



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

Case No.:A97/2024

In the matter between:

APHIWE MGWALI

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 16 OCTOBER 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an appeal, with leave of the Wynberg Regional Court, against the conviction and sentence of the appellant who was charged with rape and sentenced to 10 years' direct imprisonment. The appellant was charged with contravening section 3, read with sections 1, 36(1), 52(b), 57, 58, 59, 60, 61 and 68 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007; further read with sections 24, 256, 261 and 281 of the Criminal Procedure Act 51 of 1977 (*"the*

CPA”), section 51(1) of the Criminal Law Amendment Act 105 of 1997 (*“the CLAA”*), and the Children's Act 38 of 2005.

[2] It was alleged that, at approximately 2am on 16 May 2022 the appellant raped the complainant in her bedroom at her home where she lived with her brother, A[...] S[...] (*“S[...]”*). The complainant was 16 years’ old at the time of the incident, with her birthday on 5 August 2005. The appellant’s defence in the court *a quo* was that he and the complainant had consensual sex on the day in question. The medical evidence led at the trial confirmed that there had been recent penetration, and the main question for adjudication was whether it was consensual.

[3] According to the complainant, on the night of 15 May 2022 she returned home very drunk after spending the night drinking at a friend’s place. Her friends had accompanied her and put her into bed at home. She was wearing jeans, a t-shirt and underwear when she went to sleep. She had passed out and woken up with the appellant on top of her, with his penis inside her vagina. It was the penetration that woke her up from her sleep. The appellant had taken off her jeans completely and then moved her panties to the side, instead of taking them off completely, so that he could penetrate her. A friend of the appellant, referred to as Cheese, was also present in the room, watching the rape.

[4] When the complainant woke up and saw the appellant, she shouted at him, pushed him off and chased him and Cheese out of her bedroom, and then bolted the door of her bedroom. Thereafter, she went back to sleep. In the morning, she reported the rape to her brother and to a cousin. She, her brother, the cousin and some friends went to the appellant’s home to report the incident, but the appellant was not home. Later, when the appellant returned from work, they confronted him, and also assaulted him at some stage.

[5] The complainant also reported the incident to a male cousin, one J[...] S[...], who had contacted the police. However, the police did not react, and the complainant and company approached a lady from the community who also phoned the police. Eventually, the police arrived and took the complainant and others to the police

station where written statements were taken from the complainant and her brother. The complainant was also later taken to Victoria Hospital, where she was examined.

[6] Before discussing the grounds of appeal and the rest of the evidence, it is well to set out the relevant law.

B. RELEVANT LAW ON APPEAL

[7] The law is settled that an appeal court may only interfere with the decision of a trial court if it is established that there was a material misdirection in respect of facts and/or law.¹ In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[8] Similarly, an appellate court's power to interfere with sentences imposed by courts below is circumscribed.² It can only do so where there has been an irregularity that results in a failure of justice;³ and the court below misdirected itself to such an extent that its decision on sentence is vitiated.⁴ Ultimately, there must be a material misdirection by the trial court.⁵

[9] In *S v Malgas*⁶ it was stated that, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". This standard has been articulated differently in several cases, including the standard of

¹ *S v Francis* 1991 (1) SACR 198 (A) at 198J-199A.

² *S v Bogaards* [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41; *R v Dhlumayo and another* 1948 (2) SA 677 (A); *S v Pieters* 1987 (3) SA 717 (A) at 727; See also *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) at para 10.

³ *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at para 39 and *R v Solomons* 1959 (2) SA 352 (AD) at 366C.

⁴ *Anderson* above n 37 at 495D and Kruger *Hiemstra's Criminal Procedure* Service Issue 5 (LexisNexis, Cape Town, 2012) (Hiemstra) at 30-49 to 30-50 for a full discussion on misdirection.

⁵ See *S v Brand* 1998 (1) SACR 296 (C) at 303 E-J.

