (3) SA 339(SCA).

⁶ 1981 (3) SA 172 (A) at 180E-H.

SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[45] In the present matter, the trial court was faced with two mutually destructive versions of two single witnesses based on the evidence of the complainant and the appellant. In *S v Pietersen*,⁷ the court noted that the question that must be asked is whether there is not a reasonable possibility that the version of the accused may be substantially true, especially in the light of the fact that the magistrate was faced with the evidence of a single witness and that two mutually destructive versions were placed as evidence before the court.

[46] In a relatively terse judgment and without a proper assessment of the evidence, the trial court rejected the appellant's version as nonsensical and dishonest. Thus, this court will assess the evidence to determine if the court a *quo* was indeed correct in rejecting the appellant's version and finding that the State proved its case against the appellant beyond reasonable doubt.

[47] It is common cause that the complainant and her mother moved in to stay with the appellant in 2015. It is also common cause that the appellant acted as a father figure to the complainant. The complainant looked to the appellant as her father figure, albeit she bought him a Father's Day card. The appellant was in a position of authority and trust towards the complainant. The complainant looked to the appellant for support and guidance. This version was corroborated by the appellant, who testified that he assisted

⁷ [2006] JOL 16082 (SCA) para 5.

the complainant with schoolwork, and in doing school projects like science as well as maths.

[48] However, from 2016 onwards, the complainant testified that the appellant started to touch her a lot in an inappropriate manner. Her evidence was that the appellant began by masturbating in front of her and later touched her breast on top of her clothes. The appellant progressed in the assault, touched her breast underneath her clothes, and after that, licked her vagina, and thereafter caused her to have oral sex with him and later vaginally had sex with her.

[49] The evidence showed a trust relationship between the appellant and the complainant. In my view, the appellant employed a non-violent technique to gain access and control the complainant. The State's evidence reveals that the appellant cunningly gained the trust of the complainant with the sole intent of committing sexual acts with her. The inappropriate touching of her breasts on top of her clothes and, thereafter, underneath her clothes was intended to lure or to groom the complainant to be pliable to sexual acts. The evidence of the complainant reveals that the appellant seduced her over an extended period until the said seduction reached its pinnacle, and that was when the appellant raped and sexually assaulted her. I repeat, the grooming of the complainant happened over time, and hence, the reason the complainant could not clearly explain specific dates when the alleged incidents occurred.

[50] It has been argued in this court that the fact that the complainant cannot remember the specific dates is an indication that she is untruthful. I do not agree with this proposition. It must be borne in mind that the complainant was still very young when these offences were committed. She was still 14 years old. This was not a once off event. It happened at home where the complainant was living with her mother and the appellant. The appellant created an impression towards the complainant's mind that he loves and care for her. There was nothing unusual at home to serve as a landmark or a source of reference for the complainant. Moreover, the complainant was asked when the first time was that the appellant placed his finger inside her vagina; she asserted in response that due to the trauma she went through, she could not specifically remember whether it was in 2016/2017.

[51] The relationship between the appellant and the complainant's mother was not good. The fights between the appellant and the complainant's mother had a severe impact on the emotional well-being of the complainant. It affected her emotionally and even her performance on her schoolwork. This was the reason that caused her to leave the appellant and her mother two months before her mother and the appellant could separate. Her evidence was that the appellant touched her a lot several times such that she could not precisely remember the dates when it happened.

[52] In my view, the suggestion that because she could not remember the specific date of the incident, she was lying is unsustainable. Notwithstanding, the complainant used their school event as a source of reference when the alleged rape took place. Her

evidence was that the alleged rape happened after the Boeresport event at their school, which was between the end of 2017 and the beginning of the year in 2018. Notably, she was abused by a person she knew and trusted. I repeat, it was not a once-off event, but it progressed from one stage to the other over an extended period.

[53] Furthermore, the complainant was young and vulnerable. When these incidents happened, her mother was sick and slept most of the time. The appellant was the person she could look up to for support. The appellant corroborated her version in this regard. In his evidence, the appellant asserted that the complainant's mother suffered from depression and was admitted for about a month at Tygerberg clinic. She used anti-depressant medication, and she was exhausted and not motivated. It was also difficult for him to keep her uplifted.

[54] According to him, the complainant's mother was in a Zombie State. As a result of the depression, she did not give them any attention. This also made him tired, and it was onerous for the complainant. In my view, the evidence that when all these offences were committed against the complainant, her mother was sick and, most of the time, was sleeping in his room is corroborated by the appellant.

