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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CA&R 110/2024

In the matter between:

BUYISILE DINGALIBALA

Appellant

and

THE STATE

Respondent

JUDGMENT

RUSI J

[1] The appellant was convicted of rape by the Regional Magistrate, Tsolo, and sentenced on 20 July 2018 to life imprisonment as the rape victim was younger than 16 years of age at the time of the said rape. In terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), the offence of rape, where the victim was less than 16 years of age, inter alia, is punishable by a minimum of life imprisonment.

[2] This is an appeal, for which the appellant did not require leave of the trial court by virtue of the proviso to section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA),¹ against his conviction and sentence. In the trial court, the appellant was legally represented, and in this Court, Mr *Babane* represented him. The respondent (the prosecution) was represented by Mr *Mfihlo*. The appeal was noted out of time. Condonation was sought for its late filing, and it was granted, unopposed by the prosecution.

[3] At the trial of the case, the appellant pleaded not guilty to the charge against him. The prosecution had chiefly alleged that between February and March 2016, he raped Ms Z[...] N[...] (the complainant) *per vaginum*. It later emerged during the proceedings, and also became common cause between the prosecution and the appellant, that the complainant arrived at the appellant's home on 27 February 2016 in the circumstances I will deal with later on in this judgment, and remained there until 03 March of the same year.

[4] When the rape took place, the complainant was 15 years of age. She was born on 24 September 2000. She was 17 years of age when she testified at the trial against the appellant and was doing Grade 9. She gave her evidence under oath as envisaged in section 162 of the CPA.

The grounds of appeal

[5] The appeal against conviction is based on the narrow ground of an alleged failure of the learned Regional Magistrate to admonish the complainant. In this regard, the appellant contends that the learned Regional Magistrate erred in causing the

¹ Section 309(1) (a) provides: 'Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B. . . '

complainant to take the oath as envisaged in section 162 of the CPA, instead of admonishing her to speak the truth in terms of section 164 of the CPA as she was a child under the age of 18 years at the time she gave evidence. The appellant further contends that the learned Regional Magistrate also erred in not holding an enquiry to determine the competence of the complainant to give evidence. For this reason, so the appellant contends, her evidence is inadmissible.

[6] In appealing against his sentence, the appellant contends that the learned Regional Magistrate erred in finding that there were no substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence of life imprisonment. Below I set out in brief terms the facts on which the trial court convicted the appellant.

The complainant's evidence

[7] The complainant testified that in what appeared to be an arranged marriage, her now deceased aunt, Ms N[...] N[...], in whose care she was, gave her away to the appellant so that she would be his wife. On the day this occurred, her aunt asked her to accompany her to a relative's homestead in Sitana Locality under Magutywa Administrative Area. It was in the afternoon, and that relative's home turned out to be the home of the appellant. On arrival at the appellant's home, they found the appellant's elderly mother and other people. The appellant was called at a later stage, and upon his arrival, she was instructed by the appellant's the elders present thereat to go with him to his room. They remained in the appellant's room for a while. While there, the appellant told her that he wanted to make her his wife, a proposal she rejected. When she rejected the appellant's proposal to be his wife, the appellant left the room leaving her behind. He came back and let her out of the room. Once out of the room her aunt told her that she was going to leave her at that homestead. This must have been so that the complainant may eventually submit to being married to the appellant.

[8] Her aunt indeed left her at the appellant's homestead. When the night came, the appellant's mother instructed her to go with the appellant to his room. This came to pass. In the appellant's room she and the appellant slept in the same bed, and she slept in her clothes. The appellant attempted to undress her with a view to having sexual intercourse with her. She resisted his attempt, and he desisted, whereafter they slept until the morning.

[9] In the morning, the appellant went to work and locked her inside the room. His mother would bring her food. She remained in that locked room until the appellant returned from work. At night, she slept in the same room with the appellant. Once again, the appellant attempted to have sexual intercourse with her, and she refused. On this occasion, the appellant forced her into submission by assaulting her more than once with open hands on her face and her back. The appellant forcefully penetrated her vaginally with his penis and had sexual intercourse with her without a condom while she lay on her back.

