



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case no: A144/23

In the matter between:

M[...] T[...]

Appellant

and

THE STATE

Respondent

Coram: Le Grange J, Sher J et Dickerson AJ

JUDGMENT DELIVERED (VIA EMAIL) ON 25 JULY 2025

DICKERSON AJ:

Introduction

1. The appellant was charged with one count of contravening 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) 32 of

2007, read with Sections 92(2), 94, 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977, and further read with Section 120(4)(a) of the Children's Act, 38 of 2005.

2. The factual substratum of the charge was that on 14 March 2021 and at Langa, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, to wit PN (then aged 13 years) by inserting his penis into her vagina without her consent.
3. The provisions of Section 51(1) and Schedule 2 of Act 105 of 1997 providing for the prescribed minimum sentence of life imprisonment applied, because the complainant was a child under the age of 16 years.
4. The appellant, who was represented at the trial, pleaded not guilty on 2 February 2023. He denied the allegations levelled against him but was convicted as charged on 29 May 2023 after a full-blown trial.
5. After hearing argument, the court found there were no substantial and compelling circumstances present to justify a departure from the prescribed minimum sentence, and on 6 June 2023 accordingly sentenced the appellant to the prescribed minimum term of life imprisonment. Three ancillary orders were also made: in terms of Section 103(1) of the Firearms Control Act 60 of 2000 he was declared unfit to possess a firearm; it was ordered that his particulars be entered in the National Register for Sex Offenders in terms of Section 50(2)(a) of the Criminal Law Amendment Act (Sexual Offences and Related Matters); and in terms of Section 120(4) of the Children's Act, 38 of 2005, he was found to be unsuitable to work with children.
6. The appellant appeals to this Court against both his conviction and the sentence. He does so in terms of the automatic right of appeal under Section 309(1) of the Criminal Procedure Act.

The material facts

7. The complainant was aged 13 years at the time of the commission of the alleged offence, and 15 years at the time of the trial.
8. The State led evidence by three witnesses: the complainant herself, the complainant's father ("MN"), and Dr Alvaro Nevill Felix.
9. The complainant testified via closed circuit television during the trial, with the assistance of an intermediary.
10. The appellant testified in his own defence and did not call any witnesses.
11. The complainant lived with her aunt in Goodwood due to family problems, and her parents lived at 9[...] K[...] Hotel in Langa. The K[...] Hotel is a large hall with multiple rooms, accommodating a number of other people.
12. The complainant had known the appellant before the incident in question. He was a friend of her father and often visited the latter to watch television and eat. He also accompanied the complainant's parents to do shopping.
13. Broadly speaking, the complainant's evidence was as follows:
 - 13.1 At about midday on 14 March 2021 she was sent by her aunt to the K[...] Hotel collect her parents' identity documents. She spoke to her father, who gave her his identity document. Her mother was not at home, so she went to look for her.
 - 13.2 The complainant was initially accompanied on the search by a friend, Luciano. After Luciano had left, the complainant returned to the K[...] Hotel to search for her mother there.
 - 13.3 At the K[...] Hotel she encountered the appellant who – as indicated above – she knew as a friend of her father's. He said he would assist her to search for her mother but said that he first wanted to collect a jersey from his room.

- 13.4 The complainant accompanied him to his room and waited at the door. He invited her in and closed the door behind her. She had no reason to fear him because he was a friend of her father.
- 13.5 The appellant moved closer and asked for a kiss. He said that she was pretty. Initially she thought he was joking, but in any event declined the kiss and thanked him for the compliment.
- 13.6 The appellant again requested a kiss, and she again declined. He then pushed her onto his bed and held her by the throat with both hands. He used one hand to push her jeans and underwear down and proceeded to penetrate her vagina with his penis.
- 13.7 The complainant was able to kick and push herself free of him. She stood up, pulled up her jeans and underwear and said that she was going home and would tell people what he had done.
- 13.8 Before she left, the appellant threatened that if she were to tell anyone, he would do 'something' to her younger sister, who was a baby at the time and living with her parents.
- 13.9 The complainant initially wanted to catch a taxi to return to her aunt in Goodwood. She encountered Luciano, however, who persuaded her not to get into a taxi full of men on her own. Instead, the complainant returned to her parents' home. When her parents arrived, they noticed that something was wrong and that she was shaking. Luciano's mother had also arrived, and believing that she may be having a fit, offered to take her to the day hospital, which they did.
- 13.10 The complainant said nothing about a rape until one of the Xhosa-speaking at the day hospital spoke to her, to whom she then confided what had happened, without revealing the identity of the rapist.
- 13.11 The cleaner reported this to the complainant's father. He asked PN who had raped her, but she would not reveal his identity.
- 13.12 The next day the complainant's father again spoke to her, saying that she would be haunted for the rest of her life if she kept quiet. She then revealed the appellant as the rapist. She was taken to the Langa police to make a statement and taken to see a doctor (Dr Felix) at the Karl Bremer Hospital and was examined.

14. Broadly speaking, the evidence of the complainant's father corroborated her version regarding events preceding and following the alleged rape. He could and did not provide any direct evidence capable of corroborating her account of the rape itself because he was not there.
15. Dr Felix practices clinical forensic medicine at the Karl Bremer Hospital, Thuthuzela Care Centre. His work predominantly involves examination of patients who are victims of sexual offences. In essence, his evidence corroborated PN's account in a number of respects, and was to the following effect:
 - 15.1 He examined the complainant on 15 March 2021 and reported his findings in a written J88 medico-legal report, which formed part of the record.
 - 15.2 The complainant told him that her father's friend had grabbed her by the neck and forced her into his room where he sexually abused her by penetrating her vagina with his penis.
 - 15.3 Dr Felix observed two purple bruises on the complainant's neck. This indicated blunt force trauma to the neck, consistent with being lightly throttled as described by PN.
 - 15.4 The gynaecological examination revealed the following injuries: (1) multiple superficial abrasions at the posterior fourchette; (2) redness at the vestibule, fossa navicularis and para-urethral areas; (3) tears at 4 o'clock and 8 o'clock on the margin of the hymen; (4) no discharge; (5) 'some' bleeding.
 - 15.5 Dr Felix concluded that the injuries he observed were consistent with 'penetration by a blunt object likely by a penis or fingers' and 'bruises around the neck suggestive of being throttled/choked.'
16. The appellant denied the rape, and testified that he was elsewhere at the time, at one Phatiswa's place. As the trial magistrate observed, however, his evidence on this score was inconsistent with what had been put to State witnesses by his legal representative during cross-examination. Significantly,

the appellant called no witnesses to corroborate his version, which was essentially that of an alibi.

The conviction

17. The above is merely a precis of the tenor of the evidence, which is more carefully detailed in a lengthy judgment by the presiding magistrate. No useful purpose would be served by reiterating this: it suffices to say that the magistrate's summation of the evidence is a fair and accurate reflection of what is contained in the record.
18. The learned magistrate correctly determined that the issue to be decided was the identity of the rapist (there being no basis to doubt that a rape took place) and the probity of the appellant's alibi. In addressing these issues, one was plainly mindful of and applied the cautionary rules applicable to a single witness (which, in relation to the actual incident of rape, the complainant was). He was alert to the fact that the complainant was a juvenile, that her father's evidence was circumstantial.
19. In evaluating the evidence, the court applied and considered these features but nonetheless found PN to be a credible and reliable witness, who made a good impression. He similarly found Dr Felix to be a good witness but formed a less favourable impression of the complainant's father, whom he nonetheless found to be credible overall.
20. In contrast, the court found the appellant to be a poor witness who became worse under cross-examination. Having read the record, it is hard to disagree with this assessment. In the result, the appellant's evidence was rejected as false, and the complainant's evidence was accepted.

21. An appeal court will be slow to interfere with the factual findings of a trial court unless such findings are clearly wrong:

*'The powers of the court of appeal to interfere with the findings of fact of a trial are limited. In the absence of any misdirection the trial court's conclusion, 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 and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'*¹

(emphasis supplied)

22. The onus is to prove the guilt of an accused beyond a reasonable doubt, and an accused's version cannot be rejected solely on the basis that it is improbable: only once the trial court has found on credible evidence that the explanation is false beyond a reasonable doubt can it be rejected.² The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.³
23. In the absence of an irregularity or misdirection, a court of appeal will not intervene with the credibility findings of the trial court unless it is convinced that such findings are clearly wrong.⁴

¹ S v Francis 1991 (1) SACR 198 (A) at 198j - 199a.

² S v Van der Meyden 1991 (1) SA 447 (W) at 448f-g].

³ S v V 2000 (1) SACR 453 (SCA) at 455B.

⁴ Francis n 1 at 204C - E] S v Mkohle 1990 (1) SACR 95 (A) at 100e.

‘... there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirections by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate courts to factual findings of the trial court are so well known that restatement is unnecessary.’⁵

24. The trial court – as emerges from its comprehensive written judgment and traversal of the evidence – carefully considered all the relevant and applicable principles in evaluating the evidence.
25. There is no discernible misdirection on the part of the trial court: indeed the complaints of a supposed misdirection advanced by the appellant’s counsel in argument really amount to nothing more than dissatisfaction with the ultimate findings made. Similarly, it cannot be said that the evaluation of the evidence on any of the factual findings made by the trial court are incorrect, still less clearly incorrect. Probably for these reasons, the Appellant’s counsel properly did not in oral argument pursue the appeal against conviction.

The Sentence

26. The appellant’s personal circumstances are as follows:
 - 26.1 He was born on 4 January 1988, was 33 years of age at the time of the incident and 35 years of age at the time of sentencing.
 - 26.2 He was born and raised in Gauteng, where he lived with his parents and two sisters. After his parents relocated to the Eastern Cape, he remained in Gauteng and completed his education up to Grade 7 before also relocating to the Eastern Cape.
 - 26.3 The appellant’s sisters are married with families of their own and live in Cape Town and Gauteng respectively.

