



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: A225/2025

In the matter between:

SONGEZO WULANA

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *State v Wulana* (Appeal Case no A04/2025) [2025] ZAWCHC ... (2 January 2025)

Coram: LEKHULENI J et DAVIS AJ

Heard: 28 November 2025

Delivered: 2 January 2026

Summary: Criminal Law: Rape of 11-year-old girl – Life sentence imposed by trial court – Appeal against conviction and sentence – Evidence of child witness to be approached with caution - guilt of accused proven beyond a reasonable doubt – Appellant’s version implausible – Appeal on sentence – Section 51(3) of Criminal Law amendment Act 105 of 1997- No compelling and substantial circumstance proven – Appeal on conviction and sentence dismissed.

JUDGMENT

LEKHULENI J (DAVIS AJ Concurring)

Introduction

[1] This is an appeal against the conviction and life sentence imposed on the appellant by the Parow Regional Court. The appellant, who was legally represented at the trial, was convicted by the Parow Regional Court on 17 October 2024 on one count of sexual penetration in violation of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. At the commencement of the trial, the appellant pleaded not guilty and exercised his right to remain silent. Before the trial could commence, the sentencing provisions envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997 and the relevant competent verdicts in terms of section 256 of the Criminal Procedure Act 51 of 1977 (*the CPA*) were explained to the appellant, who understood.

[2] The State alleged that the appellant was guilty of the crime of contravening the provisions of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with the provisions of section 51(1) of Scheduled 2 Part 1 of the Criminal Law Amendment Act 105 of 1997 as amended in that on or about the period of October and November 2022 and at or near Delft in the Regional Division of the Western Cape, the appellant did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, MG an 11 year old girl by inserting his penis into her vagina on more than one occasion.

[3] The prescribed minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997 for the charge levelled against the appellant was life imprisonment because the complainant was a child under the age of 18 years at the time the alleged offence was committed. At the conclusion of the trial, the Regional Magistrate convicted the appellant of the charge of rape and found no substantial and compelling

circumstances meriting a deviation from the prescribed minimum sentence. The Regional Magistrate imposed a sentence of life imprisonment as envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997 and further made relevant ancillary orders.

[4] In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the trial court declared the appellant unfit to possess a firearm. The court also made an ancillary order in terms of section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It directed that the appellant's name be entered in the Sexual Offences Register. In addition, the court made an order in terms of section 120 of the Children's Act 38 of 2005 that the appellant is unsuited to work with children.

[5] Aggrieved by this decision, the appellant exercised his automatic right of appeal in terms of section 309(1)(a) of the CPA, seeking a reversal of the conviction and sentence imposed by the court below. In the appeal grounds, the appellant asserted that the Regional Magistrate misdirected herself in finding that the State had discharged its onus and proven the guilt of the appellant beyond a reasonable doubt. The appellant also contended that the court a quo erred in failing to find substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. The appellant seeks an order from this court setting aside his conviction and the resultant sentence.

Background Facts

[6] To fully comprehend the pertinent issues that must be determined in this appeal and the view I take in this matter; it is necessary to sketch out a brief background of the facts underpinning the reasons that fortify my conclusion. The State called four witnesses to prove the appellant's guilt beyond a reasonable doubt. The appellant testified and did not call any witnesses in his defence. Several documentary exhibits, including a medical expert report, the appellant's warning statement, the complainant's birth certificate, and presentence reports, were admitted into evidence at the trial. To the extent necessary, I will summarise the evidence led at the trial and not repeat the

evidence verbatim. Where necessary, I will refer to the exhibits admitted at the court below.

[7] The State tendered the complainant's evidence as its first witness. According to her birth certificate, marked as Exhibit B at the trial, the complainant was born on 20 July 2011. At the time of giving evidence, the complainant was 12 years old and in Grade 5. The court was held in camera, and the complainant testified through an intermediary in terms of section 170A of the CPA and via closed-circuit television. In summary, the complainant testified that she had known the appellant since she was young, as he was their neighbour. The appellant's house is opposite theirs. The witness stated that during October 2022, on a Sunday, her mother went to church, and she was at home with her little sister. The appellant called her to his house and sent her to buy a cool drink.

