

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

THE REPUBLIC OF SOUTH AFRICA



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

Case Number: A 06 / 2023

In the matter between:

X[...] W[...]

Appellant

and

THE STATE

Respondent

Coram: Le Grange ADJP (as he then was), Wille J et Bishop AJ

Heard: 22 March 2024 and 1 November 2024

Delivered: 24 January 2025

JUDGMENT

THE COURT: (unanimous)

INTRODUCTION

[1] This is an '*automatic*' appeal from the lower court against conviction and sentence. This is because the appellant was sentenced to life imprisonment by the lower court. The appellant was convicted of three counts of sexual penetration following our targeted legislation dealing with sexual offences of this nature.¹

[2] The appellant was legally represented during his trial proceedings. He pleaded not guilty to the offences as preferred against him and elected not to advance any plea explanation. The charges against the appellant were also read with the relevant provisions of the minimum sentencing regime.²

[3] The appeal against the convictions was initially based on the following grounds, namely: (a) that the appellant's legal representation failed to represent him adequately (according to the appellant after his conviction) and (b) that the evidence implicating the appellant was that of a single witness and was insufficient as it was not satisfactory in every material respect.³

[4] After the appellant was convicted as charged and at the commencement of the sentencing proceedings, the appellant raised with the trial magistrate for the first time that he was dissatisfied with his legal representation. Accordingly, another different legal practitioner represented the appellant during the sentencing proceedings in the court of first instance.⁴

[5] The appeal was initially heard some time ago, and specific issues needed to be more fully ventilated with the result that the application was then reargued in front of a full court as envisaged in s 14(3) of the Superior Courts Act.⁵

EVIDENCE

¹ Contraventions of the provisions of section 3 of the Sexual Offences and Related Matters Amendment Act, 32 of 2007.

² Section 51(1) of the Criminal Law Amendment Act, 105 Of 1997.

³ The appellant effectively advanced that the evaluation of the evidence by the trial court was wrong.

⁴ The record reflects some difficulties between the appellant and his new legal representative.

⁵ Act No. 10 of 2013.

[6] The complainant testified that she was sexually abused by the appellant when she was eight years old. The appellant is her stepfather. She testified that these incidents happened when her mother was not at home, and the appellant was the only adult present where she resided. She said this happened when the appellant told her to 'rest' on his bed. The appellant sexually molested her on two separate occasions on two consecutive days.⁶

[7] On the first occasion, she was sexually molested under the cover of a blanket on the appellant's bed in her mother's home. From the outset, she testified that her relationship with the appellant was not ideal because the appellant was not kind to her. On the first occasion when these offences occurred, her mother left her and her siblings with her aunt at her aunt's house. The appellant arrived at her aunt's house and removed her and her siblings, and they went to her mother's house, where the appellant also resided. When her siblings fell asleep, the complainant perpetrated these sexual crimes against her.⁷

[8] The following day, her mother left her home and visited some of her friends. On this occasion, she was once again sexually molested by the appellant in the same fashion as before. Her mother returned on the day after this, and she was too afraid to report what had happened to her mother. She eventually told her mother a day after that. The incident was reported to the police, and she was taken for a medical examination.⁸

[9] The clinical findings by the medical doctor who examined the complainant were of significance. The examination revealed findings compatible with penetration with a blunt object in the genital area and the anal area of the complainant. She opined that penetration had occurred vaginally through a blunt object. Extensive widespread bruising was indicated in this area, which was also consistent with blunt object penetration.⁹

⁶ This occurred on a Friday evening and the following Saturday.

⁷ This occurred on 30 August 2019 at her mother's home in the appellant's bedroom.

⁸ The first molestations took place on a Friday, the second on a Saturday. She reported the matter to her mother on Monday.

⁹ The medico-legal examination report was submitted into evidence and recorded as an exhibit.