[55] The argument that other State witnesses did not corroborate the complainant's evidence is incorrect. The complainant's evidence must not be looked at in isolation or in a piecemeal fashion. Two basic principles should be considered whenever evidence is evaluated: evidence must be weighed in its totality and not on a piece-meal basis, and

probabilities must be distinguished from conjecture or speculation. An appraisal of all the evidence is required. Reliable evidence should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered.⁸

[56] In my view, the complainant's evidence was largely corroborated by Mr. G[...]s evidence. Mr G[...]s evidence was that in June 2018 (before the case was reported), the complainant told him that the appellant touched her a lot and stared at her a lot. Crucially, this report to Mr G[...], was made when the complainant was still living with the appellant and her mother. In one instance, the complainant was in the lounge with the appellant, the witness (Mr G[...]) and the complainant were on a call. During their discussion, the complainant told him that she was feeling very uncomfortable because the appellant stared at her so much. After that, they ended the call.

[57] The next day at school, the complainant was very uneasy and uncomfortable until the second break. Mr G[...] observed that the complainant was withdrawn and emotional. She asked the complainant what had happened, and the latter did not tell him what had happened. He then concluded that the touching the complainant was referring to was a bit worse than what she was telling him. He spoke to the complainant a lot about this incident and stated that it came from her own to tell her parents. Later, after she opened the case, the complainant said to him that the appellant penetrated her with his fingers and penis.

⁸ *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

[58] I am of the opinion that Mr. G[...]’s evidence corroborates the evidence of the complainant in all material respects. The appellant was touching the complainant and abusing her sexually, so much so that this affected the complainant emotionally. Mr G[...] observed this. I consider Mr G[...] an independent witness with no interest in the matter. The complainant reported to him her alleged ordeal long before she could report to her parents or even before she could open a case with the police.

[59] I must emphasise that the complainant told Mr G[...] that the appellant was uncomfortably touching her when she was still staying with the appellant. In my view, the complainant was vulnerable. She was immature in age and in a very toxic and uncomfortable environment. Her mother and the appellant constantly fought. Her mother was sick and spent most of the time sleeping. In the process, the appellant took advantage of her vulnerability, seduced her over an extended period, and thereafter eventually raped her.

[60] As correctly pointed out by the prosecutor during cross-examination, when the complainant’s mother became sick in 2016, the appellant’s attention shifted from the complainant’s mom to the complainant. He took advantage of the vulnerability and dependence of the complainant. He groomed and lured the complainant by touching her, masturbating in front of her, licking her vagina, and later inserting his penis into her vagina.

[61] It was argued during the hearing of this appeal that there is no guarantee of truth in the complainant's evidence. Further, it was suggested that the medical evidence the State produced did not support the complainant's evidence. I do not agree with this proposition. As previously stated, it is incumbent on this court to eschew a piecemeal process of reasoning. It should assess the evidence before it holistically. The evidence of Dr Andrew's was that the complainant has an elastic hymen, which would only tear with childbirth. According to him, with enough force, one could tear it. However, with intercourse or with digital or penal penetration, it would not tear. He further stated that, as such, there was no indication of penetration. However, when questioned by the court whether, with a hymen like that, one could still find any sign of penetration, his response was no.

[62] In my view, with this evidence, the fact that there were no injuries or sign of penetration does not mean that the complainant was not raped. In any event, in his clinical findings, Dr Andrews noted that the absence of injuries does not exclude rape. Moreover, the complainant cannot be expected to have suffered physical injuries when the appellant inserted his penis in her mouth or touching her breast and licking her vagina.

[63] In addition to the above, the evidence of the complainant's mother and that of the appellant corroborates the complainant's version. The appellant and the complainant's mother confirmed that the complainant, young as she was, is a writer. She wrote poems and little stories. During cross-examination, the appellant stated that the complainant had written little stories and poems. To express her suppressed emotions, the complainant

put pen to paper and wrote a poem. Her mother discovered this poem. I find this part of the poem relevant. It states as follows:

“I still feel your hands on me, every single day. I no longer feel free, in my own body. You think I did it willingly, you pushed me down. I was not asking for it. You said, we can stop anytime...Stop. I feel your breath over my legs. I feel your lips over my stomach. I feel everything. It is like you are still here, and I am paralysed in fear because of you. I cannot stand the thought of something that was supposed to be special, because of you I do not want people to touch me. Because of you and the screams.” (“my emphasis’)

