



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

JUDGMENT

Reportable

Case no: A28/25

In the matter between:

NICHOLAS VAN DER SCHYFF

APPELLANT

and

THE STATE

RESPONDENT

Coram: NZIWENI J and MORRISSEY AJ

Heard: 22 August 2025

Delivered: 17 November 2025

Summary: The evidence provided by a child witness should not be disregarded merely because it contains minor inconsistencies or details that may have been influenced by their imagination. This is particularly relevant when those details are not essential to the overall truthfulness of their testimony.

Criminal Procedure – manner in which a child witness is sworn in - section 164 – whether requirements have been met - is determined by the unique facts of each case - what is crucial is that the assessment of a witness's oath's meaning must be evaluated based on the substance of the child's comprehension, not the syntax of their explanation. The focus should be on whether the child genuinely grasps the core moral and legal obligation to tell the truth, rather than their ability to express that understanding using formal or complex language. – subsequent questioning by the lower court revealed that the child did, in fact, understand the fundamental importance of swearing to the truth.

Sentence – No substantial and compelling circumstance – appellant had committed an exceptionally serious abuse of a position of trust. – Section 51 (3) imposes a high threshold – appellant's age- ill-health and difficult past are not sufficient to warrant an alteration of the original sentence imposed by the trial court.

ORDER

The appeal is dismissed.

JUDGMENT

MORRISSEY AJ:

- [1] The appellant appeals his conviction and sentence by the Wynberg Regional Magistrate's Court.
- [2] The Court *a quo* convicted the appellant on a charge of rape, six charges of sexual assault and three charges of exposing or displaying pornography to children. The Court sentenced the appellant to life imprisonment on the rape charge and to five years imprisonment on each of the other nine charges. All sentences were to run concurrently. The Court also made certain ancillary Orders which it is unnecessary to recount in detail. The appellant had an automatic right of appeal in respect of the rape conviction. He was granted leave to appeal in respect of the other charges.
- [3] The complainants were three girls, twin sisters and a friend. They were all minors when they testified in 2023. They testified regarding events that allegedly occurred in 2015, when the twins were nine and the friend would have been about seven years old.
- [4] The essence of their evidence was that the appellant, a friend of the twins' late maternal grandfather, would from time to time take them to his home, play pornographic films and sexually molest them by touching their private parts. One of the twins testified that the appellant raped her on one of those occasions. He was able to do so because he had given some money to the other two children who had gone to buy something at a nearby shop. They testified that when they returned, they had heard their sister/friend crying. It seems they realised

something was wrong and started throwing stones on the roof of the appellant's house.

- [5] It appears that the children reported the molestation to their mothers. Precisely when they did so is uncertain, but it seems it was around the time of the alleged rape in 2015. The mother of the twins testified. She said she reported the matter to the police but it was taken no further. She also said that her mother told her not to press the issue. The mother of the friend did not testify.
- [6] The mother of the twins was told about the rape in January 2021. The matter was reported to the police. The accused was arrested shortly thereafter.
- [7] The appellant testified in his defence. He disputed all the allegations made against him. He said that during 2015 he had not been at home during the days because he was either working as a painter or working with a friend, and only arrived home late in the evenings. He essentially said that the complaints and the twins' mother had concocted a case against him because he had stopped giving the complainants food (something he said he did sometime in 2014), and because in December 2020 he had accused the twins' mother of spending money on "*tik*" (crystal methamphetamine) instead of buying food for her family.
- [8] The Judgment of the Court *a quo* considers the evidence in detail. We have considered the record and have concluded that the findings underlying the convictions cannot be faulted. It is unnecessary to

discuss the Court *a quo*'s reasoning in detail, but we note the following for completeness.

