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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal No: **AR468/2023**

In the matter between:

X[...] P[...] M[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: Chetty J and Mossop J
Heard: 16 May and 13 June 2025
Delivered: 20 June 2025

ORDER

On appeal from the Ulundi Regional Court (sitting as the court of first instance)

1. The appeal against conviction and sentence is dismissed.
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JUDGMENT

MOSSOP J (CHETTY J concurring):

Introduction

[1] The appellant is presently serving a sentence of life imprisonment for the multiple rapes of a young girl (the complainant) who was aged eight at the time that she was violated. The appellant was described as the brother-in-law of the complainant's mother, he being involved in a relationship with the complainant's mother's sister.

[2] Following upon his conviction and sentence, the appellant applied for leave to appeal against both from the regional magistrate who heard his trial, but he failed to persuade the court to grant him such leave. This court, on petition, granted him leave to appeal against his conviction only. However, by virtue of the sentence imposed upon him, the appellant is entitled to an automatic appeal against it in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977.¹ I shall accordingly approach the appeal on the basis that it is properly against both conviction and sentence.

The point in limine

[3] Counsel who prepared the original heads of argument for the appeal was not the counsel who appeared to argue the appeal. Instead, Mr Chiliza appeared before us. Having considered the record and the initial heads of argument, Mr Chiliza came to the view that several important points had been overlooked by his predecessor. Mr Chiliza consequently delivered supplementary heads of argument intended to address the points that he believed ought to have been advanced but had not been. It is probably wise to deal with those points now, before assessing the evidence led at the trial.

¹ Section 309(1)(a) reads as follows: 'Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).'

[4] The first point taken focussed on the procedure adopted by the regional magistrate for the reception of the evidence of the complainant, who at the time that she testified was now nine years old. It was submitted by Mr Chiliza that the regional magistrate had not conducted an inquiry to determine whether the complainant knew and understood the nature and import of an oath. It was further submitted that the regional magistrate failed to satisfy himself that the complainant could distinguish between truth and lies and therefore that she was not properly admonished to speak the truth and her evidence was, thus, inadmissible.

[5] To assess the validity of this criticism, it is only necessary to quote the relevant portion of the record of what happened before the complainant commenced her evidence:

COURT: S[...], do you know what it means to take the oath? Have you ever heard of that?

WITNESS: No, I do not ... [Indistinct- voice fades], Your Worship.

COURT: How old are you? According to your parents, what do they say, how old are you?

WITNESS: Nine, Your Worship.

COURT: Now at school and at home, were you taught what the difference is between telling lies and telling the truth?

WITNESS: Yes, Your Worship.

COURT: And what did your parents and what did the teacher say what must one do? Must one tell lies or tell the truth?

WITNESS: They say it is always better to speak the truth, Your Worship, because if you tell lies, you will get arrested.

COURT: Okay. Now everything you tell us here today, I want you to tell us the truth only. Okay? We were not there. You must tell us what happened, but only the truth. We do not want you to tell any lies. Okay?

WITNESS: Yes, Your Worship.'

[6] The complainant was then admonished to speak the truth and gave her evidence.

[7] A further point taken by Mr Chiliza was that the State had failed to establish that the complainant was eight years old at the time that she was violated. There is no merit in this point. When she commenced her testimony, the complainant was asked her age and gave it as being nine years. She was not challenged on this evidence. Later, her biological mother was called to testify and was asked the following question by counsel for the appellant:

‘EXAMINATION BY MR MSUNGU: As it pleases the Court, Your Worship. Ma’am at the time when you were in Johannesburg ...[indistinct] how old was S[...]?’

MS ZULU: She was 8 years.’

[8] The complainant’s mother was not challenged on her evidence of her daughter’s age.

[9] I can accordingly conceive of no basis for upholding Mr Chiliza’s argument on either of the two points that he raised. There is no prescribed formula for assessing whether a witness should be required to take the oath or should simply be admonished to tell the truth. The regional magistrate did what was required of him and there can be no suggestion that he erred in any way. The age of the complainant was never in issue before the trial court and cannot be an issue now on appeal. The points identified by Mr Chiliza must therefore be dismissed.

The evidence for the State

[10] The evidence presented by the State was largely that of several children, of which the complainant was but one. This is because when the rapes of which the appellant was convicted occurred, the complainant was in the company of other young children. The complainant’s young companions were the witnesses upon whom the State relied on to attempt to complete the picture sketched in outline, and partially painted, by the complainant.