[64] This poem, in my view, expresses emotions and the effect of grief that the complainant suffered and continues to suffer because of the abuse. It also expresses the humiliating as well as the traumatic experience which violated her dignity and pride as a girl child. The poem also expresses the pain the complainant was subjected to and its deleterious effect on her. I find it highly improbable that the complainant would express such grief as she did if nothing at all happened to her. Importantly, the grief and emotions poured out in the poem were observed by Mr G[...] when he met the complainant at school. According to him, after the complainant told him that the appellant was inappropriately touching her, the complainant at school was distraught and emotionally withdrawn.

[65] Significantly, the complainant's mother stated that when she read the poem, she noted two things similar to what the appellant said to her. For instance, that you are easy to convince and the oral sex. Her evidence was that the appellant was obsessed with oral sex during her relationship with him.

[66] Mr Scholzel challenged the evidence of the complainant, especially that in her two statements (A1 and A18), she did not mention that the appellant forced her to have oral sex with him. He also relied on the contradiction between the statement of the complainant and the evidence in court as to whether the appellant ever molested her in the mornings. During her evidence in court, the complainant explained that the appellant did not molest her in the mornings. At the same time, in the statement, it is stated that he molested her. From a careful reading of the record, one notes that when the appellant's legal counsel laid the basis to cross-examine the complainant on her alleged statements, the complainant was not asked whether she was asked to confirm the correctness of her statements and whether, having done so, she was asked to sign the two statements. Instead, the complainant was adamant that the statements were not read back to her when she gave and signed them. As far as the A1 statement was concerned, when the court wanted to find out from her if the statement was read back to her after it was taken, she stated that not on the same day.

[67] As far as the A18 statement is concerned, she stated that it was taken and not read back to her. It was only read back to her by the prosecutor during consultation in preparation for the hearing. She also cannot read the handwriting of the officer who wrote the statements. During consultation with the prosecutor, the contents of the statements were explained to her. This, in my view, explains the reason why the forced oral sex is not in her statement. It also explains the alleged contradiction of her evidence in court and her statement that the appellant did not abuse her in the morning.

[68] Notwithstanding this finding, I am of the opinion that it is necessary to remind ourselves that the purpose of a police statement is to obtain details of an offence so that a decision can be made on whether or not to institute a prosecution. The statement of a witness is not intended to be a precursor to that witness' evidence in court.

[69] In *S v Mafaladiso en Andere*,⁹ the Supreme Court of Appeal set out the approach to be adopted in cases where there is a contradiction between the police statement of a witness and the evidence of such witness or where there is no reference in a police statement to what can be an essential aspect of that witness' testimony as is the case in this matter. Among others, the court noted that the mere fact that there are self-contradictions must be approached with caution by a court. Importantly, the court noted that it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Thus, the contradictory versions must be considered and evaluated on a holistic basis. Thus, the contradictory versions must be considered and evaluated on a holistic basis. The court must weigh up the previous statement against the *viva voce* evidence, consider all the evidence, and decide whether it is reliable or not and whether the truth has been told despite any shortcomings.

[70] In the present matter, the complainant has given a plausible explanation of the differences. She was adamant in court that the appellant did not molest her in the morning. Moreover, she was not asked in court if she confirmed the correctness of the statement. The discrepancy, in my view, has been adequately explained. She explained

⁹ 2003 (1) SACR 583 (SCA) at 593E - 594H.

that the appellant forced her to have oral sex with him. I have no reason to reject the evidence of the complainant. Although she could not remember specific dates, the complainant was truthful and candid with the court. She did not implicate the appellant falsely. She confirmed the appellant's version that he would creep into her bed in the mornings. According to her, nothing happened in the mornings. If indeed she wanted to implicate the applicant falsely, she could have done so when the appellant crept into her bed in the morning, but she did not.

[71] On the other hand, the appellant raised a bare denial. He disputed all the allegations levelled against him. He, however, confirms the version of the complainant that he would creep into her bed in the mornings. The appellant further confirmed the version of the complainant that they would sometimes watch television as a family. According to him, during sleeping time, he would sleep at one end, the complainant would sleep at the other, and the complainant's mother would sleep in the middle.