- [9] The complaints were minors when they testified and were testifying about traumatic events that occurred several years earlier, when they were young minors. Only one of the complaints could testify directly to the rape charge. Many witnesses, minors or otherwise, have difficulty recalling factual detail years after the event they testify about, even if they believe that their recall is infallible. This is manifestly a case where the cautionary rule regarding the evidence of child witnesses needs to be carefully applied.
- [10] A review of the evidence reveals various conflicts in the versions of the complainants. Those differences suggest that, although honest, some of the evidence they gave was a case of their youthful imagination filling in uncertainties in their recollection, as opposed to being a “*pure*” recollection of fact.
- [11] For example, it was uncertain whether the children were naked or clothed when the appellant allegedly molested them (or if it was always one or the other). There was also a conflict as to how it came to pass that two of them left the appellant's home before the alleged rape occurred (the overall version was that the girls had become concerned that the appellant was about to molest one of them, and that they had tried to plan a childish means of escape). There was also some uncertainty about the type of food the appellant had served the girls (one said it was always pancakes), the number of times they were

molested, and the events immediately preceding the disclosure of the alleged rape.

[12] While those sorts of uncertainties might result in evidence being rejected in certain cases, this was not one of them. All three children testified clearly and consistently about the core facts relevant to the charges, in particular, that the appellant had them watch pornographic films and that he touched their private parts. The child who said the appellant raped her described the event with the sort of detail one would expect from a person who had endured such a traumatic event. Significantly, her description included details that at her age she would unlikely have known about unless she had experienced them. For example, she explained how she bled as a result of the rape, that the appellant ejaculated on her legs, and that he wiped up the blood and ejaculate with a cloth.

[13] Even at the time she was testifying it appeared she did not understand what semen was. She said that the accused removed his penis from her vagina “... *and then he came on me, on my legs...*”. The following exchange then followed:

“Prosecutor: Now, [witness name], you used the word in Afrikaans, *kom*. Can you just tell us what is *kom*?

Witness: No.

Prosecutor: Okay. When you say no, what do you mean? Is it no, you cannot tell us or no, you do not know?

Witness: I cannot explain what it is.

Prosecutor: Now where did it come from?

Witness: Out of his penis.

Prosecutor: Okay. No, thank you, [witness name].”

- [14] Immediately after this exchange the Magistrate intervened, requesting the witness not to become irritated by the questions she was being asked. Although we obviously did not have the benefit of observing the witnesses, there are several instances in the record where the complainants became emotional when testifying to what the appellant did to them. That emotional response also tends to validate the truth of the events, in our view.
- [15] The child who said she was raped also testified as to the impact the event had had on her. She said that she started cutting herself after the incident, and that she had attempted to commit suicide by overdosing on pills once she discovered that the appellant had been released on bail. While lay witnesses may well be aware of some of the psychological trauma rape can give rise to, that would generally not be the case of minors. None of the evidence regarding self-harm or suicide was challenged by the accused (to be clear, the appellant did challenge the allegations of rape, molestation and displaying pornography).
- [16] For those reasons and the others discussed in the Judgment of the Court *a quo*, we do not consider the evidence of the complainants should be rejected simply because they are child witnesses and because there are indications that some evidence or detail that they gave was likely coloured by youthful imagination. That sort of difficulty might be problematic if the detail was more directly material to the probity of their evidence. That might be the case where, for example, they had

testified as to the appellant was wearing on a particular day, or that they had seen him at a particular place at a particular time, and those facts were critical to securing a conviction against him.

- [17] We have also considered the appellant's evidence and whether it raises a reasonable doubt as to his guilt. In our view it does not. The defence was two-pronged in the sense it consisted of an alibi and a reason why the complainants would fabricate a case against him.
- [18] The alibi is difficult to accept insofar as the appellant suggests that he spent virtually all of 2015 away from his home except in the evenings. We recognise that it was difficult for the appellant to be more specific given that the charge he faced was that he committed certain crimes in 2015. Be that as it may, the complainant who made the allegation of rape says that event occurred on a Sunday. The appellant also did not dispute that the complainants had come to his home in the past, albeit he said that occurred in 2014. The appellant did not call the person he said he had been working with in 2015 to affirm the version that they had spent virtually every day together that year, including weekends.
- [19] Perhaps more significantly is the appellant's evidence as to why the complainants would fabricate the charges levelled against him. He said that he stopped giving the children food in 2014, and that he had made his comment about the twins' mother spending her money on tik at the end of 2020. He surmised that those events had precipitated the fabrication that led to the charges being brought against him.

