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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE**

CASE NO: A12/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

SIGNATURE:

DATE: 14/04/2025

In the matter between:

BENNY MOHALE

APPELLANT

and

THE STATE

RESPONDENT

Heard 29 November 2024

Delivered 14 April 2025 by circulation to the parties' legal representatives

Coram KGANYAGO J et. PILLAY AJ

JUDGMENT

PILLAY AJ:

[1] The Appellant was convicted in the Phalaborwa Regional Court on the 8 October 2020 of contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (Rape) read with the provisions of Section 51(1) part 1 of Schedule 2 of The Criminal Law Amendment Act². The Appellant was sentenced on the 11 November 2020 to life imprisonment.

[2] The appellant was thirty-seven years old, at the time of his arrest and was legally represented throughout the proceedings. He was entitled to an automatic right of appeal flowing from being sentenced to life imprisonment, in terms of the Criminal Law Amendment Act. Both parties argued the appeal.

[3] The appellant raised various grounds of appeal as contained in the notice of appeal³, which can be highlighted as follows;

AD CONVICTION

[3.1] The court erred in finding that the state had successfully prove the guilt of the appellant beyond any reasonable doubt.

[3.2] The court further erred in finding that the child victim identified the appellant as the perpetrator of this offence.

[3.3] The court erred in admitting the evidence of DNA test results without chain of custody been proved by the state and whilst being disputed by the defence.

¹ Act 32 of 2007 as amended

² Act 105 of 1997 as amended

³ See Vol 1 pages 1 to 5 of the notice of appeal.

[3.4] the court erred in failing to approach the evidence of the child victim with the necessary caution applicable to single witness evidence.

[3.5] the court erred in finding that the defences version was not reasonably possibly true.

AD SENTENCE

[4] An effective life term of imprisonment is strikingly inappropriate in that:

[4.1] It is out of proportion to the totality of the accepted facts in mitigation of sentence.

[4.2] The court erred in finding that there existed no compelling and substantial circumstances for deviation from imposing the prescribed minimum sentence.

[4.3] The court erred in not finding that given the age of the appellant, he can still be rehabilitated into a law-abiding member of society.

[4.4] The court erred in over emphasising the following factors;

[4.4.1] The seriousness and prevalence of offence.

[4.4.2] The interest of society

[4.4.3] The deterrent effect of the sentence.

[4.4.4] The retributive element of sentencing.

[4.4.5] Appellant's record of previous convictions.

[5] It is a trite principle that the findings of fact of the trial court, are presumed to be correct unless there are demonstrable and material misdirection on its part. Those findings will only be disregarded if the recorded evidence shows them to be

clearly wrong. In the same vein, the credibility findings of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong⁴.

[6] Regard was had to the case of *S v Francis*⁵ with specific reference to the powers of an appeal court when considering the fact findings of the court *a quo*,

"the powers of the court of appeal to interfere with the findings of fact of a trial court are limited⁶ in the absence of any misdirection the trial court's conclusions including the acceptance of a witness evidence is presumed to be correct. To succeed on appeal, the appellant must therefore convince the court of appeal, on adequate grounds that the trial court was wrong in accepting the witness evidence, a reasonable doubt will not suffice to justify interference with its findings, bearing in mind the advantage which a trial court has of seeing, hearing, appraising a witness. It is only in exceptional cases that the court of appeal will be entitled to interfere with trial court evaluation of oral testimony⁷."

[7] The appellant pleaded not guilty and exercised his right to remain silent. The respondent led evidence of witnesses who testified under oath with the use of the language practitioner, and in respect of the child complainant, whose name is being withheld to protect her identity, through the services of an intermediary via a separate room in compliance with Section 156, Section 158 and Section 170(A) of the Criminal Procedure Act⁸. The evidence briefly summarised was as follows.