⁵ *S v Hadebe* [1997] ZASCA 86.

- 26.4 He left the Eastern Cape in 2006, and until his arrest was employed at various places. In particular, at the time of his arrest he was employed at Truda Chips in Cape Town as a labourer doing deliveries, where he earned an income of R160.00 per day.
- 26.5 He is not married but has an 8-year-old daughter who lived with her mother (the appellant's ex-girlfriend) in close proximity to him.
- 26.6 The appellant used his income to maintain himself and to support his child. Of the R3 600.00 per month he would generally earn, R1 000.00 would be paid towards his daughter. The child's mother is the primary caregiver and receives a social grant in respect of the daughter who is currently receiving schooling.
- 26.7 He has only one previous conviction, dating back to 18 June 2008 for possession of a dangerous dependent producing substance, for which he was sentenced to a fine of R400.00 or 20 days.
- 26.8 During the sentence proceedings, the appellant revealed for the first time that he is HIV-positive and has been receiving treatment for this condition whilst in prison. He had not used a condom during the incident and did not alert the complainant to his HIV status to enable her to take appropriate steps.
27. The trial court imposed a sentence of life imprisonment on the basis that it could not find substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment.
28. It is now argued on behalf of the appellant that the sentence imposed was shockingly harsh and inappropriate. The main thrust of this argument is that insufficient attention was paid to the potential to rehabilitate the appellant and to enable him to contribute to society and his dependents.
29. The rape of a child under the age of 16 is a heinous abhorrent crime, hence this type of rape being placed in the category of crimes attracting a statutory

life sentence in the absence of substantial and compelling circumstances. However, as Rogers J observed in CC;⁶

'The decisions of our courts, including the Supreme Court of Appeal, reflect that not infrequently perpetrators of this type of rape are not sentenced to life imprisonment because substantial and compelling circumstances are found to be present. If one examines the minutiae of leading cases it may be difficult to discern why in some of them life sentences were upheld where in others, not apparently less heinous, substantial and compelling circumstances were found exist. In S v PB 2013 (2) SACR 533 (SCA), Bosielo JA stated that findings in prior cases cannot be elevated to the status of binding precedents or benchmarks or allowed to become a straitjacket (paras 16 – 19). One must thus distinguish between the legal principles to be deduced from authoritative judgments and the detailed application of those principles to the facts of particular cases. It is the legal principles with which lower courts should mainly concern themselves.'

30. The factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind that the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions.⁷

*'If, after considering all the relevant factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence and to impose a lesser sentence.'*⁸

⁶ CC v S [2015] ZAWCHC 69 para 19.

⁷ S v Malgas 2001 (1) SACR 469 (SCA); CC para 20.

⁸ *Id.*

31. As observed in *S v Abrahams*:⁹

*‘..some rapes are worse than others’ and “The life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate or unjust.”*¹⁰

32. The Act provides no gradation from the category of rapes by first offenders which attract a sentence of 10 years (in terms of SS51(2)(b)(i) read with Part 3 of Schedule 2) and those which attract a life sentence (in terms of SS51(1) read with Part 1): a single circumstance may accordingly shift the offence from the one category to the other.¹¹

33. It is therefore the sentencing court’s duty to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence.¹² The view that the prescribed sentence can be departed from only if the circumstances are ‘exceptional’ has been rejected in *Malgas*, and it is wrong for the sentencing court to assume that a life sentence is proportionate for a crime falling into a particular category.¹³

34. As was observed in *Vilikazi*, it may be that the prescribed life sentence is seldom imposed in cases that fall into a specific category, and if that occurs ‘it will be because the prescribed sentence is seldom proportionate to the offence’.¹⁴

35. In *SMM*,¹⁵ in a review of the SCA’s decisions on rape sentencing, the court – whilst recognising that the country was facing a ‘crisis of epidemic proportions in respect of rape, particularly of young children’,¹⁶ and while emphasising

⁹ 2002 (1) SACR 116 (SCA) para 29.

¹⁰ See also *S v Mahomotsa* 2002 (2) SACR 435 SCA, paras 17 – 19.

¹¹ *S v Vilikazi* 2009 (1) SACR 552 (SCA) para 13.

¹² *Id* para 5.

¹³ *Vilikazi* n 11 paras 15 to 18.

¹⁴ *Id*.

¹⁵ *S v SMM* 2013 (2) SACR 292 (SCA).

¹⁶ *Id*, para 14]

that rape is by its nature a ‘degrading, humiliating and brutal invasion of a person’s most intimate private space, even when not accompanied by violent assault’ ¹⁷ - repeated the injunction that punishment should not be approached ‘in a spirit of anger’ and that sentencing must be assessed ‘dispassionately, objectively and upon a careful consideration of all relevant factors’ (my emphasis). ¹⁸

36. The public is rightly outraged by the scourge of rape, and there is increasing pressure on the courts to impose harsher sentences. But sentencing cannot be applied only to satisfy public demand for revenge – other sentencing objectives, including rehabilitation, cannot be discarded if a balanced, effective sentence is to be attained. ¹⁹
37. It must be recognised that there are categories of severity of rape. ²⁰ As I read the reported cases, the severity of a rape on the spectrum of gravity is required and this is one of the relevant factors to be considered objectively and dispassionately.
38. Whilst one must approach with caution the application of general principles to the facts of specific leading cases as a benchmark of appropriate sentencing, these do provide some assistance. I have reviewed a range of cases which may provide some comparable indications of sentencing in these types of cases. ²¹ I will address some of these below.
39. In *CC (supra)*, the appellant was convicted on two counts of raping children: the first involved the oral rape of a 3-year-old boy; and the second involved the digital rape of an 8-year-old girl. The appellant pleaded guilty on both

¹⁷ Para 17.

¹⁸ Para 13.

¹⁹ Para 14.

²⁰ Para 18.

²¹ *McLaggan v S* 084/13. 3/06/2013 [SCA]; *MDT v S* 548/2013. 20/03/2014 [SCA]; *Maposa Frans Madiba v S* 497/2013. 20/03/2014 [SCA]; *Thembelani Sogoni v S* A243/21. 18/07/2022; *Willem Matroos v S* A257/2022. 27/02/2023 [WCD]; *Grootetjie v S* (A78/2023) [2023] ZAWCHC 146 (14 June 2023); *Grego Beat v S* A227/23. 30/07/2024 [WCD]; *William Munyai* 546/2013. 28/03/2014 [SCA]; *Sipho Ximba v S* 1171/18. 16/09/2019 [SCA]; *M.B v S* A447/2015. 9/09/2016 [WC]; *M.M v S* (CAF19/15) [2015] ZANWHC 63 (25 September 2015); *Buso v S* (A256/2021) [2022] ZAGPPHC 404 (17 June 2022).

counts, and the magistrate imposed two sentences of life imprisonment. The appellant had himself been subject to sexual abuse in his youth but also had two previous convictions for indecent assault of girls aged 4 and 5 respectively (one of whom was a member of his family, and the other a family friend). The appeal court found the sentence of life imprisonment to be unjust and disproportionate to the crime, the offence, and the legitimate needs of the community. A sentence of 15 years of imprisonment, of which 5 years was suspended, was imposed in relation to the one count, and 12 years imprisonment of which 3 years were suspended on the second count. The court ordered that part of the unsuspended periods of imprisonment should run concurrently, because an effective period of 19 years would be 'too crushing a punishment', and that an effective period of 13 years of imprisonment struck the right balance.

40. In *CC*²² the court had regard to the SCA decisions in both *S v Mudau*²³ and *S v EN*,²⁴ in which the SCA set aside life sentences.

40.1 In *Mudau* the appellant, 47 at the time of sentencing, had raped his 13-year-old niece. He first penetrated her vagina with two fingers and shortly thereafter with his penis, in an episode lasting about 5 minutes. Semen was subsequently found on the child's underwear. He paid her to buy her silence, denied the rape, and apparently expressed no remorse. His abuse of trust in a family setting was regarded as an aggravating feature but the rape itself occasioned no serious injury to the victim and there was no additional violence. The psychological trauma could not be assessed in the absence of a victim report.

40.2 In *EN*, the appellant was a 46-year-old first offender who raped his 15-year-old stepdaughter. The latter suffered no serious physical injuries and had submitted to intercourse without threats of violence but after having accepted gifts of money. The appellant had been

²² Note 6 para 25.

²³ [2013] ZASCA 56 (9 May 2013).

²⁴ 2014 (1) SACR 198.

drinking. Life imprisonment was found to be disproportionate, and a sentence of 15 years imprisonment imposed.

40.3 In *S v GK*,²⁵ this Court set aside a sentence of life imprisonment for the rape of a 7-year-old girl and substituted it with a sentence of 17 years imprisonment.

41. The appropriate test was articulated as follows in *CC*:²⁶

'The court thus must not approach the present appeal with the mind that a life sentence is a priori a just punishment for the appellant. Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence but have a conviction that such a sentence would be unjust i.e. disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case, bearing in mind however that even discretionary sentences for crimes dealt with in the Act (i.e. once substantial circumstances have been found to be present) can be expected to be more severe than before.'

42. The learned magistrate *in casu* identified certain aggravating features of the rape itself (apart from the age of the complainant, the force used during the incident, the physical injuries suffered and the obvious psychological trauma). Nevertheless, to this should be added the appellant's HIV status, but on the spectrum of the severity of rapes with which our courts are routinely confronted, not the most severe.