- [20] A major difficulty we have with that aspect of the case is that the interaction about tik use was never put to the state witnesses, including the person to whom it was allegedly made. It was first mentioned by the appellant when giving his evidence in chief. Given its prominence in the appellant's case, it is highly unlikely that he would not have discussed it with his representative when consulting with her. We are not saying that the interaction did not occur. Rather, we are saying that it seems to have been sufficiently innocuous for the appellant not to have mentioned it to his legal representative as a potential catalyst for the laying of charges in early 2021.
- [21] Absent a trigger event for the charges being laid early in 2021, it is difficult to understand what motive the complainants would have had to fabricate a case against the appellant. He suggested it was because he stopped giving them food, but on his own account that occurred in 2014.
- [22] That version must be contrasted with the evidence of the complainants and the twins' mother. The child who said she was raped said she did not want to tell her mother about the incident for various reasons, including a concern that she would not be believed and that there would be repercussions from the appellant. She explained that she eventually told her mother when she felt she was strong enough to do so, and because she felt anger towards the appellant whom she considered was controlling her life. The other children also expressed a fear of speaking out because of a concern they would be disbelieved and the risk of repercussions. Those are inherently convincing grounds: The

appellant was a family friend who was in a position of trust. Being an adult he also held a position of power over the children.

- [23] We also bear in mind the evidence concerning the friend of the twins telling her older sister she had been molested, that being communicated to her mother, and the evidence from the twins' mother that she too was aware of allegations of molestation (but not rape) prior to the disclosure to that effect in 2021.
- [24] That evidence places the mothers in a poor light: They were alerted to the fact that the appellant had molested their children but took limited steps to intervene. We consider that evidence is important because, if the case against the appellant was a fabrication, it would be strange for the twins' mother not to also fabricate something that placed her in a better light. That she did not do so strongly suggests she was being truthful in her account and, more importantly, that it was not a fabrication.
- [25] We have also discussed the evidence of the complainants regarding the incidents giving rise to the charges. The combination of corroboration and contradiction in their evidence also points away from a manufactured version. Rather, the evidence seems to have been given freely and truthfully (even if some aspects were coloured by imagination, as explained above). A further difficulty with the appellant's version is that there was no challenge to the evidence that the child who claimed to have been raped had committed acts of self-harm after the incident. Her mother also testified to noticing her personality change. Those events occurred after the event and are

inconsistent with a theory that the complaints were fabricated some five years after the incident.

- [26] We have also considered the Court *a quo*'s views regarding the poor quality of the appellant's evidence. While one must be careful of conflating poor evidence with untrue evidence, what is significant is that the appellant asserted a very clear recollection on events that assisted him, and tended to be evasive when issues that might be adverse to him were being explored. That also has some weight that must be taken into account when evaluating the appellant's evidence. As an appellate Court we will also be slow to interfere with findings of credibility made by the Court *a quo*.
- [27] Overall, we do not consider that the appellant cast a reasonable doubt on the evidence of the complainants, at least that regarding the elements of the charges levelled against him.
- [28] A procedural issue we identified on our consideration of the record concerned the manner in which the complainants were sworn in.
- [29] Section 164(1) of the Criminal Procedure Act, 51 of 1977 requires that witnesses who do not understand the nature and import of the oath or affirmation must be admonished by the Court to tell the truth. The subsection is set out below, with emphasis added by us:

“Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or

*making the affirmation: **Provided** that such person shall, in lieu of the oath or affirmation, be **admonished by the presiding judge or judicial officer to speak the truth.**”*

[30] Section 164 must be read in the context of sections 162, 163 and 165, which essentially require evidence in a criminal trial to be given under oath or affirmation, and specify by whom such oath or affirmation may be administered. Evidence that is not given under oath is inadmissible.