[10] The complainant's mother testified that her daughter made a report to her about the sexual molestation perpetrated on her by the appellant. The report made by the complainant to her mother was consistent with the complainant's testimony, which was also corroborated by the medical evidence.¹⁰

[11] The appellant testified and called no witnesses. The appellant did not in any manner dispute the correctness of the medical evidence. He also did not dispute that on the alleged occasions when the sexual molestation of the complainant occurred, he was the only adult in the presence of the complainant at that time. However, he denied penetrating the complainant.¹¹

CONSIDERATION

CONVICTION

THE ADEQUACY OF A SINGLE WITNESS

[12] The respondent's case is that the tapestry of the available evidence proved that the appellant sexually molested the complainant beyond reasonable doubt. Further, no evidence of any nature was presented to gainsay any evidence presented by the witnesses for the prosecution save for the denials by the appellant. In these circumstances, the circumstantial evidence indirectly supplied proof. Distinguishing direct and circumstantial evidence is also relevant when an appellant does not call witnesses supporting his or her case.¹²

[13] This does not mean, as has sometimes been suggested, that an adjudicator of the facts is entitled to (or is expected to) speculate as to the possible existence of facts which, together with the proven facts, would justify a conclusion that an accused person may be innocent. Instead, this means that an accused person runs the risk that, absent any rebuttal on his or her part, the prosecution's case may be

¹⁰ That she was molested on Friday and again on Saturday.

¹¹ He did not dispute that he was alone with the complainant on the days when the alleged molestation occurred.

¹² S v Mthetwa 1972 SA 766 (A) 769.

sufficient to prove the elements of the offence, which may, in turn, lead to his or her conviction.¹³

[14] Turning now to the facts of this case. The appellant's testimony, in essence, amounted to a bald denial. He also did not call any witnesses. This had consequences.¹⁴

[15] We say this because, given the evidence tendered by the prosecution, it could not have been expected of the respondent to wallow in conjecture to search for and try and find answers to every possible inference that may be drawn. We say this because of the strategy adopted by the appellant. In the face of incriminating evidence against him, the appellant's testimony amounted to a bald denial. In addition, the court was also not expected to search for speculative explanations for the appellant's conduct, which, on the face of it, was very incriminating.¹⁵

[16] It must be so that any exculpatory suggestions or explanations that may have been put to the respondents' witnesses by the appellant's legal representative did not amount to evidence and carried no probative weight. This aspect also touches on the issue of the alleged inadequate legal representation.¹⁶

[17] Finally, on this score, the respondent was not required to plug every loophole, counter every speculative argument, and dodge every shield that imaginative counsel could conceive without a scrap of evidence in substantiation thereof.¹⁷

[18] The appellant's core complaint is that the evidence tendered by the complainant was unsatisfactory and that she was a young and impressionable single witness. We disagree. The complainant was not a single witness. We say this because, in its material terms, her evidence was corroborated by the other witness who testified on behalf of the prosecution – her mother.¹⁸ Moreover, the fact that

¹³ *Osman and Another v Attorney-General, Transvaal* 1988 (4) SA 1224 at para [22].

¹⁴ The appellant's version was that these offences did not occur (a bald denial).

¹⁵ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G - H.

¹⁶ The version put to the state witnesses was that these crimes did not take place.

¹⁷ *S v Ntsele* 1988 (2) SACR 178 (SCA).

¹⁸ The other witnesses who testified on behalf of the respondent all corroborated portions of the complainant's testimony.

penetration occurred was corroborated by the medical evidence, which was left unchallenged.

[19] The probative value and weight of all the evidence presented must also be tested and considered in the correct context, as the evidence incriminating the appellant and the evidence possibly exculpating the appellant should not be viewed and evaluated in separate compartments.¹⁹

[20] In this case, there is no evidence exculpating the appellant save his own denial. By contrast, there is only evidence against him. The identification of the appellant is not an issue in this appeal. This much was conceded.²⁰

[21] The only possible complaint remains about the testimony of a single witness and the so-called 'cautionary' rule in sexual assault cases. The lower court's judicial officer was acutely aware that the complainant was a single witness, and no misdirection or irregularity occurred while assessing this evidence. Further, the test to be applied for the proper evaluation of the evidence in sexual assault cases has now been definitively determined. The so-called cautionary rule in sexual assault cases no longer finds direct application.²¹

[22] It is trite that an appeal court's powers to interfere with findings of fact made by a court of first instance are limited. The factual findings are presumed to be correct if there is no material misdirection by the trial court. Thus, the conclusions drawn by the trial court regarding the fact that the complainant was a single witness and how this evidence was to be evaluated can only be set aside if it was wrong. It was not.²²

[23] The appellant did not in any manner dispute the correctness of the medical evidence. He also did not dispute that on the alleged occasions when the sexual molestation of the complainant occurred, he was the only adult in the presence of the

¹⁹ S v Van Der Meyden 1999 (1) SACR 447.