[8] The complainant went to the shop and, on her return, entered the appellant's house. She gave the appellant the change, and subsequently, the appellant closed the door and threw her on his bed. The appellant caused the complainant to lie on her back. The appellant undressed her and put his hand over his mouth not to make a noise. The appellant undressed himself from the bottom and penetrated her vagina. When he was done, he gave her R20. The complainant testified that she told the appellant she would report the incident to her mother. In reply, the appellant informed her that he would deny it and say it never happened. When he was done, the appellant gave her R20 and told her to leave. The complainant took the R20 and went to buy chips. She did not tell anyone about the incident because she was scared.

[9] The complainant explained that a similar incident happened on the following Monday and Tuesday. On a Monday, directly after the Sunday of the previous incident, she was home from school, and there was no one at her house. After changing her school uniform, the appellant called her and sent her to buy something at the shop. She went to the shop and, on her return, gave the appellant change; the appellant then closed the door and threw her onto the bed. The appellant closed her mouth and undressed her from the waist down, including her panties. The appellant undressed himself and penetrated her vagina. After he was done, he gave her R20. She left and went to buy chips with her friends.

[10] The complainant explained that a similar incident occurred on a Tuesday following the Monday. She came home late at 18h00 and took off her netball gear. The appellant called her, and she went to him. The appellant asked her to buy him an avocado. Indeed, she went. On her return from the shop, the appellant came from behind her and closed the door. The appellant threw her on his bed, undressed, and caused the complainant to lie on her back and thereafter inserted his penis into her vagina. When he was done, he told the complainant to leave and gave her R20 again. The complainant left and went to buy chips with the R20. The complainant stated that she went to the appellant's house on the subsequent Monday and Tuesday because she wanted money.

[11] The complainant mentioned that during November 2022, her father confronted her about sleeping with the appellant. After he became upset and threatened her with a hiding, the complainant told her father what had happened. She admitted that she was sleeping with the appellant. They then proceeded to the appellant's house, where the appellant was confronted. The appellant denied raping the complainant. The complainant's father wanted to assault him, and people intervened. Thereafter, they went to the police station, where a charge of rape was laid. The complainant was taken to the hospital, where a doctor examined her.

[12] During cross-examination, she maintained that the appellant raped her. She also stated that she took the R20 that the appellant gave her as she was desperate for it. She wanted to buy chips for herself. There was a time when her mother was not working, and she could not afford to buy chips. When she was asked why she went again to the appellant's house despite the previous ordeal, she testified that she wanted the R20. The witness also rejected the proposition that she asked the appellant to have sex with her.

[13] The complainant's father also testified. He testified that it was brought to his attention that his daughter was sleeping with an older man. He then confronted the complainant and asked her if she knew the appellant. The latter became anxious, started shaking, and cried. The witness implored the complainant to tell the truth and that if she lied, she would get a hiding. The complainant then said to him that she had slept with the appellant. Thereafter, they proceeded to the appellant's house, and he

confronted the appellant on these allegations. The appellant admitted that he had sex with the complainant and further stated that the complainant was his girlfriend. The appellant further stated that their relationship started in 2021. The complainant's father further testified that the appellant disputed that he gave the complainant R20. Instead, the appellant told him that he gave the complainant R200. There were community members at the scene, and he decided to proceed to the police station with the complainant, where a charge of rape was laid.

[14] He was cross-examined, and it was put to him that his version of the confrontation of the appellant does not accord with that of the complainant and that the appellant denies that he admitted to having sex with the complainant. In response, he stated that the appellant told him the complainant was his girlfriend. Their relationship started in 2021, and he even gave the complainant R200.

