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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Reportable/Not Reportable

Case No: AR335/23

In the matter between:

PHUMLANI NZEKE MNDAWENI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Vryheid (Mr L B Phoswa sitting as court of first instance):

1. The appeal against conviction and sentence is dismissed.

JUDGMENT

Marion AJ (Poyo Dlwati JP concurring):

Introduction

[1] This is an appeal against the conviction and sentence of the appellant, who was convicted of two counts of rape in the Regional Court, Vryheid. The appellant was sentenced to life imprisonment on each count of rape after the court *a quo* found no substantial and compelling circumstances to deviate from the prescribed minimum sentence contemplated by s 51(1), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). By virtue of the provisions of s 309(1)(a) of the Criminal Procedure Act 51 of 1977, the appellant exercised his automatic right of appeal to challenge both his conviction and sentence. The appellant is represented by Ms Citera and the State is represented by Mr Sishi.

The facts

[2] The State called five witnesses and the defence called two witnesses. The complainant was 10 years old at the time of the commission of the offences. The complainant testified that on 25 October 2011 and 26 October 2011, the appellant, known to her as Uncle Nzeke, raped her.

Ad count one

[3] On 25 October 2011, at approximately 18h30, the complainant was at the Mndaweni homestead with her friend, N[...]. This homestead is the home of the appellant. The appellant called the complainant and gave her money to go to the shop and buy tobacco for him. Upon her return, the appellant called her and told her to bring the tobacco to him in his bedroom. The appellant was alone in his bedroom and there was no one in the main house as 'N[...]' her friend, had exited the house. The appellant was standing next to the door, closed the door and ordered her to undress. The complainant refused and the appellant pushed her onto the bed. She fell on the bed onto her back.

[4] The appellant lowered his pants, removed her skirt and underwear and the complainant cried. The appellant covered her mouth with his hand and pushed her thighs apart. The appellant thereafter inserted his penis into her vagina. The complainant testified that it was very painful. The appellant made up and down movements and after some time stopped and told her to dress and go home. At this stage, there were children present in the kitchen and he made the complainant exit the house through the bedroom window. Prior to her leaving, the appellant threatened

the complainant that if she reported what happened, he would kill her. Upon returning to her home, she found her grandmother asleep, and she did not report what had happened to her aunt for fear of being beaten by her.

Ad count two

[5] On 26 October 2011, at approximately 19h00, the complainant was at her home. N[...] and M[...] came to her home to inform her that the appellant was calling her. Reluctantly, she went to the appellant's homestead and found him in his bedroom. The appellant closed the door and told her to go to the bed. For fear of being killed, she obliged. The appellant ordered her to lie face down and lowered her jeans and underwear to her feet. The appellant did the same with his pants and underwear. The complainant was crying. The appellant got on top of her from behind and inserted his penis into her anus. The complainant felt pain in her anus. The appellant made up and down movements and after some time stopped and told the complainant to dress.

[6] As the appellant was trying to get the complainant to exit his house through the window, the complainant's friend, Ms N[...] S[...] (Ms N[...]) who was standing outside her home, saw the complainant. The appellant immediately pulled the complainant back into the bedroom and closed the window. The appellant thereafter told the complainant to leave his home via the kitchen. Upon her return home, she was questioned by her grandmother about her whereabouts. The complainant lied to her and responded that she was coming from S[...]’s home. At the time, Ms M[...] M[...] S[...] (Ms S[...]), the grandmother of Ms N[...], entered the complainant's homestead and questioned her grandmother about the complainant's whereabouts.

[7] The complainant's grandmother responded that the complainant had informed her that she was at S[...]’s homestead. Ms S[...] refuted this and stated that the complainant was lying as she and Ms N[...] had seen the complainant by the window at the appellant's homestead. Her grandmother questioned her as to what she had been doing there. The complainant was afraid to respond to her grandmother because the appellant had threatened to kill her. The complainant testified that whilst exiting the bedroom window, she did want Ms N[...] and Ms S[...] to see her, and she tried to call out to them, but the appellant pulled her back into the bedroom.

