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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. CA&R 141/2025

In the matter between:

SIYATHEMBA RUSELO

Appellant

and

THE STATE

Respondent

EX TEMPORE JUDGMENT

LAING J

[1] This is an appeal against the appellant's conviction on a charge of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the relevant provisions of the Criminal Law Amendment Act 105 of 1997. The appellant also appeals against his sentence of life imprisonment.

[2] The complainant was 11 years old at the time of the incident. She testified that a traditional ceremony had taken place in June 2016 at her mother's house.

Afterwards, some of the men, including the appellant, stayed overnight because they had been under the influence of alcohol. The complainant shared a bed that night in her bedroom with her cousins and her sister, A[...]. She had been wearing a traditional skirt and a pair of panties. At some point, while sleeping, the complainant became aware of someone 'tampering' with her, as she put it. She realised that it was the appellant, who had moved her panties aside and inserted his fingers into her vagina. The appellant left her alone and went back to the lounge, where he had been sleeping. He returned later however, and repeated his actions. This happened on three occasions.

[3] The complainant did not say anything to him because she had been scared. A[...] awoke on the final occasion and shouted at him. The appellant pretended that he was looking for something. A[...] continued to shout at him and he left the bedroom, exiting the house via a window. The complainant told A[...] what happened and informed her mother, Ms N[...] J[...], the next morning. The family confronted the appellant later that day. They reported the matter to the police and arranged a medical examination. Charges were subsequently withdrawn after the appellant's family apologized on his behalf. The respective families were related through marriage.

[4] Several years later, in December 2023, the complainant attended another traditional ceremony. The appellant was also present and had been acting strangely. He made an inappropriate remark to the complainant, triggering a strong emotional reaction in her. The police investigation was reopened, culminating in the trial before the court *a quo*.

[5] The primary issue for determination at trial was the identity of the perpetrator. The state led several witnesses, including the complainant. The appellant elected not to testify. In a careful and well-reasoned judgment, the magistrate found that the state had demonstrated successfully that it had been the appellant who had raped the complainant.

[6] On appeal, counsel for the appellant referred to *S v Mthethwa* 1972 (3) SA 766 (A), in terms of which the erstwhile Appellate Division, per Holmes JA,

emphasised the need for caution regarding the identification of a perpetrator. This was important, considering the fallibility of human observation. Counsel contended that, in the present matter, the lighting in the bedroom had been insufficient to have allowed the identification of the appellant beyond reasonable doubt. The bathroom light would not have assisted and the only other source of light was a streetlamp, some 60 to 70 metres away. Both the complainant and her sister conceded that visibility had been limited. Furthermore, neither could refer to any specific feature that identified the appellant; the complainant mentioned his face and build, but only in general terms, while A[...] mentioned his clothes and his voice, but without elaboration. Counsel also pointed out that there had been at least two other men staying overnight in the house; either one could have accosted the complainant.

[7] As a starting point, it is necessary to point out that the incident never took place in pitch darkness. It was not a situation where there had been no light at all. Furthermore, the description given by the witnesses was not to the effect that there had been a single streetlamp at some distance away. The description matched what was more likely to have been a high-mast security light. Whatever the situation, all three of the witnesses were certain that it had created at least some illumination in the bedroom. Both the complainant and A[...] were adamant that it had been sufficient to have seen the appellant.

[8] If the static nature of the incident is considered, with an opportunity for the complainant to have assessed exactly who was 'tampering' with her, on not one but three occasions, then any doubt about the identity of the perpetrator must begin to recede. Importantly, any remaining doubt must disappear, however, when the complainant's degree of familiarity with the appellant is considered. The following exchange took place during re-examination:

'PROSECUTOR: How long have you known the accused, taking into consideration you were 11 years old. In 2016, how long had you known him?

HK: I can say or put it like this, Your Worship, I grew [up] in front of him.

PROSECUTOR: Okay. And did you see him on a daily basis or a weekly basis — or not very often?

HK: I can say, Your Worship, I saw him every day. He is a drunkard in the area.'

[9] The complainant had known the appellant all her life. The record indicates that he had lived just a few houses away, that he had been well-known to the family, and that he had attended traditional ceremonies and other functions at the complainant's home. This was not a case involving a stranger.

[10] Similarly, A[...] knew the appellant. She corroborated the complainant's testimony, saying that the appellant had been a family friend and that she had seen him often because he had stayed close to her house, which he would sometimes visit. During cross-examination, A[...] stated as follows:

'MS ETSEBETH: . . . Now you told us that you saw the accused often at that time. Is that right?

MS K[: Yes.

MS ETSEBETH: If you can estimate, how often? Once a week, twice a week, more than that?

MS K[: I can say every day during the week, Your Worship.

MS ETSEBETH: Every single week?

MS K[: Yes.'

