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

CASE NO.: A220/2024

REPORTABLE

In the matter between:

PETER GOLIATH

FIRST APPELLANT

MOEGAMAT ZIDANE GOMAS

SECOND APPELLANT

CAMERON FOSTER

THIRD APPELLANT

RICARDO DANIELS

FOURTH APPELLANT

DUWAYNE GALAND

FIFTH APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Goliath and Others v S* (case no A220/2024) [2025] ZAWCHC

Coram: DA SILVA-SALIE J *et* MOOSA AJ

Heard: 8 August 2025

Delivered: 13 October 2025 (delivered via email to the respective Counsel)

Summary: Criminal law – appeal – gang rape – single witness – contradiction between testimony and police statement – no bodily injury – rape proved – accused watching – male dominance – common purpose.

ORDER

On appeal from the Regional Court in Mitchells Plain, the following is ordered:

1. The appeal against conviction and sentence is dismissed.

JUDGMENT

Moosa AJ (Da Silva-Salie J concurring)

Introduction

[1] In this appeal, the appellants (sometimes referred to collectively herein as “the accused”) are seeking to have their convictions and sentences set aside. On 25 April 2023, they were each convicted in the Regional Court at Mitchells Plain for two counts of rape and one count of kidnapping. They were each sentenced to life imprisonment for rape (as per the minimum sentence regime under the Criminal Law Amendment Act 105 of 1997) [“the CLAA, 1997”], and to five years imprisonment for kidnapping. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 (“the CPA”), the sentences on count two (for rape) and count three (for kidnapping) runs concurrently with the sentence on

count one (for rape). Each appellant was declared unfit to possess a firearm in accordance with the Firearms Control Act 60 of 2000.

[2] The appellants exercised their automatic right of appeal against their convictions and sentences with respect to the two counts for rape. Leave to appeal was granted by the court a quo against the conviction and sentence pertaining to the count for kidnapping.

[3] On 26 July 2022, each of the appellants pleaded not guilty to the following charges which were put to them in a trial held in camera:

(a) Count 1 (rape) alleged that the accused (now the appellants) contravened s 3 (read with related provisions) of the Sexual Offences Act 32 of 2007 (“the SOA, 2007”) in that on or about 6 to 7 February 2021, and at or near Mitchell’s Plain, the accused unlawfully and intentionally committed an act of sexual penetration with an adult female person (“the complainant”) by inserting his/their penis(es) into her vagina without the complainant’s consent.¹

(b) Count 2 (rape) alleged that the accused, all being members of a group acting with common purpose for the furtherance of a crime, contravened s 3 (read with related provisions) of the SOA, 2007 in that on or about 6 February 2021, and at or near Mitchell’s Plain, the accused unlawfully and intentionally committed an act of sexual penetration with the complainant by Mogamat Zidane Gomas inserting his penis into the complainant’s mouth without her consent; and

¹ The trial was held in camera to protect the complainant’s identity. This judgment will do likewise.

(c) Count 3 alleged that the accused are guilty of kidnapping in that on or about 6 February 2021, and at or near Mitchell's Plain, they unlawfully and intentionally deprived the complainant of her freedom of movement by placing her in a motor vehicle and drove her to Wolfgat and tied her up till the evening of 7 February 2021.

[4] It was further alleged that s 51 and part 1 Schedule 2 of the CLAA, 1997 applied in view of the fact that the appellants, as the accused persons, acted with common purpose and the complainant was raped more than once and/or by more than one person.

[5] The argument advanced before us by Mr M Calitz for the appellants is that the magistrate erred by convicting them on a single witness's testimony. Relying on *S v Van der Meyden* 1999 (1) SACR 447 (W), he contended that her evidence did not establish their guilt beyond reasonable doubt. In his heads, he argued that this can only be proved 'if at the same time there is no reasonable possibility that his [the appellants'] innocent explanation may be true' (para 7). Mr Calitz also argued that the magistrate committed a material misdirection by not deviating from the prescribed minimum sentence for rape. Relying on *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21, he argued that the sentences imposed are excessive. For the State, Ms EA Kortje argued that the appeal is meritless.

Issues for adjudication

[6] The issues before us are two-fold. First, whether the appellants proved that the magistrate erred by finding that the State proved its case beyond reasonable doubt

against each appellant on all three counts. If this onus is not discharged, then the second issue to be determined is whether the appellants established justifiable grounds to conclude that the magistrate failed to exercise his discretion on sentence judicially and properly; or that the sentences imposed is vitiated by a material misdirection, or the sentences are disturbingly inappropriate. See *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.

[7] Answering the twin questions forming the subject of this appeal necessitates that the salient facts distilled from the appeal record comprising the State's case and the defence case at trial be narrated. I do so under the next heading. Thereafter, counsels' submissions before us are summarised. Then its cogency as regards the appellants' convictions and sentences is assessed in the light of the applicable legal principles.

Relevant factual matrix

[8] The primary evidence led by the State against the appellants, and on which they were convicted, was that of the complainant. In the ensuing paragraphs, I summarise the essence of her evidence, including her testimony pertaining to the identification of the appellants as the perpetrators of the serious offences committed against her over 2 days.