⁶ *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) para 12.

whether the sentence “creates a sense of shock”. Ultimately, the question is whether the court could reasonably have imposed the sentence that it did.⁷

[10] To reach an appropriate sentence, a court is duty-bound to consider the nature and the seriousness of the offence that the accused has been found guilty of, the personal circumstances of the accused as well as the interests of society - what is often referred to as the triad of considerations.⁸

[11] It goes without saying that each case must be adjudicated on its own facts and that no two cases are the same.⁹ It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances whether the sentence is proportionate to the particular offence.¹⁰ Punishment imposed by a court should fit the criminal, as well as the crime and be fair to society and blended with the measure of mercy¹¹.

[12] A court is also enjoined take into consideration the main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence. As the SCA has stated in *S v RO and Another*¹² :

“Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.”

⁷ See for example *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8, and *S v Bolus and Another* 1966 (4) SA 575 (AD) at 581E-G.

⁸ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

⁹ *Asmal v S* para 7.

¹⁰ *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15. *Opperman v S* [2010] 4 All SA 267 (SCA) at 278 para 30.

¹¹ *S v Rabie* 1975 (4) SA 855 (A).

¹² *S v RO and Another* 2000 (2) SACR 248 (SCA) at paragraph 30. See also *Opperman v S*.

C. APPEAL AGAINST CONVICTION

[13] In respect of the conviction, the appellant's main ground of appeal is that the complainant was a single, child witness, whose evidence was not corroborated in material respects. The complainant is also criticized for giving a first-hand account in her oral evidence which, according to the appellant, was a reconstructed version. It was also argued that the complainant's version of her sobriety was contradictory. The appellant also criticizes the complainant's conduct as improbable in that, according to her, she went back to sleep after the rape and yet became angry on the following morning. The appellant also argues that the absence of consent for the sexual act was not proven beyond reasonable doubt. The appellant also criticizes the complainant's brother, S[...], for aspects of his evidence which were not included in a written statement that he gave to the police. Finally, the appellant emphasizes that alcohol played a major role in the incident.

[14] I commence with the criticism that the complainant was a single, child witness. The Magistrate was alive to this issue and set out the applicable and settled case law in this regard, reminding herself of the legal approach to be adopted. This includes the case of *Woji v Santam Insurance Co Ltd*¹³, in which the Supreme Court of Appeal (SCA) held that a court must be satisfied that the evidence of a child witness is trustworthy, which was said to include factors such as the child's power of observation, power of recollection, and power of narration on the specific matter to be testified.¹⁴ It must be remembered too that in terms of section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:

'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.'

¹³ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.

¹⁴ See *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023) para 17 - 18.

[15] It is apparent from her judgment that the Magistrate was alive to all these considerations. She also correctly referred to section 208 of the CPA in terms of which it is competent for a court to convict an accused based on the evidence of a single witness. In applying these principles, the Magistrate took into account the fact that the complainant gave a concise and clear testimony, and maintained her version that the appellant had raped her, noting only that she exhibited some irritability during her evidence which the Magistrate did not find to be out of place.

[16] The Magistrate also had regard to the alleged contradictions between the complainant's oral evidence and her written statement regarding how she got home that night and got undressed when she got home. It was argued on behalf of the appellant that this rendered her evidence unreliable.

[17] It is correct that the cross examination of the complainant established that the information relating to her return home on the night of 15 May 2022 with the assistance of her friends, and not undressing herself before getting into bed, and the fact that her friends had only taken off her shoes before they left her in her bedroom, had in fact been relayed to her by friends who did not give evidence in the *court a quo*. This was on account of the fact that the complainant was so drunk that she had blacked out on her way home. When challenged regarding why she failed to mention in her evidence in chief that the information above was relayed to her by her friends, her explanation was that she had been cautioned (early during her oral evidence) to not give long answers. The complainant's explanation was not challenged, and the Magistrate correctly made the same observation.