[8] The child complainant CM testified under oath, through the CCTV facility, and was assisted by an intermediary. She informed the court that on 7 December 2017, she was at Phalaborwa at her Granny's place of residence, asleep with her sibling SM. The appellant entered the room and carried her to another room. In that room, he removed her underwear and started licking her on her vagina. He threatened her

⁴ see *S v Hadebe & others* 1998 (1) SACR 422 (SCA) p 645E - 6461

⁵ 1991(1)SACR 198(A)

⁶ *R v Dhlumayo and Another* 1948(2) SA 677 (A)

⁷ *S v Robinson and Others* 1968(1) SA 666 (A) at 675 G - H).

⁸ Act 51 of 1977 as amended

with a knife, that if she screamed, he would stab her. The appellant thereafter took his penis and inserted it into her vagina.

[9] She requested to go to the toilet, which was in the house, and he accompanied her to the toilet. It was then, that she was able to recognise the appellant as the person by the name of Benny. The reason she was able to see the appellant was on account of the Apollo light that was outside, shining into the house. Thereafter, she was taken back to the room, and he again took his penis and inserted it into her vagina. After he was finished, he gave her a R20,00 and told her not to tell anyone, and he left. Her mother returned home, and she informed her mother about the incident and gave her mother the money. Her mother arranged for them to go to the police station and hospital. The child complainant identified the appellant as someone she knew for a long time and was her sister's boyfriend. She had known him for years, prior to that day and that he lived a few houses away from her home.

[10] She indicated that he was wearing a hat and that whilst she was in the toilet he went to the kitchen and left the hat there. She testified that his face was visible, as the window through which the light shone, did not have a curtain and when she told the appellant that it was him, because of seeing his face, he denied it and thereafter was trying to hide his face. She indicated if she was to meet him again, she would be able to identify him. The appellant was pointed out as the person who committed the offence. The child complainant conceded during cross-examination that being carried to another room was not recorded in her statement. She confirmed that she could not see the person in the room, as the room was dark. She confirmed that she did not testify that the person had told her, he was Odeas. The appellant did not question the child complainant concerning his version of events.

[11] KM, the mother of the child testified that she had left the children asleep and had gone out. On her return she knocked to enter and was told by the child about what had transpired. She contacted the police and went to meet them where the incident was reported, and the child was taken for treatment to hospital where the child was admitted for four days. Her evidence was tested under cross examination and her statement was received as an exhibit "D". she confirmed that when she was

informed that the appellant had touched the child's breast she demanded to check the child's vagina, and that when the child disclosed everything that had transpired with the appellant. The appellant did not put his version to the mother of the child complainant, concerning the incident.

[12] The court *a quo* held a trial within a trial in respect of the admissibility of the J88 which did not have the details of the patient, who was being treated and further the discrepancy concerning the copy of the J88, which was disclosed to the appellant, without the name endorsed, whilst the respondent's copy had the name of the child complainant written on it. The investigating officer testified that she was instructed in the diary that the child complainant's details were omitted. She went to the hospital and spoke to the medical practitioner involved who then corrected the J88 including the child complainant's name. She did not have any further information concerning the matter and no proof of her allegations. The medical practitioner testified that she compiled the J88 on examining the child complainant. She had by mistake, omitted to fill in the details of the child on the J88 but she had compiled the Section 212 affidavit in respect of the J88 wherein the child complainant's name was reflected and verified with the hospital record, confirming the details of the child complainant. She recalled treating the child complainant and that the injuries sustained by the child complainant was correctly recorded on the J88.

The court *a quo* was unable to make a finding of who had written the child's name on the J88 after the respondent had requested it be corrected, but was satisfied that the medical practitioner had completed the J88 after examining the child complainant and that she conceded to the error of not endorsing the name on the J88. The court *a quo* ruled that the J88 was admissible and same was received as exhibit "A". The S212 affidavit and DNA results were received as exhibit "C" and that was the case for the respondent.

