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

Reportable/Not Reportable

Case No: AR409/23

In the matter between:

VINCENT NDODO NDLOVU

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Ulundi (Mr M E Xolo sitting as court of first instance):

The appeal against sentence and conviction is dismissed.

JUDGMENT

Marion AJ (Nkosi AJP concurring):

Introduction

[1] This is an appeal against the conviction and sentence of the appellant who was convicted of one (1) count of rape in the Regional Court Ulundi, by the learned magistrate, Mr ME Xolo. The appellant was sentenced to life imprisonment after the trial court 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 CPA), 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 Ms *Mlondo*. The complainant, Ms TNN, was 10 years old at the time of the commission of the offence. The appellant pleaded not guilty and raised an alibi defence. His version was that he was at work on the day of the incident and therefore could not have raped the complainant. The appellant was the uncle of the complainant, being her mother's brother whom she referred to as uncle 'Ndodo'. The appellant, the complainant's mother and the complainant once stayed together in the same homestead. In June 2013 the complainant and her mother moved out of that homestead.

The evidence

[2] On 2 August 2013, before 8.00 am, the complainant was on her way to school with her youngest sister. She took the foot path that she always used. At some stage along the way, her sister waited for her friends whilst the complainant continued to walk to school. As the complainant passed a stream in a bushy area, she bent down to pull up her socks. The appellant grabbed her from behind and pulled her out of the footpath to a concealed spot. He made her lie down on her back and pulled up her tunic dress. He removed her underwear and undressed himself by removing his trouser and underwear. The appellant thereafter raped the complainant penetrating her vagina with his penis. After he finished, he left the complainant at the scene. The complainant dressed up and went to school. The complainant testified that the rape was painful, and she cried. At school the complainant was uneasy because of what had happened however, she did not report the incident to anyone. She felt ashamed.

[3] After school, she reported the incident to her mother. However, it transpired that her mother did not hear her and sent her to call L[...]. Soon after the incident the

complainant experienced pain in her private parts and could not walk properly. She also fell ill with the flu. Due to being ill in school, she was taken to the local clinic. Nurse Jeffrey Vilakazi treated the complainant and testified that she was brought to the clinic by her teacher, Ms Gumede. The complainant informed the nurse that her vagina was painful and thereafter disclosed that her uncle had raped her on Friday. The matter was reported to the police and the complainant's mother testified that she only found out about the rape when the police brought her home on 7 August 2013. The complainant at that stage confirmed to her mother that the appellant had raped her. The complainant was thereafter taken to the Nkonjeni Hospital to be examined.

[4] The complainant was examined by Dr Mhlongo. The J88 was handed in by consent. Under 'History' the doctor noted that the complainant had notified him that she was raped by her uncle on 2 August 2013. The doctor's findings recorded vaginal tears at 6 o'clock and 9 o'clock. There were no signs of bleeding.

[5] The appellant testified in his defence and called his sister, Ms Thabisile Dladla, as a witness. The State objected to her evidence on the basis that it was hearsay evidence. The magistrate ruled that her evidence was hearsay and inadmissible. The magistrate did not attach any weight to Ms Dladla's evidence when evaluating the evidence. The appellant denied that he raped the complainant and insisted that he was at work on the day in question. He denied that he met the complainant on the morning of 2 August 2013. The appellant was unable to give details of what transpired on the day of the rape aside from testifying about what he usually did commuting to and from work. At the time of the incident the appellant was employed as a casual worker for a contractor building government toilets. He had been employed for a period of two months prior to the incident for that contractor. The appellant normally left home at 6.00 am and would travel either by motor vehicle or on foot to work. If he worked in the local area he would walk to work. He would travel by motor vehicle if he was summoned to work outside the area. The appellant did not recall the name of the driver of the motor vehicle that came to fetch him and take him to work.

Ad conviction

[6] The appellant disputed the issue of identity. Ms *Citera* argued that the complainant was accosted from behind and this would have made it difficult to see her perpetrator. Counsel for the appellant argued that the learned magistrate failed to consider the cautionary rules when assessing the evidence of the complainant. The complainant was a single witness in relation to the rape. The appellant stated that the complainant's failure to report the rape timeously was also an issue that needed to be addressed. 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.

