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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A350/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 25 October 2024

SIGNATURE:

In the matter between:

P[...], W[...] A[...]

APPELLANT

AND

THE STATE

RESPONDENT

Coram: Millar J et Suder AJ

Heard on: 17 October 2024

Delivered: 25 October 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 25 October 2024.

ORDER

It is Ordered that:

- [1] The appeal against conviction and sentence is dismissed.
- [2] The appellant's bail is revoked, and he is ordered to report to the Wierdabrug Police Station within 48 hours of the handing down of this order in order to commence serving the sentence of life imprisonment imposed upon him by the *Court a quo*. If he does not so report, the South African Police Services are directed to forthwith arrest him for that purpose.

JUDGMENT

SUDER AJ (MILLAR J CONCURRING)

Introduction

- [1] On 14 June 2019, the Appellant was arraigned before the Regional Court in the Regional Division of Pretoria on a count of rape in terms of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ read with Section 94 of the Criminal Procedure Act². The Appellant pleaded not guilty on the charge of rape.
- [2] The Appellant was subsequently convicted on the charge of rape and the minimum prescribed sentence of life imprisonment was imposed. Section 276 of the Criminal Procedure Act, 1977³ provides for the sentences which courts can impose.

¹ Act 32 Of 2007.

² Act 51 Of 1977 ('the CPA').

³ Act 51 of 1977 ('the CPA').

- [3] This is an appeal against the conviction and sentence. The appeal comes before this court in terms of Section 309(1)(a) of Act 51 of 1977.⁴
- [4] The Appellant was granted bail pending the outcome of the Appeal and is currently out on bail.
- [5] The Complainant's evidence was heard by the *Court a quo* through an intermediary to avoid the complainant being subjected to undue mental stress. At the time of giving evidence, the Complainant was 18 years old.
- [6] The issues for determination before this Court are whether the appellant was correctly convicted and whether an appropriate sentence was imposed.

The Evidence

- [7] There were four witnesses who testified at the trial. The Complainant, her mother and Dr Ubisi testified for the Respondent. The Appellant testified in his own defence.
- [8] The Appellant, during September 2014 and April 2017, and on several occasions during this period (recorded as approximately 20 times) unlawfully and intentionally committed several acts of sexual penetration with the Complainant - a 12-year-old female child at the time, by inserting his penis into her vagina without her consent, committing the offence of rape.
- [9] The Appellant was the Complainant's step-father when the offence was committed. The Complainant's mother and the Appellant have subsequently divorced. The Appellant has a biological daughter from his marriage with the Complainant's mother,

⁴ Section 309(1)(a) of Act 51 Of 1977 provides for an automatic right to appeal against the conviction and sentence where a regional court imposes the minimum sentence of life imprisonment.

- [10] During the period 2014 to 2017 the Appellant, the Complainant, the Complainant's mother and the Appellant's biological daughter lived in a three-bedroom house in Clubview. The Complainant initially shared a room with her younger sister, the Appellant's biological daughter, but at a later stage, during 2015-2016, the Complainant got her own room.
- [11] The evidence of the Complainant was that, on the day of the first incident, during September 2014, she was sick with a stomach bug. The Complainant's mother, who was away from home on a course, suggested that the Complainant sleep downstairs in her and the Appellant's bedroom. The reason for this was that a bathroom was attached to their bedroom, which made it convenient for the Complainant to have access to a bathroom. The Appellant told her that he will sleep in her bedroom.
- [12] The complainant testified that on the night of the first incident, she went to sleep after taking her medication. In the middle of the night, the Appellant, who indicated that he would sleep in the Complainant's bedroom, entered the bedroom around midnight while the Complainant was asleep. The Complainant woke up to the Appellant being on top of her, with his penis in her vagina. The Complainant could not breathe and was in terrible pain. The Complainant looked the Appellant in the face and did not know what to do. The Appellant made up and down movements. When the Appellant was finished, he got up, put on his underwear and pants, went out of the room and closed the door. The next morning the Appellant pretended as if nothing happened. The Complainant identified the Appellant by a light shining from outside the bedroom window.
- [13] The Complainant's evidence was that, being 12 years old at the time, she did not realise or comprehend what happened. The Complainant did not tell anyone because she knew the Appellant would become aggressive. The Complainant did not think it would happen again but over a period of three years, the Appellant raped the Complainant about 20 times, usually in her bedroom at night when the Complainant's mother was at work or worked late, and sometimes while the Complainant's mother was in the house. The

rapes in the room took place in her sister A[...]’s presence, usually between 8 and 11 at night. They shared a room upstairs.