[15] Doctor Felix, who examined the complainant after the rape charge was laid, also testified. He was stationed at Tutuzela Care Centre, Karl Bremer Hospital, at the time he examined the complainant. Dr Felix testified that he examined the complainant on 13 November 2025, and his findings were contained in the J88 medico-legal report marked Exhibit A during the trial. In his gynaecological examination of the complainant, he found that the complainant had a cleft at 08 o'clock, which is indicative of blunt object penetration, such as penetration by a penis or blunt object. According to the doctor, clefts at 9 o'clock or 3 o'clock are usually associated with sexual offences in children.

[16] The appellant's attorney cross-examined him. During cross-examination, it was proposed to him that the cleft could have been caused by the complainant when she was inserting a tampon. The doctor disputed this proposition and asserted that this suggestion does not make sense, as that would have caused the complainant significant pain. Furthermore, the doctor asserted that it was improbable that the child complainant would want to increase or cause herself significant pain by putting her fingers into her genitals.

[17] The state called the Investigating officer, Sergeant Ntswakele Masuhlo, who took the warning statement marked exhibit C at the trial from the appellant after he

was arrested. Sergeant Masuhlo testified that she took the warning statement from the appellant on 14 November 2022 at Delft Police Station. According to her, she used the Xhosa language to communicate with the appellant when she took the warning statement from him. Her testimony was that before she could take the warning statement from the appellant, she informed the appellant of his constitutional rights, including the right to remain silent and not say anything.

[18] The witness stated that she informed the appellant that if he decides to make the statement, she will write it down and submit it to the court, and that it may be used against him in court. Notwithstanding her explanation, the appellant chose to make a statement. The witness took the appellant's statement in writing. Sergeant Masuhlo testified that after taking the statement, she read it back to the appellant and asked whether he was satisfied with it or wanted to make any corrections. The appellant was happy with the statement and signed it.

[19] In summary, the relevant part of the warning statement was that in September 2022, the complainant came to the appellant's house to borrow the public toilet keys. She was wearing a gown, and it was approximately 12:00 during the day. The complainant went to the toilet and came back in a few minutes. The appellant stated that he was lying on his bed and the complainant came closer to his bed, took off her gown, and the appellant noticed that the complainant was naked. The complainant asked him that they should have sex. The appellant then told the complainant that he could not do that because she looked young. In response, the complainant told him that she's not young, but she has many boyfriends and that the appellant would not be the first one to have sex with her.

[20] They then had consensual sex. He stated in the warning statement that he never called her to come to his house, and she used to go on her own. The appellant also stated in the warning statement that they had sex more than once in September and in November 2022. He never forced the complainant to have sex with him. According to him, the complainant is his girlfriend who will visit him at his house, and they will have sex.

[21] During cross-examination, Sergeant Masuhlo clarified the fact that she interviewed the appellant in Xhosa but wrote the statement in English. According to her, the appellant also understood English. She read the statement back to the appellant, and the latter signed it after being satisfied with its contents.

[22] The Accused also testified. He knows the complainant and her parents. The appellant stated that he had known the complainant since 2018. According to the appellant, in October 2022, he sent the complainant to the shop to buy a cool drink. The complainant went to the shop and did not return. As time passed, he wondered where the complainant was and eventually decided to go to the complainant's house. When he arrived at her house, he saw the cool drink on the table, and the complainant's family were drinking from it. When he questioned the complainant about what happened, the complainant's mother said they should pour him a glass too. They then poured a drink for him, and he took the glass of cool drink and went back to his place.

[23] On a specific weekend at 12h00 during the day, the complainant came to borrow the toilet key from him and propositioned him for sex. She was wearing a pink gown. The complainant removed her gown and entered his bedroom. The complainant got onto his bed and put her hand in front of his pants under his underwear. He then got up and told the complainant that he cannot have sex with children and that he has a girlfriend who can come at any time to him. The complainant asked him for R20, and he told her he did not have it. Later, the complainant left, and he got off the bed. The witness denied raping the complainant.

[24] He was cross-examined about his warning statement, and he denied making the statement as alleged by Sergeant Masuhlo. However, he admitted to furnishing non-incriminating information in the statement. The appellant suggested during cross-examination that the charge against him was lodged to get him arrested so that the complainant's mother could take his house.

