Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Regional Magistrates:	**YES** / NO
Circulate to Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number: CA & R 09/2024

In the matter between:

STEFAANS DICKSON Appellant

and

THE STATE Respondent

Neutral citation: *Dickson v The State* (CA&R 09/2024) 19 September 2025

Coram: Williams J et Stanton J

Heard: 11 August 2025.

Delivered: 19 September 2025.

Summary: *Appeal against conviction and sentence in terms of s 309 of the Criminal Procedure Act 51 of 1977 – Conviction of rape of an 11-year-old boy child and a sentence of life imprisonment – Conflicting versions of State and defence in identification of appellant – Approach to the evidence of child witnesses – Cautionary rules properly applied – Non-existence of substantial and compelling circumstances justifying deviation from the prescribed minimum sentence – Appeal against conviction and sentence dismissed.*

ORDER

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

JUDGMENT

Stanton J

Introduction:

[1] The appellant was charged with one count of contravening s 3, read with s 1, 56 (1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape); read with s 51 (1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"), and further read with s 120 (4) of the Children's Act 38 of 2005. He is alleged to have unlawfully and intentionally committed an act of anal sexual penetration with his penis with the complainant (GK), an 11-year-old boy, on 12 January 2019 at Platfontein in the Regional Division of the Northern Cape.

[2] The appellant, who was legally represented at the trial, pleaded not guilty to the charge proffered against him. He was convicted on 05 August 2024; and on 12 December 2024, he was sentenced to life imprisonment.

[3] This appeal came before us in terms of s 309 of the Criminal Procedure Act 51 of 1977, as the appellant has an automatic right of appeal to the Full Bench of this Court against his conviction and the resultant sentence of life imprisonment.

The grounds of appeal:

[4] According to the appellant's notice of appeal against the conviction and sentence, the trial court erred in:

4.1 Finding that GK and the eyewitness, Mrs. A Khungula, GK's grandmother, were credible and reliable as they deviated in their oral evidence from their written statements; and

4.2 The sentence of life imprisonment is shockingly inappropriate.

The evidence for the State:

[5] It is not necessary to traverse the evidence in granular detail. A brief background would suffice.

[6] GK testified that he was 11 years old at the time of the incident and that he knew the appellant as he is a family member. According to his evidence, the appellant sent him to collect a lighter from his grandmother on the evening of 12 January 2019, which he took to the appellant's residence. On his arrival, GK stood outside, and he entered the residence when the appellant asked him to fetch an item from inside the house. The appellant grabbed him and pushed him to lie face down on his stomach on the bed, whereafter the appellant got on top of his back and opened his own trousers. He also removed GK's trousers, choked him, and forcefully penetrated him anally. GK was crying, and his grandmother arrived with her torch, and the appellant ran outside. GK put his underpants and trousers back on. His uncle, Mr. D Katumbela, called the police, and they took him to the hospital, where he was given medication and was examined by a doctor. According to him, his clothing was not collected at the hospital, and he returned home with the underwear and pants he had on earlier.

[7] When cross-examined, GK confirmed the anal penetration by the appellant. He, however, added that his grandmother first knocked on the window and thereafter she kicked in the door; the appellant jumped up and ran outside. He confirmed that he identified the appellant to his grandmother, his uncle and the police. He conceded that his grandmother was correct that the appellant was at his grandmother's house when he asked for the lighter, but denied the appellant's version that he and the appellant's younger brothers swapped their clothing.

[8] When cross-examined, GK, despite testifying *in camera* and with the assistance of an intermediary, kept quiet on several occasions when questioned and on various occasions did not answer questions. The trial court also had to intervene on numerous occasions. When confronted with the discrepancies between his written statement and his oral evidence, he explained that his written statement was not read back to him before he signed it, and he mainly responded that he could not remember why his statement contains more details than his oral evidence (i.e. that the appellant threatened to choke him to death; and he entered the appellant's house when the appellant asked him to go and look for something in the room). He changed his evidence in the following manner when he was cross-examined: *(a)* He could not remember whether his grandmother was at the window; *(b)* The appellant ran outside before his grandmother entered the room; and *(c)* He did not scream as he was scared and being choked. When confronted with the appellant's version, he persisted that the appellant's version is untrue and that the appellant had raped him on the evening in question. He also denied that his grandmother collected clothes from the appellant's home the following morning.