[9] The complainant was 25 years of age when she testified. Her testimony is that she was present at the residence of a friend in the evening of Saturday 6 February 2021. They were watching movies. Shortly after 22h00, the complainant left for home. She was unaccompanied. While walking home in Lost City, Mitchells Plain, she noticed that a motor vehicle was following her. It was a white Volkswagen Golf. The vehicle stopped next to her in the road. She saw the First Appellant, who was known to her by

his nickname Pilo. His face was uncovered. He was seated in the back of the vehicle. He enquired from the complainant as to where she was going. She responded by saying that she was walking home.

[10] The complainant testified that the First Appellant suddenly exited the Volkswagen Golf. He grabbed her and forced her into the backseat of the vehicle. He re-entered the vehicle, and the driver proceeded to a nearby forested area, where she was gang-raped.

[11] When the complainant was forced into the vehicle, it was occupied by the other appellants as well. Their faces were unmasked. She identified them because they were all well-known to her. Only the driver's face was covered. For this reason, he could not be identified. The Third Appellant, known to the complainant by his nickname Cammy, sat in the passenger seat in the front of the vehicle (i.e., next to the unknown driver).

[12] The complainant testified that she was forced to sit in the backseat of the motor vehicle. She was seated in between four male persons known to her. There were two on her left and two on her right side. She identified the men on the backseat with her to be the First Appellant (aka Pilo), the Second Appellant (whose nickname is Dan/Zidane), the Fourth Appellant (whose nickname is Ricky), and the Fifth Appellant (whose nickname is Chucky). As a result of their positioning in relation to the motor vehicle's door and Dan/Zidane holding the complainant tight, she was prevented from exiting the vehicle. The complainant testified that she was trapped in the motor vehicle against her will.

[13] The complainant testified that while in the motor vehicle, she enquired from the appellants as to where they were taking her, to which the reply was that she 'must just remain silent'. She testified further that she was scared and feared for her life.

[14] The complainant testified that on arrival at the nearby bushy area called Wolfgat, she was taken out of the motor vehicle and then blindfolded with a cloth. She was then led deeper into the bush at Wolfgat. After walking for a while, she was stopped by the appellants. Her blindfold was removed. Although it was dark, the complainant testified that she could see her surroundings. She explained that there was bush all around her.

[15] The complainant testified that at this stage Ricky, being the Fourth Appellant, threw her to the ground. He undressed her. When she was naked, Ricky pulled his pants down and, with the complainant on her back, he started to penetrate her. Ricky penetrated the complainant by inserting his penis into her vagina. He did so without her consent. She testified further that, during this time, the Second and Third Appellant were standing there. They watched Ricky's sexual assault on her.

[16] The complainant testified that she was kicking because she was trying to fight with them, to break loose from them. As a result of her efforts to ward off the attack, Pilo and Chucky, being the First and Fifth Appellant respectively, proceeded to hold the complainant down. Pilo grabbed the complainant at her feet and he held it tight, preventing her from kicking. Chucky held her hands down tight. Pilo and Chucky held the complainant in position when Ricky started to penetrate her. Pilo and Chucky continued to hold her by her feet and hands respectively throughout the time during

which Ricky had his penis in her vagina. In this way, they actively facilitated the assault on her.

[17] The complainant testified that when Ricky was done, Zidane [the Second Appellant] got on top of her. Like Ricky, the Second Appellant too lowered his pants and penetrated her by inserting his penis into her vagina. He did so without the complainant's consent. She testified further that while Zidane raped her, Pilo and Chucky continued to hold her tight at her feet and hands respectively, thereby actively facilitating Zidane's sexual assault. At that time, Cammy (Third Appellant) and Ricky (Fourth Appellant) were just standing there and looking on.

[18] The complainant testified that when Zidane was done with her, Cameron [aka Cammy] got on top of her. Cammy, unlike Ricky and Zidane, took off the T-shirt that he was wearing and then he pulled his pants down. Cammy got on top of the complainant while she lay with her back to the ground. He too penetrated her by inserting his penis into her vagina without her consent. While Cammy did so, Pilo and Chucky continued to hold her tight at her feet and hands respectively. The remaining appellants, being Zidane and Ricky, just stood there and watched the assault.

[19] Cammy, being the Third Appellant, was the last one who vaginally penetrated the complainant on 6 February 2021. Later, the appellants tied the complainant to a tree using rope. Chucky, being the Fifth Appellant, held the complainant's hands so they could be tied. The appellants then left. The complainant could not flee as she was tied to a tree. She said: 'I was there the whole night, screaming and crying, but no one could help me.'

[20] In the evening on Sunday 7 February 2021, each of the appellants returned to Wolfgat. Although it was dark, the complainant could see their faces. They were unmasked. When they arrived, the complainant was still tied to the tree. The complainant was hungry. She had not eaten all day.

[21] During evidence in chief, the complainant testified that, on the Sunday evening, Zidane instructed her to suck his penis. He took his penis out and put it in her mouth. She sucked Zidane's penis as instructed. She did so without consent. While this was going on, the other four appellants were standing there and looking on at Zidane.

[22] After sucking Zidane's penis, the complainant was untied and freed. She testified that before leaving the scene at Wolfgat, Zidane said to her that if she told anyone about what happened, then he is going to hurt her and her family. The complainant ran home. On arrival there, she bathed and went to bed. On the next day, being Monday 8 February 2021, she could not take it anymore. She testified that she broke down in tears and told her aunt J[...] about the incident. It was her aunt J[...] who encouraged the complainant to report the matter to the police. The complainant did so, but only days later. By the time the case went to trial, aunt J[...] was deceased. Therefore, the complainant was the State's key witness.