[14] The Complainant testified that one night the Appellant and the Complainant’s mother were fighting downstairs and the Complainant’s sister, unable to sleep, went downstairs. Thirty minutes later the Appellant entered the room carrying her sister. He placed her sister on her bed, approached the Complainant’s bed, picked her up and then lay underneath her. He pulled off his trousers and underwear as well as the Complainant’s pants and panties, placed his penis in her vagina and just lay there. After a while he got up and left the room, closing the door behind him. The following morning the Appellant acted as if nothing happened.

[15] The Complainant moved to her own bedroom in 2015 and the rapes continued.

[16] The Complainant further testified that after the first incident the Appellant would enter the bathroom and would try and wash the Complainant’s body if she was in the bath and shower. The Appellant in one instance entered the shower when the Complainant was showering and made her touch his penis. The Appellant would buy the Complainant teddy bears and clothes. Whilst this was disputed under cross-examination, the Appellant confirmed this in his examination in chief.

[17] The Complainant did not tell her mother about the incidents because the Appellant was very aggressive and she feared for her life and that of her sister and mother. The Complainant told her friend M[...] about the incidents while it continued as she had a similar experience. The Complainant’s evidence was also that she did not tell her mother about the incidents because she was not ready to tell her and because she did not know how her mother would react to the news. The Complainant’s mother was told of the incidents after a rumour was spread about the Complainant and the Appellant during the end of 2017 until early 2018. This was confirmed by the Complainant’s mother.

- [18] The incidents stopped in 2017 when the Appellant started working late hours.
- [19] The Complainant, her mother and sister left the home they lived in with the Complainant in 2018. The Appellant testified that the reason for them leaving the home was the incidents for which he was before court.
- [20] The Complainant's mother testified that the Appellant had a temper.
- [21] She testified that she became aware of the rape when she received a forwarded message from the Complainant, through which she inadvertently discovered that the Appellant had raped the Complainant. She tried calling the Complainant to find out what was going on but the Complainant was crying and unable to talk. She managed to secure an appointment with a medical practitioner the next day as her concern at the time was to ensure the physical well-being of the Complainant.
- [22] Dr Ubisi, the medical practitioner who examined the Complainant, testified that although no injuries were noted, intercourse could have taken place without any visible injuries. The Complainant was examined in 2018, four years after the first incident. Dr Ubisi further testified that the absence of injuries does not exclude penetration. At the age of 14 years, which was when the first incident of rape occurred, the hymen can stretch so the Complainant may have had sexual intercourse without any injuries because of the oestrogen. Dr Ubisi also testified that factors which could also influence injuries would be lubrication, the perpetrator's size and if the erection was weak. This was neither challenged nor disputed by the Appellant.
- [23] The Appellant denied the rape. He admitted to the Complainant's testimony that he used to enter the bathroom while she was bathing. He testified that he had done so on occasion to check on her and he regarded this as entirely normal.

Ad Conviction

[24] In deciding the appeal on conviction, this Court can only interfere with the findings of the *Court a quo* if it decides that there were patently wrong findings and/or misdirection by the *Court a quo* which led to a failure of justice.

[25] In *S v Mabena*⁵ the following was said in paragraph [11] as regard allegations of errors in the judgement of the *Court a quo*:

“[11] On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably possibly true. It was, however, not suggested that the regional magistrate misdirected herself in any respect. **The power of an appeal court, to interfere on fact with the findings of the court below, is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case. I think that the regional magistrate was correct in her finding that intercourse had in fact taken place and, in the light of that finding, rightly rejected the appellant's evidence. The appeal against conviction must therefore fail.**”

[26] The *Court a quo* extensively assessed the evidence presented by both the Appellant and the Respondent.

[27] When evaluating the evidence before it, the *Court a quo* took cognisance of the fact that the Complainant was a single witness and applied the cautionary rules when assessing the Complainant's evidence. This is notwithstanding the position crystallised by the Legislature in s 60 of the

⁵ 2012 (2) SACR 287 (GNP).