[18] Similarly, the complainant was confronted with inconsistencies appearing in a written statement which she made to the police on the day of the incident. First, she stated in it that she was 17 years old, whereas she was still 16 at the time of the incident. Her explanation was that she had explained to the police that she was soon turning 17. Second, similar to her evidence in chief, she stated in her written statement that she had taken off her shoes upon arriving home, without mentioning that that information was relayed to her by her friends. Her explanation for this was that it was because of the way in which the police officer who took down her statement had asked questions. The police had not asked her who she was with,

and she did not think it was necessary to explain that she was with her friends on the night of the incident. Next, it was put to her that she failed to mention the presence of Cheese during the rape in her written statement. The complainant stated that she had told the police that the appellant was with someone on that night but that the person, whose name she did not mention to the police, had not done anything to her. Her explanation was that she did not think this was a significant omission because she wanted to focus on what the appellant did.

[19] In summary, her explanation for the omissions in her evidence and in her written statement amounts to stating that she relied on the professionals - the lawyers and the police - to elicit the correct information from her, and her explanations were not challenged during her evidence. What is significant as regards the clothing she wore and being undressed by her friends before going to sleep is that the complainant's evidence was not challenged that, when she woke up during the rape, her jeans were off whilst her panties were still on but moved to the side to facilitate penetration by the appellant. So, to the extent that any aspect of the evidence relating to her clothing and undressing was relayed to her, it was corroborated by her own experience when she woke up.

[20] Of further significance is the fact that the essential averments concerning the rape were repeated in the complainant's written statement, where the complainant stated as follows:

"He had his penis inside my vagina. My jeans were off completely from my body and the panty were still on he moved it to the side and had his pants unzipped and his penis was inserted inside my vagina. I was shocked and shouted at him then he jumped and zipped up his pants and then I told him to leave. Then he left. He had not used a condom."

[21] The Magistrate had regard to all this evidence, and found that there were no material contradictions in the complainant's evidence. I do not find any irregularity in this regard.

[22] In my view, when considering the version of the complainant as a single witness, the evidence of her brother, S[...], is relevant. He confirmed that, on the morning of 16 May 2022 the complainant reported that she was raped by the appellant. Her report to him was that she had gone to sleep drunk and woke up to find the appellant on top of her, with his penis inside her vagina. She had been shocked, pushed the appellant away, shouted at him and kicked him out of her bedroom.

[23] S[...] continued that the complainant had reported all of this when he was returning from visiting a friend in the morning and she had approached him while he was in the street on his way back home. After the complainant's report, they had together gone to look for the appellant at his home but he was not there, and they had reported the rape to the appellant's mother, who told them to return when the appellant was back home. This was sometime between 8h00 and 9h00 in the morning. He also confirmed that he and the complainant were accompanied by the complainant's friends when they went to report the incident at the appellant's home. They went to the appellant's home on approximately three occasions without success, after which they went to the police.

[24] None of S[...]’s evidence regarding the complainant's report of the rape was disputed. His evidence corroborated the complainant's version in several respects. First, in relation to the complainant's immediate reaction when she discovered the appellant on top of her, raping her; that she shouted at him, pushed him off and expelled him from her bedroom. And according to S[...], the complainant was furious when she reported the rape to him. In addition, they corroborated each other regarding the visit to the appellant's home and report of the matter to his family. S[...] testified that they had attended to the appellant's home several times and were told he was not home and was at work. Lastly, they both testified that they attended at the police station where they gave written statements. In other words, all of the complainant's conduct from the rape afterwards was corroborated.

[25] It is noteworthy that, from the morning after the incident, the conduct of the complainant was consistent in that she reported the rape to many individuals, and was looking for the appellant with a view to confronting him. The appellant confirmed

that, while he was at work, he was alerted to a Facebook post by a friend of the complainant which accused him of the rape. He also confirmed that, by the time he arrived home, he was informed that the police had attended at his home and were looking for him. This conduct also confirms the complainant's evidence that, although she did not know how to react to the rape at the time of the incident, save for shouting at him and kicking him out of the room, she had also resolved that she would have him arrested on the following morning.