²⁰ It was conceded that the appellant was with the complainant when these offences took place.

²¹ S v M 1999 (2) SACR 548 (A).

²² Masango v S (A175 / 2021) [2024] ZAGPPHC 64 (5 February 2024).

complainant at that time. He could not explain who else could have sexually molested the complainant.²³

[24] The appellant referenced some alleged previous charges upon which he allegedly stood acquitted. Notably, this issue could have been engaged with during the cross-examination of the witnesses for the prosecution. This did not happen. We cannot question their credibility on issues never put to them. This brings us to the second ground of appeal.²⁴

THE INADEQUACY OF COUNSEL

[25] An accused's right to legal representation in section 35(3)(f) of the Constitution is a right to '*...a proper, effective or competent defense...*'²⁵

[26] The representation must be of the necessary quality to ensure a fair trial. As a general proposition, there are two types of failures by defense counsel: - (a) those that almost automatically mean the representation was incompetent, and (b) those that will do so only if they may have materially affected the trial outcome. The former category includes a complete failure to consult with an accused person. The latter covers tactical decisions like ineffective cross-examination or electing not to call a witness or witnesses.²⁶

[27] In these cases, courts must give some leeway to the defense counsel. It is all too easy to second-guess a defense lawyer with the benefit of hindsight. As Harms JA laconically observed: '*convicted persons are seldom satisfied with the performance of their defense counsel.*'²⁷

[28] An accused person is not entitled to the best possible defense. They are entitled to a competent defense that ensures a fair trial. But still, the right to legal

²³ He did not dispute that he was alone with the complainant on the days when the alleged molestation occurred.

²⁴ The prosecutor elicited from the appellant a possible motive during the cross-examination of the appellant.

²⁵ S v Halgryn 2002 (2) SACR 211 (SCA) at paragraph [14].

²⁶ These failures do not generally affect the issue of a fair trial.

²⁷ S v Halgryn 2002 (2) SACR 211 (SCA) at paragraph [14].

representation *'cannot simply mean to have somebody stand next to one to speak on one's behalf'*.²⁸

[29] Instead, effective legal representation:

*'...entails that the legal adviser act in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defense...'*²⁹

[30] Ultimately, a court will not overturn a conviction merely because the accused's attorney made an error, even a negligent one. It will only overturn a conviction because of inadequate representation in two situations: - (a) the failure was fundamental, such as a failure to consult with the accused at all, so that it can be said that there was no representation at all, or (b) the representation fell below the standard of what is reasonable, *and* if the accused had received competent representation, there is a reasonable possibility it would have altered the outcome of the trial. Although we could find no case that expressly adopts this standard, it fits with the jurisprudence from external authorities on the topic, from which our courts have repeatedly drawn guidance.³⁰ It also appears to strike the appropriate balance between protecting the constitutional right to legal representation while not allowing counsel's every error to vitiate convictions that would have stood even with the best possible representation.

[31] It is also in line with the ordinary standard adopted for irregularities that cater for the position, among other things, that no conviction or sentence shall be reversed or altered because of any irregularity or defect in the proceedings unless a failure of justice has resulted from such irregularity or defect.³¹

²⁸ S v Mafu and Others 2008 (2) SACR 653 (W) at paragraph [24].

²⁹ S v Mafu and Others 2008 (2) SACR 653 (W) at a paragraph [24].

³⁰ Strickland v Washington 466 US 668 (1984).

³¹ There must be an adverse consequence for the alleged irregularity contended for by the appellant.