43. Reserving a sentence of life imprisonment for the most severe cases is not the most appropriate manner of approaching the question of whether it should be imposed in a particular matter as there is always a more horrific and brutal rape imaginable. *Non constat*, however, that the converse applies: namely that every rape of a minor requires a sentence of life imprisonment. This seems to be the import of the authorities referred to in paragraphs 31 to 37

²⁵ 2013 (2) SACR 505 (WCC).

²⁶ Para 26.

above. To adopt a different approach would not accord with the dictum by Rogers J in CC (at paragraph 26) to the effect that:

'The court thus must not approach the present appeal with a mind that a life sentence is a priori a just punishment for the appellant. Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence but have a conviction that such a sentence would be unjust, i.e. disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case.'

44. On application of the above principles, and on a conspectus of the facts, I am satisfied that the sentence of life imprisonment is disproportionate to the crime and the legitimate needs of the community, and places insufficient emphasis on the prospect of appellant's rehabilitation and his ability to function in and contribute to society.
45. The appellant is a comparatively young man. He held employment, was economically active, and supported his child. To all intents and purposes he has no previous convictions and there is no evidence of this type of behaviour on other occasions.
46. That the accused is to all intents and purposes a first offender, and did not previously manifesting similar behaviour, is not in or of itself a substantial and compelling circumstance. It is nonetheless a factor to be weighed, not only in the light of the appellant's prospects of rehabilitation, but also in relation to the punitive and deterrent aspects of sentence.
47. Despite the dictum in *S v PB* (see para 29 above) that findings in prior cases should not become straitjackets, I have found it unavoidable to have regard to comparable cases and sentences handed down by the courts in other matters (as indeed was done by this court in *CC supra*). Some of the cases to which I had regard – and which I thought provided a reasonable basis for comparison

– are set out above. The facts of those cases speak for themselves.

48. I concluded that the magistrate had misdirected himself by over-emphasising the aggravating factors, failing to take proper account of the accused's personal circumstances and prospects for rehabilitation, and in starting from the *a priori* position that a life sentence was a just punishment *per contra CC supra*.
49. In all the circumstances an appropriate sentence would, in my view, be 20 years imprisonment and in the result, I would propose the following order:
- 49.1 the appeal against the conviction should be dismissed;
 - 49.2 the appeal against sentence should be upheld;
 - 49.3 the sentence of life imprisonment set aside and substituted by a sentence of 20 years imprisonment; and
 - 49.4 the incidental orders made by the magistrate confirmed.

J DICKERSON

Acting Judge of the High Court

SHER J (LE GRANGE J concurring):

50. I have had the benefit of reading the judgment of my colleague. I agree that in his comprehensive judgment the magistrate properly considered the relevant principles applicable when evaluating the evidence and consequently the appeal against conviction cannot be sustained.
51. Regrettably, I cannot agree with my colleague's approach regarding the sentence. He proposes that it should be substituted with one of 20 years imprisonment, as he is of the view that the magistrate misdirected himself by over-emphasising the aggravating factors, failing to take proper account of the appellant's personal circumstances and prospects of rehabilitation, and

proceeding from the *a priori* position that a sentence of life imprisonment was a just punishment, contrary to the decision of this Court in 2015 in *CC*.²⁷ In that matter Rogers J (Veldhuizen J concurring) held, following the approach which he had adopted (with Gamble J concurring, Matthee AJ dissenting) some 2 years earlier in *GK*,²⁸ that in appeals involving the imposition of prescribed minimum sentences an appellate court was entitled to make its own value judgment as to whether there were substantial and compelling circumstances present and, if it differed from the sentencing court in this regard, to interfere and to substitute the sentence imposed with its own.

52. Whilst the rapes in both *CC* and *GK* are distinguishable from the one in this matter (they involved penile oral and digital vaginal penetrations of children, and none of the victims sustained any physical injuries), it is nonetheless necessary to consider the decisions in these matters as my colleague's judgment is predicated on the approach which was adopted in them, and they are frequently cited by counsel and followed in this Court as a basis to interfere with sentences in appeals involving the rape of young children by trusted adults in positions of care, power and/or authority.
53. I am of the view that the reasoning and approach which was adopted in both *CC* and *GK* is not consistent with the *ratio* in *Malgas* (as confirmed in *Dodo*), on prescribed minimum sentences and should accordingly not be followed.²⁹ To explain why I have come to this conclusion it is necessary to restate certain fundamental principles in the light of their historical background.

The relevant principles

²⁷ Note 6.

²⁸ *GK v S* [2013] ZAWCHC 76 (majority judgment), [2013] ZAWCHC 77 (minority judgment of Matthee AJ); 2013 (2) SACR 505 (WCC).

²⁹ *S v Dodo* 2001 (1) SACR 594 (CC) para 11. In *Patmar Exploration (Pty) Ltd & Ors v Limpopo Development Tribunal & Ors* 2018 (4) SA 107 (SCA) para 3 the SCA confirmed that a court may decline to follow a previous decision by it if it finds that it was clearly wrong as a result of a fundamental departure from principle, 'manifest oversight', misunderstanding, or 'palpable mistake', or the reasoning upon which its decision was based was clearly erroneous.

54. It is a trite and long-established principle of our criminal law that the imposition of sentence is 'pre-eminently' a matter that falls within the discretion of a trial court³⁰ and, as such, is within its prerogative.³¹
55. As this discretion is a true discretion or, as it is also sometimes referred to, a 'narrow' one, it is equally well-established that an appeal court may not interfere with a sentence that has been imposed in the exercise thereof simply because it does not accord with the sentence it may have imposed had it been seized of the matter, nor, in the words of Marais JA in the seminal decision in *Malgas*,³² may it approach the question of sentence as if it were the trial court and substitute the sentence imposed with its own one 'simply because it prefers it'.
56. As a result, it has consistently been recognised that (save where the proceedings are beset by a material irregularity resulting in a failure of justice) an appeal court may only interfere in two instances: where the sentence is vitiated by a so-called 'material misdirection', or where the disparity between the sentence which would have been imposed by it had it been the sentencing court, and that which that court imposed, is so marked that it can properly be described as inducing a sense of shock, or as 'startlingly or disturbingly' inappropriate.³³ A 'misdirection' is simply a term used to refer to an error that was committed by the court, either in determining or in applying the facts relevant to assessing an appropriate sentence. As the central enquiry in an appeal against sentence is not whether it was right or wrong, but whether the trial court exercised its discretion properly and judicially, a mere misdirection is not in itself sufficient to allow for interference on appeal, and it must be material i.e. of such a nature or degree of seriousness that it shows, directly

³⁰ The earliest recitation of this principle by appellate courts, that I could find, was some 100 years ago, in *R v Mapumulo* 1920 AD 56; and then *R v Ramanka* 1949 (1) SA 417 (AD) at 420. Since then, it has been repeated as an incantation in so many matters that it is not necessary, nor is it feasible, to provide references in this regard.

³¹ *Malgas* n 7 para 13; *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8.

³² *Id* para 12.

³³ *Malgas* *id*; *S v Motloun* [2016] ZASCA 96; 2016 (2) SACR 243 (SCA) paras 6-7; *Hewitt* n 31 para 8.

or inferentially, that the trial court either failed to exercise its discretion at all, or that it exercised it improperly or unreasonably.³⁴

57. It is equally trite that when engaging in the exercise of its discretion i.e. in arriving at an appropriate sentence a trial court is required to have due regard for the triad of factors first enunciated in *Zinn*:³⁵ the nature and seriousness of the offence, the interests of the community and the accused's personal circumstances. A trial court will be held to have materially misdirected itself where it failed to have any, or due, regard for any of the circumstances which traditionally form part of these component factors. Thus, it is commonly accepted that a material misdirection has occurred if the trial court left out or ignored one of these factors or their component circumstances, or under- or over-emphasised any at the expense of others.
58. In 1997 the legislature adopted the Criminal Law Amendment Act³⁶ ('the CLA'), which made provision for the setting aside of all death sentences which had previously been imposed and a process for their substitution with alternative sentences, and the introduction of so-called 'prescribed minimum sentences' in the case of certain serious offences. The sentences, which came into effect on 1 May 1998, were intended to be temporary, short-term measures, which were to be in place for 2 years, to deal with an 'alarming burgeoning' in the commission of certain crimes and the 'tide of criminality which threatened to engulf society'.³⁷ However, they are now permanent fixtures of our sentencing landscape.
59. As for the terms of imprisonment which are to be imposed as prescribed minimum sentences, section 51 read with Parts 1-3 of Schedule 2 to the Act provides for a gradation, based on the categorised severity of certain listed offences, principally those of murder, rape and aggravated robbery, depending on the circumstances attendant on their commission and whether the accused is a 1st, 2nd or 3rd offender. As far as the offence of rape is concerned, the

³⁴ *S v Pillay* 1977(4) SA 531 (A) at 535E-F.

³⁵ *S v Zinn* 1969 (2) SA 537 (A).

³⁶ Act 105 of 1997.

³⁷ *Malgas* n 7 para 7.

most severe of the prescribed sentences, that of life imprisonment, is to be imposed on all offenders (even if it is their first such offence) where their victim is raped more than once or by more than one person, or by a person who has two previous convictions for rape, or who commits the offence knowing that he has HIV/AIDS, as well as in instances where the victim is under the age of 16 or is physically disabled or mentally ill.³⁸

60. However, the CLA provides that where a court is satisfied that ‘substantial and compelling circumstances’ exist which justify the imposition of a lesser sentence than the one prescribed in any case, it must enter those circumstances on the record of proceedings and may then impose such lesser sentence it deems fit.³⁹ As the Act does not define what such circumstances are it was left to the courts to give meaning to the term. This resulted in divergent interpretations by the different divisions.⁴⁰
61. In *Van Wyk*⁴¹ this division adopted the approach that these circumstances included all those which had previously been referred to as mitigating circumstances and which served to diminish an offender’s moral blameworthiness. In Gauteng there were conflicting approaches. In *Mofokeng*⁴² it was held that they had to be circumstances that were so unusual and exceptional in nature that they were compelling, whereas in *Blaauw*⁴³ and *Homareda*⁴⁴ it was held that they were all the circumstances which a court had traditionally considered when imposing sentence, including both mitigating and aggravating ones, weighed cumulatively. If, in doing so, the court concluded that the prescribed minimum sentence would be ‘grossly disproportionate’ (*Blaauw*) or disproportionate (*Homareda*) to the crime committed or to the sentence which would otherwise previously have been appropriate (*Homareda*), the necessary test was met for the imposition of a lesser sentence.