[13] The appellant testified and indicated that on the date in question he was at the residence of the complainant. He had gone there to take his girlfriend SM who is the complainant's aunt, to the Marula festival. On his arrival he found his girlfriend's sister NM, who informed him that his girlfriend was in Middleburg and that she would not be returning in time for the Marula festival. NM suggested that he give her R200,00 and a ticket to the Marula festival and they agreed to have consensual

sexual intercourse. When they were finished, NM informed him she was going to bath, and he remained in the room. NM returned, told him that his girlfriend had come back from Middleburg, and he must leave and wait for her on the street. He was also instructed not to meet up with his girlfriend at the Marula Festival.

[14] He left and waited by the gate of his homestead for about 30 minutes. He confirmed that his house was just along the main road. Later that night he called NM who arranged to meet him, as he had the tickets for the Marula festival. Whilst travelling he received a call from NM's phone, but it was the complainant's mother who accused him of sleeping with BM, and now NM, and herself. She then asked if he still had the tickets for the festival, which he confirmed and he said he would give it to them, once they arrived. At midnight he was called by NM again, indicating that he better have her R200,00 or else he would have a problem.

[15] Between 06h00am and 07h00am he was called by BM his girlfriend, who enquired from him, what he had done at her homestead, and indicated to him, that she had warned him, to keep away from her sisters, and since he did not listen, the police were looking for him. He contacted NM who had no idea about this information, and suggested he go to the police. He was later called by NM's aunt who informed him, that there was an allegation, that he committed rape at her house and suggested, he approached the police, since he denied knowledge of this allegation. He did approach the police and was subsequently arrested in respect of this offence.

[16] The appellant denied the allegation of sexually penetrating the complainant. He indicated that on the date in question, the complainant was not present, at the time he was with NM at the house. He highlighted that he was at the Marula festival the entire night, especially at the time, that he was accused of committing the offence. He believed the complainant was implicating him falsely, because she hated him. This was on account of the argument he had with her father, because of his relationship with BM. The argument concerned him disturbing BM, who was looking after the complainant and her sibling SM. He indicated that he was in a love relationship with the complainant's mother from 2012 to 2014. That he fell in love with BM in December 2016, and that relationship ended in 2018 whilst he was in custody in respect of this offence.

[17] The appellant led the evidence of NM, who denied that on the night in question, she had sexual intercourse with him, in exchange for a ticket to the Marula festival. She denied telling him to leave, because his girlfriend had returned, and having any communication with him, in respect of the R200,00 and the tickets for the Marula Festival. She did not corroborate his version and denied that he was in a previous relationship with her sister KM, the complainant's mother.

[18] The appellant called BM who indicated that the appellant was her ex-boyfriend. She indicated that the relationship was terminated when she was informed by the child complainant that the appellant had raped her. She indicated that she did not know of him being in a relationship with her sister KM and only knew that the appellant was in a relationship with her and only her. She confirmed that the witnesses all lived in the same house, where this incident occurred.

[19] The appellant called Abednego Mulombo who testified that he was a friend of the appellant. In 2008 he lived at the appellant's house. He knew that the appellant had a girlfriend, by the name of K[...]. His girlfriend was friends with K[...]. He did not know when the relationship between K[...] and the appellant ended, but they were together for almost 2 to 3 years. He had no knowledge of the whereabouts of the appellant on 2 December 2017, and he did not know a child by the name of CM. The appellant then closed his case.

[20] The court *a quo* found that the evidence of the child complainant was supported by the medical evidence, justifying the allegation of being sexually penetrated on that night in question. The court *a quo* was satisfied that the only issue was concerning who sexually penetrated the child complainant. The court *a quo* was satisfied that the child witness identified the appellant, who was her neighbour and someone she had known for years. She identified him when she went to the toilet and saw his face because of the light shining into the toilet. The court *a quo* further found that the appellant's version was improbable and rejected it, and based on the totality of the evidence, convicted the appellant of the offence charged.