[31] There are a number of decisions that consider section 164. They reveal that whether or not the requirements of the section have been met in any given case often dependent on the specific facts before the Court. Two leading decisions that articulate the relevant principles are *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) and *S v Matshivha* 2014 (1) SACR 29 (SCA).

[32] In our view, the key principles can be distilled to the following:

- a. There is a distinction between understanding: (i) what it means to speak the truth, and (ii) the nature and import of the oath/affirmation.
- b. The first distinction needs to be understood in order for a witness to be competent to testify (at least without the intervention of an intermediary).

- c. One can only understand the second distinction if one understands the first. In other words, one can only begin to understand the nature and import of the oath or an affirmation if one understands what it means to speak the truth.
- d. Being distinct enquiries, it is best for a Court to consider them separately.

- [33] For evidence to be reliable it is insufficient for a witness merely to know what it means to tell the truth: Witnesses also need to know that the Court requires them to tell the truth when testifying, and that the failure to do so will have adverse repercussions for them. Taking an oath or affirmation to tell the truth serves that purpose.
- [34] What section 164 contemplates is a witness who, due to tender age or other impediment, cannot understand the concept and significance of an oath or affirmation. In such a case the Court is required to admonish the witness to tell the truth. This is a practical way to ensure the reliability of their evidence, with the admonishment being a substitute for the sobering effect of taking an oath or affirmation before testifying.
- [35] An admonishment will thus typically entail impressing upon the witness the importance of testifying truthfully and that there will be adverse consequences if they do not. The facts of any given case will inform the nature and extent of the admonishment required.
- [36] The following extracts from the transcript reveal the enquiry undertaken by the Court *a quo* in respect of the three complainants in this case. The first extract is the evidence of the twin who alleged she

had been raped by the appellant, the second is the evidence of her sister, and the third is that of the friend. All emphasis is added by us.

[37] The first twin (testimony of 25 July 2023):

“Court: Can you tell me your name please?

Witness [provides name]

Court: **How old are you, [witness name]?**

Witness: **16.**

Court: What is your date of birth?

Witness: The 13th of the ninth month, 2006.

Court: And which **Grade are you in,** [witness name]?

Witness: **Ten.**

Court: Which school?

Witness: [provides name of school].

Court: Sorry? [repeats misheard name of school]?

Witness: [repeats name of school].

Court: [confirms name of school].

Witness: Yes.

Court: Okay. Sorry, you are speaking English now. They said you speak Afrikaans. Is jy meer gemaklik met Afrikaans?

Witness: Ja.

Court: Okay. [witness name], voordat ons begin wil die hof net gou hoor, **weet u wat dit is om die eed af te le?**

Witness: **Nee.**

Court: Het die staatsaanklaer dit nie met u bespreek nie?

Witness: Nee.

Court: Die hof wil vir u insweer, want dit wat u nou gaan getuig moet jy did nou onder eed... **Die hof wil weet of u kan sweer dat u die waarheid gaan praat.**

Witness: **Ja.**

Court: So het u enige beswaar, [witness name], om te sweer dat u die waarheid gaan praat?

Witness: Ja.

Court: Het u a beswaar of nie?

Witness: Nee.

Court: **Verstaan u nou a bietjie beter wat dit is?**

Witness: **Nee.**

Court: **Het u al gesien hoe op n gehoor waar die hof n persoon insweer?**

Witness: **Nee.**

Court: Wat ek gaan doen is ek gaan vra, [witness name], sal u nou sweer die getuienis wat u gaan gee is die waarheid, niks anders as die waarheid, so help u God. Het u dit al vantevore gehoor?

Witness: Nee.