The findings of the trial court

[25] After considering the conspectus of the evidence, the trial court made favourable credibility findings regarding the evidence of the complainant, who was a child and a single witness on the alleged rape. It held that the complainant and her father gave credible and reliable evidence to the court about what had transpired from the time the complainant was confronted by her father and the explanation she gave in court on the alleged rape. The trial court found that the complainant's version was credible and trustworthy and was corroborated by her father's evidence and the appellant's warning statement. The court also found that the warning statement was properly taken with the appellant's cooperation and accepted it as evidence against the appellant.

[26] To the contrary, the court found the appellant's version, that the complainant, an 11-year-old child, placed her hand in his pants under his underwear, was false. The court found the appellant's response during cross-examination about his actions when the complainant allegedly placed her hand in his pants to be startling. The court found that on the totality of the evidence, the appellant's version that he did not sexually abuse the complainant was not reasonably possibly true. In addition, the court found that the appellant wanted to create an impression that the complainant, an 11-year-old, was dominating him by offering him sex. In the court's view, it was not reasonably possible that a child of 11 years of age dominates the space of an adult person of 43 years of age.

The grounds of appeal

[27] The appellant raised various grounds of appeal on conviction and sentence. The grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows:

[28] The trial court erred in finding that the State had proved the appellant's guilt beyond a reasonable doubt. The court a quo erred in finding that the complainant's evidence was credible and reliable in all material respects despite the fact that the complainant was a single witness and a child witness in respect of the charge of rape

upon which the appellant was convicted. The court a quo erred by failing to approach the complainant's evidence with the necessary caution it deserved and by finding that it met the requirements of section 208 of the CPA.

[29] The court a quo erred in finding that the complainant's evidence was a clear and concise narrative despite the fact that she indicated on the first day that the appellant overpowered her as she was afraid of him, yet she returned to the home of the appellant for another two consecutive days, wherein she did not fight at all. The court erred in rejecting the appellant's version as not reasonably possibly true.

[30] Regarding the sentence, the appellant contended that the trial court failed to consider the appellant's personal circumstances. The appellant further contended that the Regional Magistrate erred by failing to find any substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. The trial court erred by failing to consider the possibility of reformation and rehabilitation.

Applicable legal principles

[31] It is settled law that in a matter such as the present, this court's powers to interfere on appeal with the findings of fact of the trial court are limited in the absence of demonstrable and material misdirection. Where there is no misdirection on the facts, the presumption is that its findings are correct, and the appellate court will only interfere with them if it is convinced that they are wrong. This principle was restated in *S v Jochems* 1991(1) SACR (A) at 211 E-G as follows:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless is convinced on a conspectus of the evidence that the trial court was clearly wrong. ***R v Dhlumayo and Another* 1948(2) SA 677 (A)** at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para12. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings."

[32] In *Minister of Safety and Security & others v Craig & others NNO* 2011 (1) SACR 469 (SCA) para 58, Navsa JA stated that although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts and upon probabilities. In such a case a court of appeal with the benefit of a full record may often be in a better position to draw inferences.

Submissions by the parties

[33] At the hearing of this appeal, Mr Sivnarain, who appeared for the appellant, submitted that at the time of the incident, the complainant was 11 years old. In counsel's view, a child of that age is easily impressionable and influenced. Mr Sivnarain submitted that when the complainant was confronted by her father, she could have said that she was raped out of fear of getting a hiding. Moreover, Mr Sivnarain asserted that, when questioned about whether anyone had done anything to her, the complainant responded that no one had. Regarding the appellant's evidence, the appellant's counsel submitted that the appellant tendered his evidence in a clear and concise manner and did not contradict himself in any way. Furthermore, Mr Sivnarain contended that the state had failed to prove its case beyond a reasonable doubt due to material contradictions in its case and therefore, the conviction should be set aside.