[23] At the trial, the complainant had no doubt that the appellants kidnapped her and raped her while she was in their captivity. She identified them because their faces were not covered. She saw them in the motor vehicle and at Wolfgat on the Saturday and Sunday evening. The complainant recognised each of the appellants because they are all known to her. This is not in undisputed. Each reside in the same neighbourhood

where she lives, namely, in a suburb of Mitchells Plain. Each appellant resided in homes close to the complainant's home at the time of her kidnapping and rape in February 2021.

[24] Zidane lived in a house next to the complainant. She knew him for all her life. She knows Cammy for years. Ricky is a family friend whom she knew since childhood. As for Chucky, the complainant said that she knew for about 5 years. Each of the appellants was so well known to the complainant that she called them by their nicknames. She testified, and Pilo confirmed, that the appellants are each members of the Americans, a neighbourhood street gang.

[25] The First (aka Pilo), Third (aka Cammy), Fourth (aka Ricky), and Fifth (aka Chucky) Appellant each tendered a defence which is a bare denial. None of them were able to provide substantiation or corroboration for their versions. Each denied that they were present in the white Volkswagen Golf vehicle on Saturday evening, 6 February 2021. They all denied being at Wolfgat with the complainant on 6 and 7 February 2021. They all denied raping her. None of them could recall where they were on those days, or what they did. The Second Appellant (aka Zidane) raised an alibi defence. His father, Mr Fadiel Davids, testified that Zidane was home on the Saturday night when the offences were perpetrated between 22h00 and 23h00.

[26] At the trial, the State intended to call Dr Ahmed Haffejee, being the medical doctor who examined the complainant and completed the J88 medical form. However, owing to Dr Haffejee suffering a stroke, he was unable to testify. The contents of the J88 report are hearsay. Its admissibility is subject to the prescripts of s 3 of the Law of

Evidence Amendment Act 45 of 1988. See *Fortuin and Another v S* (A17/2024) [2024] ZAWCHC 244 (5 September 2024) para 52. Therefore, by agreement between the prosecutor and the defence attorneys, Mr Van Rooyen (for Zidane) and Mr Cupido (for the rest of the accused), the J88 was admitted into evidence and marked Exhibit C.²

[27] Owing to the importance which the appellants' counsel before us, Mr Calitz, placed on aspects of the J88 in support of his submission that the trial magistrate misdirected himself when he convicted the appellants, it is necessary to summarise key notations recorded therein by Dr Haffejee. Part I records that the complainant was examined on 16 February 2021 at 09h55 at Heideveld Community Health Centre. In Part II, which details the 'History of the alleged assault and/or rape', Dr Haffejee wrote:

'23 year old female alleges that she was sexually assaulted on 6/2/2021 around 23h00. The alleged perpetrators are known to the patient.'

As for clinical findings, Dr Haffejee recorded that he observed no physical injuries (that being, abrasions, bruises, cuts, or other injury). As for the results of Dr Haffejee's gynaecological examination, he wrote that he observed no injuries or abnormalities. As for the complainant's hymen, Dr Haffejee recorded that there were 'Clefts at 3:00; 5:00; 8:00; 9:00' and 'loss of hymen tissue between 6:00 and 7:00'.

[28] Dr Haffejee recorded his conclusions on the J88 form, based on history and all findings, both positive and negative, as follows:

² The consent by the defence to the admission of the J88 report into evidence obviated the need for the trial magistrate to make a formal ruling, before closure of the State's case, on the admissibility of the report's contents. For the approach to be adopted in determining admissibility in any such instance, see *S v Ndlovu and Others* 2002 (6) SA 305 (SCA).

‘Possibility of forced vaginal penetration by penis / object cannot be excluded, despite the absence of acute injuries. (The patient has been sexually active since the age of 18 years).’

[29] Before us, Mr Calitz relied heavily on Exhibits A and B. Exhibit A is the complainant’s statement recorded in English by a police officer, Ms Du Bruyn. It was recorded about a week after the incidents. Exhibit B is the statement made by Samantha Pretorius, a sergeant stationed at Mitchells Plain Family Violence, Child Protection and Sexual Offences Unit. This statement was in the docket at the appellants’ bail hearing.

[30] The events recounted in Exhibits A and B differ in some respects from the complainant’s testimony. First, whereas she testified that during her rape on 6 February 2021 she was held down by two assailants, paragraph 5 of Exhibit A records that she was held down by four persons. Secondly, whereas the complainant testified that she was forced to suck Zidane’s penis (being the Second Appellant), paragraph 6 of Exhibit A records that she was forced to suck Chucky’s penis (the Fifth Appellant). She answered likewise to a question from the court. Thirdly, whereas she testified that Pilo (the First Appellant) grabbed her and forced her into the motor vehicle, paragraph 3 of Exhibit A (and paragraph 4 of Exhibit B) records that Ricky (the Fourth Appellant) did this. Fourthly, while the complainant testified that she was penetrated vaginally by three persons on Saturday evening, paragraph 5 of Exhibit A records that she was penetrated vaginally by all five of the appellants. Fifthly, whereas she testified that the appellants left Wolfgat after she was vaginally raped by three of them on the Saturday evening, paragraph 6 of Exhibit A records that she was raped by all the appellants for a second

time on that evening before they left. Sixthly, while the complainant testified that Zidane raped her on the Sunday evening, paragraph 4 of Exhibit B records that Ricky raped her on that evening. Seventhly, while the complainant testified that the appellants returned to Wolfgat on the Sunday evening, paragraph 7 of Exhibit A records that they were there the whole day.