[10] After the appellant went to work the next day, she was given R50.00 (fifty rand) by the appellant's mother who indicated that it was for her to spend as she wished. She escaped from the appellant's home and used the money to get a taxi to Magutywa where she lived with her aunt. When she escaped, the appellant and his mother were not at home.

[11] On her arrival at her aunt's home, she took her back to the appellant's home where she admonished her to remain. When the night came on that day, she and the appellant slept together in his room, but the appellant did not have sexual intercourse with her. In the morning, she was instructed by the appellant's mother to go and buy bridal attire (*amajelimane* also known as 'German print'), and she complied. She subsequently wore the bridal attire and was instructed to perform the duties of a new bride which included making the local elderly ladies tea.

[12] She spent another night with the appellant, but no sexual intercourse took place on this night. She was removed from the appellant's home by her uncle, Mr M[...] N[...] who went to report the matter to the police. At the police station she was told that because she had washed herself, she would not be taken for medical examination.

The evidence of Mr M[...] N[...]

[13] Among other things, the evidence of Mr M[...] N[...] revealed that the complainant was orphaned and had been placed in the foster care of his sister, Ms N[...] N[...], under the supervision of social workers. When it came to his attention that she had missed school, he investigated her whereabouts and learned that his sister had married her off to the appellant. That this had happened, was confirmed to him in a letter he received from the appellant's family in which they informed him that his family should not look for the complainant as she was at the appellant's home. Mr M[...] N[...] was the last witness that the prosecution called.

[14] At the close of the case for the prosecution and after his application to be discharged in terms of section 174 of the CPA was refused, the appellant testified in his defence.

The appellant's evidence

[15] According to appellant, his mother phoned the complainant's aunt asking her to find him a wife. His mother and the complainant's aunt arranged that the complainant would be married off to him, hence she was eventually brought to his home by her aunt. He did not know her age at the time but 'saw that she was a child'. The complainant accepted his proposal for marriage but requested to continue with her studies. He undertook to permit her to do so, and she was happy with the undertaking. He and the complainant went to announce to the elders and the complainant's aunt, that they had reached an agreement to marry. When the complainant's aunt left his home, the complainant stayed behind of her own volition.

[16] The appellant denied that he as much as attempted to have sexual intercourse with the complainant, let alone having sexual intercourse with her without her consent. It was his version, instead, that the complainant even offered to do his washing while he was repairing the kraal the next day. This, said the appellant, she did as his wife. He spent 5 nights with her, and they shared a bed before her uncle came to fetch her. On all the 5 nights the complainant did not go to bed in her full clothes but in a T-shirt and shorts. The appellant denied that before her uncle's arrival the complainant escaped from his home. According to him, when the plaintiff learned that his uncle was looking for her, she ran to her aunt's home as she feared that her uncle would assault her.

The findings of the trial court

[17] The trial court accepted the version of the complainant as being true. This, after assessing it against the applicable cautionary rule since she was a single witness and a child under 18 years of age. In convicting the appellant on the evidence of the complainant as a single witness, the learned Regional Magistrate found that her evidence was clear, coherent and satisfactory in all material respects.

Counsel's submissions in this Court

[18] The principal submission that Mr *Babane* made was that in the light of the fact that the complainant was 17 years of age when she gave her testimony, the judicial officer ought to have held an inquiry to determine her competence to testify and whether she understood the import of an oath. According to Mr *Babane*, the complainant was a candidate to be admonished under the provisions of section 164 of the CPA. He also took issue with the fact that the actual administration of the oath to the complainant does not appear from the record.

[19] Among the case law on which Mr *Babane* relied in making his argument was *S v Nedzamba*.² In that case, the complainant in a rape charge was 14 years of age when she gave evidence. On appeal, the Court lamented the trial court's failure to establish whether the child witness understood the nature and import of the oath and whether she knew what it meant to speak the truth.