[7] Counsel for the respondent argued that the court *a quo* had not misdirected itself. She stated that in terms of s 208 of the CPA an accused person may be convicted on the evidence of a single competent witness. She further submitted that the court *a quo* gave a detailed and well-reasoned judgment wherein the magistrate analysed the evidence of the complainant and was alive to the fact that the cautionary rule had to be applied. Ms *Mlondo* argued that the allegation of rape was supported by the findings recorded in the J88. She further stated that both the complainant and her mother testified that on the date of the incident L[...] was called. Hence giving credence to the version that the complainant did report to her mother, who did not hear her. The complainant subsequently reported the rape to Jeffrey Vilakazi, the nurse at the local clinic. She further submitted that the period between the rape and reporting did not negate prosecution against a perpetrator.

The law

[8] *Milton*,¹ in *South African Criminal Law and Procedure*, wrote:

'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

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

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.)

[9] Section 58 of the CLAA provides for ‘Evidence of previous consistent statements, and states:

‘Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.’

[10] Section 59 of the CLAA is titled ‘Evidence of delay in reporting, and provides that:

‘In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.’

[11] In *Monageng v S*,² Maya JA stated

‘It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure.

...

Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant’s behaviour and her explanation for not immediately reporting the appellant is plausible.’

[12] In *S v Vilakazi*³ the court stated that there is a ‘reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly

² *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) para 24.

³ *S v Vilakazi* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 19.

recognised fact. It is also generally accepted that with young children the reluctance is compounded.’

[13] In assessing the applicability of the cautionary rule, the Supreme Court of Appeal in *Maila v S*,⁴ in referring with approval to *Woji v Santam Insurance Co Ltd*,⁵ in terms of its discussion on s 208 of the CPA stated

‘[17] . . . 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*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

“*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.*” (Emphasis added.)

[18] This Court 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.’ (Emphasis in original.)

⁴ *Maila v S* [2023] ZASCA 3 (*Maila*).

⁵ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.

Analysis

[14] The only issue in dispute was the identity of the person who raped the complainant. It was common cause the complainant was raped. The medical evidence of Dr Mhlongo as recorded in the J88, corroborates the evidence of the complainant in respect to the rape. In respect of the aspect of identity, the complainant was clear in identifying the appellant as the perpetrator, as she knew him well and had previously lived with him. Although she was initially accosted from the back, he had made her lie down on the ground and she would have had ample opportunity to clearly identify him. It was broad daylight and the appellant's face was uncovered. 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 evidence. The court *a quo* carefully scrutinised her evidence which was given in detail. The appellant's alibi defence was weak although I accept that there is no onus on him to prove his innocence. He was, however, a poor witness.

[15] In my view, the court *a quo* correctly cited the principles from the applicable case law relating to both a single witness and child witness. The learned magistrate was aware of the dangers of convicting on the evidence of a single witness, as this appears from his judgment. In the case of *S v Dyira*,⁶ in reference to *S v Artman*,⁷ 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 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;

⁶ *S v Dyira* 2010 (1) SACR 78 (ECG) para 10.

⁷ *S v Artman and Another* 1968 (3) SA 339 (A) (*Artman*).

(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 *Artman* that ‘the exercise of caution must not be allowed to displace the exercise of common sense’.⁸

[16] In most rape and sexual assault cases the complainant is a single witness. In *Stevens v S*⁹ 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 ease. In my view, she was an honest and reliable witness. I find that the evidence of the complainant is trustworthy and, thus, satisfactory beyond reasonable doubt.

[17] Corroboration in matters like these is not a strict requirement. However, in *casu* the complainant’s version is corroborated in material respects by her mother, Jeffrey Vilakazi and the J88. The appellant’s version of being at work was made up and must be 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 must accordingly fail.

Ad sentence

[18] 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,

⁸ *Artman* at 341C-D.

⁹ *Stevens v S* [2005] 1 All SA 1 (SCA) para 17.

that the appellant was a 39-year-old first offender, his highest level of education was grade 5, he was employed as a contract worker and earned an income of R1 500 per month. The appellant supported his family, including his two nieces. The appellant submitted that the sentence of the court *a quo* was disproportionate to the circumstances. In the appellant's head of argument, it was argued that there are degrees of seriousness in rape cases, and this was not the worst rape case.

[19] The respondent argued that the learned magistrate had carefully considered the appellant's personal circumstances. Ms Mlondo stated that the court *a quo* correctly found that there were no factors before it to justify a departure from the prescribed minimum sentence. She argued that there was no misdirection by the court *a quo* in sentencing the appellant to life imprisonment.

[20] Section 51(1) of the CLAA requires a minimum prescribed sentence of life imprisonment to be imposed for a conviction of rape include where the complainant is raped more than once or where the complainant is a child under the age of 18 years, unless in terms of s 51(3)(a), substantial and compelling circumstances exist that justify a lesser sentence. The complainant in this matter was 10 years old and raped by her uncle, someone she would have trusted and in a position of authority over her.