[8] Ms S[...] and Ms N[...] corroborated the complainant's version and each other. Ms N[...] testified that she saw the complainant moving up and down in the appellant's bedroom. Thereafter, she saw the complainant at the window about to

jump out. The appellant was standing behind the complainant and she observed the appellant pulling the complainant back. She could see clearly as the appellant's bedroom light was on. Under cross-examination, Ms N[...] confirmed that she saw the appellant and the complainant clearly as nothing obstructed her view and her home was close to the appellant's.

[9] Ms S[...] testified that on 26 October 2011, at approximately 19h00, Ms N[...] had gone outside to throw away water. She quickly entered the house and asked her to come and see. Ms S[...] went out to the side of the house where Ms N[...] had come from and saw the complainant at the appellant's room wanting to come out of the window. Ms S[...] stated that she went straight to the complainant's home and found the complainant with her grandmother. She further testified that she told the complainant's grandmother to enquire from the complainant as to where she had been. The grandmother responded that she told her that she was coming from her friend's house where she went to fetch her exercise book. Ms S[...] told the grandmother that the complainant should be chastised for lying as she saw her in the appellant's room attempting to jump out through the window.

[10] The complainant's grandmother, Mrs L[...] E[...] J[...] (Mrs J[...]), testified that on 26 October 2011, at about 19h30, she sent the children to look for the complainant at the Mndaweni residence. A short while later, the complainant entered and told her she was at the Sibisi house. Ms S[...] then entered and enquired where the complainant was coming from. Ms S[...] informed her that she saw the complainant trying to exit the window of the appellant's home. Ms S[...] then left. On 27 October 2011, Mrs J[...] requested her neighbour, Mrs I[...] S[...] S[...] (Mrs S[...]) to question the complainant about the truth of her whereabouts, as when she questioned the complainant, the complainant only cried. Mrs J[...] was an unsophisticated witness. Mrs S[...] confirmed to Mrs J[...] that the complainant was sexually assaulted by the appellant. Mrs J[...] reacted by crying.

[11] Mrs S[...] testified that on 27 October 2011, as per the request of Mrs J[...], she questioned the complainant as to what she was doing in the appellant's room and climbing out of the window. After some crying, the complainant reported that the appellant had raped her by putting his penis into her vagina and she was afraid to tell

anyone as he had threatened to kill her. Mrs S[...] thereafter reported the rape to the complainant's family. The complainant did not report the first incident of rape to her. The complainant had testified that she did not report to Mrs S[...] about the first incident of rape nor the details of the second rape as she felt ashamed.

[12] The matter was thereafter reported to the police and statements were taken. The complainant was also examined by a doctor whose name was not clear from the record. Although the J88 medico legal report is not part of the record before us, it was admitted into evidence by consent, and it was common cause at the trial that the complainant had indeed been sexually penetrated. The doctor had recorded in the J88 form the extent of the complainant's injuries, including tears in the hymen at three o'clock and nine o'clock and a discharge. That, in essence, was the state's case.

[13] The appellant testified that on 25 October 2011, at about 18h30, he was at home with 12 family members. He denied raping the complainant and stated that her testimony was all lies. The appellant said that on 26 October 2011, at 19h00, he was at home with all his family members. He thus placed himself at his home where the rapes of the complainant took place. He denied raping the complainant or calling for her. As an afterthought, in his evidence in chief, he testified that Ms N[...] and Mrs S[...] made the story up to get even with him for refusing to attend to a plastering job. This was, however, never put to the witnesses. He further testified that the relationship between the complainant's family and him was not good, as they considered him to be poor. He also testified that Ms S[...] was falsely incriminating him, as for some time, they were not on speaking terms. These statements were never put to the relevant witnesses. The appellant called Mr Njabulo Mkonsa as a witness, but he could not recall the events of 25 October 2011.