[34] On the other hand, Mr Snyman, the State's legal counsel, argued that the court a quo correctly weighed up the complainant's evidence and found her to be a credible, reliable, and honest witness. Mr Snyman further submitted that the appellant's version falls to be rejected. According to Mr Snyman, two state witnesses testified that the appellant admitted to having sex with the complainant. The appellant further admitted to having the complainant naked on his bed. Mr Snyman submitted that the appellant adapted his version as the trial progressed. In his view, the trial court analysed and weighed the evidence of the State and the appellant in line with established legal principles and accordingly rejected the appellant's version. Mr Snyman implored this court to dismiss the appeal both on conviction and sentence.

Discussion

Ad Conviction

[35] Against this backdrop, I turn to evaluate the merits of this appeal on conviction. The issue for determination in this appeal is whether the appellant's guilt was established beyond a reasonable doubt.

[36] It is well established in our law that the duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. The accused need not assist the State in any way in discharging this onus. (*S v Mathebula* 1997 (1) SACR 10 (W)). In assessing whether the State has discharged the onus of proving its case against the accused beyond a reasonable doubt, it must consider all the evidence in concluding whether to convict or acquit an accused. In other words, a court's conclusion must account for all the evidence presented before it. (*S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h).

[37] The complainant was both a child witness and a single witness in this case. She was 11 years old at the time of the alleged offense and was 12 years old when she testified at the trial. Her evidence was given through an intermediary in terms of section 170A of the CPA. As a single witness, the complainant's evidence had to either be: (a) substantially satisfactory in every material respect, or (b) corroborated. (*Phogole v The State* (370/2023) [2024] ZASCA 54 (9 May 2025)) para 77. Her evidence had to be approached with caution. In *S v Webber* 1971 (3) SA 754 (A) at 758F-H, the court held:

'A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the creditability of the witnesses. The probative value of the evidence of a single witness should also not be equated with that of several witnesses.'

[38] Our court have stressed the fact that it is not possible to prescribe a formula in terms whereof every single witness' credibility can be determined, but it is essential to approach the evidence of a single witness with caution and to weigh up the good qualities of such a witness against all the factors which may diminish the credibility of the witness. (see *S v Sauls* 1981 (3) SA 172 (A) at 180E-H).

[39] Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness. As stated above, the testimony of a single witness should be clear and satisfactory in all material aspects. The exercise of caution against such evidence must not be allowed to displace the exercise of common-sense. (*S v Artman and Another* 1968 (3) SA 339(SCA)).

[40] As correctly pointed out by Mr Snyman, the trial court was faced with two mutually destructive versions of two single witnesses based on the evidence of the complainant and the appellant. In *S v Kotze* (776/16) [2017] ZASCA 27 (27 March 2017) para 17, the court stated as follows regarding mutually destructive versions:

'Where a trial court is faced with two mutually destructive accounts, logic dictates that both cannot be true. Only one can be true. Consequently the other must be false. However the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold proof beyond reasonable doubt.'

[41] In this case, it is common cause that the appellant and the complainant knew each other. The two are neighbours. It is also common cause that the complainant's vagina was penetrated by a blunt object. The evidence of Doctor Felix corroborates the version of the complainant that she was penetrated in her vagina by a blunt object. The complainant pointed at the appellant as the person who raped her. The appellant denied that he raped the complainant and, in fact, asserted that nothing happened between them. The trial court rejected this version as false and found that the state

proved its case beyond a reasonable doubt. For the reasons that follow, I am of the view that the findings of the trial court are correct and unassailable.

[42] It is important to stress that the complainant's evidence must not be assessed in isolation. It must be assessed together with the evidence of the accused and the other state witnesses. The appellant's evidence largely corroborates the complainant's version. The complainant's evidence was that the appellant sent her to the shop to buy a cool drink, and on her return, the appellant locked her inside his room and raped her. On the other hand, the appellant's version is that he sent the complainant to the shop to buy a cool drink, and that the complainant did not return to his house to bring it.