[11] The complainant could not be precise about when the acts of rape occurred, and the best that she could do was to state that they occurred sometime in 2010.

According to her, she was raped on five separate occasions in that year. The first rape occurred during the daylight hours and the remaining four all happened at night. All the rapes occurred at the homestead at which the appellant resided.

[12] As regards the first incident of rape, the complainant testified that she and two other children, called S[...]i (S[...]i) and S[...]a (S[...]a), had gone to the Mbatha homestead, located in an area called Sishwili, an area near Ulundi, to pay a visit to a young child called Z[...]. The appellant is the biological father of Z[...], and he physically resides at the homestead that bears his surname. Upon their arrival at the Mbatha homestead, the complainant and her youthful companions did not find Z[...] there, but the appellant was there. At some stage he sent S[...]i off to a local shop to purchase a loose cigarette for him. The fact of that instruction to S[...]i, and her errand to the local shop, was confirmed by S[...]i when she testified at the trial.

[13] After S[...]i departed to go to the shop, the complainant testified that the appellant instructed her to go inside the dwelling and to brush her hair. She dutifully obeyed the instruction of her elder and went inside, followed by the appellant. Once inside, the appellant closed the door to the bedroom that she had entered and instructed her to pull down her skirt and panties. She again obeyed. The appellant then removed his trousers and instructed her to lie down on the bed in the room. She did so, and the appellant then placed his penis into her vagina. She cried but was warned by the appellant not to mention what he had done because if she did so, he would kill her. When he was finished, the appellant then gave the complainant R1 and told her to use it to purchase ice lollies for herself and S[...]i at the shop.

[14] There was further corroboration of aspects of the complainant's evidence from the evidence of S[...]i. She confirmed that the complainant was in the bedroom with the appellant. She knew this to be the case because upon her return from the local shop, she went to the bedroom and pushed open the door, which remained unlocked. As she did so, she was admonished by the appellant from within the bedroom not to proceed further into the room. She did not enter the room, but having already pushed open the door, she testified that she was able to observe the appellant on top of the complainant on the bed. She testified that the appellant was

not wearing his trousers, as the complainant had stated, and she was able to see his penis.

[15] There was further corroboration of what happened in the bedroom from S[...]a when he testified. He had been outside throughout, playing with a ball. He testified that S[...]i was looking for the complainant, presumably after returning from the local shop, and so he had gone to the window of the bedroom and peeped into the room. Using the exact words that S[...]a employed, he stated that he saw the appellant 'jumping on top of Senoti.'² He testified that he saw the complainant and the appellant lying on the bed in the bedroom, as had S[...]i.

[16] All the further counts of rape occurred at night, when the complainant was required to stay at the Mbatha homestead while her grandmother, with whom she would ordinarily stay, was away. The four young children present at the Mbatha homestead would then sleep the night together in a single room. The evidence adduced by the complainant was that the appellant would enter the bedroom in the dead of night and get onto the bed in which she was sleeping. He would then place his penis within her vagina and have intercourse with her, all this whilst she, in fact, was sharing a bed with another child. All of this occurred in the darkness. Asked how she could be sure that the person who violated her was the appellant, the complainant gave the eminently logical answer that he was the only adult in the locked house and, thus, it could only be him.

[17] On first consideration, this modus operandi would seem to be questionable. Would there not be a noise that would wake one or more of the other children in the room and thus expose the appellant? Would the complainant herself not cry out, with the same effect? According to the State case, there was, however, a witness who confirmed the complainant's version of events. That witness was the child who had peeped into the bedroom through the window during the daytime rape of the complainant, namely S[...]a. He testified that on one occasion when all the children shared a bedroom, he had not fallen asleep and was awake when he observed the appellant do precisely what the complainant said that he did, namely, enter the

² This was not the complainant's name but was an appellation by which she was also known.

bedroom, get into the bed in which she slept and get on top of the complainant. Despite the darkness, he testified that he recognised the appellant because he wore the same white T-shirt that he ordinarily wore when he was fixing motor vehicles. Significantly, S[...]a was not cross-examined by the appellant's legal representative.