Submissions by counsel

[31] The core submissions advanced by Mr Calitz before us are outlined in paragraph [5] above. He posited several strands in support of his main ground that the magistrate erred by convicting the appellants on the complainant's testimony. I now summarise them.

[32] First, Mr Calitz pointed to the differences highlighted in paragraph [30] above. Relying on *S v Muhlaba and Others* 1973 (3) SA 141 (R), he argued that the differences constitute serious contradictions showing not only that the complainant's version was inconsistent in material respects, but also that she was prone to giving misleading, unreliable information about key events pertaining to the offences. On this basis, Mr Calitz submitted that the magistrate erred in not approaching the complainant's evidence with more caution. If he did, so the argument proceeded, then the magistrate would have concluded that the complainant was neither credible nor reliable, and that her evidence was neither clear nor satisfactory in every material respect for purposes of sustaining convictions on single witness testimony as envisaged by s 208 of the CPA.³

³ Section 208 of the CPA reads: 'An accused may be convicted of any offence on the single evidence of any competent witness.'

[33] The second string in Mr Calitz's bow is the information recorded by Dr Haffejee in the J88 form. He argued that the magistrate erred by failing to give proper weight to the fact that there were no injuries on the complainant's body. Mr Calitz submitted that this fact casts serious doubt on the truthfulness of the complainant's version that (i) her hands and legs were held down tight by Chucky and Pilo respectively to enable her being raped by the others; (ii) her vagina was repeatedly penetrated by some of the appellants; and (iii) her hands were tied by the appellants from Saturday night until Sunday evening.

[34] Mr Calitz also contended that the magistrate erred by placing no weight on the fact that the disclosures made to Dr Haffejee differ in material respects from the complainant's oral testimony. Mr Calitz pointed to the fact that the J88 makes no mention of: (a) the kidnapping on 6 February 2021; (b) that the complainant was tied to a tree at Wolfgat from 6 to 7 February 2021; and (c) that the complainant was raped on 7 February 2021. Mr Calitz reasoned that if any of these key events occurred, then the complainant would have mentioned it to Dr Haffejee who, in turn, would have recorded them in the J88.

[35] Mr Calitz submitted that when the J88 is viewed objectively and considered in its proper context, then it casts serious doubt on the veracity of the complainant's assertion that she was the victim of a kidnapping and gang rape. He argued that the J88 adds weight to the contention that the appellants' denials of guilt are reasonably possibly true.

[36] A third string in Mr Calitz's bow is his argument that, based on *S v Safatsa and Others* 1988 (1) SA 868 (A) and *S v Mgedezi and Others* 1989 (1) SA 687 (A), the

evidence to the effect that while one of the appellants raped the complainant the rest stood around, does not establish the pre-requisites for rape by common purpose.

[37] Before us, Mr Calitz contended that the life sentences imposed are not mitigated with any degree of mercy or compassion. He argued that the sentences are retributive in nature and/or effect, as well as disproportionate, having regard to the appellants' respective personal circumstances, the gravity of the offences, and society's interests. Mr Calitz contended that the magistrate erred in failing to consider the different roles played by each appellant in the offences, and erred in not finding that there were substantial and compelling circumstances present for all the appellants, or for any among them.

[38] Ms Kortje, for the State, contended that the appeal ought to be dismissed. She conceded that the inconsistencies enumerated in paragraph [30] above existed. Relying on *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 437F, she submitted, however, that the trial court was correct in its approach when dealing with the inconsistencies, namely, the magistrate considered the nature and cause of the inconsistencies, and viewed them in the light of the totality of the trial evidence. Ms Kortje submitted that the magistrate correctly concluded that the inconsistencies were, in context, not of a material nature, nor had the effect of destroying the complainant's credibility, nor her evidence implicating the appellants in the commission of the offences.

[39] Ms Kortje contended that the absence of injuries on the complainant's body as per the J88 does not mean that she was not raped in the manner described by her. Ms Kortje pointed out that the medical examination took place on 16 February 2021, being

10 days after the vaginal rapes on 6 February 2021. Ms Kortje argued that this lapse of time allows for healing to occur. She also pointed to Dr Haffejee's conclusion that 'forced vaginal penetration by penis/object cannot be excluded, despite the absence of acute injuries'.

[40] In reply to Mr Calitz's common purpose argument, Ms Kortje relied on *Tshabalala v S*; *Ntuli v S* 2020 (5) SA 1 (CC) to substantiate her submission that the trial court correctly found that the evidence proved that the complainant was raped on consecutive evenings by a gang. She submitted that the complainant was clear and unequivocal in her identification of each appellant, and in her evidence that each was present at Wolfgat on Saturday and Sunday evening, and each acted in concert with the requisite mens rea.