[72] In my view, the bare denial of the appellant is implausible for the following reasons: The appellant's evidence was that he had a perfect relationship with the complainant. They had pillow fights and, at times, tickle fights. The appellant assisted the complainant with homework and school projects. The relationship appeared to be that of father and daughter. The appellant painted a picture of a wonderful relationship. The complainant even bought him a Father's Day card.

[73] Surprisingly, in June 2018, while the complainant and her mother were still living together with the appellant, the complainant raised the question of sexual abuse with Mr G[...]. She told Mr G[...] that the appellant was inappropriately touching her a lot. This caused the complainant to be reserved and emotionally withdrawn at school. In my view, this piece of evidence defeats the version that the appellant proffered. If indeed, everything was pleasant and hunky-dory as the appellant suggests, it is highly strange that the complainant would implicate him to her friend Mr G[...].

[74] In my judgment, the complainant reported her ordeal to Mr G[...] because the appellant was sexually abusing her. Undoubtedly, the complainant could not have reported to Mr G[...] that the appellant, who was of great help to her with her schoolwork, was abusing her if there was nothing that the appellant was doing to her. She reported to him because she was being abused by the person she trusted. In my view, the complainant was a candid and truthful witness, and the record certainly lends itself to that conclusion. It cannot be suggested that the complainant was influenced to make a case against the appellant.

[75] Regarding the appeal on the sentence, it is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. The power of a court of appeal to interfere with a sentence imposed by the trial court is circumscribed. Interference with a sentence on appeal is not justified in the absence of a material misdirection or irregularity or unless the sentence imposed is so startlingly inappropriate as to create a sense of

shock.¹⁰ Thus, an appeal court will only interfere with a sentence on appeal if it appears that the trial court has exercised its discretion improperly or unreasonably.¹¹

[76] In the present matter, the essential enquiry is whether the court *a quo* in imposing the sentence of life imprisonment had exercised its discretion properly and judicially. It was argued that the trial court failed to consider the appellant's personal circumstances properly but merely paid lip service to his circumstances. It was also argued that the trial court did not consider the Correctional Officer's report, which recommended correctional supervision.

[77] In my opinion, the court *a quo* misdirected itself on sentence. The following reasons bear out this finding. The appellant was convicted of three counts of rape that attracted life sentences. Upon convicting the appellant on these counts, the court *a quo* was bound to impose the prescribed sentence unless there were substantial and compelling circumstances to deviate from that sentence. The trial court found that since rehabilitation of the appellant is possible, this should solely count as a substantial and compelling factor to deviate from the prescribed sentence. I find the reason advanced by the trial court very flimsy and insubstantial to warrant a deviation from the prescribed sentence. Notwithstanding, the State did not challenge the sentence imposed by the court *a quo*.

¹⁰ *S v Moosajee* [1999] 2 All SA 353 (A), para 8.

¹¹ *S v Gerber* [1998] 4 All SA 315 (NC).

[78] Crucially, despite its finding that there were substantial and compelling circumstances warranting a deviation from the prescribed sentence, the trial court still imposed a sentence of life imprisonment in terms of section 51(1) of the CLAA. In my view, in doing so, the court below erred. The jurisdiction of the Regional Court to impose a life sentence is circumscribed in section 51(1) of the CLAA. Once the court found substantial and compelling circumstances as envisaged in section 51(3) of the CLAA, it could not impose a sentence of life imprisonment in terms of section 51(1) of the Act. Instead, it was at large to exercise its discretion and impose a lesser sentence. The need to impose a lesser sentence was no longer under the prescribed minimum sentencing mechanism. In a nutshell, the court *a quo* could not deviate from the prescribed minimum sentence due to the existence of substantial and compelling circumstances warranting such deviation and still impose the prescribed sentence.

[79] What compounds the conundrum, in this case, is that the court *a quo* imposed a globular sentence in respect of the three rape charges. The court took the three counts of rape together for purposes of sentence and imposed one sentence of life imprisonment. While it is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence, our courts have on various occasions expressed some misgivings about such sentences particularly where an accused was convicted after having pleaded not guilty but subsequently having the conviction on some counts set aside on appeal.¹²

¹² *S v Rantlhai* (1178/2016) [2017] ZASCA 106 (13 September 2017) at para 9; *S v Young* 1977 (1) SA 602 (A) at 610E.

[80] Notwithstanding, in *S v Rantlai (supra)*, the Supreme Court of Appeal noted that there is no absolute bar against imposing globular sentences. However, there seems to be some unanimity in our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances.¹³ This is because there will be circumstances where, for instance, it can be used to ameliorate the effect of sentences that may appear shockingly inappropriate.