[20] As regards the appeal against sentence, Mr *Babane* made no pertinent submissions, and indeed none were made in the heads of argument that were filed on behalf of the appellant. He indicated that he would leave that aspect for the court to make its determination.

[21] On behalf of the prosecution, Mr *Mfihlo* chiefly submitted that nowhere on the record is an indication that the complainant did not understand the nature and significance of the oath. In any event, so the submission continued, no basis had been established for the admonition of the complainant as no finding was made that she did not understand the import of the oath. In making this submission Mr *Mfihlo* relied on *S v B*.³

[22] Regarding the appeal against sentence, Mr *Mfihlo* submitted that no substantial and compelling circumstances existed which warranted a deviation from the prescribed sentence of life imprisonment.

The legal principles

[23] The principles regarding the admission of witness to give evidence were set out in *S v Matshivha*,⁴ where it was said:

² *Nedzamba v S* (911/2012) [2013] ZASCA 69; 2013 (2) SACR 333 (SCA) (27 May 2013). Reliance was also placed on *S v Seymour* 1998 (1) SACR 66 (N).

³ 2003 (1) SA 552 (SCA).

⁴ 2014 (1) SACR (SCA) 29 at paras 10 and 11.

‘The reading of s162(1) makes it clear that, with the exception of certain categories of witnesses falling under either s163 or s164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible. . .’

[24] In the light of the fact that an irregularity is relied on in challenging the appellant’s conviction, the test, if an irregularity is found to have occurred, is whether the irregularity, is sufficiently serious as to undermine basic notions of trial fairness and justice.⁵

[25] As regards sentencing, it bears re-stating that it is a matter for the discretion of the trial court, which discretion will only be interfered with on appeal if it has not been exercised properly and judiciously, the test being whether the sentence meted out is vitiated by an irregularity, or a misdirection, or is disturbingly inappropriate.⁶

[26] CLAA prescribes discretionary minimum sentence to be imposed on persons convicted of various categories of serious offences including rape. These prescribed sentences may be departed from only where there are in existence in a given case, substantial and compelling circumstances justifying the deviation. This is in terms of section 51(3) of the same Act.

Discussion

[27] Before I deal with the procedural irregularity implicating the applicability of sections 162 and 164 of the CPA as the ground of the appeal against the appellant’s

⁵ *Van der Walt v S* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC), para15; see also *Tuta v The State* (CCT 308/20) [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) (31 May 2022), para 30.

⁶ *S v Rabie* 1974 (4) SA 855 (A) at 857 E; see also *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12.

conviction, it is convenient to first dispose of the appellant's contention that the record does not show the actual administration of the oath to the complainant.

[28] It seems to me that this contention is self-defeating in that the main ground relied on for this appeal is premised on the acceptance that an oath was indeed administered instead of admonishing the complainant. The appellant cannot have it both ways. However, for what this contention is worth, it suffices to say that *ex facie* the record, the complainant gave her evidence under oath after her full names and age were ascertained. This is encapsulated in the following excerpt of the record:

"Z[...] N[...] DECLARES UNDER OATH"

[29] This is apart from the fact that we were not referred to any authority in terms of which a record of proceedings must verbatim contain the words spoken during the administration of an oath to a witness. Rule 66(1) of the Rules of the Magistrates' Court which governs records of criminal cases provides as follows:

'(1) The plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand (also in this rule referred to as "shorthand notes") either verbatim or in narrative form⁷ or recorded by mechanical means.'

[30] I may add that it is highly doubtful that those responsible for the transcription of mechanical or digital records would have transcribed the taking of an oath (in narrative form as it appears from the record) if no oath was taken during the proceedings whose record was being transcribed.

⁷ Emphasis intended.

[31] For these reasons, I am unable to agree with the suggestion made by Mr *Babane* that there ought to have been a verbatim recordal of the administration of the oath to the complainant. I now turn to deal with the principal ground of appeal against the appellant's conviction.