[9] Mrs. A Khungula testified that the appellant is her sister's grandson. On 12 January 2019, GK collected her lighter as the appellant requested to borrow same. She went looking for him and, after hearing his screams, coming from the appellant's house, she kicked the door open, and she saw GK pulling up his pants. The appellant stood behind GK, and his clothes were under his knees. The appellant passed her and ran outside. She saw blood on GK's buttocks, whereafter she asked Mr. D Katumbela for assistance. Mr. Katumbela phoned the police, who took them to the hospital. When cross-examined as to why she did not refer to the appellant's name in her statement, she explained that his name is difficult to pronounce. She repeated that she saw the appellant running out while he was pulling up his trousers and that she found GK on the bed with his knees on the floor. She denied the appellant's version that she collected clothes from his house the following morning. She added that the doctor took some of GK's clothes, but he was still wearing the same underwear when they went home.

[10] Mr. D Katumbela corroborated Mrs. Khungula's evidence pertaining to his involvement in the matter. He testified that he knows the appellant as a brother and that he saw a mark on GK's neck and a tear on his anus. He also noticed semen on the anus.

[11] According to the J88 medical report and the evidence of Dr. F Mokoya, who examined GK on 13 January 2019, GK sustained fresh tears at the six o'clock and 11 o'clock position of the orifices in the anus, which he opined is indicative of forceful anal penetration with a blunt object. In addition, he observed marks on GK's neck that are consistent with finger pressure, resembling strangulation. He noted that GK appeared to be severely traumatised. He collected swabs from GK's anus and perineum and secured GK's underwear, which he placed in an evidence bag that he sealed and handed over to Warrant Officer Antonie.

[12] Warrant Officer Antonie testified that Dr. Mokoya sealed the evidence in her presence and that she handed same, together with the appellant's buccal swab collected by Constable Tsiane, to Sergeant Van Rensburg. Warrant Officer Antonie delivered the sealed evidence bags to Warrant Officer Lotter at the Forensic Laboratory, Plattekloof, Cape Town.

[13] Warrant Officer Slabbert, a forensic analyst, testified that she received the sealed evidence bag on 19 January 2021. She confirmed that the appellant's DNA reference sample is identical to the DNA reference sample found in GK's underwear, but that unknown DNA was obtained from the swab of GK's anus. When confronted with the appellant's version that he wiped his penis with the underwear after he had sexual intercourse with his girlfriend, she stated that it is possible to transfer DNA in that manner, but based on the positioning of the stains, one in the middle at the back, and one at the right, higher up on the outside of the underpants, it is more probable that the deposit was not left by wiping.

The evidence for the appellant:

[14] The version of the appellant was a bare denial of any of the evidence tendered by the State. He denied that he was at the house, depicted in the photo album, on 12 January 2019, and insisted that he was at his uncle's house with his mother and siblings. According to him, he had sexual intercourse with his girlfriend, Tango or Tube, whereafter he removed the condom and semen using his hand and wiped his penis with a cloth that he then discarded on the floor. Mrs. Khungula and GK arrived at his mother's house at approximately 01h25, and Mrs. Khungula requested him to hand over GK's clothes. His girlfriend was asleep on his bed in the room. Mrs. Khungula took some clothes and left. When confronted with the evidence that his DNA was found on GK's underwear, he testified that he and his girlfriend had sexual intercourse, and he thinks that he used GK's underwear to wipe himself. When cross-examined, he changed his evidence and testified that Mr. Khungula collected the clothes after 5 o'clock in the morning. He confirmed that he never informed the police about his girlfriend. He placed the identity of the perpetrator in dispute because unknown DNA was found in GK's anus; and he denied that he had raped GK.