Court: Okay. So dit is wat die hof vir u wil vra, ne, of u die waarheid gaan praat. **So u se u het geen besweer om die eed af te le nie?**

Witness: **Ek verstaan nie nou eintlik nie.**

Court: So die eed, dit is wanneer n persoon sweer.

Witness: Ja.

Court: **Weet u wat dit is om te sweer?**

- Witness: **Ja.**
- Court: As u se so help my, God.
- Witness: Ja.
- Court: Verstaan u? Verstaan u dit?
- Witness: Ja.
- Court: Okay. **So as die hof nou se jy moet die eed afle dan bedoel dit ek gaan vir u vra sal u sweer om die waarheid te praat.**
- Witness: Okay.
- Court: **Nou weet u wat die verskil is tussen die waarheid en n leuen?**
- Witness: **Ja.**
- Court: Wat is die verskil? As u nou... As u iets verkeerd by die skool moet doen, ne?
- Witness: Ja.
- Court: As jy nou vir die juffrou se of jy gaan nie skool toe nie of jy se jy is nou siek and jy is nie siek nie, is dit... En jy vertel vir die skool – jou onderwyser jy was nie by die skool omdat jy siek was, maar jy weet jy was siek nie, is dit n leuen of die waarheid?
- Witness: Dit is n leuen.
- Court: En wat is die gevolg as dit moet gebeur? As hulle nou uitvind jy het gelieg? Is daar ... [tussenbeide]
- Witness: Ek gaan gestraf word.
- Court: Goed. En by die huis, is daar... Jy weet as jy met jou ouers woon – woon jy met jou ouers, [witness name]?
- Witness: Ja.

Court: **En wat is die gevolg as jy n leuen moet vertel?**

Word jy gestraf of wat gebeur?

Witness: **Hulle sal my straf, ja.**

Court: Okay. **So verstaan u nou a bietjie beter wat dit is om die eed af te le?**

Witness: **Ja.**

Court: Die hof wil net basies weet dat dit wat u nou gaan vertel is net die waarheid.

Witness: Ja.

Court: **En dat u ook verstaan is as jy nie die waarheid praat nie, daar kan n gevolg wees?**

Witness: **Ja.**

Court: **Verstaan u dit,** [witness name]?

Witness: **Ja.**

Court: Ms [prosecutor] and Advocate [for the appellant], do you think she sufficiently understands?

Prosecutor: Yes, Your Worship. State confirms.

Counsel: Confirm, Your Worship.

Court: Okay. Goed. [Witness name], kan u u regterhand vir my op plaas asseblief? Hou net jou regterhand op. Ja. So die hof gaan vir u nou insweer, ne? So luister baie mooi. Sal u dan nou sweer dat die getuienis wat u gaan gee is die waarheid, niks anders as die volle waarheid? So help u, God?

Witness: Ja.

Court: Okay. U kan se so help my, God.

Witness: So help my, God.”

[38] The second twin (testimony of 17 October 2023):

Court: Okay, now before we start the Court needs to hear from you; do you have any problem taking the oath? **And the oath means that I will have to then swear you in and you would have to tell the truth. Do you have any objection in doing so? Het jy enige beswaar om die eed af te le?**

Witness: **No.**

Court: No? Okay, **do you understand what it means?**

Witness: **Not really.**

Court: **How old are you?**

Witness: **17.**

Court: Are you at school?

Witness: Not currently.

Court: Okay, which **Grade did you attend and finish?**

Witness: **10.**

Court: Grade 10? **Okay, so the oath, die eed is basies waar die Hof vir u in sweer en dan moet U net sweer dat U et die waarheid gaan praat.**

Witness: **Okei.**

Court: **Verstaan u nou?**

Witness: **Ja.**

Court: **Is U gemaklik on dit te doen?**

Witness: **Yebo.**

Court: Okay. Goed, dankie dan kan U, U regter hand op hou [witness name]. Met jou, with your palm facing to the

screen, and open your hand. There we go, that is how we swear. Okay?