Analysis

[14] In this appeal, the appellant contended that the court *a quo* erred in convicting him, as the state had not proved beyond reasonable doubt that he had raped the complainant on both occasions. The appellant submitted that the court *a quo* failed to consider the cautionary rules when assessing the evidence of the complainant as the complainant was a single witness in relation to the two incidents.

[15] The appellant in his heads of argument stated that the complainant had failed to report the rapes and that she had lied to her grandmother. This argument was also canvassed by Ms Citera during argument. In *South African Criminal Law and Procedure*,¹ the following is stated:

‘It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant. But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age.

The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.’ (Footnotes omitted.)

The appellant’s arguments are baseless in light of the fact that the complainant was 10 years old at the time of these offences and that the appellant had threatened to kill her if she reported his actions.

[16] In *S v Vilakazi*,² the court stated that ‘reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded’. Mr Sishi correctly pointed out that the complainant respected the appellant who she considered an ‘uncle’. That would have been the reason that she returned when called by the appellant to come to his home the next day. It was also clear from her evidence that she was afraid of the appellant, as he had threatened to kill her.

[17] In *S v Dyira*,³ the court held that:

‘The requirement in such a case is, as always, proof of guilt beyond reasonable

¹ J R L Milton *South African Criminal Law and Procedure - Volume II Common-law crimes* 3 ed (1996) at 461.

² *S v Vilakazi* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 19.

³ *S v Dyira* 2010 (1) SACR 78 (ECG) (Dyira) para 6.

doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda* 1951 (3) SA 158 (A) at 162E - 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt *Law of Evidence* 4-7).'

[18] In my view, the court *a quo* correctly cited the principles from the applicable case law relating to both a single witness and a child witness. It was aware of the dangers of convicting on the evidence of a single witness, as this appears from the judgment. In *Dyira*⁴ the court stated:

'In the ordinary course:

- (a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;
- (b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all

⁴ *Dyira* para 10.

material respects. Here the delay of 17 weeks in making a complaint must be regarded as a material defect in the evidence;

(c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt. Here there was no corroboration;

(d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence (*S v Artman* 1968 (3) SA 339 (A) at 340H). This is the route which the State must take to support this conviction.'

Holmes JA went on to say in *S v Artman and Another* that 'the exercise of caution must not be allowed to displace the exercise of common sense'⁵

[19] In most rape and sexual assault cases, the complainant is a single witness. In *Stevens v S*⁶ the court stated:

'In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well- established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.'

In the present case, the court *a quo* correctly found that the complainant answered all the questions put to her without hesitation and with ease. In my view, she was an honest and reliable witness.

[20] Corroboration in matters like these is not a strict requirement. However, in *casu* the complainant's version is corroborated in material respects by Ms N[...] and Mrs S[...]. I am of the view that the complainant testified in a satisfactory manner in all material respects. The court *a quo* correctly found that the cautionary rule was applicable in assessing the complainant's and Ms N[...]s evidence. The court *a quo* carefully scrutinised the complainant's evidence which was given in detail. The

⁵ *S v Artman and Another* 1968 (3) SA 339 (A) at 341C-D.

⁶ *Stevens v S* [2005] 1 All SA 1 (SCA) para 17.

complainant's evidence in respect of the incident on 26 October 2011 was further corroborated by Ms N[...] and Ms S[...], who saw the complainant attempting to exit the appellant's bedroom through the window. The evidence of the first report, Ms S[...], was honest and reliable. She answered all questions in a satisfactory manner. The injuries on the J88 form further corroborated the complainant's evidence of being raped.

[21] The evidence tendered by the defence witness, Mr Mkonsa, did not assist the appellant in any way. The appellant's version was far-fetched, made up and was correctly rejected as false. Having regard to the totality of the evidence, I am of the view that the court *a quo* correctly rejected the appellant's version. The appeal against conviction on counts 1 and 2 must accordingly fail.