[15] Ms. A Dickson, the appellant's sister, testified that she resided in the house depicted on the photographs until December 2018, whereafter she relocated to a farm in the Free State; and returned to Platfontein in April 2019 due to her mother's illness. When cross-examined, she testified that she does not know whether the appellant had access to the house, but conceded that someone must have had access to the house as the photograph depicted that the door was open.

[16] This constitutes the factual matrix of the evidence before the trial court.

Ad appeal against conviction:

The test on appeal against conviction:

[17] In *Rex v Dhlumayo and Another,*[1] the Appellate Division ruled that the ambit of interference in factual and credibility findings by the trial court is constrained on appeal due to the reasons that, unlike the trial court, the appeal court has no live experience of the actual trial court. The court held that it will not disturb the factual findings of a trial court unless the latter had committed a misdirection.[2] We must therefore be satisfied that the ground(s) for appeal exists.

[18] The appeal against the conviction principally turns on the reliability of the evidence of the state witnesses about the identity of the perpetrator, as contrasted against the evidence of the appellant. It is clear from the record that there are two conflicting versions on how the events unfolded.

[19] It is trite that the State bears the onus of establishing the guilt of an accused beyond a reasonable doubt. The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.[3] The Supreme Court of Appeal in the recent judgment of *Sekoala v The State*[4] confirmed that:

> '. . . the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. . . . It is also trite that in an appeal, the accused's conviction can only be sustained after consideration of all the evidence including the accused's version of events.'

[20] That being said, the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly

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[1] 1948 (2) SA 677 (A) at 705.
[2] *Ibid* at 706.
[3] *Rex v Difford* 1937 AD 370 at 373 and 383; see also *Tshiki v S* (358/2019) [2020] ZASCA 92 (18 August 2020) para 13.
[4] [2024] JOL 63108 (SCA); [2024] ZASCA 18 (21 February 2024) para 27; see also *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-H, adopted and affirmed by the Supreme Court of Appeal in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8.

wrong.[5] The Supreme Court of Appeal in *S v Hadebe and Others,*[6] with reference to *Moshephi and Others v R,*[7] confirmed the approach to the assessment of evidence as follows:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[21] Section 208 of the Criminal Procedure Act provides that a court is entitled to convict an accused person on the evidence of a single witness. It is judicial practice that such evidence, however, should be treated with the utmost care. De Villiers JP in *R v Mokoena*,[8] expressed the approach as follows:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect.'

[22] The exercise of the cautionary rule must, however, not be allowed to displace the exercise of common sense.[9] In *S v Jones,*[10] it was held that the cautionary

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[5] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645G-H.
[6] *Ibid* at 645J-646B.
[7] (1980-1984) L A C 57 at 59F-H.
[8] 1932 CPD 79 at 80.
[9] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G ("*Sauls*"); see also *S v Artman and Another* 1968 (3) SA 339 (A) at 341A-D.
[10] 2004 (1) SACR 420 (C) at 422.

rule requires that a court must be aware of factors which render uncritical acceptance of evidence hazardous. The cautionary rule does not require that evidence must be free of all criticism, it requires only that evidence must either be substantially satisfactory in relation to material aspects or that it must be corroborated.[11] Even though a single witness' evidence might be criticised in some respects, it still does not exclude the fact that a court might nonetheless find the witness credible.[12]

[23] In *S v Mafaladiso en Andere,*[13] the Supreme Court of Appeal held that where there are material differences between the witness's evidence and their prior statement, the final task for the judge is to weigh up the previous statement against *viva voce* evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth has been told, despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.[14]

[24] Regarding the ground that the trial court erred in finding that GK and Mrs. Khungula were credible and reliable although they deviated in their evidence from their written statements; a useful guidance may be sought in *S v Mafaladiso* (*supra*), where the headnote (in English) reads:

> 'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous

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[11] *Ibid*, see also *S v Ganie and Others* 1967 (4) SA 203 (N) at 206G-H.
[12] *Sauls,* above fn 9.
[13] 2003 (1) SACR 583 (SCA) at 584.
[14] See also *Robinson and Others v S* [2019] JOL 41057 (KZP) para 9.

statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.'