[21] The appellant was convicted and subsequently sentenced, and the appeal was directed against both conviction and sentence. This court must determine, whether in the light of the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt. If it is found that the appellant was properly convicted, whether the sentence meted out to the appellant was appropriate.

[22] The onus rests on the state to prove its case beyond a reasonable doubt. There is no onus on the appellant. In the case of **S v JACKSON**⁹ the court said:

"the burden is on the state to prove the guilt of an accused beyond a reasonable doubt, no more or no less."

[23] This court must consider the totality of the evidence led, considering the probabilities and improbabilities of the respective versions as well as the credibility of the witnesses.

[24] In evaluating evidence regard was had to the case of **S v Chabalala**¹⁰, the Honourable Judge Hefer AJA said:

"to weigh up all the elements which point towards the guilt of the Accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

[25] The appellant admitted that he knew the child complainant, her mother and her aunts for some time. He admitted that his house was nearby the child complainant's residence. He admitted visiting the child complainant's house on the night in question around 20h00pm. He disputed the allegations and raised the defence of being at the Marula festival around 23h30pm, when the alleged incident occurred. The appellant indicated that the child's age was not proved nor was her

⁹ 1988[1] SACR 470 at 476 e-f

¹⁰ 2003(1) SACR 134 (SCA) at paragraph 15

evidence as being a single witness considered. This court had regard to the fact that the child, was known to the appellant as being a child, the J88 medical evidence, indicated her age to be 10 years old. The appellant in his evidence, also referred to the complainant as the child. It is not disputed that the child complainant, was under the age of sixteen years at the time the alleged offence was committed, and the appellant charged in terms of the Sexual Offences Act. This court is satisfied that the child complainant was a child under the age of sixteen years old for the purposes of determining the appeal.

[26] The child complainant was a single witness, and the provisions of Section 208 of the Criminal Procedure Act was applicable. Regard was had to the case of **Maila v The State**¹¹ where the SCA noted the following,

"It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person.... s 60 of the 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.'

¹¹ 429/2022) [2023] ZASCA 3 (23 January 2023)

[27] The child complainant was clear with details as to how the incident unfolded, her evidence was honest and reliable in respect of the room where she was sexually penetrated being in darkness, and only being able to identify the appellant when she went to the toilet, where she was able to see the appellants face. She said this was possible, because of the light shining, into the toilet from outside. The court *a quo* found that the child witness, was truthful concerning the circumstances in which she found herself, on the night in question. This court appreciates that the evidence of the child witness was tested and amidst the discrepancy as to whether it was one or more penetrations, which she corrected as twice, holistically her evidence was consistent and found to be truthful.

[28] The court *a quo* held a trial within a trial on account of the child's name not being reflected on the J88 medical report and who endorsed the respondent's copy of the J88. Amidst the author of this endorsement, not being traced, this court is of the view that this does not in any way, tarnish the veracity of the contents of the J88, in respect of the physical injuries sustained by the child complainant. The medical practitioner confirmed having compiled the Section 212 affidavit wherein the child complainant's details were recorded and examining the child and confirmed the findings made in the J88. She recorded that there were fresh tears, abrasions and a torn hymen. The conclusion reached was that the child had signs of recent penetration. Based on the child complainant's injuries she was hospitalised for four days. The appellant did not contest this evidence concerning the child being physically injured. He disputed being the perpetrator.

[29] It is noteworthy that when the child complainant was cross examined the version concerning her hatred for the appellant, concerning his dispute with her father was never canvassed. Nor was it put to the complainant's mother that she was in a love relationship with the appellant and that she had spoken to him on the night of the incident, concerning him having a physical relationship with her and her two sisters. These were important aspects that were not ventilated during cross examination especially to give strength to the allegation that this was a false charge against him, on account of sleeping with NM her sister, whilst being in love with BM the other sister.