[32] Thus, the negligence of counsel *per se* is not a get-out-of-jail-free card. It affects the legitimacy of the proceedings only if the negligence might reasonably have affected the outcome.³²

[33] This case appears to fall into the second category (we say it seems so because, as we explain, the facts are uncertain). The appellant must therefore establish two things: - (a) that his attorney acted below what was expected of a reasonable attorney, and (b) that there is a reasonable possibility that, if the appellant's attorney had acted diligently, the appellant might have been acquitted.³³

[34] There are two complaints about how the appellant's legal representative conducted himself: - (a) how he led the appellant's evidence and (b) his failure to put his client's (now alleged) new version to the state's witnesses.³⁴

[35] First – the examination in chief. Mr Shumi began his questioning by putting the charges to the appellant and asking him if he was aware of them. He then asked: “the first instance it occurred when you were present and three other minor children. Do you remember that day?” The question is problematic. The Appellant's defence was that there was no “instance” of rape. That is presumably why he answered:

‘...I recall they said it was the Friday that that happened...’

[36] Mr Shumi then asked: “And Friday did you put anything in the vagina of the child?” And then: “Did you put a finger into her anus?”. The appellant answered No to both, but the prosecutor then objected that Mr Shumi was asking leading questions.

[37] He then changed tack. He asked: “What happened on that day? Just narrate everything which happened on that day.” The appellant began to do so. He gave an explanation starting with his activities in the morning. While not all of his explanation

³² In our view, the outcome regarding the conviction was not tainted.

³³ There was insufficient evidence to show that the initial attorney did not act diligently.

³⁴ No evidence was placed before us that the appellant advised his attorney of the new fabrication claims.

may have been directly relevant, he was obviously trying to provide context for what happened (or did not happen) later in the day.

[38] Mr Shumi clearly wanted the appellant to get to the point. He interrupted the appellant twelve times to prevent him from providing his full version of events.³⁵

[39] The effect of Mr Shumi's approach to leading the appellant was twofold, neither of which served the Appellant's interests:

[39.1] The constant reference to "the incident" implied that something occurred. But the appellant's version is that nothing occurred. By constantly requiring the appellant to talk about something that he claimed did not happen, Mr Shumi implied that it did.

[39.2] The appellant was not able to get out his full version. He was not able to explain the context of what occurred, who else may have been present, how the complainant may have received her injuries, or why she or her mother may have falsely accused him. These were (it would turn out) all obviously relevant to his defence. Yet Mr Shumi not only did not ask him questions to enable him to present his version on those issues, he sabotaged his own client from doing so.

[40] This, however, is not enough (on its own) to set aside the conviction. It is not enough because it does not satisfy the second part of the test. We cannot say whether there is a reasonable possibility that the failure to present the background and the context of the alleged offences to the court affected the trial's outcome.³⁶ While we may disagree with the manner and style of the appellant's initial attorney in the presentation of the evidence, this does not mean that this affected the outcome of the trial. No evidence was presented in this connection. The appellant was

³⁵ "Just be brief and straight to the point;" "Let us talk about the event which related to the incident"; "Okay let me just try to guide you"; "No, no, let us talk about what happened in your room ... with the minor child"; "No, no, talk about the incident"; "Talk about the incident"; "Talk about the incident"; "Just a minute. What you are telling the Court is that on that particular evening you did not touch her?"; "Okay. Let us go to the next day"; "No, no, just talk about the incident"; "Talk about the incident"; "Yes, just go straight to the evening."

³⁶ No evidence was presented in this connection.

required to explain what evidence he would have given had Mr Shumi allowed him to do so. This court would then consider whether, if that evidence had been led, there was a reasonable possibility it would affect the outcome.

[41] That brings us to the appellant's second complaint about his legal representation: whether his legal representative put his version to the witnesses for the prosecution.

[42] The basis for this claim does not emerge from direct evidence from the appellant about what he told his attorney. Rather, the argument is implied from what occurred during the appellant's cross-examination.

[43] The prosecutor asked the appellant: "And you raised [the complainant] like as if she was your daughter?" The appellant then responded:

'...Since over three years old, but I was in custody prior to this in 2017. The mother made a case against me for assault GBH and [the mother] made a case that [the complainant] was also scratched by, by me. And I attended that court in Parow 2 that is running from June 2016, 2017 till the 4th of December 2018...'

[44] The Prosecutor then explored the details of this earlier case. It emerged that (according to the Appellant) the complaint was very similar to the present one. The mother had alleged that the appellant had sexually assaulted or raped the complainant. Both the complainant and her mother testified at the trial and he was found not guilty. He then went back to live with them. When asked why he went back to live with them after the supposedly false accusation, the appellant said: "It was my first time that I ended up in prison. I did not know. I spoke to her. She said she was sorry. She said people instigated her." When asked to confirm that he still looked after the complainant despite the allegedly false complaint, the appellant said: "She is a child; she was told to tell this thing".