[43] The complainant stated that after the rape, the appellant gave her R20. The appellant, on the other hand, stated that he gave the complainant R20, which he alleged was borrowed by the complainant's mother. From the two versions, the fact that the appellant sent the complainant to the shop to buy a cool drink, and the exchange of R20, corroborate the complainant's version.

[44] Furthermore, it is common cause that at some point, the complainant and the appellant were in bed together, with the complainant naked. According to the appellant, the complainant approached him and asked him to have sexual intercourse with him. The complainant found him in bed, she undressed herself and got in bed with him. While in bed, the complainant placed his hand inside the front of his pants under his underwear. The appellant's version in this regard is very suspicious and highly concerning. It must be borne in mind that the complainant was a vulnerable child, and the appellant was 43 years old.

[45] From his version, it is not clear why he allowed the complainant to climb into his bed and sleep with him under the duvet while she was naked. The complainant is an 11-year-old child and could be the appellant's child. According to his version, the appellant allowed the complainant, young as she was, to insert her hand in his private parts. If this version is accepted, surely this is an abhorrent act that an elderly person in the appellant's position would have rebuffed with disdain and called the complainant to order.

[46] Importantly, this version was not put to the complainant during cross-examination. The appellant adapted his version during his evidence in chief and during cross-examination. In my view, this version is implausible, does not make sense at all, and the court below was correct in rejecting it.

[47] What compounds the difficulty in the appellant's version is that, notwithstanding that he knew the complainant's mother, who is his neighbour, he did not tell her of the alleged proposition of the complainant. This, in my view, is a clear indication that that never happened and that the appellant fabricated his evidence. From the totality of the evidence, it is very clear that the appellant took advantage of the complainant and her poverty. He groomed the complainant by giving her money after having sex with her. The complainant kept quiet and did not tell her parents because she was benefiting financially from the abuse. She was keen to receive the R20 that the appellant gave her each time the appellant had sex with her. She was able to buy chips for herself and her friends with the money that she received from the appellant.

[48] It must be stressed that the complainant was an 11-year-old child at the time of the incident. She was vulnerable and defenceless. She was lured and enticed by the R20 she received from the appellant, and she returned to him in the subsequent days. In my view, the court below was correct in not making any adverse finding on the conduct of the complainant for going to the appellant on the second and third occasions after the first rape. In *S v D* 1995 (1) SACR 259 (A) at 260G-H, the Supreme Court of Appeal noted that children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do.

[49] As discussed above, the court a quo admitted the appellant's warning statement as evidence against the appellant. It is interesting to note that the admission that the appellant made in the warning statement accords with the evidence of the complainant's father. When the complainant's father confronted the appellant about the alleged sexual abuse, the father testified that the appellant informed him that the complainant had been his girlfriend since 2021. Interestingly, in his warning statement, the appellant told the investigating officer that the complainant was his girlfriend, and

they had consensual sex in September and November 2022. In other words, from the evidence presented, the appellant admitted before two independent witnesses who are not related to each other that the complainant was his girlfriend. It appears that the appellant was unaware, when he made the warning statement, that the complainant was too young to give valid consent. He would likely have been made aware by his legal representative, which likely explains his altered version at the trial, when he denied having had intercourse with the complainant.

[50] The appellant assailed the warning statement that he gave to the investigating officer. Significantly, it is not in dispute that his rights were explained to him when the statement was taken. After his rights were explained, the appellant chose to make a statement. The statement was given in Xhosa, and the investigating officer reduced it to writing in English. The appellant contended that he is Xhosa-speaking and does not understand English. According to him, the admissions that he made in the warning statement as discussed in paragraphs 19 and 20 above, did not come from him. In my view, the warning statement is so detailed that it would be inconceivable to suggest that the investigating officer concocted a version which implicates the appellant.

[51] The investigating officer made it clear in her evidence in chief and in cross-examination that, after taking the warning statement, she read it back to the appellant, who understood, indicated that he was satisfied with its contents, and thereafter signed it. As correctly observed by the court a quo, there is no way that a police officer who does not know the appellant and the complainant would fabricate such a statement that would implicate the appellant adversely.