[41] On sentencing, Ms Kortje pointed out, with reference to *S v Musingadi and Others* 2005 (1) SACR 395 (SCA) para 52, that a conviction based on common purpose may, together with other relevant mitigating factors, constitute grounds for deviating from a prescribed minimum sentence. However, she argued that the facts of this case and the personal circumstances of the appellants do not merit a deviation. Consequently, so she submitted, the appellants failed to show a material misdirection on the magistrate's part.

Evaluation of the ground of appeal in re conviction

[42] It is common cause that inconsistencies exist between the complainant's viva voce testimony and some contents recorded in Exhibits A and B. The nature and extent of the differences appear in paragraph [30] above. They need not be repeated here. The

trial record shows that the complainant was subjected to rigorous cross-examination by counsel for the defence. The complainant was also questioned by the magistrate and the prosecutor on certain inconsistencies.

[43] The reasons for the differences were explained by the complainant. Her explanation was consistent throughout. The complainant testified that she was still traumatised when she reported the events to SAPS. Sergeant Pretorius confirmed that the complainant was still traumatised when she spoke to her at a later time. The complainant spoke in Afrikaans when she reported the incidents. She spoke to Ms Du Bruyn who was Xhosa-speaking. The complainant said that a language barrier existed between her and this police officer. She explained that her fragile state of mind coupled with the language barrier with Ms Du Bruyn accounted for the differences between facts in Exhibit A and her oral testimony, the latter of which occurred more than a year after the incidents in February 2021.

[44] The trial magistrate was mindful of the contradictions. He referred to them in his judgment. The magistrate recorded that, as a result thereof, he re-read the complainant's statement and considered her explanation for the differences. He found it to be plausible. I agree. For the applicable test in this regard, see *S v Xaba* 1983 (3) SA 717 (A) at 730B-G; *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593E-594H.

[45] Differences between oral testimony and a prior statement to the police is a common occurrence. Statements made to, and written down by, police officers are notoriously not recorded with the degree of care, skill, accuracy, and/or completeness that they require (and deserve). See *S v Rhode* [2019] 1 All SA 740 (WCC) para 16.9.

Various factors contribute to this daily reality. The factors include, but are not limited to, inadequate writing skills; poor listening skills; and/or communication challenges caused by, amongst others, enunciation, speech, and differences in, for e.g., language and/or culture.

[46] Communication related challenges may well result in the precise meaning intended by a statement's signatory to be lost in the process of a police officer's mental translation, resulting in the statement not necessarily being a fair or accurate reflection of the details imparted by the witness. Therefore, the existence of differences between a witness's testimony and a prior police statement is, per se, no justification for rejecting the former in favour of the version recorded in the latter; nor does it justify a conclusion that the witness is unreliable or lacks credibility.

[47] More is required for any such outcome to be merited. No hard and fast rules can be laid down in advance as to the circumstances when viva voce evidence will prevail over the contents of a police statement (or vice versa). This is a factual enquiry to be undertaken in every instance.

[48] In the case before us, the complainant's home language is Afrikaans (not English). She narrated her ordeal to the police in Afrikaans.

[49] In his heads (at para 59), the appellants' counsel argued that, owing to the police officer's surname (i.e. Du Bruyn), the probabilities favour an inference that she was 'an Afrikaans speaking person'. This submission is dangerous, and misses the point. First, to draw a factual inference from a surname runs counter to the rules of evidence. Doing

so would also promote judicial stereotyping of persons based on, for e.g., surname. Judicial officers should resist any temptation to do so. Secondly, the issue is not whether Ms Du Bruyn could speak Afrikaans, but rather whether Exhibit A accurately reflects the material information imparted to Ms Du Bruyn by the complainant.

[50] The magistrate considered the inconsistencies mentioned in paragraph [30] above and evaluated them against the evidence viewed in its totality. The magistrate concluded that the inconsistencies were not of a material nature.

[51] It does not make a material difference in casu whether it was Pilo or Ricky who grabbed the complainant and forced her into the motor vehicle. She identified both men as part of the group who kidnapped her and kept her captive. She placed them both in the backseat of the vehicle en route to Wolfgat; and she placed them both at Wolfgat on the Sunday evening when she was set free. It also makes no material difference whether the complainant's vagina was penetrated on the Saturday evening by all five appellants, or only by three of them (while others made common purpose with those acts).

[52] Similarly, it makes no material difference that Exhibit A records that the complainant was raped the whole of Sunday 7 February 2021. The appellants were never charged with, nor convicted for, repeatedly raping the complainant on that day. Count 2 was for a single act of rape. It was committed in the evening on Sunday 7 February 2021. On any version of the facts, the complainant placed all the appellants at Wolfgat on that evening. Furthermore, in the light of the doctrine of common purpose applied in relation to count 2, it makes no material difference whether the complainant

sucked Zidane's penis on the Sunday evening while all the other appellants stood watching, or whether she sucked Ricky's penis while all the other appellants stood by and watched.

[53] Having regard to the consistency and clarity of the complainant's testimony throughout her time in the witness box as appears from the trial record, I conclude that the magistrate's findings that the differences noted in paragraph [30] above did not undermine her credibility, cannot be faulted. This is more so when consideration is given to the fact that the magistrate was steeped in the trial's atmosphere. See *S v Dhlumayo* 1948 (2) SA 677 (A). As such, the magistrate was able to observe the complainant, and is best-suited to determine her demeanour while she testified about her trauma and about the humiliating, dehumanising experiences suffered at the appellants' hands.