[45] Later under cross-examination, the appellant testified that the complainant would have falsely implicated him in the rape because she was "more afraid of the

mother than I would say of myself ... because the mother would if she is in a state then she would threaten them.”

[46] This evidence, for the first time clearly alleged (and provided some explanation for why) the complainant and her mother might falsely implicate the appellant. After eliciting it, the prosecutor asked if he “would agree that this what you are telling me is actually, it is important information, right?” The appellant agreed. The prosecutor went on: “[T]his changes your whole case what you are telling us now, that the mother is actually the influence.” The appellant agreed and emphasized that the complainant’s mother had influenced her to falsely implicate him.

[47] The prosecutor then made the obvious point: That version was never put to the complainant or her mother. The appellant tried to blame his attorney, but is interrupted so it is unclear from the transcript what he was trying to say. But he then says: “It is the only problem is Mr Shumi had an open book with nothing written on it, so how could he ask questions because we did consultation.” The prosecutor then asked why he did not require Mr Shumi to ask the questions as he was present in court and had been in court before. The appellant answered: “Ja, no, I agree with you, but in that case, I had a lawyer who came to me and asked me is there any questions you would like to ask that he did not ask. In this case, Mr Shumi did not even look at me.”

[48] What can we make of all this? By the time he was cross-examined, it is clear that the appellant’s defence was that the mother had influenced the complainant to falsely accuse him of rape, that she had done it before, and that he had been found not guilty. The problem was that this claim had not been put to either witness. As we know, “Failure to put an accused’s version to a state witness will generally be taken to mean that the accused accepts the version of the state witness.”³⁷

[49] But the appellant, it appears, did not accept their versions. He says they were intentionally falsely accusing him and had done the same on a prior occasion. Nor

³⁷ S v Mafu and Others 2008 (2) SACR 653 (W) at para 12.

were any of the documents in the earlier case, in which he was supposedly acquitted on similar charges brought by the same complainants, introduced in evidence before the trial court, or in this court.

[50] If the appellant gave the instructions, Mr Shumi had a duty to investigate the records of that previous trial. If the records supported the appellant's claims, and he neglected to put his client's version to the state's witnesses, then (absent some explanation from Mr Shumi) he had a duty to put that version to the state's witnesses. If that is what occurred, it was conduct falling below the ordinary standard of what is required of an attorney representing an accused.

[51] There is also a reasonable possibility that, if the appellant's version is true, and had that version been put to the state's witnesses, the outcome would have been different. The complainant or her mother may have admitted that they influenced to falsely accuse the appellant. Or there may have been similarities between this case and the previous one that cast doubt on their credibility or the state's case. Although the medical evidence shows that CE was penetrated, it does not identify the culprit. The link to the appellant rested solely on the evidence of the complainant and her mother.

[52] In *Chabedi*, in comparable circumstances, the Court held that the "lack of essential and consequently proper cross-examination of the State witnesses resulted in material parts of the State's case being left untested."³⁸ It set aside the accused's conviction because of this failure. It may be that the same occurred in this case.

[53] But before we can go down the route followed in *Chabedi*, we must ask whether: (a) there was any foundation for the appellant's claim about a previous trial; and (b), if so, whether the failure to put that version to the state witnesses was the appellant's fault or his attorney's.

[54] It is impossible to answer either question on the evidence before us. We do not know whether the prior trial in fact occurred, and whether the record of that trial

³⁸ S v Chabedi 2004 (1) SACR 477 (W) at para 22.

would in fact have supported the appellant's claim, or whether it was all a fabrication. We do not have direct evidence from either the appellant, or Mr Shumi about how or when they consulted, nor what was said during the consultations. We do not know whether the appellant provided these instructions to Mr Shumi or not. If he did, we do not know whether Mr Shumi did not put the version as part of an agreed strategy, or through negligence. And we do not know whether the appellant was aware that the version should have been put to the state witnesses, and, if he was, whether he asked Mr Shumi to do so.