[52] Most importantly, the version in the warning statement aligns with the version given by the appellant in court, except for the penetration part. This is clearly something the investigating officer could not have made up. Save for the fact that the warning statement was admitted by the court when it gave judgment on the merits, it is my firm view that the court a quo was correct in accepting the warning statement against the appellant, which the appellant clearly made freely and voluntarily.

[53] The appellant raised inconsistencies in the state's case and submitted that they indicate the complainant was untruthful. For instance, one of those discrepancies was that the complainant testified that her mother left home with her sister, but later in cross-examination stated that her sister was playing away with friends. I have also noted other discrepancies raised by the appellant in his grounds of appeal. However, I am of the view that those contradictions are immaterial. They do not go to the heart of what happened to the complainant. It is important to remind ourselves that contradictions, per se, do not lead to the rejection of a witness' evidence.

[54] Furthermore, not every contradiction or error made by a witness unfavorably affects their overall credibility. (*S v Oosthuizen* 1982 (3) SA 571 (T)). In each case, the court must consider the nature of the contradictions, their number and importance and their bearing on the parts of the witness' evidence. In my view, these discrepancies are immaterial and do not discount the reliability and credibility of the complainant. In my judgment, the complainant was a candid and truthful witness, and the record certainly lends credence to that conclusion. Her version was corroborated by all the State witnesses and, to a great extent, by the appellants' version. She stated that the appellant raped her almost two weeks before the doctor examined her. The doctor confirmed that the complainant was penetrated with a blunt object in her vagina, and he observed a cleft on the vagina, which is a healed tear.

[55] The healed tear accords with the complainant's version. It cannot be reasonably suggested that the complainant was influenced to bring a case against the appellant. The evidence proved beyond any reasonable doubt that the appellant raped the complainant. Consequently, I am satisfied that the trial court's finding that the state proved the guilt of the appellant beyond a reasonable doubt was correct and should not be purged. Furthermore, I am of the firm view that the appellant's version was implausible, and the court a quo was correct in rejecting it as false.

Ad sentence

[56] As far as the appeal on the sentence is concerned, it is trite law that sentencing is pre-eminently a matter of the trial court's discretion. Interference with a sentence on appeal is not justified in the absence of a material misdirection or irregularity, or unless

the sentence imposed is so startlingly inappropriate as to create a sense of shock. (*S v Moosajee* [1999] 2 All SA 353 (A), para 8). Thus, an appeal court will only interfere with a sentence on appeal if it appears that the trial court has exercised its discretion in an improper or unreasonable manner. *S v Gerber* [1998] 4 All SA 315 (NC).

[57] In the present matter, the essential enquiry is whether the court a quo in imposing the sentence of life imprisonment had exercised its discretion judicially and properly. It was argued on behalf of the appellant that the trial court failed to consider the personal circumstances of the appellant properly and erred by failing to find substantial and compelling circumstances to deviate from the prescribe sentence of life imprisonment.

[58] The personal circumstances of the appellant were succinctly set out in the pre-sentence report of the Probation Officers and the Correctional Officers' report. The appellant was 43 years old, not married and had four children from different relationships. The children are 4, 18, 20 and 22 years old respectively. The appellant is not the children's primary caregiver. Three of the children are adults. The minor child resides with her maternal family. The appellant was not married but had a life partner. The appellant was raised by his maternal grandfather as his father was working in Johannesburg. The appellant met his father for the first time when he was 15 years old. The appellant was employed at Kensington Zabbus Distribution for more than 6 years as an assistant truck driver. He earned R1250 per week. He supported his four children by paying R1000 per child per month. The appellant passed standard 6. He reported that he suffered from ill-health and had severe headaches and eye problems, which led him to abandon school.

[59] In her pre-sentence report, the probation officer recommended that the court consider sentencing the appellant to direct imprisonment in terms of section 276(1)(b) of the CPA.