Witness: Right.

Court: Okay so will you swear that the evidence you are about to give is the truth, nothing other than the full truth, so help you God?

[WITNESS NAME]: [admonished] [through intermediary] [through court]

Court: Thank you, you are now sworn in, you can put your hand down now.

Witness: Thank you.”

[39] The friend (testimony of 18 October 2023):

“Court: Good afternoon.

Witness: Good afternoon.

Court: How are you?

Witness: I am alright and you

Court: I am fine, thank you. Ms [witness name], it is the magistrate speaking, Ms Ramos. Before we start with your evidence, the court will just have to swear you in. I will explain what that means. Can you just **tell me how old you are?**

Witness: I am now **15 years old, turning 16 next year.**

Court: Okay, and your full name? Just tell me your full names?

Witness: [provides full name]

Court: So you are 15, turning 16 next year.

Witness: Yes.

Court: Are you at school, [witness name]?

Witness: No, I actually left school. That was last year.

Court: Last year?

Witness: Yes, in the middle of the year.

Court: Okay, **which grade did you last attend?**

Witness: **Grade 8.**

Court: Grade 8, okay. So [witness name], before you give the evidence, before you tell your story, the court has to make sure that I swear you in. **Do you understand what it is to take the oath? It is basically be that the court will have to ask you to swear that what you are going to tell us today is the truth.**

Witness: **Yes.**

Court: **Do you understand what that means?**

Witness: **I do understand.**

Court: Okay, do you have any problem or objection taking them oath [witness name]?

Witness: No.

Court: So you understand what it means to take the oath and tell the truth?

Witness: Yes.

Court: And you have no problem doing so today?

Witness: No problem.

Court: Okay, are you going to testify in English or Afrikaans?

Witness: Afrikaans.

Court: So can you raise your right hand for me please with your palm showing to the screen.

Witness: This one?

Court: Yes, that one. Sit up straight quickly. Sit up nicely so that you are comfortable there.

Witness: Sorry.

Court: Can you clip that in? Okay, you are comfortable?

Witness: Yes.

Court: Okay. If you raise your right hand for me please. Would you swear that the evidence you are about to give [witness name] is the truth, nothing other than the full truth, so help you God? You can respond by saying so help me God.

Witness: Help me God.

Court: So help me God.

Witness: So help me God.”

- [40] As these extracts reveal, the Court *a quo* did not admonish the twins despite them indicating that they did not understand (or fully understand) what it meant to take the oath. Rather, the Court sought to explain the concept to them, and swore them in once she had done so. The friend indicated that she understood what it meant to take the oath, but the Court did not test that understanding in any material way.

- [41] We requested supplementary heads of argument from the parties regarding the appropriateness of the approach of the Court *a quo*. We are grateful to counsel for their assistance.
- [42] Having considered the matter, we consider that on the facts of this case it was correct for the Court to have sworn the witnesses in as opposed to admonishing them.
- [43] As regards the twins, in our view the record reveals that the professed lack of understanding they indicated was one of syntax as opposed to substance.
- [44] Although the twins expressed confusion about what it meant to take an oath, further questioning revealed that they understood what it meant to swear something was true; and the Court then explained that that was essentially what taking the oath meant.
- [45] The first twin had initially said that she did not understand what it meant to take the oath and the extent of the Court's further questioning reveals a sufficient degree of rigour to test her subsequent statement that she did understand the import of swearing something was true. Indeed, the Court expressly told the first twin that there would be consequences for her if she did not tell the truth in her evidence. While not determinative, it is not without significance that the representatives of the parties both confirmed that they considered the first twin "*sufficiently understands*".
- [46] The second twin expressed some uncertainty as to what it meant to swear something to be true, but indicated she understood the concept

once it was explained to her in Afrikaans, the language she chose to testify in.