[26] As to the events of the night before the incident, similar to the complainant, S[...] blacked out or, according to him, 'tipped' after a night of drinking with his own friends at a nearby tavern called Castro's. One of those friends was the appellant. From Castro's, S[...] and friends, including the appellant and a person called Kamva, went to his house to finish the alcohol. He could not remember the names or the exact number of the additional friends who joined him from Castro's. He also could not remember much of what happened after arriving home, and could not say when exactly he had tipped, and could only recall the fact that he shared his bed with the appellant, while two others slept in the same room but on a different bed.

[27] While S[...] was in bed during the night, he heard his sister arriving back home, and heard her door opening and closing, and also heard her talking which he assumed was to herself. Soon thereafter, he got up and went to check on the complainant, and he found the appellant in the complainant's room. He asked the appellant what he was doing in the complainant's bedroom, and the appellant stated that he was going to the toilet. S[...] told him to get out of the complainant's bedroom, and the appellant went back to bed. Later, the appellant again got out of bed, and when S[...] wanted to know where he was going, the appellant told him he was going to the toilet. The toilet is next to the bedroom of the complainant. S[...] followed the appellant to the toilet, where the appellant sat on the toilet seat and said he would sleep there. Because S[...] was tired and wanted to sleep, he left the appellant in the toilet. During all these events, the other friends who had slept over were asleep.

[28] In cross examination, S[...] was confronted with the fact that his written statement made no mention of finding the appellant in the complainant's bedroom on that night or of the appellant telling him he was going to the toilet; or of his sister

coming home and speaking to herself. He could not explain these omissions though he stated that he had relayed this information to the police who had taken down the written statement for him. At the same time, he stated that he had read the statement after it was written down for him. Accordingly, there remained no explanation for these omissions from his written statement. This may explain why the Magistrate did not take this evidence into account when she evaluated the evidence. In turn, the appellant has not been able to point to any misdirection committed by the Magistrate in this regard.

[29] It was argued before us that, because S[...] omitted the said evidence from his written statement, this negatively affected his credibility. I do not agree. The record indicates that S[...] was a fair witness. For example, he readily admitted that there may be things that his sister does not share with him, including a possible romantic relationship with the appellant. He also readily stated that he did not know whether the appellant and his sister spoke on that evening or agreed to have sex. He also stated that he did not know whether or not the appellant had raped his sister. All of this indicates that the witness was an honest witness in relation to the rape, because he could have easily implicated the appellant if he wanted to. There was accordingly no reason to find that he was not a credible witness.

[30] Apart from fully corroborating the evidence of the complainant concerning the immediate report of the rape on the morning after the incident, which I have already dealt with, the evidence of S[...] is important in other respects concerning the rape itself. Firstly, although he readily admitted that the appellant and the complainant could have been involved in a romantic relationship, he, like the complainant, firmly disputed that the appellant slept over in the complainant's bedroom on that night. S[...]’s first memory of that night after he blacked out, was of him and the appellant in his bed in his bedroom. This evidence, which was elicited during cross examination, was not disputed.

[31] By contrast, the appellant belatedly claimed that S[...] was aware that he (the appellant) was sleeping in the complainant's room that night and had seen them together in that room. As the Magistrate correctly pointed out, this new version was not put to S[...].

[32] The appellant's belated version was coupled with an allegation that at 5am on the morning of 16 May 2022, the complainant woke the appellant up so that he could attend work. The question that arises in light of this evidence is, if the complainant woke him up at 5am in order for him to attend work, why would she attend at his home between 8am and 9am, some three or four times, expecting to find him there? I have already adverted to the fact that the complainant and her brother corroborated each other regarding the fact that they and the complainant's friends went to the appellant's home repeatedly. The appellant confirmed that, whilst he was at work, he had received a phone call from home informing him that the complainant had attended at his home with her friends, reporting that he had raped her.

[33] It is clear from this evidence that the complainant was not aware of the appellant's whereabouts during this time. It shows that she expected the appellant to be at home on that morning. That is the only reason they returned on three or four occasions. This is in stark contrast to the appellant's version that the complainant was aware that he was at work because she had lovingly woken him up on that morning after spending the night together in her bed.