[32] Granted, the default position in terms of the section 162 of the CPA is that witnesses in criminal proceedings shall give evidence under oath.⁸ In the case of a witness who may take an oath or who may be required to do so but objects thereto on any of the grounds stated in section 163, the judge or judicial officer may direct him/her to make an affirmation in the prescribed manner. Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.⁹

[33] Where a person to be examined in criminal proceedings is found not to understand the nature and import of the oath or the affirmation, he/she may be admonished by the presiding judge or judicial officer to speak the truth. This is in terms of section 164 of the CPA.

[34] As we understand the submissions that Mr *Babane* made on behalf of the appellant, he suggests that the trial court, by virtue of the witness's age of minority, should conduct an inquiry as a matter of mandatory procedure, into the competence of that witness. Mr *Babane's* point of departure seems to be that the young age of the

⁸ *S v Matshivha* footnote 4, *supra* at paras 10 and 11; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) para 166.

⁹ Section 163 provides:

(1) Any person who is or may be required to take the oath and—

b) who objects to taking the oath in the prescribed form;

(c) who does not consider the oath in the prescribed form to be binding on his conscience; or

(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:—

"I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth".

(2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.

(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

witness (below the age of majority) will perforce lead to that witness's admonition by the judicial officer. In the discussion that follows, I deal, more fully, with this issue.

[35] It must, as a starting point, be stated that a witness is only competent to testify if he or she is able to appreciate the difference between truth and lies. Every person not expressly excluded by the CPA from giving evidence is presumed to be competent to give evidence.¹⁰ The corollary is that even for a witness to be admonished to speak the truth where she is found not to understand the import of an oath or affirmation, he must be capable of differentiating between the truth and lies.

[36] As the Court held in *Rambuda v S*¹¹, it is clear from the reading of s 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies, and, if the enquiry yields a positive outcome, admonish the witness to speak the truth.¹²

[37] In the instant case, the record indicates that the complainant, who was 17 years of age and a Grade 9 learner, was caused to take the prescribed oath. Learned author Kruger states that there is no particular age at which a child is deemed to understand the meaning of the oath. Such a determination depends on the understanding shown by the child in answering questions by the judicial officer, who has to decide whether it is a case for a warning or an oath.¹³

¹⁰ Section 192 of the CPA provides that every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.'

¹¹ *Rambuda v The State* (156/14) [2014] ZASCA 146 (26 September 2014) quoting with approval *S v Matshivha*, supra, footnote 4; *Macinezela v The State* (550/2017) [2018] ZASCA 32 (26 March 2018); *S v Malinga* 2002 (1) SACR 615 (N).

¹² Ibid para 7.

¹³ A Kruger - Hiemstra's Criminal Procedure, (Lexis Nexis) Issue 11, 2018 page 22-48(1).

[38] In *S v B*¹⁴ which concerned the admissibility of the evidence of two young witnesses, the complainant and a witness both 13 years of age, had given evidence in the Regional Court. They were not asked to take an oath and were merely admonished to tell the truth. The court *a quo* set aside the resulting conviction, *inter alia*, on the basis that the complainant's evidence was inadmissible. The Supreme Court of Appeal held as follows:

‘Dit is duidelik dat art 164 `n bevinding vereis dat `n persoon weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard en betekenis van die eed of die bevestiging begryp nie. Soos in die geval van `n aantal vroeëre uitsprake, het die hof a quo beslis dat die feit dat `n bevinding vereis word, noodwendig inhou dat `n ondersoek die bevinding moet voorafgaan (sien *S v Mashava (supra op 228g-h)*; *S v Vumazonke 2000 (1) SASV 619 (K) op 622f-g*). Na my mening is dit `n te enge uitleg van die artikel. Die artikel vereis nie uitdruklik dat so `n ondersoek gehou word nie en `n ondersoek is nie in alle omstandighede nodig ten einde so `n bevinding te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê of om `n bevestiging te verkry, dit aan die lig kom dat die betrokke persoon nie die aard en betekenis van die eed of die bevestiging verstaan nie. Die blote jeugdigheid van `n kind kan so `n bevinding regverdig. Na my mening word niks meer vereis as dat die voorsittende regterlike amptenaar `n oordeel moet vel dat `n getuie weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard of betekenis van die eed of bevestiging begryp nie. Hoewel verkieslik word geen formele genotuleerde bevinding vereis nie (sien *S v Stefaans 1999 (1) SASV 182 (K) op 185i*).’