- [47] The nature and extent of the Court's enquiry must also be considered in the context of the age and education of the twins. They were almost majors when they testified (the first twin was 16 and the second twin was 17, their birthday having passed between their testimony). The second twin had completed Grade 10, and the first twin was in Grade 10, when testifying. In the ordinary course of things, one would expect a child in high school to appreciate the gravity of swearing a fact to be true, even if they do not understand a reference to their being required to "*take an oath*" before testifying in Court.
- [48] The age and level of schooling is also relevant when considering the position of the friend. She was 15 years old when she testified, and had left school during Grade 8. As indicated, she said that she understood what it meant to take the oath, and the Court did not enquire further into that understanding. The Court had however explained that taking the oath meant that she would swear that she would tell the truth. We consider that in those circumstances the enquiry was sufficient, and that the confirmation from the friend that she understood what it meant to swear to tell the truth was sufficient to be accepted by the Court.
- [49] Two other issues we identified from the transcript were the following: First, the record does not record the second twin confirming the oath (as the extract above reveals, the oath was administered but there is no record of the second twin confirming it). Second, although the complainants gave evidence through an interpreter (and via closed

circuit television), there is no record of the interpreter having been sworn in.

- [50] The first issue might be an omission in the transcript, or it may be that the witness affirmed the oath in a non-verbal way (for example, by nodding her head). We are hesitant to make any assumptions against the appellant. Ultimately, we do not think it is necessary to do so. Even if the evidence of the second twin is treated as being inadmissible, the exclusion of it would have no impact on the outcome of the appeal. That is because it essentially served to corroborate what the other complainants said. The exclusion of the evidence would also not be the equivalent of the second complainant not being called (in which case we would need to consider whether an adverse inference should be drawn).
- [51] The failure to swear in an interpreter/translator has been held to render the interpreted evidence inadmissible, except where the interpreter is an official or permanent one (*S v Naidoo* 1962 (2) SA 625 (AD) at 633B-E). Whether the interpreter was an official or permanent one does not appear expressly from the record. However, we have noted that the same translator assisted the Court on each occasion the matter was heard, and translated the evidence of all of the complainants. While preparing this Judgment we asked the parties to indicate whether the interpreter was a permanent one. Counsel for the respondent advised that that is the case, and that the relevant interpreter is stationed at the Wynberg Magistrates' Courts. We thus do not consider that any of

the evidence should be excluded on this ground. We mention that no objection to the interpreter's evidence was made before us.

[52] As far as sentence is concerned, we are not minded to interfere with the findings of the Court *a quo*. A review of the Court *a quo*'s judgment regarding sentencing reveals that the Court took all relevant considerations into account to arrive at an appropriate sentence. We agree that the Court *a quo* was required to impose life imprisonment in respect of the count of rape by virtue of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (as read with paragraph b(i) of Part 1 of Schedule 2, regarding rape), and that there were no substantial and compelling factors justifying a departure from that minimum sentence as contemplated in section 51(3).

[53] Without intending to focus on any specific aspect considered by the Court *a quo*, the appellant abused a position of trust in a most egregious way. His relationship with the complainants meant that he was able to resist his conduct coming to light for several years. The Court needs to send a clear message that rape, especially the rape of children, is not to be tolerated. The appellant sought to rely primarily on his age and ill-health to justify a departure from the minimum sentence. We have considered that and are alive to the very difficult past the appellant has had. We do not consider we should interfere with the decision by the Court *a quo* that, on the facts of this case, those factors do not pass the high threshold of section 51(3).

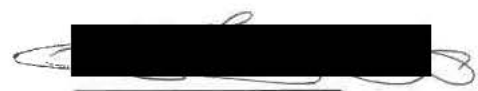
[54] In light of the above, the appeal falls to be dismissed.

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MORRISSEY AJ

Acting Judge of the High Court

[55] I concur.

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NZIWENI J

Judge of the High Court

Appearances:

Counsel for the Appellant : Advocate N Kunju

Counsel for the Respondent : Advocate MJ September