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

Case No: A46/2023

In the matter between:

V[...] W[...]

Appellant

and

THE STATE

Respondent

Court: Justice J I Cloete et Acting Justice T Sarkas

Heard: 29 August 2025

Delivered electronically: 8 September 2025

JUDGMENT

SARKAS AJ:

[1] On 22 August 2022 the appellant was convicted of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (rape) by the Somerset West Regional Court.

[2] The complainant was 14 years old at the time of commission of the offence, and on 8 September 2022 the trial court imposed the prescribed minimum sentence of life imprisonment.²

[3] The appellant appeals against the conviction and the sentence imposed, on the following grounds:

3.1. First, it is contended that the evidence in the matter proved that it was reasonably possible that the appellant could have misconstrued the complainant's silence as consent, and so he did not have the necessary *mens rea* to commit the offence of rape.

3.2. Second, it is submitted that the following considerations warrant interference in the sentence imposed – the appellant has four children, two of whom are minors aged 13 and 14; the appellant also has no previous convictions; given that life imprisonment is a minimum of 25 years, the appellant will be approximately 81 years old when considered for parole; and the trial court made no allowance for the appellant having misconstrued the complainant's silence for consent.

[4] The conviction arises from the trial court having found that the State had proven beyond a reasonable doubt that the appellant had on several occasions raped the complainant. While the appellant admitted to having had sexual intercourse with the complainant, his defence at trial was that the complainant had consented to same.

[5] This defence must be evaluated with reference to the nature of the consent contemplated in the Sexual Offences Act. In *Director of Public Prosecutions Eastern*

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 (*'the Sexual Offences Act'*).

² In terms of s 51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act No 105 of 1997 (*'the CLA'*).

Cape, Makhandla v Coko (Women's Legal Centre Trust and others as amici curiae)
the Supreme Court of Appeal held that:

5.1. The Sexual Offences Act explicitly requires that consent must be given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to.³

5.2. Mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act.⁴

[6] The State relied on the evidence of the complainant, the complainant's mother, a school friend of the complainant, and Dr Adelle Sterley, a medical doctor specialising in the assessment of child victims of sexual abuse, who examined the complainant and completed the J88 form. The appellant testified in his own defence and called no other witnesses.

[7] The trial court's summation of the evidence fairly and accurately reflects what was contained in the record. It is not presently necessary to deal in detail with the evidence given by the complainant about precisely what occurred, given the appellant's admissions at trial and the unchallenged evidence regarding the appellant's role and conduct in relation to the complainant.

[8] The following facts became common cause during the trial:

8.1. The complainant's date of birth is 11 August 2002.

8.2. The appellant is her stepfather, who at the time of the alleged offence was 50 years old and had been married to the complainant's mother since the complainant was about 5 years old.

8.3. The appellant was a policeman at the time of the alleged offence, and a figure of authority in the complainant's life (a "*father figure*" according to the appellant).

³ Section 3 of the Sexual Offences Act provides that "*Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.*"

⁴ *Director of Public Prosecutions Eastern Cape, Makhandla v Coko (Women's Legal Centre Trust and others as amici curiae)* [2024] 3 All SA 674 (SCA) ('Coko') paras 55-56.

8.4. The complainant's home life was troubled. The appellant, who was the breadwinner in the family, abused alcohol and physically abused the complainant's mother.

8.5. The complainant had been taught by her mother to obey the appellant's instructions without question, in order to keep peace in the home.

8.6. The incidents of sexual intercourse resulting in the appellant being charged occurred sometime during November 2016 up to and including September 2017. The complainant did not resist the complainant during these incidents.

[9] On the disputed issue of consent, the complainant's denial that she had consented to having sexual intercourse with the appellant was emphatic throughout her evidence. The trial court was correct in finding that the complainant was a credible witness. Furthermore, the complainant's evidence was substantially corroborated by her mother.

[10] The trial court was also correct in rejecting the appellant's evidence on the issue of consent as a fabrication. His assertions that the complainant forced herself on him and seduced him, were coupled with his evasions when pressed to explain what he did to stop her given the power dynamics of their relationship. Tellingly, in his testimony the appellant repeatedly and consistently referred to the complainant as "*the child*".