[30] The appellant challenged the Section 212 affidavit in respect of the DNA as being inadmissible, due to the lack of the chain statements, to prove the said DNA report. This court accepts that Section 212 allows for prima facie proof by means of an affidavit, of the contents of the report and results obtained during the examination. Section 212 facilitates the production of evidence, but does not relieve the respondent, of proving its case beyond a reasonable doubt. If there is need for further chain statements, same must be handed in as exhibits.

[31] Section 212(4) reads that:

'(a) Whenever any fact established by any examination or process requiring any skill-

(i) in biology, chemistry, physics, astronomy, geography or geology;

(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;

(iii) in computer science or in any discipline of engineering;

(iv) in anatomy or in human behavioural sciences;

(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or

(vi) in ballistics, in the identification of fingerprints or body-prints or in the examination of disputed documents, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection ... and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact'.

[32] Exhibit "C" the DNA results amidst complying with Section 212, required chain evidence to prove the reference buccal sample. It is improper to assume that since the appellant was the person being accused of this offence, that he was the donor of the DNA used in the comparison, as referred to in the S212 affidavit. The respondent failed to lead evidence concerning this aspect. Exhibit "C" does not indicate details of the donor, therefore without more, this evidence does not strengthen the respondent's case against the appellant. This oversight by the respondent is regrettable.

[33] This court considered the remaining evidence, to determine if the respondent proved its case against the appellant without the DNA evidence. This court was satisfied that in this instance, the DNA report was not the only evidence implicating the appellant. The child complainant's testimony identifying him as the perpetrator, coupled with the medical evidence verifying her physical injuries, gave credence to her allegation of being sexually penetrated by the appellant who was well known to her.

[34] When considering the appellant's version, regard was had to the case of *Shackell v S*¹² Brand AJA stated the following:

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[35] The appellant unfortunately, was an exceptionally poor witness. His version of events of the evening tryst with NM, appeared unrealistic and far-fetched especially when NM disputed his version in totality. The conspiracy he was hoping to rely upon,

¹² 2001 (4) ALL SA 279 (SCA)

did not materialise. The defence witnesses did not strengthen his case, nor did they provide corroboration for his whereabouts, which appeared to be an alibi, of his presence at the Marula festival, at the time that the alleged incident occurred.

[36] The appellant's witness Abednego Mulombo failed to connect the appellant's girlfriend by the name of K[...], who he came to know in 2008 to the complainant's mother KM, who according to the appellant was his girlfriend between 2012 to 2014. He was of no help to the appellant in respect of providing him with an alibi for the night of the incident, as he did not know the whereabouts of the appellant. The appellant version was riddled with improbabilities. The most obvious one being, that the child complainant's mother, with the help of BM and NM, injured the child complainant, to repay him for sleeping with NM. This is so farfetched as opposed to the accepted facts.

[37] He raised the defence of being at the Marula festival but failed to testify about the festival itself, in support of this allegation. This court accepts that there is no onus on the appellant to prove his alibi, but for the court *a quo*, to have had an opportunity to ventilate this version, he was at least required to place aspects peculiar to his experience, at the festival, if he met anyone who could vouch for his presence there, and test the evidence in respect of the phone calls, but this was not forthcoming.

[38] In the case of **R v Hlongwane**¹³ the Court stated the following:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. R v Biya 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the Biya's case supra, Greenberg JA, said at page 521...'if on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime'.

¹³ 1959 (3) SA 337 (A)

The Supreme Court of Appeal, in **S v Mathebula**¹⁴, noted that *"The vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony". This is no doubt so because the appellant's alibis must be assessed holistically and weighed against the totality of the evidence*¹⁵.

[39] The respondent assisted the appellant to secure the witnesses NM and BM to testify on behalf of the appellant, but there was no corroboration of his allegations, save being in a love relationship with BM, which from the onset was not in dispute. When considering the totality of the evidence, the appellant's version and alibi dismally failed to withstand scrutiny under cross-examination. Therefore, when considering the evidence in totality, the appellant's guilt was proven, beyond reasonable doubt and, accordingly, the trial court rightly convicted the appellant as charged.