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provides that: *'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'*

- [28] The Complainant's evidence was found to be credible and reliable in all material respects and the Appellant's evidence to be full of material contradictions and inherent improbabilities. It was found that the Appellant's evidence was not reasonably, possibly true. In fact, the Appellant's evidence corroborated the evidence of the Complainant.
- [29] Although the Complainant was a single witness, the Complainant's mother corroborated the Complainant's evidence on certain aspects more especially the aggression of the Appellant. She was also found to be an impressive and credible witness. There were no material improbabilities or contradictions in the evidence of the Complainant's mother.
- [30] The important evidence provided by the Complainant was not disputed by the Appellant, viz. the Complainant's evidence that the Appellant told the Complainant on the night of the first incident in September that he would sleep in her room.
- [31] During cross-examination of the Complainant the Appellants version was that he denied entering the bathroom, although he testified that he had done so and regarded it as being normal. Furthermore, it was never put to the Complainant that the Appellant would testify that he did not rape the Complainant although he also testified to this in his evidence.
- [32] The Appellant's legal representative argued that the cautionary rule was applicable as the Complainant was a single, child witness. The *Court a quo* considered that the Respondent called three witnesses whose evidence was found to be honest, credible and satisfactory. The *Court a quo*, whilst applying the cautionary rules providing that the evidence of a single witness,

in this case a child witness, must be treated with caution, acknowledged that section 208 of the Criminal Procedure Act allows for a conviction on the single evidence of a competent witness.

- [33] The Court *a quo*'s application of the cautionary rule cannot be criticised. This matter was not canvassed in argument by Appellant's counsel, although mentioned in the Heads of Argument as a ground for appeal.
- [34] Although the incidents took place several years before, the Complainant proved to be a competent witness in that she narrated events in a clear and satisfactory manner. In *Woji v Santam Insurance Co*⁶, Diemont J stated that in determining if a young person's evidence is trustworthy, it is necessary to assess the capacity of the child to tell the truth. This capacity depends on whether the child is intelligent to observe, as well as on his or her ability to remember events. *Maila v The State*⁷ the court stated that "satisfactory in all respects" does not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.
- [35] In *S v Jackson*⁸, Olivier J stated that the cautionary rule was based on an irrational and outdated perception, because it unjustly stereotypes complainant's in sexual assault cases as unreliable. Kirk-Cohen J, in *Director of Public Prosecutions v S*⁹ questioned whether the same conclusion should apply to children. The learned judge acknowledged that it is common cause that problems do occur with the testimony of small children. The Court held that these problems arise from the fact that witnesses are young. *In casu*, the Complainant was 18 years old when giving her testimony so can hardly be described as a small child.
- [36] It was argued that certain important parts of the Appellant's version were not put to the State's witness due to the error of his legal representative.

⁶ 1981 (1) SA 1020 A.

⁷ (429/2022) [2023] ZASCA 3 (23 January 2023).

⁸ 1998 (1) SACR 470 SCA.

⁹ 2000 (2) SA 711 TPD.

Counsel for the Appellant argued that the Appellant was a layperson who was reliant on being guided by his legal representative's questioning to amplify his answers, sometimes monosyllabic in nature, on certain issues, such as the Appellant's failure to amplify his denial of the offence and the fact that his versions were not put to the Complainant. Despite the Appellant's counsel submitting that the Appellant was reliant on the questioning by his legal representative, the Appellant in some instances amplified on his answers without being prompted by any follow up questions.

[37] There is nothing to indicate that the trial was not conducted properly. The legal representative engaged with the Appellant to ensure that all aspects were being addressed in cross-examination. The Appellant had ample opportunity to address discrepancies and contradictions in the Complainant's and witness testimonies and to make sure that his version was put to the witnesses.

[38] Honing in on the first incident during September 2014 when the Complainant was raped in the Appellant's bedroom, this was a significant event. Most significant events remain imprinted in one's mind, Despite the Complainant giving a detailed account of the events of that day, the Appellant failed to challenge the Complainant's version or to put his version to her under cross-examination. This is inexplicable considering that the Appellant was aware of the seriousness of the charge. The argument made by Appellant's counsel that he was a layman and was required to be guided by his legal practitioner is without merit. The legal practitioner cannot be expected to put words into the Appellant's mouth. There is no suggestion that the Appellant was unable to understand the consequences of not providing a reason or explanation for the allegations (at the time) against him. In respect of key questions the Appellant furnished non-specific answers.