[25] In *Maila v S*[15] *("Maila"),* Mocumie JA re-stated the principles applicable to the approach of the evidence of a single child witness as follows:

'The evidence in this case was based on the evidence of a single witness, the complainant. Apart from being a single witness to the act of rape, the complainant was a girl child, aged 9 years at the time of the incident. For many years, the evidence of a child witness, particularly as a single witness, was treated with caution. This was because cases prior to the advent of the Constitution (which provides in s 9 for equality of all before the law) stated *inter alia* that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator). To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this Court stated in *Woji v Santam Insurance Co Ltd*[16] *("Woji")*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must consider to conclude that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

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[15] (429/2022) [2023] ZASCA 3 (23 January 2023) para 17.
[16] 1981 (1) SA 1020 (A) at 1028B-D.

Trustworthiness. . . depends on factors such as *the child's power of observation*, his power of recollection, and his power of narration on the specific matter to be testified. . . . His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the *capacity of recollection* will depend again on whether he has *sufficient years of discretion* "*to remember what occurs*" while the *capacity of narration or communication* raises the question whether the child has the "*capacity to understand the questions put, and to frame and express intelligent answers*".'

[26] The Supreme Court of Appeal has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that:

'. . . the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be "trustworthy". This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. "Satisfactory in all respects" should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What this Court in *S v Hadebe* calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees. This position has been crystallised by the Legislature in s 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provides that:

"Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence".'[17]

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[17] *Maila*, above fn 15, para 18 (Footnotes omitted).

[27] In *Maila*,[18] Mocumie JA, further re-stated the approach to alibi defence as follows:

'It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty.

The only responsibility an accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the alibi defence, after investigations, prove to be solid.'

[28] The alibi defence has received the attention of our courts over the years, in particular that of the Constitutional Court in *S v Thebus and Another*,[19] where it is stated:

'. . . [A] failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*.[20] After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

"But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the *alibi* at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection".'

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[18] *Supra* at paras 20 and 21.
[19] 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) para 63.
[20] 1944 AD 571 at 586.

Evaluation of the evidence:

[29] GK was a single child witness regarding the sexual penetration.

[30] Mr. Biyela, on behalf of the appellant, argued that GK's evidence does not meet the required standard as his evidence was not clear and satisfactory in all material aspects. In support of this submission, he stated that GK, when cross-examined, kept quiet without answering questions, and the court had to intervene on numerous occasions. He added that GK and his grandmother's evidence is contradictory in that Mrs. Khungula testified that she heard GK's screams, which led her to the house of the appellant. GK, however, testified that he did not, or could not, scream. Mr. Biyela furthermore contended that Mrs. Khungula's evidence of identification is unreliable as she has poor eyesight, and the incident occurred at night. In the final instance, he submitted that Mr. Katumbela's evidence does not corroborate Mrs. Khungula's evidence, as she testified that Mr. Katumbela was at the door of the appellant's house when she came out of the house, but he testified that he was not there and was woken at his house.

[31] On a perusal of the record, it is evident that the trial court was alive to the statutory provision and approached GK's evidence with caution. In addition, the trial court took note of the contradictions between GK's and Mrs. Khungula's evidence. GK's demeanour in court was also scrutinised by the trial court which noted that it is crucial to take GK's age at the time of the rape and his educational level into consideration. The discrepancies in GK's evidence were evaluated, and the trial court found corroboration for his version in the evidence of Dr. Mokoya. The trial court was satisfied that GK relayed his evidence in a chronological manner. It found that, despite the long silences and repeated questions when he testified, GK's evidence remained consistent, he was capable of proper observation, and he recollected the material events correctly. The record reflects that GK provided a detailed account of how he was positioned on the bed, raped and strangled by the appellant.

[32] To my mind, the contradictions in GK's oral evidence and between him and Mrs. Khungula are of no consequence. GK's evidence that the appellant, who is well known to him, raped him was unequivocal and materially satisfactory. I also agree with the trial court's assessment that Mrs. Khungula accurately identified the appellant as she used her torch. I am therefore satisfied that the trial court did not err in accepting the evidence of GK and Mrs. Khungula.