[Translation: It is clear that section 164 requires a finding that a person, due to ignorance arising from youthfulness, inadequate upbringing, or some other cause, does not understand the nature and significance of the oath or affirmation. As in the case of a number of earlier judgments, the court a quo held that the fact that a finding is required necessarily implies that an inquiry must precede the

¹⁴ *S v B* footnote 3 *supra*, para 15.

finding (see S v Mashava (supra at 228g-h); S v Vumazonke 2000 (1) SACR 619 (C) at 622f-g). In my opinion, this is too narrow an interpretation of the section. The section does not expressly require that such an inquiry be held, and an inquiry is not necessary in all circumstances in order to make such a finding. It may, for example, become apparent when an attempt is made to administer the oath or obtain an affirmation that the person concerned does not understand the nature and significance of the oath or affirmation. The mere youthfulness of a child may justify such a finding. In my opinion, nothing more is required than that the presiding judicial officer must make a judgment that a witness, due to ignorance arising from youthfulness, inadequate upbringing, or some other cause, does not understand the nature or significance of the oath or affirmation. Although preferable, no formal recorded finding is required (see S v Stefaans 1999 (1) SASV 182 (K) op 185i)].

[39] When regard is had to these authorities, *Nedzemba* is no authority for the proposition that by reason only of the fact the witness was below the age of 18 years, the court was required to determine whether the witness understood the purport of an oath.

[40] It is to be noted that in its amended form, section 164(1) does not state any specific reasons for a person's failure to understand the import of an oath. Learned author Kruger note that the words "from ignorance arising from youth, defective education or other cause" at the beginning of the subsection were deleted by the amendment to section 164(1) section 68 of Act 32 of 2007 resulting in the wide ambit of section 164 in terms whereof court can now make the finding that a witness does not understand the oath on any basis.¹⁵

[41] In the present case, the learned Regional Magistrate did not raise the issue of the complainant's age in relation to her eligibility to take the oath, nor did he doubt her competence as a witness – he was clearly of the view that the witness was competent

¹⁵ Hiemstra's Criminal Procedure, footnote 12 supra, page 22-48.

to testify, and she did so under oath. Indeed, nothing from the record indicates that when the oath was administered to the complainant the learned Regional Magistrate was not satisfied that she was able to understand the nature and significance of an oath.

[42] Apart from the foregoing, the complainant's chronology of events after her arrival at the appellant's home is largely confirmed by the appellant, barring his denial of the fact that he as much as attempted to have sexual intercourse with her on the second night of her presence at his home as she testified. It must be remembered that the learned Regional Magistrate, unlike this Court, was steeped in the observation of the complaint as she gave her evidence under oath. His findings in this regard are encapsulated in the following passage:

“I had an opportunity to observe the complainant while she testified in court. I have already indicated that she made a good impression to this court . . . she gave her evidence in a clear and logical manner and never contradicted herself. . .”

[43] At the heart of administering the oath (and admonition to speak the truth), is the need to ensure that the evidence given is reliable.¹⁶ Reliability of the child's evidence depends on how intelligent, observant and honest the child is.¹⁷ If regard is had to the general tenor of the complainant's testimony when she gave her evidence in chief and under cross-examination, there is no doubt that she appreciated the duty of speaking the truth, had the sufficient intelligence and maturity, and could communicate effectively. The record before us demonstrates this amply. An example of this instance is when she was asked if on the first, third and subsequent occasions when she slept in the appellant's room, he made any attempt to have sexual intercourse with her without her consent. She testified that there was never any such attempt. To my mind, this was indicative of a witness who understood what it meant to speak the truth.