The appeal on conviction stands to fail.

[40] In respect of sentence, the appellant was convicted of contravening Section 3 Act 32 of 2007, read with Section 51(1) part 1 of schedule 2 Act 105 of 1997 as amended. The prescribed sentence was Life Imprisonment, unless the appellant was able to show the court that substantial and compelling circumstances existed to warrant the court imposing a different sentence.

[41] In **Kgosimore v the State**¹⁶, the Court restated that;

"It is trite law that sentence is a matter for the discretion of the Court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include, whether the reasoning of the trial Court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed

¹⁴ 2010 (1) SACR 55 (SCA) at para [11].

¹⁵ S v Combrinck [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) at para [15].

¹⁶ 1999 (2) SACR 238 (SCA) at paragraph 10

and the sentence the Court of Appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the Court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

[42] Applying the principles set out in **S v Zinn**¹⁷ this court had regard to the evidence tendered in mitigation and in aggravation of sentence. The appellant argued that the court *a quo* misdirected itself by not attaching sufficient weight to the mitigating circumstances of the appellant, to deviate from imposing life imprisonment. The appellant was 40 years old at the time of sentence, single with one minor child of 10 years old. The child was currently staying with his maternal aunt, who is the child's primary caregiver. The minor child was a recipient of a social grant. The appellant had his own RDP house and generated income by leasing a room in the house. The appellant was employed doing construction work prior his arrest. The appellant was a first offender in respect of this offence but had unrelated previous convictions. He was detained in custody after being convicted and awaiting sentence. On appeal it was argued that the sentence was harsh and disproportionate under the circumstances in this case.

[43] The respondent indicated that the personal circumstances of the appellant were properly ventilated and cumulatively taken into consideration, by the trial court. In aggravation of sentence the respondent argued that the child complainant was 10 years old at the time of the offence and was sexually penetrated more than once. The incident has impacted the child complainant, especially as no remorse was shown, as alluded to, by the probation officer indicating that the court should not deviate, from the prescribed minimum sentence.

¹⁷ 1969 (2) SA 537 (A) at 540G

[44] The court *a quo* considered all the applicable legislation, the principles as laid out in **State v Malgas**¹⁸ and found no substantial and compelling factors were present which warranted the court to be merciful. In considering all the relevant factors, the court *a quo* was satisfied that the applicable term of life imprisonment rendered the prescribed sentence just, in that it was not disproportionate to the offence, the appellant and the needs of society. To impose the prescribed term would not result, in an injustice being done, and as such the sentencing court was entitled to impose the prescribed sentence. The court *a quo* could therefore not be faulted for imposing the sentence of life imprisonment on the appellant.

[45] This court had regard to the sentiment expressed by the SCA in *Maila v The State* where the approach to sentence of a minor was expressed as follows,

*"[58]The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In S v Jansen*¹⁹*, the court stated it thus:*

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. ... The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. '

¹⁸ 2001 (1) SACR 469 (SCA)

¹⁹ S v Jansen 1999 (2) SACR 368 (C) at 378G-379B.

[59]Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences.

[46] To impose the prescribed term would not result in an injustice being done and as such the sentencing court was entitled to impose the prescribed sentence. The court *a quo* could therefore not be faulted for imposing the sentence of life imprisonment on the appellant.

The appeal on sentence also stands to fail.

[47] In the result the following order is made

[47.1] The Appeal on both the conviction and sentence is dismissed.

PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION POLOKWANE

I AGREE

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant : **Adv MUTHIVHITHIVHI TE**
Instructed by : **POLOKWANE JUSTICE CERTRE**

Counsel for the respondent: **Adv MULAUDZI R**
Instructed by : **DPP POLOKWANE**

Date heard : **29 November 2025**
Electronically circulated on : **14 April 2025**