[33] Furthermore, the J88 medical report and the evidence of Dr. F Mokoya corroborate GK's evidence that he was raped. In addition, the appellant's DNA was found on GK's underwear, confirming that the appellant raped him. The evidence that an "unknown DNA sample" was collected from GK's anus is insignificant in view of Warrant Officer Slabbert's second report that the "unknown DNA sample" was matched to GK.

[34] I agree with the trial court's assessment that the evidence of GK, Mrs. Khungula and Mr. Katumbela that GK returned home with his underwear was a mere mistake. Dr. Mokoyo, Warrant Officer Antonie and other witnesses called by the State to prove the chain of custody, provide corroborated and objective proof that GK's underwear was collected at the hospital and submitted for forensic analysis.

[35] The version of the appellant, however, is not bolstered by the DNA evidence or any alibi evidence. It is clear that he had no intention of calling his girlfriend to testify. As in *Maila*, the identity of his alibi witness was not revealed until the trial had commenced and extremely far into it. None of the witnesses were confronted with the alibi evidence, save for the broad statement that the appellant had sexual intercourse with his girlfriend and that she was still sleeping in his bed on Mrs. Khungula's arrival at his house. Tellingly, the appellant provided no plea explanation in which he could have disclosed that the basis of his defence was predicated on alibi evidence. In the final instance, Warrant Officer Slabbert's evidence that the DNA transfer was in all probability not caused by the appellant wiping his penis does not support the appellant's version.

[36] The evidence, when considered as a whole, taking proper account of inherent strengths and weaknesses, and taking into consideration probabilities and improbabilities on both sides; weighs so heavily in favour of the State that it excludes any reasonable doubt about the appellant's guilt.

[37] The finding of the trial court that the guilt of the appellant was proven beyond a reasonable doubt cannot be faulted. The appeal against the conviction of the appellant must accordingly fail.

Ad appeal against the sentence:

Applicable law:

[38] The conviction *in casu* attracts a sentence of life imprisonment in that s 51 (1) of the CLAA stipulates that a high court or regional court must, if it has convicted a person of rape where the victim is a person under the age of 18 years, sentence the person to life imprisonment, unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[39] It is trite that sentencing is primarily in the discretion of the trial court. The question to be answered is not whether the sentences were right or wrong, but whether the trial court, imposing the sentence, exercised its discretion properly and judicially. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.[21] Only when there is an irregularity or where the trial court made a grave error or where the sentence is shocking and inappropriate, will a court of appeal intervene.[22]

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[21] *S v Pillay* 1977 (4) SA 531 (A) at 535E-G.
[22] *S v Pieters* 1987 (3) SA 717 (A) at 728B-C; see also *Director of Public Prosecutions, Grahamstown v Peli* [2018] JOL 40195 (SCA) para 7.

[40] The aforesaid approach was endorsed by the Supreme Court of Appeal in *S v Hewitt*[23] in the following terms:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.' (Footnotes omitted).

[41] Where, as here, the trial court imposed the sentence prescribed by the CLAA, the approach on appeal is whether the facts that were considered by the sentencing court are indeed substantial and compelling or not. Bosielo JA, in the matter of *S v PB*[24], reaffirmed the correct approach by a court on appeal against a minimum sentence, as follows: -

'. . . Can the appellate court interfere with such a sentence imposed by the trial court exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

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[23] 2017 (1) SACR 309 (SCA) para 8.
[24] 2013 (2) SACR 533 (SCA) para 20.

[42] The correct approach to follow when considering the provisions of the CLAA, in particular whether substantial and compelling circumstances exist, was set out in *S v Malgas*[25] as follows:

'. . . It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.

In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based – than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand

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[25] 2001 (1) SACR 469 (SCA) paras 7-9; see also *S v Dodo* 2001 (3) SA 382 (CC) para 11 (where the *dictum* in *S v Malgas* in para 25 was approved).

scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.'

[43] In *S v Vilakazi*[26] the Supreme Court of Appeal observed as follows:

'The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. *In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas said should be avoided.* But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances

[26] 2012 (6) SA 353 (SCA) para 58.

might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.' (Emphasis added).