[34] Another aspect in respect of which S[...]s evidence is significant relates to his undisputed evidence that he was in bed when his sister arrived home. This is in direct contradiction to the appellant's version that, when the complainant came home, she joined him and the others, including S [...], who were all drinking, and that it was during that time that he and the complainant reached an agreement to have sex. The significance of S[...]s version is that it takes away the possibility of a conversation between the appellant and the complainant in which they agreed to have sex.

[35] In this regard, the evidence concerning the state of sobriety of the complainant is also significant. She testified that she had blacked out on her way home and sobered up only when she woke up with the appellant raping her. As a result, she could not give any evidence as to who was in the house when she arrived home. In fact, as the Magistrate held, the complainant did not think that her brother was home when she arrived because she had last seen him during the afternoon of

15 May 2022. The significance of this evidence is that the complainant was too drunk to even socialize further on that night, let alone entering into an agreement to have sex. Her version is rather supported by the evidence of S[...], that all in the house were in bed when she arrived home.

[36] The appellant attempted to deny the complainant was drunk during his evidence, during the following exchange:

“APPELLANT: Yes, your worship, she drank.

PROSECUTOR: Was she drunk?

APPELLANT: Not in a state where she would not know what she is doing, you worship.

PROSECUTOR: I put it to you if she was drunk, she could not have had consensual sex with you.

APPELLANT: It has happened before, your worship, where she would drink and get drunk and then we would still sleep together, you worship.

PROSECUTOR: She was not in her sound and sober senses when she on this night of the rape case that you had sex with her what do you say to that?

APPELLANT: I would say, your worship, yes, she had something to drink, your worship, she had alcohol to drink but she was in a sound mind, your worship, and because we spoke and both of us, we spoke, your worship, and we consented to sleeping together, your worship.”

[37] This was a significant feature of the appellant’s evidence, because without its belated introduction, there was no opportunity to have reached agreement with the complainant to have consensual sex. In other words, if the complainant was not too drunk when she arrived home, the possibility of reaching agreement to have consensual sex was alive. As the Magistrate observed however, the appellant later contradicted himself and admitted that the complainant was not sober, during the following exchange:

Prosecutor: But you would agree therefore that if you were drunk you would not be in your sound and sober senses?

Appellant: You are not sober, your worship.

Prosecutor: You are not in your sound senses. What is the answer?

Appellant: Yes.

Prosecutor: So you agree with me that [the complainant] was also not in her sound and sober senses?

Appellant: She was not sober, your worship.”

[38] From the record, these conversations regarding the complainant’s sobriety were in the context of the whole evening as opposed to during the sexual act. It bears repeating that the complainant’s own evidence that she blacked out before she even reached home until the sexual act, was not disputed. She described the brandy and beers that she drank that night. She was heavily drunk. It is understandable that the Magistrate queried how such a drunk person could give consent. It is also understandable, given the appellant’s attempt to deny the complainant’s drunken state, that the Magistrate held that the appellant’s evidence was unreliable and lacking in credibility.

[39] I agree with the assessment of the appellant’s credibility for an additional reason. He belatedly claimed that it was the complainant’s friends who put her up to making false allegations of rape against him, and that she did not really want to make that complaint. Not only was this not put to the complainant, but it was not substantiated. The Magistrate correctly dismissed it.

[40] As I have already indicated, the appellant criticizes the complainant because she went back to sleep after the rape. Her explanation, in part, was that she did not know what to do at the time other than to expel the appellant from her bedroom. Further, that it was still in the night-time, and she did not know where her brother was because the last time she had seen him on the previous day was when he was outside at a nearby tavern with friends. She was also scared of what the appellant and Cheese might do to her if she left her bedroom again. This is why she opted to rather lock her bedroom door from the inside, and told herself that in the morning she

would report the appellant to the authorities. This evidence was not challenged, and the appellant has not pointed to why this explanation is not plausible.