Ad sentence

[22] The appellant submitted that the court *a quo* erred in finding that no substantial and compelling circumstances existed to impose a lesser sentence than the minimum prescribed by the legislature. The appellant further submitted that the court *a quo* ought to have placed greater emphasis on the following facts namely, that the appellant was a 42-year-old first offender, he had no history of violence, he did odd jobs earning the sum of R750 every two weeks, and that he had spent 19 months in custody awaiting finalisation of his trial. Ms Citera argued that the appellant's previous conviction in 2005 for abuse of dependence-producing substance was unrelated. She submitted that the court *a quo* failed to attach due weight to the appellant's personal circumstances. In the appellant's heads of argument, it was argued that the fact that the appellant spent 19 months awaiting trial, taken together with his personal circumstances, constituted substantial and compelling circumstances to deviate from the minimum sentence.

[23] The respondent argued that the court *a quo* had carefully considered the appellant's personal circumstances. Mr Sishi also contended that the time spent in custody is not a factor to be regarded as substantial and compelling for a court to

deviate from the minimum sentence. He referred the court to *S v Ludidi and Others*,⁷ where the court stated:

‘A court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person’s life. It cannot be “reduced” by the period spent in custody awaiting trial and it would be improper for a court to take into account the possibility of parole.’ (Footnote omitted.)

Mr Sishi argued that the court *a quo* correctly found that there were no factors before it to justify a departure from the prescribed minimum sentence.

[24] Section 51(1) of the CLAA requires a prescribed sentence of life imprisonment to be imposed for a conviction of rape where the complainant is raped more than once or where the complainant is a child under the age of 16 years,⁸ unless in terms of s 51(3)(a) of the CLAA, substantial and compelling circumstances exist that justify a lesser sentence. The complainant in this matter was 10 years old and raped on two occasions.

[25] *Malgas v S*⁹ is the *locus classicus* of what constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. The court stated the following:

‘If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’

[26] In *Malgas*,¹⁰ the court further stated:

‘[8] ... 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

⁷ *S v Ludidi and Others* [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) para 14.

⁸ This was the stated age in the CLAA at the time when the offence was committed. The age has now been increased to 18 years following amendments by the Criminal and Related Matters Amendment Act 12 of 2021.

⁹ *Malgas v S* [2001] 3 All SA 220 (A) (*Malgas*) para 25.

¹⁰ *Malgas* paras 8 and 9.

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...

[9] ...The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand 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.'

[27] It is trite that a court of appeal can only interfere with a sentence handed down by the court *a quo*, if there was a material misdirection by the trial court or if the sentence was shocking or disturbingly inappropriate.¹¹

[28] In *S v Jansen*,¹² the court stated the following:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. . . It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and

¹¹ Malgas para 12.

¹² *S v Jansen* 1999 (2) SACR 368 (C) at 378g-379b.

democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

In this case, the complainant was 10 years old, and the appellant was someone she respected and looked up to as an 'uncle'. The appellant took advantage of his position when he raped the complainant twice, and this was an aggravating factor.

[29] I can find no reason to interfere with the sentence imposed by the court *a quo* as there is no misdirection on its part. I am of the view that the time spent by the appellant awaiting trial is not a substantial and compelling circumstance to allow the court to deviate from the prescribed minimum sentence. The prescribed minimum sentence imposed in this case does not result in an injustice to the appellant. The sentence of life imprisonment in the circumstances of this case is not 'shocking', 'startling' or 'disturbingly inappropriate'. The court *a quo* further fulfilled the objectives of sentencing namely, retribution, deterrence, prevention and rehabilitation in its evaluation on sentence. This type of sentence will prevent and deter the appellant from committing such an offence again and will send a clear message to all like-minded people wanting to commit offences like these against children.

Order

[30] In the result:

1. The appeal against conviction and sentence is dismissed.

**MARION AJ
POYO DLWATI JP**

Date of Hearing: 15 August 2025

Judgment: 22 August 2025 Appearance:

Applicant: Ms TM Citera

Instructed by: Legal Aid South Africa

Pietermaritzburg

Respondent: Mr M Sishi

Instructed by: Director of Public Prosecutions Pietermaritzburg