[11] To his credit, at the hearing of the matter counsel for the appellant rightly conceded that in applying the principles set forth in *Coko*, and taking into account that the appellant was in a position of trust and had authority over the complainant, who was 14 years old at the relevant time, there is no basis for a finding that the complainant's defence of consent is reasonably possibly true.

[12] On a proper evaluation of the evidence, the trial court was correct in concluding that the state proved its case beyond reasonable doubt, and the appeal against conviction must fail.

[13] In the assessment of whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentence imposed by the trial court, it is well established that:⁵

13.1. The specified prescribed minimum sentences are not to be departed from lightly and for flimsy reasons, and speculative hypotheses favourable to the offender, undue sympathy and the like are to be excluded.

13.2. If a court is satisfied for objectively convincing reasons that the circumstances of a particular case render the prescribed minimum sentence unjust, that is, disproportionate to the crime, the offender and the legitimate needs of society, it is entitled to characterise them as substantial and compelling.

13.3. The test of gross disproportionality must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's right under section 12(1)(e) of the Constitution not to be treated or punished in a cruel, inhuman or degrading way.

[14] To this must be added the injunction in *S v Matyityi*, where the Supreme Court of Appeal held that '*...Courts are obliged to impose [minimum] sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts...or vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order*'.⁶

[15] Finally, in the recent judgment of *M.T v S* this Court, with reference to the leading authorities dealing with the test for interference with sentences on appeal, explained that:

⁵ See *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Dodo* 2001 (1) SA 594 (CC).

⁶ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23.

15.1. There is no reason why the standard test which applies in appeals in ordinary sentencing cases should not apply to appeals in prescribed minimum sentence cases.

15.2. A court of appeal in a prescribed minimum sentence case should 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 was wrong as a result of a material misdirection.⁷

[16] In the present matter, the trial court carefully weighed all relevant facts and circumstances, including the appellant's age and lack of remorse. The record also reflects the devastating impact on the complainant, both in the evidence and in the Victim Impact Report prepared by Ms Ada Buys, a social worker who specialises in the assessment of child victims of sexual abuse, based at the Helderberg Child Abuse Centre.

[17] The trial court correctly concluded that there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence. The appellant's age does not detract from the abhorrence of the crime, particularly when regard is had to the effect that a sexual crime has on a minor. What is more, the appellant did not at any stage express remorse. In fact, he blamed the complainant.

[18] Counsel for the appellant submitted that one of the factors to be considered is that '*no violence was perpetrated on the complainant*'. This submission is misguided, not least because the legislature has directed that, when imposing a sentence in respect of rape, an apparent lack of physical injury to a complainant cannot constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.⁸ Rape is a form of violence. In *Director of Public Prosecutions, KwaZulu-Natal v Ndlovu* the Supreme Court of Appeal addressed the gravity of the

⁷ *M.T v S* [2025] [ZAWCHC] 307 (25 July 2025) (WCC)

⁸ Section 51(3)(a A)(ii) of the CLA.

crime of rape and its attendant intolerable consequences, including the lasting emotional and psychological trauma inflicted on the victim.⁹

[19] It is furthermore apposite to consider the observation in *S v Vilakazi* that *‘there comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.’*¹⁰

[20] On the facts of this case, involving as it does the repeated rape of a minor child by her stepfather, the trial court’s reasoning cannot be faulted and the sentence was not vitiated by material misdirection, nor was it shocking, startling or disturbingly inappropriate or disproportionate.

[21] It follows that the appeal against sentence must also fail.

[22] **The following order is made:**

The appellant’s appeal against both conviction and sentence is dismissed.

T SARKAS
Acting Judge of the High Court

I agree, it is so ordered.

J I CLOETE
Judge of the High Court

⁹ *Director of Public Prosecutions, KwaZulu-Natal v Ndlovu* 2024 (1) SACR 561 (SCA) paras 73-76.

¹⁰ *S v Vilakazi* 2012 (6) SA 353 (SCA) para 54,

Appearances:

For the appellant: Adv R **Liddell**
Instructed by: Moffit Attorneys

For the respondent: Adv E **Erasmus**
Instructed by: The National Prosecuting Authority,
Directorate of Public Prosecutions, Cape Town