[18] The complainant did not immediately report what had happened to her to an adult. She explained that she was fearful that the appellant would carry out his threat if she told anyone what he had done to her. She only reported the appellant's conduct about a year later, when she was watching a Digital Versatile Disc (DVD) where the issue of sex was alluded to. She was with the other children, who mentioned loudly that the complainant knew something about sex, which comments were overheard by the complainant's mother who then made further inquiries about what was meant by this, and the full story then came out. The complainant was thereafter examined by a doctor who completed a J88 document recording her observations and findings.

[19] In that J88 document, the examining doctor, Dr Salona Prahladh, made the following notes of her observations of the complainant's genitalia:

'On genital examination, hymen tear @ 8'clock (sic) seen +- 5mm – healed tear 7 months old.'

[20] In a further recordal, the examining doctor recorded the following:

'The above person was allegedly raped by a known person more than five times. Last sexual assault was more than a year ago. On examination, old hymenal tear seen at 8 o'clock in keeping with penetration.'

The appellant's case

[21] No case at all was presented by the appellant. He chose to close his case without himself testifying or calling the evidence of any witnesses. All that was put to the witnesses called by the State by his legal representative was that the appellant would deny raping the complainant. Yet, he did not do that under oath.

Analysis of the evidence on conviction

[22] The evidence on the first incident of rape narrated by the complainant was clear and compelling. The evidence on the other counts was slightly foggier and lacking in detail. This, perhaps, is understandable because the complainant had described in granular detail what had occurred to her during the daylight rape and did not go into the same detail when narrating what had happened to her during the nighttime rapes. Nonetheless, a prima facie case of multiple rapes had been made out by the evidence adduced by the State that simply went unanswered by the appellant.

[23] What is the effect of remaining silent in the face of a prima facie case? The appellant in this matter, no doubt, was within his rights not to enter the witness box. He could not be compelled to give evidence, less so if that evidence would tend to incriminate himself.³ But his decision not to take to the witness box was not made in a vacuum and consequences would naturally flow from it. What the consequences of that decision could be was considered by Cameron JA in *S v Tandwa and others*,⁴ when he observed that exercising the right to remain silent:

‘... does not suspend the operation of ordinary rational processes. The choice to remain silent in the face of evidence suggestive of complicity must in an appropriate case lead to an inference of guilt.’

[24] *Murray v DPP*,⁵ a matter that had its origin in Northern Ireland, but which found its way to the United Kingdom’s House of Lords,⁶ was a matter that dealt with the issue of what inferences could be drawn from the silence of an accused person when faced with a prima facie case. In the House of Lords, Lord Slynn observed that:

‘... if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a

³ Constitution of the Republic of South Africa, section 35(3)(j).

⁴ *S v Tandwa and others* [2007] ZASCA 34; [2007] SCA 34 (RSA); 2008 (1) SACR 613 (SCA) para 53 (*Tandwa*).

⁵ *Murray v DPP* [1994] 1 WLR 1 (HL) 11G.

⁶ The matter, thereafter, also proceeded to the European Commission on Human Rights.

matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.’

Cameron JA endorsed Lord Slynn’s reasoning in *Tandwa*.

[25] The fact that a prima facie case has been made out by the State that goes unanswered by an accused person obviously does not automatically result in the onus borne by the State of proving the guilt of the accused beyond doubt being discharged. But a failure to provide evidence in rebuttal of a prima facie case where the facts reveal that it was within the exclusive power of the accused person to demonstrate what the true facts were, and the accused person fails to take advantage of that opportunity to give that explanation, may result in the prima facie case established becoming conclusively established.⁷ The reason for that is that there is simply no evidence to gainsay the case made out against the accused person and there is therefore no reason to doubt the credibility or reliability of that case.

[26] It appears to me that this is an instance where the appellant ought to have explained what actually transpired with the complainant in the various bedrooms about which evidence was led. This became more clamant in the light of the unchallenged evidence of the medical practitioner who examined the complainant. The obvious reason why the appellant did not testify, and perhaps could not testify, was that to do so he would have to be cross examined, a prospect that perhaps did not appeal to him, for, as John Henry Wigmore stated:

‘Cross-examination is the greatest legal engine ever invented for the discovery of truth.’⁸

The inference to be drawn is that cross-examination of the appellant would have unequivocally established his culpability on the offences for which he was charged.