[55] What should the Court do in this evidential vacuum?

[56] First, we must say definitively that it is not sufficient to defeat an inadequate assistance of counsel claim to say merely that the appellant was present in court and should have prompted Mr Shumi to put his version to the witnesses. If the prior trial occurred and the appellant gave the instructions to Mr Shumi, it was Mr Shumi's duty to identify that it was relevant and put the appropriate questions to the witnesses. It is not for a client to do his attorney's job. As Claassen J explained in *Mafu*, the "procedural duty" to put a client's version to the state's witnesses "constitutes a basic and elementary forensic skill which has to be learnt and mastered by the most junior of defending counsel. In fact, it is one of the first things taught in any course on trial advocacy."³⁹

[57] But there are reasons to be skeptical of the appellant's belated claim of inadequate representation.

[57.1] When the charges were put to the appellant, he pleaded not guilty and offered no plea explanation. The appellant confirmed this. In these circumstances, one would have expected the appellant to have taken the court into his confidence and explained that these charges against him were fabricated and preferred against him because of some ulterior motive. He elected to remain silent and adopt a 'wait-and-see' approach.

³⁹ S v Mafu and Others 2008 (2) SACR 653 (W) at paras 12 and 14.

[57.2] Mr Shumi was replaced after conviction by a new attorney. He did not ask for the proceedings to be re-opened so this new version of events could be presented to the prosecution's witnesses.⁴⁰ If the appellant believed Mr Shumi had failed to put vital evidence to the state witnesses, surely he would have told his new attorney who would have taken the appropriate steps. The appellant only complained about his legal representation when the shoe pinched in cross-examination, and after conviction and sentence, but never provided any substantive evidence to support the complaint.

[58] Ultimately, because we do not know whether there is any truth to the appellant's claim, and we do not know why those claims were not put to the witnesses, we cannot uphold the appeal.

[59] The bottom line is that the appellant has never positively averred that he did, as a fact, inform his initial legal representative of the alleged motive to implicate him falsely. The appellant had three opportunities to fill the evidential vacuum – when the appeal was initially brought, when the matter was set down for re-argument before a Full Court, and even after that hearing. In oral argument on both occasions, the Court raised the absence of this evidence. Despite these enquiries, no evidence that would allow the Court to uphold the appeal was introduced. It was open to the appellant, at any point, to seek to provide the evidence that could substantiate his claim.⁴¹ He has not done so.

[60] The appellant was legally represented before us. We have no evidence that his current representation is inadequate or is not acting on his instructions. In these circumstances, where the appellant has not put up evidence about either his alleged previous acquittal, or what instructions he gave to his attorney, he has not established the requirements for a successful claim of inadequate representation of counsel.

SENTENCE

⁴⁰ It was open to the appellant to apply for the re-opening of his case. He did not do this.

⁴¹ This is permitted under s 19 (b) of the Superior Courts Act 10 of 2013.

[61] The appellant was charged with a contravention of the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60, 61 and 68 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), read with sections 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977. Sections 51 and Schedule 2 Part 1 of the Criminal Law Amendment Act, 105 of 1997 and the provisions of sections 92 (2) and 94 of the Criminal Procedure Act 51 of 1977 also found application.⁴² The prescribed minimum sentence was life imprisonment.

[62] The appellant's circumstances at the time of sentencing were: (a) he was fifty-two years old at the time when he was sentenced; (b) he was held in custody awaiting the finalization of his trial for about four years; (c) he was married and lived on the premises where the complainant resided; (d) he is a qualified electrician; (e) he lost his previous wife and children in an incident involving arson and, (f) his last previous conviction dates back more than thirty years.

[63] The appellant submits that the cumulative effect of the factors listed above should have been regarded as substantial and compelling sufficient to deviate from the prescribed minimum sentence. It is a trite law that in sentencing, the punishment should fit the crime and the offender, be fair to society and the offender, and be blended with mercy.⁴³

[64] An appeal court's discretion to interfere with a sentence may be exercised only: (a) when there has been an irregularity that fails justice; (b) or when the court *quo* misdirected itself to such an extent that its decision on sentencing is vitiated, or (c) when the sentence is so disproportionate or shocking that no reasonable court could have imposed it. Crimes in general, but especially against women and children, offend against the aspirations and ethos of all South Africans. Not only do crimes against women in this country amount to a severe invasion of the dignity of the victims, but these crimes do not contribute to our claims that we live in a gender-

⁴² Act No, 32 of 2007.