[81] As discussed above, the court *a quo* erred in imposing a life sentence despite its finding in terms of section 51(3) of the CLAA. Such misdirection demands the intervention of this court. Consequently, this Court faces the duty of imposing a sentence on the appellant. In considering an appropriate sentence, I must mention that the appellant's personal circumstances were set out in detail before the trial court. They are not repeated in detail in this judgment to avoid prolixity.

[82] At the hearing of the matter, the appellant was 39 years old, unmarried, and had no children or dependents. He was born in Bloemfontein in 1983 and is the eldest of three children. He was diagnosed with encephalitis, which is an inflammation of the active tissues of the brain caused by an inflammation or an auto immune response. Due to his condition, the appellant had to attend a special need school. His parents divorced while he was in Grade 10, and his father moved out of the common home. As a result, the appellant and his sister had to leave school to seek employment to financially assist in maintaining the household and his mother, who was unemployed.

¹³ *S v Nkosi* 1965 (2) SA 414 (C) at 416C.

[83] Later, the appellant registered for a course in computer studies at Dynamic Computer Training Centre in Tygervalley, where he completed his course and is a certified professional. The appellant was previously employed by Royal Gutters for two to three years. He has no contact with his father. The appellant supported his mother as well as the complainant's mother. He had no previous convictions. The appellant previously lived at Parow but relocated to live with his mother on a farm in Klapmuts. He was unemployed for a year before his arrest. The appellant has a good relationship with his mother. The Probation Officer reported that the appellant's income formed a significant part of the family's day to day income. The Probation Officer also reported that the appellant is a pillar of support to his 71-year-old mother.

[84] Having considered the personal circumstances of the appellant discussed above, and in the various reports presented as evidence, the interest of society, the seriousness of the crimes committed by the appellant, the impact that this ordeal had on the complainant, I am of the view that there are substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence. I am further of the view that the imposition of three life sentences in the present case would be startlingly and disturbingly inappropriate. Moreover, the sentence that the court should impose should be a sentence that will be deterrent, retributive and, at the same time, reformatory.

[85] Lastly, one of the grounds of appeal is that the court *a quo* did not consider correctional supervision as a sentencing option. In my view, correctional supervision as a sentencing option would be improper and disproportionate to the gravity and severity of

the offence the appellant was convicted of.¹⁴ It must be stressed that the appellant invaded the dignity and the privacy of the complainant. As the trial court found, this ordeal left the complainant with emotional scars that she will live with for the rest of her life. To this end, we need to remind ourselves that our Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime.¹⁵ Hence, section 12(1)(c) of the Constitution guarantees everyone the right to freedom and security which include the right to be free from all forms of violence from either public or private sources.

[86] Given all these considerations, I am of the view that a sentence of imprisonment of 18 years for each rape count (counts 6, 7, and 8) is appropriate in the circumstances. To ameliorate the cumulative severity of the sentence, I would propose that the sentence of 18 years imprisonment in respect of counts 7 and 8 and the prison sentence imposed by the trial court in respect of the sexual assault counts (counts 1, 2, 3, 4, and 5) be ordered to run concurrently with the sentence in count 6.

Order

[87] In the result, I would propose the following order.

87.1 That the appeal on conviction be dismissed.

87.2 The sentence imposed by the trial court in respect of counts 1, 2, 3, 4 and 5 be confirmed.

¹⁴ *S v Mngoma* 2009 (1) SACR 435 (E).

¹⁵ *S v Abrahams* 2002 (1) SACR 116 (SCA) para 30.

87.3 That the sentence imposed in respect of counts 6, 7, and 8 be set aside and be replaced with the following sentence:

87.4 The appellant is sentenced to 18 years imprisonment in respect of count 6,

87.5 18 years imprisonment in respect of count 7, and

87.6 18 years imprisonment in respect of count 8. In terms of section 280(2) of the CPA, the sentence of imprisonment in respect of count 1, 2, 3, 4, 5, 7 and 8 would run concurrently with the sentence of imprisonment in count 6.

87.7 The appellant is effectively sentenced to serve a term of 18 years imprisonment.

87.8 In terms of section 282 of the CPA, the sentence imposed above is antedated to 30 March 2022.

LEKHULENI JD

JUDGE OF THE HIGH COURT

I agree and it so ordered:

KUSEVITSKY D

JUDGE OF THE HIGH COURT

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