[39] It is implausible that the Appellant would have a general conversation with the Complainant about her day after opening the bathroom door and standing in the bathroom while the Complainant was bathing. Entering the bathroom to oversee a child's activity is plausible to a certain extent, but

such an act is improbable in relation to the Complainant's age. This is consistent with the Complainant's version as to the real purpose of the Appellant entering the bathroom.

- [40] The *Court a quo* questioned the Appellant on why he did not wait for the Complainant to finish in the bathroom and then talk to her. The Appellant's response was that children will be children and they must learn to listen to their parents that is the way he was taught. This response is concerning and supports the Complainant's expressions of fear for the Appellant.
- [41] The Appellant criticised the *Court a quo*'s acceptance of the medical evidence yet the medical evidence was not challenged and was undisputed. This was despite Appellant's counsel commenting that the 20 incidents of rape could not have taken place without causing any injuries.
- [42] The medical evidence presented was that the absence of injuries did not exclude penetration. High oestrogen in a child of the age of the Complainant makes the hymen stretchy making sexual intercourse possible without injuries. Under cross-examination, Dr Ubisi further testified that even before oestrogen levels increase, the noting of injuries could be influenced by factors such as the perpetrators size and the strength or weakness of an erection. This court notes that the evidence, although neutral, did not exclude the fact that penetration did take place.
- [43] It was not evident from the records and Counsel for the Appellant could not demonstrate to this court where in the records this was challenged by the Appellant indicating that he was prepared to subject himself to an examination which could have proven that injuries would have been caused by penetration. Counsel for the Appellant responded by stating that as a lay person the Appellant would not have known that he could ask his legal representative to subject him to an examination.
- [44] The Appellant was being tried for a serious offence, which he denied without explanation or challenge to the Complainant's version, and even as a lay

person (although legally represented) he would have known to take whatever steps necessary to dispute the Complainant's version. The Appellant's legal representative went so far as to accuse the Complainant of fabrication, yet this was not addressed by the Appellant in his examination in chief.

[45] Counsel for the Appellant submitted that even if the Appellant's case was without scrutiny, the medical evidence was uncorroborated and unsubstantiated. This is not necessary in a case where the evidence is not placed in issue. The medical evidence was not placed in issue and the explanation by Dr Ubisi stands unchallenged.

[46] The Court *a quo* found contradictions but did not find the contradictions to be material or improbable., These were expected from an honest but imperfect recollection and reconstruction. The Court *a quo*'s finding that this did not affect the Complainant's credibility cannot be faulted.¹⁰

[47] In *R v Mthembu*,¹¹ the Court expressed the test for the evaluation of the evidence in a case such as the present as follows:

"I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise, the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though,

¹⁰ *S v Mkohle* 1990 (1) SACR 19 (SCA) 98f-g; *S v Oosthuizen* 1982 (3) SA 571 (T) 576B-C

¹¹ 1950 (1) SA 670 (A) at 679-680.

if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties. Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree as is the line between proof by a balance of probabilities and proof beyond a reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty (Rex v. de Villiers) (1944, A.D. 493 at p. 508) so, it may fairly be reasoned, a number of probabilities as to the existence of the facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused's guilt."

[48] In *Vilakazi v S*¹² the court stated as follows:

' . . . [O]ur courts have not considered the lack of evidence of a voluntary complaint (also referred to as a "first report") to be fatal to a charge of rape. In this regard, Milton, in South African Criminal Law and Procedure, says: "It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such [a] complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant. But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age. The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear."

¹² *Vilakazi v S* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 15.

- [49] In *S v Ntsele, Eksteen AJA* (as he then was) stated the following:
“Prove guilt beyond a reasonable doubt- not beyond a shadow of doubt- if only remote possibility is in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable”, the case is proved beyond a reasonable doubt.”
- [50] The Complainant presented as a trustworthy witness and her testimony was satisfactory in all respects. Having heard argument on the grounds of appeal on the conviction and having evaluated the record of the proceedings and the Court *a quo*’s assessment of the evidence, the Court *a quo* correctly found that the Respondent proved the Appellants guilt beyond a reasonable doubt.
- [51] The Appellant was properly convicted on the evidence presented. There is accordingly no reason for this court to interfere with the Court *a quo*’s finding on the conviction.