[27] It is so that the evidence of the witnesses who implicated the appellant were child witnesses, as previously mentioned, and the evidence of such witnesses must

⁷ *S v Boesak* [2000] ZASCA 112; 2000 (1) SACR 633 (SCA)

⁸ J H Wigmore, J H Chadbourn, and WA Reiser: ‘Evidence in Trials at Common Law,’ 1974, published by Little, Brown USA in 1974, page 32.

be approached with some caution. While the regional magistrate did not specifically make reference to the cautionary rule by name when considering the evidence of those children in his judgment, there is no doubt that he, in fact, applied such rule: he acknowledged the youthfulness of the witnesses in his judgment, he carefully and critically scrutinised their evidence, and he sought corroboration for their evidence.

[28] The proper approach to the assessment of the evidence of children was addressed by the Appellate Division in *Woji v Santam Insurance Company*⁹ 1981 (1) SA 1021 when it stated the following:

‘The question which the trial court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand questions put, and to frame and express intelligent answers” (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child’s trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth?’

[29] The regional magistrate considered the abovementioned factors. He criticised some of the child witnesses, more particularly the evidence of S[...]a in certain respects. As may be expected when the evidence of young children is heard, there were contradictions between what they individually remembered and said. Those contradictions are acknowledged. But they largely related to insignificant or superfluous issues that did nothing to detract from the collective power of their evidence seen as a whole. The variations in their evidence did not diminish the

⁹ *Woji v Santam Insurance Company* 1981 (1) SA 1021

cogency of that evidence or suggest that they had conspired to falsely secure the conviction of the appellant. On the contrary, that evidence, replete with its imperfections, simply served to establish that such manipulated conduct did not occur here.

[30] In the circumstances I am satisfied that the regional magistrate correctly determined the guilt of the appellant and his appeal against conviction must consequently fail.

Considerations on sentence

[31] Rape is always a serious matter. And it is a scandalously common offence. Disturbingly, the rape of children is unacceptably commonplace. In *S v Jansen*,¹⁰ the court stated that:

‘Rape of a child is an appalling and perverse abuse of male power.’

[32] Our society claims to be civilised, and we frequently extoll the importance, and virtue, of ubuntu, but the conduct of an increasing number of men ignores this important societal value. Children are not to be viewed as sex objects nor are they to be viewed as easy and convenient targets for those who are not able to control their sexual urges. Sexual attacks upon our children violate not only their bodily and psychological integrity but it also forces them out of the idyll of childhood into the adult world that they should not be required to face until they are equipped to do so.

[33] The complainant in this matter went to the Mbatha homestead for an entirely innocent purpose. But her decision to go there had calamitous consequences for her. The place where she no doubt thought that she would be safe turned out to be a place of immense danger to her. The person who she was entitled to believe that she would be safe with, the appellant, turned out to be a predator intent on abusing her. Citizens are very quick to claim their constitutional rights but seem less inclined to acknowledge that children, too, have constitutional rights. Those rights must be protected with the same vigour as the rights of adults.

¹⁰ *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

[34] The regional magistrate delivered a thorough and considered judgment on sentence. He considered the well-known triad of interests formulated in *S v Zinn*,¹¹ and correctly applied the approach proposed in *S v Malgas*,¹² namely that the minimum sentence required by the law to be imposed should not be departed from for insignificant or flimsy reasons. There is a minimum sentence applicable to the facts of this matter, namely life imprisonment. The regional magistrate, correctly in my view, found that there were no substantial and compelling reasons to depart from the imposition of the prescribed minimum sentence.

[35] In *S v Bogaards*,¹³ the Constitutional Court, observed that:

‘... sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.’ (Footnotes omitted.)

[36] For an appellate court to interfere with a sentence, there must ordinarily be a material misdirection by the sentencing court. Absent any such misdirection, an appellate court may not approach the issue of sentence:

‘... as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh ...’¹⁴

[37] I discern no misdirections in the judgment of the regional magistrate. He appears to have properly exercised his discretion when considering the question of sentence. That being the case, there is no scope for this court to interfere with the sentence imposed upon the appellant.

¹¹ *S v Zinn* 1969 (2) SA 537 (A).

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

¹³ *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) par 41.

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

The order

[38] I would accordingly propose the following order:
The appeal against conviction and sentence is dismissed.

MOSSOP J

I agree and it is so ordered:

CHETTY J

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