³⁸ Section 51(1) read together with paras (a) and (b) of Part 1 of Schedule 2.

³⁹ Section 51(3)(a).

⁴⁰ The decisions are cited in *Malgas* n 7 fn 3.

⁴¹ *S v Van Wyk* 2000 (1) SACR 45 (C) at 49J-50A.

⁴² *S v Mofokeng & Ano* 1999 (1) SACR 502 (W) at 523c-d, 524c-d.

⁴³ *S v Blaauw* 1999 (2) SACR 295 (W).

⁴⁴ *S v Homareda* 1999 (2) SACR 319 (W) at 321i-j and 325i.

62. The question of which of these approaches was correct was settled by the SCA in *Malgas*,⁴⁵ a decision which is cited with monotonous regularity in cases involving prescribed minimum sentences. Unfortunately, this is yet another instance where it is necessary to refer to it, as the principles which were laid down in it constitute the lens through which the decisions in *GK* and *CC* must be considered.
63. At the outset of his exposition Marais JA pointed out that by prescribing minimum sentences that applied in certain categorised instances the legislature aimed at ensuring there would be a 'severe, standardised and consistent' response from the courts unless there were 'truly convincing' reasons to deviate therefrom, as the emphasis had shifted to the objective gravity of the listed offences and the public's need for the imposition of effective sanctions against them.⁴⁶ He then dealt with the effect which the legislative prescription of minimum sentences had on the powers of sentencing courts. He held that the provisions constituted 'generalised statutory injunctions' to impose set sentences, which rested not upon the circumstances of the case, or the personal circumstances of the offender, but simply upon whether the offences of which an offender had been convicted fell within the specific categories set out in Schedule 2.⁴⁷
64. Thus, a sentencing court no longer had a 'clean slate' on which to 'inscribe' whatever sentence it would otherwise have previously deemed fit.⁴⁸ Instead, it was required to approach the question of sentence conscious of the fact that the legislature had 'ordained' the applicable prescribed minimum sentence as the sentence which should ordinarily be imposed, and it was required to respect and not merely pay lip service to the legislature's wishes.⁴⁹

⁴⁵ Note 7.

⁴⁶ *Id*, para 8.

⁴⁷ Para 14.

⁴⁸ Para 8.

⁴⁹ Para 25.

65. As to the provision that, where the court was satisfied that ‘substantial and compelling circumstances’ existed which justified a departure from a prescribed minimum sentence it had the power to decide upon an alternative sentence, whatever ‘nuances of meaning might lurk’ in the phrase its central aim was that the specified sentences were not to be departed from ‘lightly’ and for ‘flimsy’ reasons which could not withstand scrutiny. These included ‘speculative hypotheses’ favourable to the offender, ‘maudlin sympathy’ and an aversion to imprisoning 1st offenders.⁵⁰ In general terms therefore they were circumstances which could be seen to be substantial and compelling in contrast to those of ‘little significance or debatable validity’, or which reflected a ‘purely personal preference unlikely to be shared by many.’⁵¹
66. For the rest however the legislature had not intended to exclude any or all of the many factors and circumstances which were traditionally taken into account by courts when sentencing offenders,⁵² nor were these required to be ‘exceptional’.⁵³ Ultimately, the court was required to determine whether the cumulative impact of all the circumstances relevant to sentence justified a departure from the standardised response which the legislature had ordained.⁵⁴ If, after considering all such circumstances the sentencing court was satisfied that they rendered the prescribed minimum sentence unjust, in that it would be disproportionate to the crime, the criminal and the needs of society, such that an injustice would be done by imposing it, it was entitled to impose a lesser sentence.⁵⁵
67. In practical terms therefore, where a court’s sense of unease about imposing a prescribed minimum sentence had ‘hardened into a conviction’ that an injustice would be done, it would usually be satisfied that the circumstances rendered the imposition thereof unjust or disproportionate, and they would be entitled to be characterized as substantial and compelling.⁵⁶

⁵⁰ Para 9.

⁵¹ Para 18.

⁵² Para 9.

⁵³ Para

⁵⁴ Para 25G.

⁵⁵ Para 25I.

⁵⁶ Para 22.

The decisions in *GK* and *CC*

68. With that by way of background, I turn to the decisions in *GK* and *CC*. In *CC* a boy aged 3 and a girl aged 8 were subjected to penile oral and digital vaginal rape, respectively. In *GK* a 7-year-old girl was subjected to penile oral penetration. None of the victims in the two matters sustained any physical injuries. As for emotional and psychological *sequelae* it was found that the 3-year-old in *CC* was, on the face of it, seemingly unaffected by what had happened as he had been too young to understand what had been done to him, and the 8-year-old was said to be ‘functioning normally’ for her age. However, later in the judgment it was also said that she had become anxious, fearful and shameful about what had happened and was experiencing headaches and stomach pains. The 7-year-old in *GK* had required counselling and had become withdrawn, distressed and plagued by feelings of guilt and a sense of poor self-image. She had also started bedwetting and displayed signs of errant behaviour.
69. In both matters the offenders had previous convictions for sexual offences. In *CC* the 41-year-old accused, who had himself been subjected to oral rape by an older boy when he was about 8 years old and later anal rape by him, had been convicted some 10 years earlier of two counts of what was then known as ‘indecent assault’, in the form of digital vaginal penetrations i.e. rapes of two girls aged 4 and 5 years, for which he had been sentenced to 10 years imprisonment.
70. On appeal the sentence of life imprisonment which had been imposed on him was altered to an effective term of 13 years imprisonment. In *GK*, the 58-year-old accused had previously been convicted of attempted rape some 11 years earlier, for which he had been sentenced to 4 years imprisonment. His sentence of life imprisonment was altered on appeal to 17 years imprisonment.

71. In *GK*, the majority remarked that the prescribing of certain minimum sentences had effectively deprived the courts of their ordinary sentencing discretion unless there were substantial and compelling circumstances. The presence or absence of such circumstances was therefore the jurisdictional fact on which the existence, or not, of such a discretion depended.⁵⁷ A determination as to whether there were such circumstances was not a matter of discretion but a 'value judgment',⁵⁸ in the sense referred to in *Media Workers Association*⁵⁹ (which concerned the determination of whether an employer's conduct constituted an unfair labour practice), review cases⁶⁰ concerning whether legal practitioners who had been subjected to disciplinary proceedings were fit and proper persons to continue practising, and the prescribed minimum sentence decisions in *Homareda*⁶¹ and *PB*.⁶² In its view, unless there were clear indications in the CLA that the making of this value judgment had been 'entrusted solely to the discretion'(sic) of the trial Court, an appellate court might form its own view as to whether such circumstances were present or not.⁶³
72. On the majority's reading, the test on appeal as to a trial court's findings in relation to the presence or absence of substantial and compelling circumstances was left open in *Malgas*.⁶⁴ Although in some decisions subsequent to it, including decisions by the SCA, one could find statements to the effect that the trial court had misdirected itself regarding whether there were substantial and compelling circumstances present, or not, and on this basis appeal courts had held they were accordingly at liberty to reconsider the matter, those cases had not pertinently addressed what the 'appropriate' appellate test was.⁶⁵

⁵⁷ Para 3

⁵⁸ Para 4.

⁵⁹ *Media Workers Association of SA & Ors v Press Corporation of SA Ltd* 1992 (4) SA 791 (A) at 800C-G.

⁶⁰ *Vide* the cases cited at fn 1 in *GK*. The most recent decision, on appeal, is that in *SA Legal Practice Council v Kgaphoke & Ano* [2025] ZASCA 66.

⁶¹ Note 44.

⁶² *S v PB* 2013 (2) SACR 533 (SCA), also cited as *Bailey v S* [2012] ZASCA 154.

⁶³ *GK* para 4.

⁶⁴ Para 5.

⁶⁵ Para 7.

73. The majority referred⁶⁶ to the decision in *Bailey* (more commonly referred to as *PB* following its citation in the criminal reports),⁶⁷ where Bosiello JA held that the approach on appeal to evaluating sentences imposed in prescribed minimum sentence cases differed from that which applied in relation to those instances where sentences were imposed by courts under the 'ordinary' sentencing regime. In the case of the former the 'proper enquiry' was to determine whether the facts and circumstances which were considered by the sentencing court were substantial and compelling or not. To this end, all the circumstances bearing on the question had to be examined and the appeal court was not confined to having regard only for the circumstances which the trial court took into account.
74. The majority took this to mean that the appeal court could form its own view as to the correct answer to the question, and there was nothing in the CLA which fettered its powers to reconsider the issue of substantial and compelling circumstances. It also held that the values of the Constitution were better served by an interpretation which did not fetter an appeal court when it considered the question of whether substantial and compelling circumstances were present or not; and allowing it to make its own value judgment on appeal would provide an accused with 'greater safeguards' against the imposition of disproportionate punishments.⁶⁸
75. It held further that, given the dictum of Nugent JA in *Vilakazi*⁶⁹ that it would be wrong for a sentencing court to assume, *a priori*, that a prescribed minimum sentence was proportionate to an offence listed in the CLA, an appeal against its imposition should likewise not be approached by an appellate court with a view that it was, *a priori*, a just punishment.⁷⁰ What the appeal court was required to do was to ask itself whether it was not merely uneasy at the imposition of such a sentence, but had a conviction that it would be unjust i.e. disproportionate to the triad, and answering this question inevitably entailed

⁶⁶ *Id.*

⁶⁷ Note 62.