[11] Later, the appellant's attorney put to A[...] that the appellant would deny that he had slept overnight at the house. It was suggested that A[...] was unable to say who had spent the night there because she had gone to bed early. But she responded:

'MS K[: Ja, what I am sure of, Your Worship, seeing that Siyathemba is a family friend, every time when there is a ceremony or traditional ceremony or whatever is happening there, Your Worship, he would be there also; he would be present. He would always be there, every time when there is a ceremony there at home, Your Worship. And he would sleep over there, Your Worship.'

[12] What is striking about the record is that, despite intense and sustained cross-examination, both the complainant and A[...] demonstrated absolute certainty; they were adamant that the appellant had been the perpetrator. This is understandable, considering their degree of familiarity with him. There was, moreover, no reason for either of them to have falsely implicated the appellant; both testified that their relationship with him had not been characterised by any ill will.

[13] Although their mother, Ms B[...], never witnessed the scene, she corroborated the fact that the appellant had been one of the three men who had stayed overnight. It is difficult to accept counsel's argument that it was possible that either of the other two men had accosted the complainant. One was the complainant's stepfather, the other was her younger sister's uncle. Both were known to the witnesses. Neither was a stranger. No evidence was presented to have suggested that either was the perpetrator — or, conversely, to have cast reasonable doubt on the witnesses' identification of the appellant. From the evidence of Ms J[...], moreover, the appellant had already left the house by the time that the complainant reported the matter to her mother. She said that she had locked the front door before going to bed but had seen an open window in the morning. Her testimony corroborated the evidence of the complainant and A[...] that the appellant had exited the house in such manner. A further consideration is Ms J[...]'s undisputed testimony that the appellant's family had later apologized on his behalf. His sister was married to Ms J[...]'s brother. This had prompted the withdrawal of the charges shortly after the incident.

[14] Taken as a whole, the evidence of the witnesses indicated overwhelmingly that the appellant — and no-one else — had been the perpetrator.

[15] Regarding sentence, counsel referred to the seminal decision in *S v Malgas* 2001 (1) SACR 469 (SCA). In that regard, counsel accepted that a prescribed sentence could not be departed from lightly and for flimsy reasons that could not withstand scrutiny. Nevertheless, traditional factors continued to play a role. To that effect, the prescribed sentence must be proportionate to the crime, the offender, and the interests of society. The principles in *S v Zinn* 1969 (2) SA 537 (A) remain ever relevant.

[16] In the present matter, counsel argued that the court *a quo* ought to have placed more emphasis on the appellant's clean record, his age, and his state of intoxication. Furthermore, counsel contended that the offence did not fall within the worst categories; the complainant did not sustain physical injuries, no gratuitous violence was involved.

[17] Regarding the last point, the categorization of cases, especially in relation to rape, is an exercise fraught with hazard. Whereas the court *a quo* would have benefitted from a victim impact assessment, the record indicates that the incident gave rise to acute emotional distress on the part of the complainant. This seems to have been triggered late, several years after the incident, when the complainant encountered the appellant at another traditional ceremony. The experience remains a raw scar that runs deeply through the complainant. At the risk of repeating what has been said in so many judgments dealing with similar facts, the horrors associated with the crime of rape cannot be understated. In the present matter, the offence involved the rape of a minor — the rape of a child. There was undisputed evidence that it occurred on three occasions during the night. In the circumstances, it cannot simply be said that this was a case that did not fall within the worst categories. It must be seen for what it is.

[18] Turning to the remaining factors, it is true that the appellant's age and his status as a first offender cannot be ignored. The same can be said of his state of intoxication. Against this must be weighed the age of the complainant, the fact that the offence took place in her bedroom while she had been asleep, that the appellant was known to the complainant and her family and that he had abused their trust, that there was no evidence of the degree to which he had been intoxicated and how this could have been a mitigating factor, and that the complainant had experienced physical pain. When placed in the balance, after adding the nature of the offence, it is extraordinarily difficult to say that there were substantial and compelling circumstances to have justified a departure from the prescribed sentence.

[19] Counsel referred to *S v Petkar* 1988 (3) SA 571 (A), where the erstwhile Appellate Division, per Smalberger JA, set out the conditions under which a court of

appeal may interfere with sentence. None of those exist in the present matter. The findings of the court *a quo* must remain undisturbed.

[20] Consequently, I would order that:

The appeal against conviction and sentence is hereby dismissed.

JGA LAING
JUDGE OF THE HIGH COURT

I agree.

R KRÜGER
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant:

Adv Geldenhuys

Instructed by:

Legal Aid, South Africa

MAKHANDA

For the respondent:

Adv Van Rooyen

Instructed by:

Director of Public Prosecutions

MAKHANDA

Date heard:

21 January 2026.

Date delivered:

21 January 2026.