[54] In his judgment, the magistrate commented that the complainant did not exaggerate nor embellish her testimony, even though she had opportunity to do so. She testified that only one of the appellants raped her on the Sunday evening, while the others stood watching. If she intended to mislead the court by implicating all of them, then her testimony would have been tailored accordingly. That the complainant did not do so is telling – it supports a finding of her credibility and reliability as a single witness.

[55] As for the J88 form, the magistrate held that the absence of vaginal injuries is immaterial. This finding too is unassailable on the facts. While the presence of vaginal injuries as recorded in a J88 form would provide some measure of corroboration for the complainant's version (see *Lotter v S* [2025] ZAWCHC 370 (21 August 2025) para 37),

the converse does not hold true. In other words, the absence of vaginal injuries does not, per se, justify a finding that vaginal penetration did not occur.

[56] The vagina is known to be a forgiving organ. In a woman's anatomy, a vagina has the capacity to endure and to heal. This is a relevant consideration here because the examination by Dr Haffejee occurred, as appears from the J88, ten days after the incidents on 6 February 2021. As appears from paragraph [28] above, Dr Haffejee concluded that the absence of noticeable acute injuries did not exclude the possibility that forced vaginal penetration of the complainant's vagina by a penis occurred (as was reported to Dr Haffejee).

[57] Another relevant consideration in the present context is, as recorded in paragraph [43] above, the indisputable psychological damage which manifested in the complainant. What caused it? Rape is more than a mere physical assault which may cause a physical scar. It causes mental scarring too. While the physical scars heal, the mental scars remain. See *S v Kearns* 2009 (2) SACR 684 (GSJ) para 15. Accordingly, the complainant's psychological trauma is evidence consistent with her having been raped.

[58] The absence from the J88 of any mention of certain events which the complainant testified occurred on the Saturday and Sunday evening (see paragraph [34] above) is immaterial in casu. Their omission does not, per se, serve as evidence that the complainant fabricated a version while she was in the witness box. Dr Haffejee did not testify. There is nothing in the trial record which indicates what questions he posed to the complainant which elicited the answers recorded in the J88. Accordingly,

an adverse inference cannot be drawn against the complainant based on omissions from the J88.

[59] I now turn to the issue of rape by common purpose (see paragraph [36] above). The highwater mark of the submission that the State failed to establish guilt by common purpose in relation to the multiple rapes at Wolfgat on the Saturday and Sunday evening appears at paragraph 16 of Mr Calitz's heads of argument. It reads:

‘When asked about what the other Appellants did, she responded “They were just standing there, Your Worship, looking at him” and “They were present” and doing “Nothing”’.

[60] Before us, the appellants' counsel submitted that the complainant's testimony that some of the appellants did “nothing” indicates that they did not actively participate in, nor acted in furtherance of, the rapes perpetrated by the others. Consequently, so he reasoned, the magistrate erred in finding that Pilo and Chucky were guilty of rape by common purpose with the rest of the appellants (Ricky, Zidane, and Cammy) who were held to have vaginally penetrated the complainant without her consent on 6 February 2021. On the same basis, it is argued that the magistrate wrongly convicted Pilo, Cammy, Ricky, and Chucky for rape by common purpose with Zidane who was found to have had oral sex with the complainant without her consent on 7 February 2021. These submissions are unmeritorious.

[61] The complainant's testimony on this score must be viewed in context. It must be understood against the mosaic of her evidence in its totality. If not, then a skewed picture would emerge. The complainant said that while being raped by Ricky, then

Zidane, and finally Cammy on 6 February 2021, the others looked on and did nothing. By this she meant that they did nothing to stop the rapes. While Zidane and Cammy stood waiting for their turn to rape the complainant, she was emphatic about the active, supporting roles played by Pilo and Chucky. They enabled vaginal penetration to occur by reason that Pilo held the complainant's legs down, while Chucky held her hands tight. Both Pilo and Chucky acted as they did in reaction to the complainant fighting back to ward off her rapists, and in concert with the other perpetrators. See paragraphs [16] to [19] above.

[62] In these circumstances, the finding cannot be faulted that Pilo and Chucky were guilty of rape by common purpose. To this end, the evidence, viewed in its totality, shows that Pilo and Chucky: (a) were at Wolfgat when the rapes were committed by Ricky, Zidane, and Cammy, all acting in concert as a group; (b) were each positively identified by the complainant as being at Wolfgat when she was raped by the remaining appellants acting in concert as a group; (c) each knew of the group's mode of operation to commit the crime of rape and each intended for the complainant to be raped; and (d) each associated themselves with the actions of the group by holding down the complainant to enable the remaining members of the group to penetrate her vaginally, one by one. Joint criminal liability must ensue for Pilo and Chucky as perpetrators - they actively associated and participated in a common criminal design with Ricky, Zidane, and Cammy, all of whom acted in concert as a group with the requisite blameworthy state of mind. See *Tshabalala v S*; *Ntuli v S* *supra* para 48.