⁶⁸ *Id.*

⁶⁹ Note 11 para 18.

⁷⁰ *GK* n 28 paras 11 and 14.

forming a view as to what a just sentence would be in all the circumstances of the case. If the 'notional' just sentence postulated by the appeal court fell materially below the prescribed minimum sentence, there would be substantial and compelling circumstances present to depart from the prescribed sentence. It was not necessary that the disparity was such that it induced a sense of shock or that it was disturbingly inappropriate.⁷¹

76. After setting out its reasoning for the approach that it considered should be adopted the majority then went on to pronounce on certain aspects of the circumstances pertaining to the offence and the appellant. In its view, the rape which had been committed fell 'well short' of the most serious types of rape for which a life sentence would 'ordinarily' be a just sentence, in the new dispensation. It was an oral rape which, although disgusting, was 'far less calculated' to injure and cause physical pain than a vaginal or anal one and there was no evidence that the complainant had suffered injuries or 'significant' pain. In addition, the rape was of brief duration and was not accompanied by extraneous violence. It seemed to have been a spur of the moment act of sexual gratification, and the accused may have been influenced by the alcohol he had consumed. Although the complainant required therapy and further counselling for the emotional and psychological *sequelae* of the incident, these did not appear to be of an extreme and debilitating nature.
77. As for the appellant's previous conviction for attempted rape some 11 years earlier, the majority considered that it was fair to assume that the offence had not been particularly heinous as the appellant had only been sentenced to a relatively light term of 4 years imprisonment (in terms of s 276(1)(i) of the Criminal Procedure Act⁷²) and his previous conviction should accordingly not be given 'undue prominence'.⁷³ As for as the instant offence for which the accused was convicted, prior to the enactment of the CLA (which broadened the definition of rape to include non-vaginal penetrations), it would only have

⁷¹ Id, para 14.

⁷² Act 51 of 1977.

⁷³ GK para 24.

constituted the common law offence of indecent assault, for which it would probably have received only a few years imprisonment. Thus, in its view, to say that life imprisonment was the just sentence to impose upon a crime which only a few years before would have been punished with a few years imprisonment, seemed to be going ‘considerably too far’.⁷⁴ As a result it reduced the sentence of life imprisonment to one of 17 years imprisonment

78. That then as far as *GK* is concerned. Some 2 years later, in *CC*,⁷⁵ the Court endorsed the approach it had adopted in *GK* for interfering with a lower court’s determination regarding the question of substantial and compelling circumstances viz. that as an appellate court it was at liberty to make its own value judgment thereof and if it differed with that of the sentencing court, it was entitled to reduce the prescribed sentence which had been imposed. To this end it endorsed the approach it had adopted in *GK* that it was entitled to form a view as to what it considered a (notional) just sentence should have been and if it ‘fell materially’ below the prescribed minimum sentence imposed there would be substantial and compelling circumstances present, even if the disparity was not striking or disturbingly inappropriate and did not induce a sense of shock.⁷⁶

79. As it did in *GK* (where it was described as the most recent relevant decision of the SCA), it referred to *Mudau*,⁷⁷ where in 2012 a sentence of life imprisonment which was imposed on a 47-year-old who had raped his 13-year-old niece, was set aside and substituted with one of 15 years imprisonment, and the decision in 2014 in *EN*,⁷⁸ where a 46-year-old who had raped his 15-year-old stepdaughter had his sentence of life imprisonment also reduced to 15 years imprisonment.

An evaluation

⁷⁴ *Id* para 29.

⁷⁵ Note 6 para 18.

⁷⁶ *Id*, para 26.

⁷⁷ *Mudau v S* [2013] ZASCA 56; also reported as *S v SMM* 2013 (2) SACR (SCA) 292.

⁷⁸ *S v EN* 2014 (1) SACR 198 (SCA).

(i) Ad GK and CC

80. That the assessment of whether there are substantial and compelling circumstances present, or not, in a matter where a prescribed minimum sentence is applicable, involves a value judgment by a sentencing court and not the exercise of a discretion, was recently confirmed (albeit *obiter*) in the minority judgment of Kollapen J in the decision of the Constitutional Court in *Tuta*,⁷⁹ with reference to the decisions in *Homareda*, *PB* and *GK*. Kollapen J noted that the far-reaching change which the CLA had introduced, whilst not removing a judicial officer's sentencing discretion, had fettered it to some extent, and had resulted in a sentencing framework which might pose a higher risk to the freedom of the individual and to considerations of a fair trial.⁸⁰ This allowed for a wider scope for interference by an appellate court in cases involving prescribed minimum sentences, as opposed to those where a sentencing court had exercised a discretion, in the true sense. In making this remark Kollapen J referred⁸¹ to the comments made by Bosielo JA in *PB*, previously referred to.
81. I understand Kollapen J's remarks to mean no more than to contrast the restraint and deference which an appeal court must exercise and show in its evaluation of a matter which involved the exercise of a true, ordinary sentencing discretion, where the trial court was entitled, within the bounds of reason and rationality, to impose its own, preferred, individually tailored choice of sentence, a choice which an appeal court is ordinarily bound to accept, as opposed to a case where the sentencing court did not have that choice and was bound to impose a minimum sentence prescribed in terms of the CLA, unless there were substantial and compelling circumstances present. This is clear from the justification which Bosielo JA gave in *PB*⁸² that a different approach was warranted because, as per *Malgas*, the minimum sentences to be imposed are ordained by the Act and cannot be departed from lightly or for flimsy reasons, and it followed therefore that the 'proper enquiry' on appeal

⁷⁹ *S v Tuta* 2024 (1) SACR 262 (CC) paras 166, 172-180 and 184.

⁸⁰ *Id* paras 181 and 183.

⁸¹ At para 184.

⁸² Note 62 para 20.

was whether the facts which were considered by the sentencing court were substantial and compelling or not.

82. In my view, whilst the sentencing regime which has been imposed by the CLA altered the sentencing discretion i.e. the powers of and the process which a trial court must engage in when imposing sentence, at heart that has not materially and fundamentally altered the process which an appellate court must engage in, and its powers, when considering an appeal against a minimum sentence imposed in terms of the CLA , (save in relation to the 'striking disparity' power which does not apply); and when interpreting and giving effect to the CLA care should be taken not to transplant and make applicable to the appeal court, the process that must be engaged in by the sentencing court. If one does not honour the distinction between the different processes which the two levels of adjudication must perform one may inadvertently rupture long-standing, well-established principles that have applied for a century in our criminal law in relation to the powers and functions of sentencing courts vis-à-vis those of appellate courts. It is the function of the court of first instance i.e. the sentencing court to arrive at, and to impose, an appropriate sentence and the function of an appellate court to supervise and regulate this power by correcting errors made in the exercise thereof, and the roles should be kept separate and distinct from one another.
83. In *Malgas*, the *fons et origo* of the current state of the law relating to the function that a sentencing court must exercise when determining whether to impose a prescribed minimum sentence, Marais JA noted ⁸³ that some of the courts which had to deal with the problem of what to make of the prescribed minimum sentence/'substantial and compelling' provisions had resorted to the processes of thought employed, and concepts developed by, courts dealing with appeals against sentence, an approach which was problematic and likely to lead to errors in giving effect to the intention of the legislature.

⁸³ Note 7 para 11.

84. In making these remarks Marais JA was pointing out that in attempting to arrive at a cogent, working definition of what constituted substantial and compelling circumstances, trial courts were inadvertently seeking to transplant reasoning which was applicable to the determination of appeals, into their process. In my view, in certain instances, such as in *GK* and *CC*, the converse has also happened i.e. appellate courts have resorted to employing processes of thought and concepts which have been developed for the exercise by trial courts of their power to determine whether to impose prescribed minimum sentences, to the consideration of appeals against them.
85. It is surely no accident that, directly after making his remarks about sentencing courts wrongly transplanting the reasoning of appellate courts into their determination of what constituted substantial and compelling circumstances, Marais JA went on to set out the essential differences between the functions of the two courts. He pointed out⁸⁴ that the mental process which a trial court engaged in, in the exercise of its sentencing discretion, involved considering the circumstances of the case before it in the light of the well-known triad of factors and circumstances relevant to sentence and, in the light thereof, to impose a just and appropriate sentence. In exercising its oversight function the duty and function of the court of appeal was to respect the trial court's choice of sentence, arrived at in the exercise of its discretion, unless there was a material misdirection i.e. error in its reasoning, or there was such a striking disparity between the sentence it would have imposed and that which was imposed by the trial court, that it was shockingly or disturbingly inappropriate or induced a sense of shock. It was not the function of the court of appeal, he said, to approach the question of sentence as if it were the trial court and to substitute the trial court's sentence with one it chose simply because it preferred it. To do so would be to usurp the discretion of the trial court (and, it may be added, its function).⁸⁵

⁸⁴ *Id* para 12.

⁸⁵ *Id*.