¹⁶ *S v Raghubar* 2013 (1) SACR 398 (SCA) paras 4–5.

¹⁷ *R v Manda* 1951 (3) SA 158 (A) at 163.

[44] I make the finding that the learned Regional Magistrate committed no irregularity in causing the complainant to take the oath. The appellant's contention that the complainant's evidence was wrongly admitted has no merit, it must accordingly fall by the wayside. I proceed to determine whether there are any grounds on which this Court must interfere with the sentence that the trial court imposed on the appellant.

The appeal against sentence

[45] Only the appellant's personal circumstances were placed before the trial court. They are that he was a 'young gentleman' (42 years of age) who lived with his mother, his wife and boy child. He had two other children who lived with their respective mothers. He was unemployed and lived on odd jobs. He completed a learnership programme which was intended to enhance his employability. He had a previous conviction dated 2002 for shoplifting.

[46] No submissions were made in the trial court regarding whether there were substantial and compelling circumstances which justified a deviation from the prescribed minimum of life imprisonment. A pre-sentence report had otherwise been submitted to the court. I return to this aspect shortly hereafter.

[47] In aggravation of sentence in the trial court, the prosecution emphasized the prevalence and seriousness of the offence that the appellant was convicted of, as well as its heinous nature. It was further submitted that since no substantial and compelling circumstances were advanced on behalf of the appellant, the court was enjoined to impose the sentence of life imprisonment.

[48] The Supreme Court of Appeal has held that the proper enquiry on appeal concerning the sentence imposed by the trial court, is whether the facts which were considered by the sentencing court are substantial and compelling or not.¹⁸

[49] In imposing the sentence of life imprisonment, the learned Regional Magistrate found that no substantial and compelling circumstances existed which would justify a deviation from the prescribed sentence of life imprisonment. He considered the probation officer's report in which it was principally recorded that the appellant had persisted in denying the offence, stating that the complainant agreed to be married to him and that she may have reported having been raped under the pressure of coercion by her uncle. In terms of education, he dropped out of the University of the Western Cape while he was doing his first year due to financial challenges and subsequently worked as a cleaner at that University.

[50] The probation officer also noted that the offence had caused negative behavioural changes on the part of the complainant who ended up dropping out of school. According to the probation officer, the complainant had become a belligerent child who stayed away from home and went to cohabit with a male.

[51] The learned Regional Magistrate rejected the notion that the appellant acted under a belief that he was following a customary practice when he had sexual intercourse with the young complainant as his supposed wife. He reasoned that in as much as the complainant was given away by her aunt, the appellant was capable of making the choice to reject arrangement that was made on his behalf.

[52] It bears mentioning that in *S v Mvamvu*¹⁹, a case involving rape in circumstances where the accused had abducted his customary law wife who had deserted her marital home, the Court remarked that that where there was evidence that the appellant's actions

¹⁸ *S v Bailey* 2013 (2) SACR 533 (SCA), para 20; compare *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (19 March 2001) (*Malgas*), para 12.

¹⁹ *S v Mvamvu* (350/2003) [2004] ZASCA 90; [2005] 1 All SA 435 (SCA); 2005 (1) SACR 54 (SCA) (29 September 2004), para 16 and 17.

were shaped and moulded by the norms, beliefs and customary practices by which he lived his life which were his ingrained traits and habits, they should not be ignored but weighed up against the benchmark provided by the legislature for offences of the particular type.

[53] A disconcerting feature of the present case is that the appellant told the trial court that it was his mother who initiated and facilitated the arranged marriage between him and the complainant. This implies that he was a passive party who only proposed marriage to the complainant on her arrival, at the direction of his mother.