Ad Sentence

- [52] Turning to the question of the prescribed minimum sentence of life imprisonment imposed by the Court *a quo*, it is trite that sentencing is pre-eminently a matter for the discretion of the trial court.
- [53] An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court. A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence out of preference. Such an act will usurp the sentencing discretion of the trial court. A material misdirection by the trial court vitiates its exercise of that discretion and an appellate court is then entitled to consider the question of sentence afresh. In doing so, it assesses

sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance.¹³

- [54] Even in the absence of a material misdirection, an appellate court may be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'¹⁴
- [55] It is trite that when determining an appropriate sentence, a court should be mindful of the foundational sentencing principle that 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy. In seeking to achieve the aforesaid objectives, courts are enjoined to temper the punishment with a measure of mercy.¹⁵
- [56] The approach of the courts to sentencing is that judicial officers should not approach punishment in the spirit of anger because doing so would make it difficult to achieve the delicate balance between the crime, the criminal and the interest of society. The general purpose of imposing a sentence is to achieve the following objectives: rehabilitation, deterrence, prevention and retribution¹⁶.
- [57] The object of sentencing is not to satisfy public opinion, but to serve the public interest.¹⁷ The public interest in this and other rape cases involves ensuring the protection of women and children and ensuring that decisions are taken by the courts in cognisance of the constitutional rights of privacy and dignity, particularly every child's right to be protected from maltreatment, neglect, abuse and degradation.

¹³ *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023).

¹⁴ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

¹⁵ *S v Rabie* 1975 (4) SA 855 (A).

¹⁶ *Ibid.*

¹⁷ *S v Mhlakhaza and Another* [1997] 2 All SA 185 (A) at 189. Also see *S v M* (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC).

[58] In deciding the appeal on sentence, it is apposite to consider whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentence.¹⁸ The appeal against sentence is opposed on the grounds that no substantial and compelling circumstances were demonstrated to the Court *a quo* to evaluate and none of the circumstances submitted to this court are sufficient to deviate from the minimum sentences imposed by the Court *a quo*.

Court *a quo* on Sentencing

[59] The Appellant cites the absence of physical injuries as per the medical report as a substantial and compelling factor for deviating from the minimum prescribed sentence. I do not agree with this given the neutrality of the medical evidence presented by Dr Ubisi, which was not challenged. It was held in *S v Chapman*¹⁹ that when imposing a sentence in respect of the offence of rape, an apparent lack of physical injury to the complainant and any relationship between the complainant and accused prior to the offence being committed are not, on their own, considered to be substantial and compelling circumstances justifying the imposition of a lesser sentence. For this reason, the appeal against sentence must also fail.

[60] In the circumstances, I propose the following order:

[60.1] The appeal against conviction and sentence is dismissed.

[60.2] The appellant's bail is revoked, and he is ordered to report to the Wierdabrug Police Station within 48 Hours of the handing down of this order in order to commence serving the sentence of life imprisonment imposed upon him by the Court *a quo*. If he does not so report, the South African Police Services are directed to forthwith arrest him for that purpose.

F SUDER

¹⁸ See *Radebe v The State* [2019] ZAGPPHC 406 at para 12

¹⁹ 1997 (2) SACR 3 (SCA) at 5B.

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I AGREE, AND IT SO ORDERED

**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 17 OCTOBER 2024

JUDGMENT DELIVERED ON: 25 OCTOBER 2024

COUNSEL FOR THE APPELLANT: MR ANTHONY RUDMAN
INSTRUCTED BY: MESSRS ANTHONY RUDMAN
ATTORNEYS

REFERENCE: MR. RUDMAN

COUNSEL FOR THE RESPONDENT: ADV. PCB LUYT.
INSTRUCTED BY: THE DIRECTOR OF PUBLIC
PROSECUTIONS – PRETORIA.

REFERENCE: 10/2/5/1/3-PA34/2023