86. The learned judge of appeal warned⁸⁶ that the long-established tests for interference with sentences on appeal had been evolved in order to avoid subverting basic principles that are fundamental to our law of criminal procedure viz that the imposition of sentence is the prerogative of the trial court; for 'good reason', and it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised.
87. Maintaining the distinction between the functions and approaches of the two courts should, in my view, not be abandoned because of the 'substantial and compelling' enquiry which a sentencing court must now engage in, and I see no reason why the 'material misdirection' test should not apply as the standard basis for interference on appeal in prescribed minimum sentence cases, just as it does in the case of ordinary sentencing cases.
88. To say that in a matter where a prescribed minimum sentence may be applicable a sentencing court performs a 'value judgment' does not mean that it engages in some arcane, extraordinary process hitherto unknown to our law. As was explained in *Malgas*, at the outset the court must engage in exactly the same exercise that a sentencing court would engage in ordinarily: it must carefully and methodically identify the relevant circumstances which must be taken into account insofar as they may impact on the sentence to be imposed, including the circumstances pertaining to the nature and seriousness of the offence and the interests of the community (usually these include aggravating circumstances) as well as those pertaining to the offender (usually these include personal, mitigating circumstances impacting on the offender's blameworthiness). At this stage therefore, whether substantial and compelling circumstances exist is, as said in *DPP Gauteng Division*,⁸⁷ a factual enquiry. Once it has concluded this step, the court must then weigh these circumstances, just as it would in an ordinary sentencing case. The only difference at this point is that whereas in an ordinary sentencing case the

⁸⁶ Para 13.

⁸⁷ *Director of Public Prosecutions, Gauteng Division, Pretoria v D.M.S & A.O.L.* [2023] ZASCA 65; 2023 (2) SACR 113 (SCA) para 19.

result of the weighing will point it towards a choice of possible sentences (or a combination thereof) amongst a variety of options ranging from a warning, fine, or term of correctional supervision, to a term of imprisonment it considers appropriate (direct or suspended, partially or wholly); in a prescribed minimum sentence case it can only, and must ordinarily, impose a term of imprisonment which is specified by the CLA, unless it finds that cumulatively the net weight of the circumstances it took into account are such that they render the imposition of the prescribed sentence unjust i.e. disproportionate.

89. Given that, where a court does find such circumstances to be present it is at large to exercise the very same, ordinary sentencing discretion that it would have in cases where a prescribed minimum sentence does not apply, it seems, in my view, to be illogical and principally unsound for an appellate court to apply a different test (i.e. its 'own value judgment') to an appeal in a prescribed minimum sentence case, than the test it would apply to an appeal in an ordinary sentencing case (the 'material misdirection' test). After all, in its result the exercise engaged in by the sentencing court in arriving at the sentence imposed in such a case will in effect be the same as that which would be engaged in by it in a non-prescribed sentence case. Why then should there be a different 'own value judgment' test in appeals in prescribed minimum sentence cases, where a sentencing court has found that there were *no* substantial and compelling circumstances present? Why is there a need for a deviation from the standard, 'material misdirection' test?
90. Reduced to its essentials, the function of an appeal court in a matter involving a prescribed minimum sentence is not materially dissimilar to that which it performs in an ordinary i.e. non-prescribed minimum sentence appeal. It must assess the evidence to determine whether the sentencing court properly and correctly identified all the relevant factors and circumstances for sentence that a sentencing court would ordinarily consider. The only difference is that it must thereafter determine whether the sentencing court weighed them correctly as substantial and compelling, or not. If, in doing so, it concludes that the sentencing court misdirected itself materially either by failing to have regard for any relevant factors and circumstances, or due or proper regard for them

(by under or over-emphasising any), it will then be entitled to interfere with the sentence that was imposed *a quo*. To then determine a fair and appropriate sentence it will be compelled, at this juncture, and because of the CLA, to make its own value judgment of the factors and circumstances before it, to determine whether on the basis of the test expounded in *Malgas* they qualify as substantial and compelling i.e. whether they constitute weighty and convincing reasons for not imposing the sentence prescribed by the legislature. As is the case in a sentencing court of first instance, such circumstances will be present if the combined, cumulative weight and effect of them, properly evaluated, is such as to render the imposition of the prescribed minimum sentence unjust or disproportionate.

91. In the circumstances, whilst it is so that the test for appellate interference in prescribed minimum sentence cases was not expressly set out in *Malgas*, which is understandable as it dealt with the issue of what constituted substantial and compelling circumstances for a sentencing court faced with the application of the CLA, I do not agree that it was left open, as was held in *GK*. On my reading of *Malgas* and its restating of the trite principles pertaining to interference on appeal (with particular regard to the application of the 'material misdirection' test) and the importance of abiding by these principles, which have been long-established and are in place for 'good reason', it was effectively endorsing them as applicable also to appeals in prescribed minimum sentence cases, without expressly saying as much.
92. In my view, for reasons of principle, harmony and consistency a court of appeal in a prescribed minimum sentence case should therefore not be entitled to interfere with a sentencing court's determination as to the existence or not of substantial and compelling circumstances, by making its own value judgment of them, unless and until it first finds that the sentencing court's determination of them i.e. its value judgment, was wrong, as a result of a material misdirection.
93. On my reading of them, the authorities referred to in *GK* (as endorsed in *CC* and *Tuta*) do not support the 'own value judgment' test that *GK* introduced and

instead effectively support and endorse the traditional ‘material misdirection’ test that applies in appeals in ordinary sentencing cases, as the test that should also apply in prescribed minimum sentence appeals.

94. In *Media Workers Association*⁸⁸ the Appellate Division distinguished the exercise of a (true) discretion from a value judgment, on the basis that in the case of the former a number of courses are available to the repository of the power, and in exercising a choice in this regard he/she will be acting within their powers and their decision accordingly cannot ordinarily be set aside, merely because a reviewing/appeal body would have chosen a different course. It held with reference to the facts before it that, in contrast to this, the power to determine whether certain acts constituted an unfair labour practice was not discretionary. It was a determination or ‘value’ judgment to be arrived at by a court in the light of all the relevant considerations and did not involve a choice between permissible alternatives. In respect of such a judgment/determination a court of appeal could well come to a different conclusion.⁸⁹ In its subsequent decision in *Wijker*⁹⁰ the AD held that this meant that a court of appeal was entitled to substitute its own (‘value’) judgment on an issue in question, *if it was of the view that the lower court had erred in its conclusion* i.e. in its determination/value judgment. In *Homareda*⁹¹ Cloete J (as he then was) consequently held that, as the determination of whether or not there were substantial and compelling circumstances involved making a value judgment, in accordance with the decision in *Wijker* a court of appeal was entitled to substitute its own judgment on this issue if it was of the view that the sentencing/lower court had erred in its conclusion in this regard.
95. Similarly, on my reading of *PB* the issue on appeal, as identified by the SCA,⁹² was whether the lower court had *erred* in not finding that the facts which were put forward by the appellant, who had raped his own 12-year-old daughter, were substantial and compelling, such that they justified a departure from the

⁸⁸ Note 59.

⁸⁹ *Id* at 800C-G.

⁹⁰ *Wijker v Wijker* 1993 (4) SA 720 (AD) at 727E-728B.

⁹¹ Note 44 at 326c-d.

⁹² Note 62 paras 14 and 22.

prescribed sentence of life imprisonment. The appellant had pleaded guilty and expressed remorse to the probation officer, and the complainant had not sustained any physical injuries but had suffered emotional and psychological *sequelae* in the form of anxiety, fear, guilt, shame, anger and mood swings, and had been compelled to leave school as she fell pregnant because of the rape. The SCA held that the high court had erred in finding that there were substantial and compelling circumstances present and confirmed the sentence of life imprisonment which had been imposed by the regional court. In doing so it is notable that, even though it was dealing with an appeal in a prescribed minimum sentence case, in which it held that a somewhat different approach was to be followed than that which applied in the case of appeals in ordinary sentencing cases, the SCA reiterated the fundamental principle that sentencing discretion lies pre-eminently with the sentencing court.⁹³

96. In *Tuta* ⁹⁴ Kollapen J similarly accepted that since a court brings out a value judgment when it makes a determination as to the existence or not of substantial and compelling circumstances, an appellate court is entitled (as per *Homareda*) to interfere with that decision *if an error has occurred* and *Malgas* sets the threshold for such interference. Even in *GK* ⁹⁵ the Court noted and agreed with the dictum in *Homareda* that a court of appeal is entitled to substitute its own value judgment on the issue of whether substantial and compelling circumstances were present, if it is of the view that the lower court erred in its conclusion.
97. In the circumstances to jump from an acceptance of the proposition that interference on appeal in relation to the issue of substantial and compelling circumstances is only justified where the lower court has misdirected itself, which accords with the long-established approach in ordinary sentencing cases, to holding that such interference is permissible even where there is no misdirection, and simply because the appeal court has made its own value

⁹³ Id para 19.

⁹⁴ Note 79 para 184.

⁹⁵ Note 28 para 5.

judgment which differs from that of the lower court, seems to me to be conceptually unsound and against fundamental principles.

98. In several decisions in rape matters since *GK* and *CC*, including factually comparable matters such as *EN*⁹⁶ (2014), *Zulu*⁹⁷ (2021) and *Maila*⁹⁸ (2023) where the prescribed minimum sentence of life imprisonment was imposed by the courts *a quo* on men in positions of trust, care and/or authority who had raped children, as well as in *DPP Gauteng Division*⁹⁹ (2023), which involved the rape of a 12-year old by her 21-year old female and 17-year old male cousins, the SCA applied the material misdirection test to determine whether the lower court had erred in relation to its assessment of whether there were substantial and compelling circumstances, and whether it was therefore at liberty to interfere with the prescribed sentence imposed. This tallies with the approach adopted by it in earlier, important decisions that followed *Malgas*, such as *Vilakazi*¹⁰⁰ (in 2009), where the material misdirection test was also applied.
99. In my view there is accordingly no need for a different approach or test, such as the ‘own value judgment’ test, and no reason why the standard test which applies in appeals in ordinary sentencing cases should not apply to appeals in prescribed minimum sentence cases. Given that the prescribed minimum sentence regime has now been in place for well-nigh on 27 years, during which time a substantial body of case law has been built up in respect of matters involving such sentences, there is also no need to have the ‘own value judgment’ test as an additional or ‘greater safeguard’, to protect offenders.
100. I also have difficulty with the approach that was adopted in *GK* and endorsed in *CC* that an appeal court in a prescribed minimum sentence case is entitled to form its own view as to what a just sentence would be in all the

⁹⁶ Note 78.