[63] Furthermore, I hold that the magistrate did not misdirect himself when he concluded that Pilo, Cammy, Ricky, and Chucky were guilty of rape by common purpose perpetrated on the Sunday evening. In instances of group rape, 'the mere presence of a group of men results in power and dominance being exerted over women victims' (*Tshabalala v S; Ntuli v S supra* para 51). When dealing with rape perpetrated by a group of men, it must be remembered that 'rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room' (*Tshabalala v S; Ntuli v S supra* para 54).

[64] The evidence shows that the appellants were all complicit and acted in cahoots. They kidnapped the complainant and kept her captive. They instilled fear by intimidation and brutality. When they arrived at Wolfgat on the Sunday evening, they had all the power over the complainant. She was their hostage. They left her unfed for the entire Sunday. She was at the mercy of a group who the complainant knew are members of the feared Americans gang.

[65] By tying her to a tree located deep in the bush where her screams could not be heard, the group intended to, and did, ensure that escape was impossible and help was inaccessible. The group intended to, and did, exert their power and dominance over the complainant when Zidane instructed that she suck his penis. None in the group uttered a word of objection, nor did anything to disassociate from Zidane's actions. Out of fear, the complainant sucked Zidane's penis.

[66] As a mark of their association with Zidane's actions, all the remaining group members stood and watched the complainant being humiliated and dehumanised through rape. The requirements for joint criminal liability are proved. Pilo, Zidane, Cammy, and Chucky actively associated and participated in a common criminal design with Zidane. They each had the requisite blameworthy mindset.

[67] The submission that the complainant's evidence, as a single witness, was neither clear nor satisfactory in every material respect is not borne out by the record before us. The cautionary rule should not displace common sense. See *S v Sauls* 1981 (3) SA 172 (A) at 180E-G. The complainant's evidence on the critical events of 6 and 7 February 2021 was clear and consistent in every respect material to the indictments. In the face of rigorous cross-examination, her evidence remained coherent throughout, and it did not suffer from internal contradictions or defects of any material nature (or effect). In the circumstances, the magistrate was, understandably so, satisfied that the complainant told the truth. As such, her evidence was credible and reliable to sustain a conviction for all.

[68] Save for the appellants' reliance on inconsistencies with the complainant's prior police statement, an issue discussed earlier in this judgment (see paragraphs [42] to [53] above), I am unable to find any justifiable basis to criticise the magistrate's rejection of the appellants' defences. Consequently, I find no basis to conclude that the magistrate misdirected himself by convicting the appellants on the evidence of a single witness. I am fortified in this view by reason that the complainant clearly and

unequivocally identified the appellants as the perpetrators of the heinous crimes committed against her.

[69] In casu, there is no dispute that the complainant knew the appellants before 6 February 2021; nor is it disputed that she was acquainted with each of them sufficiently well to be able to identify them; nor is it argued that this is a case of mistaken identity; nor is it argued that she could not have made a proper identification due to, amongst other things, proximity, length of time, lack of opportunity, and/or poor lighting or visibility. See *Moodley and Another v S* (475/2023) [2024] ZASCA 102 (20 June 2024) para 15.

[70] Owing to our courts recognising ‘the fallibility of human observation’ (*S v Mthetwa* 1972 (3) SA 766 (A) at 768A), evidence of identification is approached with some caution. However, this ‘must not be allowed to displace the exercise of common sense’ (*R v Bellingham* 1955 (2) SA 566 (A) at 569). It is not enough for an identifying witness to be honest. The reliability of an identification must be tested against other relevant factors too (such as, lighting, visibility, proximity of the witness, and opportunity for observation). See *S v Mthetwa* supra at 768A - C.

[71] In casu, the complainant was kidnapped and sat in the motor vehicle in between four of the appellants. Cammy sat in the front seat. The complainant was in very close proximity to each of the appellants. Thus, she was able to see and identify them. This continued at Wolfgat. Ricky, Zidane, and Cammy were all on top of the complainant when they raped her. Pilo and Chucky held the complainant by her feet and hands respectively. The complainant watched as they all left on the Saturday evening, and

then had ample time and opportunity to observe them again on the Sunday evening before she was freed.

[72] As regards identification, the following dictum was endorsed in *Arendse v S* (089/2015) [2015] ZASCA 131 (28 September 2015) para 10:

‘one of the factors which in our view is of greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... *In a case where the witness has known the person previously, questions of identification ..., of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified.* What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made”.’ (footnotes omitted) (my emphasis)

[73] In *Abdullah v S* (134/2021) [2022] ZASCA 33 (31 March 2022) para 13, the SCA pointed out that when an eyewitness identifies a person known to him, then ‘it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction.’ The SCA went further and held ‘that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate’. This is instructive here.

[74] For all these reasons, I would dismiss the appeal against the appellants’ convictions. I now turn to deal with the appeal against the sentences imposed a quo.

Evaluation of the ground of appeal against sentence

[75] Appellate courts may not usurp the sentencing discretion of a trial court. See *S v Malgas* 2001 (2) SA 1222 (SCA) para 12. There are instances where an appellate court may interfere with a sentence. See *Nabolisa v S* 2013 (2) SACR 221 (CC) para 22. Various tests have been formulated to assess if interference may occur. These include, determining if the reasoning of a trial court is vitiated by misdirection; or determining if the sentence imposed is startlingly inappropriate or induces a sense of shock; or determining whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed.