[54] I searched the record in vain for evidence from the appellant where he asserted any customary law precept that would have informed his conduct and any evidence that his actions were influenced by his entrenched belief in that customary practice. Not that these would constitute a defence nor would they, on their own, constitute substantial and compelling circumstances. All of this is apart from the fact that even under customary law, the wife, whether in an ordinary or arranged marriage, would have to be of the age of majority. To conclude on this aspect, it bears mentioning that the fact that the complainant was failed by her aunt who gave her away for the supposed marriage is, for the present purposes, a neutral factor. As the learned Regional Magistrate correctly observed, it was available to the appellant to invoke his own agency and denounce the arrangement or at most turn it down.

[55] It is rather difficult to fathom why a person such as the appellant, who was by no means illiterate or unsophisticated, conducted himself in the manner that he did. The learned Regional Magistrate cannot be faulted in finding that no substantial and compelling circumstances existed which justified a deviation from sentence of life imprisonment which is prescribed for rape of the kind that the appellant was convicted of. Indeed, none appear from his personal circumstances.

[56] However, the absence of substantial and compelling circumstances from the personal circumstances of the appellants is not in and of itself the end of the inquiry. As

held in *Vilakazi*,²⁰ a prescribed sentence cannot automatically be assumed to be proportionate in a particular case, and that disproportionate sentences are not to be imposed as the courts are not vehicles for injustice.

[57] In *S v Dodo*,²¹ the Court held that it is incumbent on a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the offence in question. This the court does by considering all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

[58] In the context of the present case, a fact which must be given consideration is that the rape of which the appellant was convicted of is not one of the worst ones. In *Mudau v S*²² the Court remarked:

‘[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person’s most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person’s fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi*, Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that ‘women’s right to give or withhold consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa’.

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in

²⁰ *S v Vilakazi* 2009 (1) SACR 552 (SCA) (*Vilakazi*) para18.

²¹ 2001 (3) SA 382 (CC) para 37; *S v Vilakazi*, footnote 21 supra, at para 15.

²² *Mudau v S* (764/12) [2012] ZASCA 56 (9 May 2013); see also *S v Brahams* 2002 (1) SACR 116 (SCA).

S v Abrahams that ‘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 and unjust’. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing.”

[59] While I say this, I remain acutely alive to the reality that the offence of rape of the victim (who, in this case, was only 15 years old) is, on its own, a traumatic injury to the victim’s psychological being. To think otherwise would be dishonest of this Court.

[60] To the extent that the learned Regional Magistrate did not consider the proportionality of life imprisonment after his finding that no substantial and compelling circumstances existed from the appellant’s personal circumstances to justify a lesser sentence, he erred. I make the finding that the cumulative circumstances of the case, ought to have weighed in favour of the appellant as constituting substantial and compelling circumstances.

[61] In the circumstances, the sentence of life imprisonment is disproportionate to the offence the appellant committed. It is regrettable that little to nothing was done, both in the trial court and in this Court, to present argument on behalf of the appellant, on the existence or otherwise of substantial and compelling circumstances. This notwithstanding, when regard is had to the record, this Court is entitled, by virtue of its inherent powers of intervention, to disturb the findings of the trial court regarding sentence.

[62] With that said, it is an undeniable fact that the appellant committed a deplorable, heinous and degrading act of sexually violating the young complainant. A substantial period of imprisonment is still necessary. I am satisfied that from the date of sentence, being 20 July 2018, the appellant has served a part of the sentence of life imprisonment.

[63] In the result, I would make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld, and the sentence of life imprisonment is set aside and substituted for the sentence set out below:
“The accused is sentenced to 18 years’ imprisonment”.
3. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is antedated to 20 July 2018.

L. RUSI
JUDGE OF THE HIGH COURT

I agree:

M. MHAMBI
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the appellant : *Mr X Babane*
: Legal Aid South Africa
Mthatha Local Office

Counsel for the first respondent : *Adv. S. Mfihlo*
The Office of the Director of Public Prosecutions,
Mthatha

Date heard : 19 February 2025

Date delivered : 19 August 2025