[60] Section 51(3) of the Criminal Law Amendment Act 105 of 1997 demands the imposition of the prescribed minimum sentences unless a court is satisfied in a particular case that there are 'substantial and compelling circumstances' that justify the imposition of a lesser sentence. In the present matter, I am mindful of the

accused's personal circumstances. However, I hold the view that the sentence imposed by the trial court is unimpeachable. The appellant raped an innocent child who looked to him for protection. The appellant betrayed the trust that the complainant had in him. He groomed her by giving her R20 instead of protecting her. As the Probation Officer correctly observed, the complainant is a minor and therefore had no defence protecting herself against a male adult. The Probation Officer further submitted that in the light thereof that the appellant abused his power and is still not taking responsibility for the commission of the offence, as well as the pain and suffering the complainant suffered, the court should impose a stiff sentence to send out a clear message that this kind of behaviour towards children will not be tolerated.

[61] Crucially, in *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58, the Supreme Court of Appeal held that in cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. The court held that once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to be the kind of 'flimsy' grounds that *S v Malgas* 2001 (1) SACR 469 (SCA) said should be avoided. But they are nonetheless relevant in another respect.

[62] I have considered the personal circumstances of the appellant, the possibility of rehabilitation, the victim impact statement of the complainant, and I cannot find any misdirection in the sentence imposed by the trial court. Furthermore, I must emphasise that the appellant was convicted of rape of a helpless 11-year-old child, which attracted life imprisonment. Upon conviction on this count, the court a quo was bound to impose the prescribed sentence unless there were substantial and compelling circumstances warranting a deviation from it. There were none. To the contrary, there are serious aggravating factors that militate against deviating from the prescribed minimum sentence.

[63] A final aspect requires comment. The trial court admitted the warning statement of the appellant when it gave judgment on the merits. To the extent that the appellant impugned the contents of the warning statement, the admissibility of that

statement, in my view, should have been dealt with before the closure of the state's case to enable the defence to mount its defence accordingly. In *S v Molimi* 2008 (2) SACR 76 (CC) paras 41 and 42, the Constitutional Court held that a timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is a procedural safeguard. The court held that when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty about the case he is expected to meet and may be placed in a precarious position of having to choose whether to adduce or challenge evidence.

[64] This notwithstanding, in my view, the guilt of the appellant was proven beyond a reasonable doubt, even without the appellant's warning statement.

[65] In the final analysis, given all these considerations, I am of the view that the appeal on both conviction and sentence must be dismissed.

Order

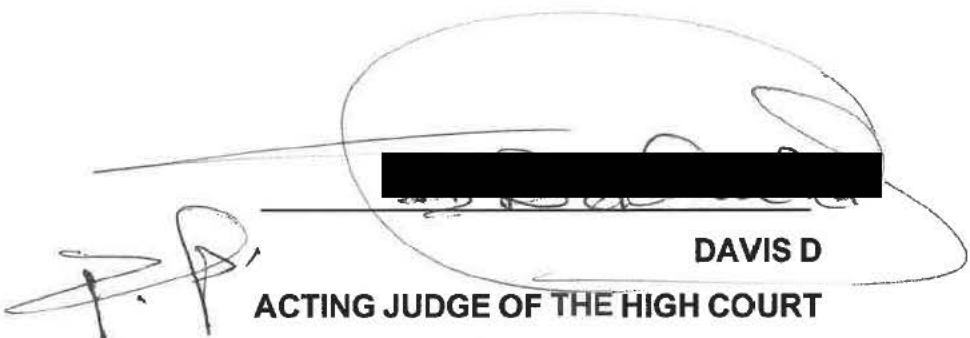
[66] In the result, the following order is granted.

66.1 The appeal on both conviction and sentence is hereby dismissed.



LEKHULENI JD
JUDGE OF THE HIGH COURT

I agree:



DAVIS D
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant: Mr Sivnarain

Instructed by: Legal Aid South Africa

For the Respondent (State): Mr Snyman

Instructed by: Director of Public Prosecutions