[21] *S v Malgas*¹⁰ 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.'

[22] In *Malgas*¹¹ the court further stated:

¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*) para.

¹¹ *Malgas* para 8 and 9.

[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 *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.'

[23] 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.¹²

[24] In *S v Jansen*¹³ 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 A aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

¹² *Malgas* para 12.

¹³ *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

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, and this was an aggravating factor.

[25] With regards to the argument requiring the court to consider that there are differing degrees of rape, the following cases are important to note: in *Khoza v S*¹⁴ the court stated the following:

'the submission that there are degrees of rape ignores that rape in itself is a most heinous act that equates with the most debasing and invasive attacks on a person's bodily integrity and mental wellbeing. Worst still with child rape.'

[26] Khampepe J in a concurring judgment in *S v Tshabalala and Another*¹⁵ emphasised that:

'Words matter. Words give a construction of a certain viewpoint of the world, and this viewpoint tends to be gendered. Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another, without consent, it must be buttressed that the victim does not experience rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation."' (Footnotes omitted.)

[24] In response hereto the court in *Leburu v S*¹⁶ stated the following:

'Having regard to the sentiments expressed by Khampepe J in *Tshabalala, Ntuli*, the submissions that the rapes were not the worst kind should be put paid to.'

[25] The court in the following Western Cape judgment did not agree with this statement, and in *Botsane v S*¹⁷ said:

'Rape on its own is violence. Rape by its very nature is a violent crime as it involves threats or force. I cannot fathom how it can be said that the lack of physical injury in a rape of a six-year-old is mitigating.'

¹⁴ *Khoza v S* [2022] ZAKZPHC 30 para 25.

¹⁵ *S v Tshabalala and Another* [2019] ZACC 48; 2020 (2) SACR 38 (CC) para 70.

¹⁶ *Leburu v S* [2022] ZANWHC 57 para 24.

¹⁷ *Botsane v S* [2023] ZAWCHC 131 para 33.

[26] Matlala in an article¹⁸ expressed that:

‘The language used by judges in rape adjudication often mirrors and perpetuates detrimental rape myths. Prevalent rape myths include the myths that: sexual assault is mostly committed by strangers, that “real” rape involves violent force or the use of a weapon, that rape victims will always have physical injuries, that women “ask for” rape in some way through their actions or behaviour, and that if rape did happen, the complainant would always report it as soon as possible.’ (Footnotes omitted.)

She further went on to write that:¹⁹

‘The judiciary has a responsibility to establish precedents that convey a “clear and unequivocal

Pronouncement” of its dedication to formulating and enforcing robust legal principles aimed at combating gender-based violence. This constitutional mandate was notably emphasised by the Supreme Court of Appeal (SCA) in the case of *S v Chapman*, where the court articulated

that “the Courts are under a duty to send a clear message to the accused, to other potential rapists, and to the community”. The court further asserted its commitment to safeguarding “the

equality, dignity, and freedom of all women”, vowing no leniency towards those threatening these rights. To fulfil its constitutional mandate, it is imperative for the courts to eliminate erroneous and uninformed perceptions surrounding rape. This will require judges to adopt a feminist jurisprudential framework, which is in accordance with their constitutional duties to foster gender equality, safeguard women’s rights to personal freedom and security, and uphold their dignity.’

In my view and considering the above, the argument by the appellant that there are degrees of seriousness in rape cases, and this was not the worst case of rape, cannot stand. Rape is a serious offence and the effect that it would have emotionally and psychologically on a defenceless minor is one that the legislature would have taken into account when prescribing the minimum sentence. Hence, this argument falls to be rejected.

¹⁸ R Matlala ‘Rape myths and the language of the law: The need for a feminist jurisprudential approach’ (2024) 14 *Constitutional Court Review* 137 at 139.

¹⁹ Ibid at 141.

[27] The rest of the factors listed in mitigation are not such that they cumulatively amount to substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum. I can find no reason to interfere with the sentence imposed by the court *a quo* as there is no misdirection on the learned magistrate's part. 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'. I agree with the respondent's argument that the court further fulfilled the objectives of sentencing namely, retribution, deterrence, prevention and rehabilitation in his evaluation on sentence. This type of sentence will prevent and deter him from committing such an offence again and will send a clear message to all like-minded people wanting to commit offences like these on children.

Order

[28] In the result:

The appeal against sentence and conviction is dismissed.

Marion AJ

I agree, and it is so ordered

Nkosi AJP

Date of hearing 17 October 2025

Date delivered: 27 October 2025

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