[41] It has been repeatedly pointed out¹⁵ that victims, including from rape, display individualised emotional responses to an assault, and that they may only decide to report an incident once they are supported by a family member or when a friend confirms that this behaviour is indeed wrong.¹⁶ This is precisely what happened in this case, where the complainant went back to sleep and waited for the opportunity to report the matter to her brother who was, for all intents and purposes, her guardian. And in the morning, at the first available opportunity of the day, she approached her brother in the road whilst he was returning from a visit to report the matter to him.

[42] I have already mentioned that the medical evidence confirmed recent vaginal penetration of the complainant. Dr Pepper testified regarding the contents of a J88 form which she completed when she examined the complainant on 16 May 2022 at 17h25 at Victoria Hospital. The findings of the gynecological examination included a fresh abrasion on the right labia minora, adjacent to the vaginal, which she also described as an acute genital trauma. Her conclusion was that, given its location and length, it was the result of penetration by a blunt object. However, it could be a result of consensual sex, but which would result from very rigorous activity, with no lubrication used. The medical evidence therefore did not conclusively confirm a rape, but it did confirm that penetration had taken place.

[43] It is significant that the Magistrate found in the appellant's favour that he and the complainant could have previously engaged in consensual sex whilst they were both drunk. Even so she found, on the facts of this case, that there was rape. In fact, she applied the provisions of sections 56(1) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 which provide that it is not a valid defence for a person accused with rape to contend that there is a marital or other

¹⁵ *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) (1 October 2008) paras 23 – 24.

¹⁶ See *Maila v S* para 28, referring to UNODC Handbook for the Judiciary on Effective Justice Responses to Gender-based Violence against Women and Girls, at 25.

relationship between him or her and the complainant. I find no misdirection in the Magistrate's findings regarding the conviction.

D. THE APPEAL AGAINST SENTENCE

[44] As regards sentence, it is apparent from the record that an error was made, and the State concedes as much. The appellant was charged with, and was asked to plead to the provisions of section 51(1) of the CLAA, which provide as follows:

“Notwithstanding any other law, but subject to subsections 3 and 6, the Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

[45] In both the conviction and sentencing judgments, however, the Magistrate stated that the appellant was charged in terms of section 51(2)(b) of the CLAA, which provides as follows:

“Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in...Part III of Schedule 2, in the case of –

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years...”

[46] The issue gets more complicated. The appellant was charged with the wrong minimum sentence provision. At the time of the offence in this matter, 16 May 2022, Part I of Schedule 2 provided that the rape victim had to be a person under the age of 16 years in order for the provision to apply. In other words, as at 16 May 2022, the life imprisonment sentence prescribed in Part I of schedule 2 was only applicable if

the rape victim was under the age of 16. That did not apply to the complainant who had already turned 16 years old at the time of the incident. The evidence was that she was already 16 years old and was due to turn 17 on 5 August 2022. It was only with effect from 5 August 2022 that the age limit was increased to 18, by means of the Criminal and Related Matters Amendment Act 12 of 2021. This means the appellant could not have been convicted of 51(1) of the CLAA, read with Part I of Schedule 2.

[47] The applicable provision is rather section 51(2)(b) of the CLAA, read with Part III of Schedule 2. One assumes that this is the reason that the Magistrate applied section 51(2)(b) in her judgment, although the record makes no mention of the reasoning for her departure from the provision in the charge sheet. It is clear, however, from the sentencing remarks at paragraph 33 of the sentencing judgment that those are the provisions that the Magistrate took into account when she held that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence of 10 years' direct imprisonment.

[48] The question is whether there was a material misdirection which requires this Court's intervention. The primary consideration in my view, is one of jurisdiction, as was the case in *Ndlovu v S*¹⁷. The Constitutional Court highlighted in that case¹⁸ that Magistrates' Courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrates' Courts Act and other relevant statutes. In *Ndlovu v S*, the Regional Magistrates' Court had sentenced an accused to life imprisonment in terms of section 51(1) despite his having been charged with section 51(2). The Constitutional Court held¹⁹ that the Magistrates' Court would have had jurisdiction to sentence the accused to life imprisonment only if it had convicted him of an offence referred to in Part I of Schedule 2, which was not the case.