⁹⁷ *Director of Public Prosecutions, Pretoria v Zulu* [2021] ZASCA 174, paras 18 and 30.

⁹⁸ *Maila v S* [2023] ZASCA 3 paras 43, 46 and 56.

⁹⁹ Note 87 para 22.

¹⁰⁰ Note 11 para 31.

circumstances and, in order to do so, is entitled to have regard for sentences which have been imposed in other, factually comparable cases, and if the notional just sentence that it arrives at by means of this exercise is 'materially' below that imposed by the sentencing court, substantial and compelling circumstances will be present which justify a departure from the prescribed minimum sentence. As previously pointed out, in pursuance of this approach the courts in *GK* and *CC* referred to the decisions in *Mudau* and *EN*, in which terms of imprisonment less than life imprisonment were imposed, and my colleague has likewise referred to them.¹⁰¹

101. In my view this approach is also conceptually unsound for several reasons. In the first place, it runs directly against the grain of the sentencing regime and process that was introduced by the CLA, which proceeds from the premise that prescribed minimum sentences are ordinarily to be applied to offenders convicted of certain offences. The legislature introduced these sentences not because it considered them to be just but because it considered them to be a necessary and effective remedy to deal with a burgeoning crime rate and violent crimes against women and children in particular. The fairness or justness of these prescribed sentences is not the initial, primary consideration that a sentencing court is faced with in a matter where they may be applicable. Its initial consideration is simply whether the prescribed minimum sentence is applicable to the offender before it. As was pointed out in *Malgas*, that does not depend on the sentencing circumstances of the case but on the categorisation of the offence for which the offender has been convicted. If it falls within the applicable category and Schedule in the CLA, the prescribed minimum sentence must, in ordinary circumstances, be imposed on the offender and the sentencing court is not relieved from the duty of imposing it, as it is statutorily obliged to do so, whether or not it considers the sentence to be just. It must be convinced, for substantial and weighty reasons, that imposing the prescribed sentence will be *unjust* in the sense that it will be disproportionate to the triad, before it is entitled *not* to impose it. Thus, the

¹⁰¹ In fn 21 of his judgment he cites several other cases which he says (in para 38), he reviewed, and which provided some comparable indications of sentencing. However he does not set out or discuss the *rationes* or the facts of these cases or the sentences which were imposed in them.

essential question it must answer is not whether the prescribed minimum sentence will be a just sentence, but whether it will be an unjust one. These are not equivalent enquiries to which the answers are the same, in the sense of being opposite sides of the same coin. The question of what sentence will be just is one which is asked by a sentencing court exercising its ordinary sentencing discretion, the question of whether a sentence will be unjust is the one asked by a court which is ordinarily required to impose it because it is prescribed in terms of the CLA.

102. In the second place, a sentencing court in a prescribed minimum sentence case is surely only entitled to have regard for lesser sentences which were imposed in factually comparable cases (for which such cases serve as guidelines not straitjackets, in the words of *PB*¹⁰²), *after* it has arrived at a conclusion that imposing the prescribed minimum sentence would be unjust/disproportionate because there are substantial and compelling circumstances present, and not *before*, because it is only at that point that it is at liberty to exercise a sentencing discretion and not before. It cannot use the sentences imposed in other cases as the rationale for holding that imposing the prescribed minimum sentence in the case before it will be unjust/disproportionate, on the basis that *they* establish or constitute substantial and compelling circumstances. That would be putting the cart before the horse and amount to a failure to do what it is supposed to do, which is to determine whether the circumstances of the case before it, not those in other cases that were previously heard, amount to substantial and compelling circumstances. In *Nkunkuma*¹⁰³ the SCA held that to approach a matter in which a prescribed minimum sentence is applicable as if the sentencing yardstick is the sentences imposed in a range of other disparate cases and then to ask whether the prescribed minimum sentence can be considered too severe, against that benchmark, constitutes a misdirection.

103. In the third place, if one is to have regard for sentences in comparable rape cases (of children by older males in positions of care, power and/or authority),

¹⁰² Note 62 paras 17 and 19: *S v D* 1995 (1) SACR 259 (A) at 260e.

¹⁰³ *S v Nkunkuma & Ors* [2013] ZASCA 122; 2014 (2) SACR 168 para 10.

a proper survey should include not only those cases where lesser sentences were imposed by the SCA on appeal, such as the decisions in *Mudau* and *EN*,¹⁰⁴ but also to the legion of cases before and after *GK* and *CC* where lesser sentences were increased by it to sentences of life imprisonment, after it held that the lower (appeal) or sentencing court had erred in its assessment of whether there were substantial and compelling circumstances, or where it confirmed sentences of life imprisonment which had been imposed. In this regard, reference may be made to the decisions in *PB* (in 2012), *Munyai*¹⁰⁵ and *MDT*¹⁰⁶ (2014), *TM*¹⁰⁷ and *Buthelezi*¹⁰⁸ (2019/2020), *Zulu* (2021) and *Maila* (2023).

{ii} Ad the dissenting judgment

104. I agree with my colleague that the magistrate's summation of the evidence is a fair and accurate reflection of what was contained in the record. As a result, in the absence of any demonstrable and material error or 'misdirection' the magistrate's factual findings are presumed to be correct.¹⁰⁹
105. My colleague correctly points out that in determining whether there were substantial and compelling circumstances present all the circumstances that would traditionally have to be considered for sentence should be taken into account, as directed by *Malgas*. These, he says, should then be weighed to determine whether the prescribed sentence of life imprisonment is 'proportionate' to the offence. He notes that, although in *SMM*¹¹⁰ the SCA recognized that the country was facing a crisis of epidemic proportions in respect of rape, particularly of young children, it held that the imposition of punishment should not be imposed in a spirit of anger, but dispassionately and objectively, upon a careful consideration of all relevant factors. The

¹⁰⁴ Vide *EN* at paras 10 and 14 and *Mudau* at para 13.

¹⁰⁵ *Munyai v S* [2014] ZASCA 36.

¹⁰⁶ *MDT v S* [2014] ZASCA 15; also reported as *S v MDT* 2014 (2) SACR 630 (SCA).

¹⁰⁷ *Director of Public Prosecutions, Grahamstown v TM* [2020] ZASCA 5.

¹⁰⁸ *Director of Public Prosecutions, Gauteng Division, Pretoria v Buthelezi* [2019] ZASCA 170; 2020 (2) SACR 113 (SCA).

¹⁰⁹ *Hadebe* n 5 para 11; *Bee v Road Accident Fund* 2018 (4) SCA 366 (SCA) para 46.

¹¹⁰ Note 15 paras 13 and 14.

decision in *SMM* is the same decision which is referred to by my colleague and by the majority in *GK* as *Mudau*, in accordance with its then citation on SAFLII, before it was reported as *SMM* in the SA Criminal Reports. It was handed down on 9 May 2013, two weeks before the decision in *GK*.

106. My colleague points out, with reference to the decision in *SMM*, that it must be recognized that there are categories of severity of rape and this is one of the factors that must be taken into account. He finds that on the spectrum of severity of rapes with which our courts are routinely confronted, the one in this matter is not the 'most severe'.
107. He says that the magistrate correctly identified certain aggravating features of the rape in this matter, apart from the age of the complainant, the force used during the incident, the physical injuries suffered and the 'obvious'(sic) psychological trauma, to which he adds the appellant's HIV status. Despite saying this however, he comes to the view that the magistrate misdirected himself by over-emphasising the aggravating factors, failing to take 'proper' account of the accused's personal circumstances and his prospects for rehabilitation, and in commencing from the *a priori* position that a life sentence was a just punishment, contrary to the decision in *CC*.
108. Consequently, he concludes that the sentence of life imprisonment is disproportionate to the crime and the 'legitimate needs' of the community, and places insufficient emphasis on the prospects of the appellant's rehabilitation and his ability to function in and contribute to society.
109. I differ with the approach he has adopted towards the matter, as well as in his evaluation of the circumstances and factors relevant to the question of sentence.
110. My colleague correctly referred to the salient principles which are to apply, as set out in *Malgas*, but in my view he has failed to apply them. Thus, instead of carefully determining whether the magistrate correctly identified and weighed the component circumstances of the triad of factors that are relevant to the

imposition of sentence and correctly concluded that their cumulative effect was not such as to render the imposition of life imprisonment disproportionate, he applies the 'own value judgment' test adopted in *GK* and *CC*, and to this end looks at lesser, reduced sentences that were imposed on appeal in two matters (*Mudau/SMM* and *EN*) which were decided prior to *GK/CC*. No consideration was given to decisions of the SCA, post *GK* and *CC*, where, based on the test espoused in *Malgas* sentences imposed by lower courts in comparable matters were increased to life imprisonment, or where sentences of life imprisonment were confirmed. He uses the sentences imposed on appeal in *Mudau/SMM* and *EN* to arrive at a yardstick or benchmark to arrive at a notional just sentence, against which to weigh the sentence imposed by the magistrate, and then, because of the resultant disparity between the imposed sentence and his notional one, to find that there are substantial and compelling circumstances present which justify a departure from the prescribed minimum sentence.