Evaluation:

[44] The appellant advanced the following personal circumstances in mitigation: -

44.1 He was 26 years old at the time of the commission of the offence;

44.2 He is single and has no children;

44.3 He was employed at a farm and earned a monthly salary of R4 300, but returned to Platfontein to assist his family as his mother and grandmother were ill. He was not their primary caregiver;

44.4 He only attended school until standard 3; and

44.5 He spent four years and nine months in custody awaiting the finalisation of his trial.

[45] The appellant is, however, not a first offender, as he has previous convictions for rape and murder.

[46] Mr. Biyela contended that this Court must have regard to the long period the appellant was in custody prior to the finalisation of the trial, as it was an exceptional delay, not necessarily caused by only the appellant.

[47] The record reflects that: *(a)* the outstanding DNA analysis; *(b)* the difficulty in procuring a !Xhu interpreter and intermediary; *(c)* Covid restrictions; *(d)* the appellant's physical well-being; and *(e)* the appellant changing legal representation *inter alia* resulted in various postponements before the trial could commence.

[48] Even if there were delays in the finalisation of the trial, the Supreme Court of Appeal in *S v Ngcobo*[27]made the following crucial observations in this regard, thus:

'Typically, some delays seem to have been at the instance of the state and others at the instance of the appellant. Primarily the appellant remained in custody because his three bail applications failed. Even if there were delays, this court said in *Radebe*:

"the test was not whether on its own that period of detention constituted a substantial and compelling circumstance, but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one."

Furthermore:

"the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified."

In short, a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust.'

[49] Regarding the seriousness of the offence of rape, of which the appellant has been convicted and sentenced, the Supreme Court of Appeal in *S v Hewitt*[28] had the following to say:

'. . . Our courts have, in countless cases of this nature, consistently expressed society's abhorrence of sexual offences, which once earned South Africa the shameful title of being the rape capital of the world, and the devastating effect they have on victims and society itself. The courts have aptly described rape as "a horrifying crime" and "a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim", and as "a very serious offence" which is "a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim". Rape of a child,

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[27] 2018 (1) SACR 479 (SCA) para 14; see also *S v Radebe and Another* 2013 (2) SACR 165 (SCA) para 13-14; and *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others* 2014 (2) SACR 337 (SCA) para 16.

[28] 2017 (1) SACR 309 (SCA) para 9.

usually committed by those who believe they can get away with it and often do, is far more horrendous. As was held in *S v Jansen*, it is "an appalling and perverse abuse of male power" which "strikes a blow at the very core of our claim to be a civilised society". It is unsurprising therefore that society demands the imposition of harsh sentences which adequately reflect censure and retribution upon those who commit these monstrous offences, and to deter would-be offenders.' (Footnote omitted).

[50] The trial court magistrate, in her detailed judgment on sentence, considered all the relevant factors which come into play when deciding upon an appropriate sentence – the serious nature of the offence, the interests of the community, the prevalence of violence towards women, children and the elderly and the personal circumstances of the appellant, which included that the appellant has previous convictions for murder and rape. In my view, not one of these factors was over-emphasised at the expense of another.

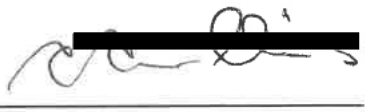
[51] I find that the trial court weighed both the mitigating factors and the aggravating factors and correctly found that no substantial and compelling circumstances exist to deviate from the prescribed minimum sentence of life imprisonment. In my view, the trial court exercised its discretion in a reasonable manner, and the sentence is not shockingly inappropriate. We further find that, when considered cumulatively, the appellant's personal circumstances do not constitute substantial and compelling circumstances and therefore do not justify a deviation from the imposition of the prescribed minimum sentence. There is accordingly no basis on which this court can interfere with the sentence imposed.

[52] In the result, the following order is made:

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

STANTON J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur



WILLIAMS J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

On behalf of the appellant:	Adv. KK Biyela
On instructions of:	Legal Aid SA
On behalf of the respondent:	Adv. SK Weyers-Gericke
On instructions of:	The NDPP