[49] On application to the present case, because the rape victim was not under 16 years of age at the time of the incident, Part I of Schedule 2 was not triggered. As a

¹⁷ *Ndlovu v S* 2017 (2) SACR 305 (CC)

¹⁸ At para 41.

¹⁹ See para 42.

result, the Magistrate Court did not have jurisdiction to sentence the appellant to life imprisonment, and if she had imposed such a sentence, that would have amounted to a material misdirection. Rather, the correct provision in the circumstances would have been section 51(2), which is what the Magistrate in effect applied.

[50] It is so that an accused person should be informed at the outset of the trial of the correct provisions of the CLAA or other provisions relating to an increased sentencing regime that the state intends to rely upon or are applicable.²⁰ However, this is not an absolute rule, and each case must be determined on its own particular facts and circumstances. Although it is desirable that the facts the state intended to prove to increase the sentencing jurisdiction under the CLAA should be clearly set out in the charge sheet, substance must prevail over form.²¹

[51] Ultimately, the determination of whether the rights to a fair trial have been infringed turns on the question of prejudice to the accused.²² It has been held²³ that an indication of the existence of prejudice to an accused is if he or she could reasonably have conducted his or her defence differently, if he or she were informed at the outset of the trial of the applicable provisions of the Minimum Sentences Act. If there is a reasonable possibility that the accused may have conducted his or her case differently, there would in these circumstances be an infringement of the right to a fair trial.

[52] Unlike the cases discussed above, the distinguishing feature of this case is that the Magistrate approached the imposition of sentence conscious of the applicable prescribed minimum sentence in the circumstances of this case.²⁴ As the SCA stated in *S v Malgas*: “*The mental process in which courts engage when considering questions of sentence depends upon the task at hand*”²⁵. The Magistrate met this requirement when she applied section 51(2) of the CLAA.

²⁰ *Khoza and Another v S* (1267/2017) [2018] ZASCA 133; 2019 (1) SACR 251 (SCA) (28 September 2018) para 10.

²¹ *S v Legoa* 2003 (1) SACR 13 SCA [2002] ZASCA 122 para 21.

²² *Khoza op cit*, para 10.

²³ *Khoza op cit*, para 10.

²⁴ At para 24B.

²⁵ At para12.

[53] Furthermore, whereas the appellant pleaded to the minimum sentence of life imprisonment, he was in fact liable to a lesser sentencing regime, although still in terms of the minimum provisions of the CLAA. There is no discernible prejudice that may be said to have been incurred by him in this regard. If anything, the events set out in this part of the judgment turned out in his favour. This much is supported by the arguments advanced on his behalf in this Court, to the effect that the Magistrates' Court did not have jurisdiction to impose life sentence on the facts of this case. I agree. There would accordingly be no point in remitting the matter to the Magistrates' Court simply so that the charge may be amended to substitute section 51(1) with section 51(2). The correct provision has already been considered and applied by the Magistrates' Court. Considerations of proper administration of justice militate against such an approach which, in effect, would amount to elevating form over substance.

[54] Having considered the factors taken into account in arriving at the sentence, I am furthermore of the view that there is no basis to interfere with the sentence of 10 years meted out by the Magistrate. The appellant stated that he is a father of one child who lives with the appellant's mother, and is a breadwinner who supports his family. He is also a first-time offender. Even taken cumulatively, the personal circumstances relied upon by the appellant do not amount to substantial and compelling circumstances which justify the imposition of a lesser sentence than the one prescribed in section 51(2). It must be remembered that the legislature recognized the noxious prevalence of rape in our society when it instituted the prescribed minimum sentence. The seriousness of the crime committed by the appellant cannot be over-emphasized, especially when taking into account that the rape in this case occurred in the safety of the complainant's home and bedroom.

[55] In the circumstances, the appeal against conviction and sentence is dismissed.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree, and it is so ordered.

A. KANTOR
Acting Judge of the High Court

APPEARANCES

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For the respondent : Adv N G Breyl
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