[76] Regardless of which formulation is used, the true objective of the enquiry on appeal remains constant. The enquiry seeks to assess whether there was a proper and reasonable exercise of the discretion bestowed upon the court which imposed sentence. See *Kgosimore v S* 1999 (2) SACR 238 (SCA) para 10. A trial court either exercises its sentencing discretion judicially and properly, or it does not. If it does, then a court of appeal has no power to interfere; if it does not, then interference is justified.

[77] Owing to the applicable test as formulated in the preceding paragraph, the starting point must be a consideration of the magistrate's reasons for imposing the sentences that he did. If his reasons are flawed to the extent that his sentencing discretion can be said to have been exercised injudiciously, then interference on appeal would be warranted. If not, then the appeals against each sentence imposed fall to be dismissed.

[78] The magistrate's judgment on sentence reveals that he considered the applicable legal principles pertaining to sentencing an accused. He discussed various well-known judgments on sentencing, as well as considered the statutory provisions pertaining to minimum sentences for rape. On appeal before us, there was no suggestion that the magistrate's understanding or application of the applicable principles was flawed. The kernel of the argument is simply that the magistrate exercised his discretion improperly on the facts, including his decision that none of the appellants showed substantial and compelling circumstances for purposes of deviating from the minimum sentence regime.

[79] I disagree with the submission that the sentences imposed are disproportionate to the crimes, the criminal, and society's interests. The punishment imposed fit the crimes involved and the criminals who perpetrated them. In accordance with *S v Malgas* supra para 25, the magistrate considered the traditional *Zinn* triad (namely, the personal circumstances of each accused, the nature and gravity of the offences, and the interests of society). He then measured the cumulative effect of all relevant aggravating and mitigating factors against the barometer of substantial and compelling circumstances. He concluded that a deviation from the ordained prescribed minimum sentence is not justified in relation to the appellants, or any among them. On the record before us, that discretion was exercised judiciously after relevant facts were considered. The magistrate did not err.

[80] The appellants' counsel urged us to remember the following sage words by the apex court in *S v Dodo* 2001 (3) SA 382 (CC) para 38:

‘Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.’ (footnotes omitted)

It is the appellants who ignored these sentiments and the spirit of humaneness underlying them. The appellants preyed on the complainant. She was an object used to satisfy their lust for sex, and to exert the power of a gang over a defenceless woman. They targeted her while she walked alone down a street at night in her neighbourhood, a place where she ought to feel safe. See *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 16.

[81] On 6 to 7 February 2021, the appellants treated the complainant with utter cruelty. After kidnapping her from the street, they drove her to a secluded place in the bush specifically chosen by them where they could, undisturbed, have their way with her as they saw fit. At Wolfgat, the complainant was thrown to the ground; stripped naked; held down with force; then her dignity, privacy, and bodily integrity was brutally violated by gang who committed multiple acts of rape. The complainant screamed, but to no avail.

[82] To add considerable pain to the psychological injury, the complainant was then tied to a tree like a dog; left in the bush overnight, all alone, cold, scared, and without any food to eat or water to drink. She went hungry for an entire Sunday. The complainant cried and shouted, but no one heard her screams. She was traumatised. On the next evening, her captors returned; and the nightmare of the previous evening started all over again. The complainant was raped. She was forced to suck Zidane’s

penis (referred to by her as his 'thing'). The other appellants watched her suffering and be degraded for their pleasure.

[83] The circumstances of this case fall squarely within the purview of the legislated minimum sentence regime which should ordinarily be imposed. A minimum sentence should not be departed from lightly, or for flimsy reasons which cannot withstand scrutiny. See *S v Malgas supra* paras 8 -10; *S v Dodo supra* paras 11 and 40. The trial court held that there were no factors which constitute substantial and compelling circumstances that would justify deviating from the legislatively ordained minimum sentence of life for any of the appellants. This decision is unassailable on the facts of this case.

[84] The magistrate justifiably held that the aggravating considerations in casu merit a life sentence. The appellants, acting in concert, did not display an iota of sympathy towards the complainant. They abused their power over her. They humiliated and dehumanised her in very gruesome and brutal ways.

[85] The multiple gang rapes suffered by the complainant rank among the worst category of rape. See *S v Mahomotsa supra* para 17. To aggravate matters, the rapists are not strangers. They are men from the complainant's community whom she trusted. Therefore, she spoke to Pilo when the motor vehicle which followed her on a quiet road late at night stopped beside her. The appellants betrayed the complainant's trust when they first kidnapped her, and later raped her.

[86] The appellants were cunning in their approach to the complainant. They kidnapped her and then took her deep into the bush at Wolfgat. They held her captive for about 24 hours; and in appalling conditions. During her captivity, the complainant suffered multiple rapes. She endured cruel, degrading, and dehumanising treatment.

[87] The complainant fought hard to protect her dignity and bodily integrity from being violated by a gang. She fought so hard that it took Pilo and Chucky to restrain her. This enabled the vaginal rapes to occur on 6 February 2021 – first by Ricky; then by Zidane; and, finally, by Cammy.

Order

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

“The appeal against the conviction and sentence is dismissed.”

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

G. DA SILVA-SALIE

JUDGE OF THE HIGH COURT

Appearances:

For appellants: M Calitz

Instructed by: Legal Aid South Africa, Cape Town Justice Centre

For respondent: EA Kortje

Instructed by: Office of the Director of Public Prosecutions, Cape Town.