111. For the reasons I previously set out, in my view such an approach is wrong, and if one applies the correct test, in accordance with *Malgas*, it is evident that the magistrate did not misdirect himself in any way, by failing to have any or proper or due regard for any of the circumstances relevant to sentence, and the sentence imposed accordingly cannot be interfered with. In this regard and starting with the nature and gravity of the offence, the following. Whilst it is so that the rape was not of the 'most severe' kind that the court has had to deal with, this does not avail the appellant. As was pointed out in *Mahomotsa*¹¹¹ because more serious cases than the one under consideration are imaginable, it does not follow that something should be kept in reserve for them and the sentence imposed in the case at hand should be correspondingly lighter. There will always be cases which, although differing in their respective degrees of seriousness, justify the imposition of the maximum penalty possible. As Nugent JA pointed out in *Vilakazi*¹¹² there is always a 'greater horror' imaginable.

¹¹¹ *S v Mahomotsa* 2002 (2) SACR 435 (SCA); [2002] ZASCA 64 para 19.

¹¹² Note 11 para 54.

112. It seems to me that, as was held in *Zulu* ¹¹³ (where the SCA reversed a sentence of 20 years imprisonment which was imposed by the High Court on each of 3 counts, in an appeal by a stepfather who raped his minor stepdaughter, and re-instated sentences of life imprisonment which had been imposed by the regional court), my colleague has ‘underplayed’ the seriousness of the offence and the circumstances in which it was committed.
113. This is evident, firstly, from the fact that, in describing the complainant’s injuries with reference to the report of her examination by Dr Felix, he records that she sustained ‘superficial’ abrasions to her genitalia and ‘some’ bleeding, and that she had been ‘lightly’ throttled. Whilst it is so that Dr Felix referred to the multiple abrasions that the complainant sustained as superficial and that there was some bleeding on examination, this does not mean that the injuries which she sustained can properly be characterized as minor. The complainant was a child of 13 years at the time of the rape. On examination a day afterwards she presented with two (large) linear-shaped bruises on either side of her neck, measuring approximately 5cm x 1cm and 4cm x 2 cm in size, which Dr Felix ascribed to her ‘likely’ (not ‘lightly’) being throttled, multiple superficial abrasions to an area of her genitalia as well as redness, and several tears in her hymen, consistent with penetration with a blunt object, and there was still some bleeding. Dr Felix did not record the superficiality of the bruising or the extent of the bleeding in parentheses, and by doing so my colleague gives the impression that they were minimal or slight, and that this lessens the severity of the assault. I see the fact that a day after the rape the complainant was still bleeding as an aggravating factor which underscores the severity thereof. According to both Dr Felix and the complainant the violence meted out to her caused her significant bruising and pain.
114. In their totality, given the age and physique of the complainant, the injuries which she sustained were serious and bear testament to the savage assault which the appellant launched on her. This was clearly no impulsive, ‘spur of the moment’ act but a planned and devious one, which constituted a gross

¹¹³ Note 97 para 30.

betrayal and breach of the trust which the complainant had reposed in the appellant, as a friend of her father. Knowing that she was alone and vulnerable he lured her into his room on the pretext of fetching a jersey, before they were to set forth to look for her mother.

115. After she refused to give him a kiss, he pushed her onto his bed and, whilst throttling her, removed her jeans and underwear and raped her. Fortunately, she was able to struggle, push and kick herself free, but the experience must have been a terrifying one for her. When she arrived at home she was in a terrible state: her one arm was flailing, and she was distraught and shaking to such an extent that her mother thought she was having a fit.
116. When she fled from the appellant, he threatened that he would hurt her baby sister if she told anyone what had happened to her. Such was the fear that the appellant instilled in her that she did not reveal what he had done to her, even after a cleaner at the hospital was able to gain her trust. It was only after her father told her that she would be haunted for the rest of her life if she did not reveal who was responsible, that she disclosed the appellant's identity.
117. Furthermore, aside from the physical injuries she sustained in the rape the complainant suffered severe emotional and psychological damage, and the incident had a profound and lasting effect on her. She has recurrent nightmares, never walks alone, does not trust any of her father's male friends and continues to require counselling. She also had to change schools.
118. As far as the appellant's personal circumstances are concerned, as has frequently been pointed out in such matters and without in any way attempting to be cynical, none of them are of such a nature or kind, individually or cumulatively, as to distinguish him from scores of other men like him, who have abused their positions of trust, care and authority and have raped children, and they are not substantial and compelling.
119. As far as rehabilitation generally is concerned, it is well-established that when it comes to serious offences listed in the CLA, such as rape, murder and

robbery, it must pale in importance as against the other stated aims of punishment such as retribution and deterrence, and society's need to give expression to its sense of outrage.¹¹⁴ My colleague seems to have found that the appellant enjoys reasonable prospects of rehabilitation as he is a 'comparatively' young man,¹¹⁵ who was economically active in support of his child and was, for all intents and purposes, a 1st offender. Whilst I recognise these circumstances, in my view they do not suffice to establish that the appellant is a real candidate for rehabilitation, nor do they serve to entitle him to be given a lesser sentence than the one prescribed. To be capable of being rehabilitated an offender needs to show, in the first place, that he/she has acknowledged what they have done by owning up to, and accepting responsibility for, it. Then he needs to show that he is truly contrite for what he has done. The appellant has not done so. He pleaded not guilty, as he was entitled to do, and steadfastly denied that he had raped the complainant. He maintained this position even after he was convicted. The appellant has not shown that he regrets what he has done, let alone that he is remorseful for it.¹¹⁶ There is no indication from the evidence that he even appreciates and understands the enormity and gravity of his actions.

120. It was pointed out in *Keyser*¹¹⁷ that a lack of appreciation and an absence of responsibility do not bode well for an offender's prospects of rehabilitation and in *Dyantyi*¹¹⁸ it was remarked that in the absence of sincere contrition an offender's prospects of rehabilitation are unrealistic. In any event, as Navsa JA noted in *Ngcobo*¹¹⁹ it does not necessarily follow that the imposition of a shorter term of imprisonment will always have a greater rehabilitative effect

¹¹⁴ *S v Mhlakaza & Ano* 1997 (1) SACR 515 (SCA) at 519d; *S v Swart* 2004 (2) SACR 370 (SCA).

¹¹⁵ In *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 23 it was held, with reference to the 27-year-old offender, who was six years younger than the appellant was in this matter at the time when he committed the rape, that courts should not subvert the will of the legislature in relation to the imposition of prescribed minimum sentences by resorting to ill-defined concepts such as 'relative youthfulness' or 'other vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness.'

¹¹⁶ *Id Matyityi* para 13 as to the difference between regret and remorse.

¹¹⁷ *S v Keyser* 2012 (2) SACR 437 (SCA) para 29.

¹¹⁸ *S v Dyantyi* 2011 (1) SACR 540 (ECG).

¹¹⁹ *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo & Ors* 2009 (2) SACR 361 (SCA) para 22.

and an offender's rehabilitation is only one of the considerations one must have regard for when sentence is being imposed.

121. As far as the seriousness of the offence and the interests of the community is concerned it is also not necessary for me to recite the oft-quoted *dictums* in the cases as to the humiliating, degrading and brutal invasion of privacy and dignity that rape entails,¹²⁰ the appalling and perverse abuse of male power that it represents,¹²¹ and the ravaging damage it inflicts on young children, often scarring them emotionally and psychologically for the rest of their lives. As my colleague noted, some 13 years ago in *SMM/Mudau* the SCA recognised that the country was facing a crisis of epidemic proportions in respect of the rape of young children. From the remarks made by it in a series of decisions since then it is clear that the crisis has not abated and if anything, has increased. Thus, in 2020 in *DPP Grahamstown/TM*¹²² the SCA remarked that the country was facing a 'pandemic' of sexual violence against women and children and in 2023 in *Maila*¹²³ it commented that the rape of women and children was rampant and had reached such alarming proportions that we had amongst the highest rape statistics in the world, even higher than certain countries that were at war.
122. As is evident, in at least 6 factually comparable matters since *GK* and *CC* (over almost 10 years between 2014 and 2023),¹²⁴ involving male figures in positions of trust, care and/or authority who raped young children, the SCA held that the cumulative effect of their personal circumstances, weighed against the circumstances of the rapes they had committed, were not sufficiently weighty as to constitute substantial and compelling circumstances, and it accordingly upheld sentences of life imprisonment that were imposed by lower courts, or increased lesser sentences imposed to sentences of life imprisonment. As recently as 2023, in *Maila*¹²⁵ the SCA entreated courts,

¹²⁰ *S v Chapman* 1997 (2) SACR 3 (SCA) para 5.

¹²¹ *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

¹²² Note 107 para 15.

¹²³ Note 98 para 57.

¹²⁴ *MDT* and *Munyai* (2014), *Buthelezi* (2019), *TM* (2020), *Zulu* (2021) and *Maila* (2023)- for the citations see above.

¹²⁵ Note 98 para 59.

given the onslaught of rape on children, not to 'shy away' or 'retreat' from imposing the ultimate sentence of life imprisonment in appropriate cases, In my view this is a case where such a sentence is properly warranted and applying it will in no way be disproportionate to the triad of factors relevant to sentence, or unjust. In his model and exemplary judgment the magistrate did not proceed on the basis that a sentence of life imprisonment was *a priori* a just one and gave meticulous and proper consideration to all of the circumstances relevant to sentence, and there is accordingly no cause or reason to interfere.

123. I would accordingly dismiss the appeal and confirm both the conviction and the sentence.

M SHER
Judge of the High Court

LE GRANGE J:

124. I have had the privilege of reading the detailed judgments of my colleagues. Regrettably, I cannot agree with the judgment of Dickerson AJ. In my view, the persuasive reasoning in the judgment of Sher J is eminently sound, and I concur with it. In the result the appeal against both conviction and sentence is dismissed.

A LE GRANGE
Judge of the High Court

Appearances:

Appellant's attorney: L Adams (Legal Aid, Cape Town)

Respondent's counsel: Adv J Van der Merwe (DPP, Cape Town)