⁴³ S v Rabie 1975(4) 855 (AD) at 862 G.

equitable and just society. This crime perpetrated against an eight-year-old child renders it even more reprehensible.⁴⁴

[65] The appellant was fifty-two years old when he was sentenced. Following section 73(1)(b) of the Correctional Services Act,⁴⁵ a person sentenced to life imprisonment theoretically remains in prison for the rest of his or her natural life. Life imprisonment, in practice, is regarded as a sentence of twenty-five (25) years of imprisonment. In this connection, the parole provisions that may become relevant and to the benefit of the appellant are indicated as follows:

‘... A person sentenced to life imprisonment may not be placed on parole until he or she has served at least twenty-five (25) years of the sentence, but such a prisoner may, on reaching the age of sixty-five (65) years, be placed on parole after he has served at least fifteen (15) years of the sentence...’⁴⁶

[66] After some anxious consideration, we find no redeeming factors to the appellant's benefit in mitigating his sentence. We find only aggravating factors even though the appellant has spent a significant period incarcerated as a pre-trial prisoner. When an offender has been detained as an awaiting trial prisoner for an extended period, this may be considered when an appropriate sentence is imposed. This is not a substantive and compelling circumstance on a strict interpretation. However, nothing prevents this court from considering the period that the offender has been incarcerated, pending his or her trial, when imposing the appropriate sentence. This does not apply mechanically through arithmetic calculation.⁴⁷

[67] A court is expected to depart from the prescribed minimum sentence regime if it can find and identify substantial and compelling circumstances to justify such a departure to the appellant's benefit. In addition, it is obliged to remember that a specified sentence has been prescribed by law as the sentence that should be regarded as ordinarily appropriate in these circumstances. Deterrence and

⁴⁴ The complainant was a soft target for the appellant.

⁴⁵ Act 111 of 1998 (the “Act”)

⁴⁶ Section 73(6)(b)(iv) of the Act.

⁴⁷ The fact that the appellant was an awaiting trial prisoner does not automatically mean “time served”.

retribution often tend to steer the severity of the proposed sentence in a specific direction. Rehabilitation, on the other hand, tends to pull the proposed sentence in yet another direction.⁴⁸

[68] In my view, focusing on rehabilitation, in this case, would lead to an unfair and inappropriate sentence, which will be disproportionate to that deserved by the appellant for the crime upon which he stands convicted.⁴⁹

[69] This crime is an instance of gender-based violence, which has regrettably reached pandemic proportions in our country. We believe an unambiguous message must be sent to offenders participating in this criminal activity. That this crime was committed against an eight-year-old child requires that in considering the issue of a sentence, the court must consider the provisions of section 28 of the Constitution, namely the right of every child under section 28(1)(d), to be protected from maltreatment, neglect, abuse or degradation, a right which the accused egregiously infringed in this case.⁵⁰

[70] In our view, the court of the first instance did give sufficient weight to the appellant's circumstances and the issue of his possible rehabilitation. This we say because the lower court did not err when imposing the prescribed minimum sentence of life imprisonment upon the appellant.⁵¹

[71] Also, the appellant did not show any remorse. Finally, the imposition of a life sentence upon the appellant was not unjust and disproportionate, considering the circumstances surrounding the commission of the offence.⁵²

ORDER

[72] In conclusion, an order is issued in the following terms, namely that:

⁴⁸ Deterrence is an important issue in this case.

⁴⁹ The appellant showed no remorse whatsoever.

⁵⁰ *S v Myburgh* 2007 (1) SACR 11 (W), at page 15 at h.

⁵¹ This issue was considered thoroughly by the judicial officer in the court of first instance.

⁵² The complainant was a soft target and a very young girl.

1. The appeal against the appellant's convictions is dismissed.
2. The appellant's convictions are confirmed.
3. The appeal on sentence is dismissed.
4. The sentence of life imprisonment is confirmed.

LE GRANGE, ADJP (as he then was)

WILLE, J

BISHOP, AJ